JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 30, 2018

Title
Jury Instructions: New, Revised, Revoked, and Renumbered Civil Jury Instructions (Release 33)

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (CACI)

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Agenda Item Type
Action Required

Effective Date
November 30, 2018

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October 1, 2018

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new, revised, revoked, and renumbered civil jury instructions prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months. On Judicial Council approval, the instructions will be published in the official 2019 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective November 30, 2018, approve for publication the following civil jury instructions prepared by the committee:

1. Revisions to 18 instructions: CACI Nos. 206, 435, 450C, 1730, 1802, 2400, 2401, 2404, 2430, 3066, 3210, 3211, 3220, 3244, 3704, 3903J, 4550, and 4551;

2. Addition of 4 new instructions: CACI Nos. 1208, 2023, 2528, and 2705;

3. Merging of CACI No. 2402 into 2401, with the revocation of 2402.

4. Renumbering of CACI No. 2407 as 3963, of CACI No. 2433 as 3903P, and of CACI No. 3963 as 3965.

A table of contents and the proposed new, revised, and renumbered civil jury instructions are attached at pages 39–136.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee and its charge.[1] At this meeting, the council approved the *CACI* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI* to ensure that the instructions remain clear, accurate, current, and complete.

This is release 33 of *CACI*. The council approved *CACI* release 32 at its May 2018 meeting.[2]

Analysis/Rationale

A total of 28 instructions are presented in this release. The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 34 additional instructions under a delegation of authority from the council to RUPRO.[3]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant additions and changes recommended to the council.

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[1] Rule 10.58(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions."

[2] The committee now also issues two releases annually in January and July for online only delivery. These online-only releases—, Release Numbers 31A and 32A for 2018—are limited to nonsubstantive technical changes and the like as described in note 3 below.

[3] At its October 20, 2006 meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use.

New instructions

CACI No. 1208, *Component Parts Rule.* The committee proposes a new instruction on the product liability of a component parts manufacturer, distributor, or supplier. The basic rule is that a component parts provider is not liable for injuries caused by the product into which the part is integrated unless (1) the component part itself is defective; or (2) (a) the defendant may have substantially participated in the integration of the component into the design of the end product, (b) the integration of the component caused the end product to be defective, and (c) the defect in the product causes the harm.[4] The committee has been considering this proposal for several years, but it was put on hold awaiting the California Supreme Court opinion in *Ramos v. Brenntag Specialties Inc.* In *Ramos*, the court held that the component parts rule does not apply if the injury is caused by the component itself when it is being used as intended before integration into another product.[5]

On revisiting the proposal, the committee decided to limit the instruction to the second exception. There was considerable discussion with regard to the burden of proof. While the component parts rule is an affirmative defense,[6] the committee eventually came to agree that the plaintiff has the burden of avoiding the defense by proving one of the exceptions. Otherwise, the defense would be in the position of having to prove that either the component or the integrated end product was *not* defective, and this is contrary to the general principles of strict product liability.

CACI No. 2023, *Failure to Abate Artificial Condition on Land Creating Nuisance.* Last release, a commenter called the committee's attention to a federal district court case from the Eastern District of California[7] in which the court, addressing California law on nuisance, stated that there were potential claims for nuisance under the Restatement Second of Torts, sections 838 and 839. Section 838 provides for liability if the defendant has a right of possession in land and consents or unreasonably permits a third party to create a nuisance on the land. Section 839 provides for liability if the defendant unreasonably fails to abate a nuisance when it is in possession of land.

The committee found no California case addressing liability under section 838. However, section 839 was applied in *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com. (Leslie Salt).*[8] On this basis, the committee proposes new CACI No. 2023 supported by Restatement Second of Torts, section 839 and *Leslie Salt.*

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[4] *Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500, 508.

[5] *Id.* at p. 504.

[6] See *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 183; see also *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1006, fn. 6.

[7] *Coppola v. Smith* (E.D.Cal. 2013) 935 F.Supp.2d 993.

[8] (1984) 153 Cal.App.3d 605, 618–622.

CACI No. 2528, *Failure to Prevent Sexual Harassment by Nonemployee*. The recent case of *M.F. v. Pacific Pearl Hotel Management LLC*[9] addressed employer liability under the Fair Employment and Housing Act (FEHA) for harassment by a nonemployee.[10] In response, the committee proposes adding new instruction CACI No. 2528 to the FEHA series to address this situation and others in which nonemployees, such as customers or salespersons, come onto the premises and harass employees.

CACI No. 2705, *Affirmative Defense to Wage Order Violations—Plaintiff Was Not Defendant's Employee.* Recently, the California Supreme Court issued its long-awaited decision in *Dynamex Operations W. v. Superior Court (Dynamex)*[11] greatly restricting the circumstances under which an employer may properly classify a worker as an independent contractor rather than an employee under California's wage orders. The court held that the employer had the burden of proving that the worker satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[12]

Whether the three *Dynamex* factors can be issues of fact to be presented to a jury is not clear from the opinion. The rule on employment status has been that if there are disputed facts, it's for the jury to decide whether one is an employee or an independent contractor.[13] But because the employer must prove all three factors, if any single factor can be found against the employer as a matter of law, the case will not reach a jury. However, should there be proof or disputed facts on all three factors, the committee proposes this new instruction because of the importance and prominence of the issue.

In response to *Dynamex*, the committee has also made some additions to the Directions for Use to CACI No. 3704, *Existence of "Employee" Status Disputed*, in the Vicarious Responsibility series. In *Dynamex*, the court found merit in the concerns "regarding the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors."[14] CACI No. 3704 is such an instruction. And while the court's concerns in *Dynamex* focused on

[9] (2017) 16 Cal.App.5th 693.

[10] See Gov. Code, § 12940(j).

[11] (2018) 4 Cal.5th 903.

[12] *Id.* at pp. 955–956.

[13] *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342.

[14] *Dynamex, supra*, 4 Cal.5th at p. 956.

the wage and hour context, the committee decided that the language should be noted in the Directions for Use to CACI No. 3704.

Revised instructions

CACI No. 435, *Causation for Asbestos-Related Cancer Claims*. In the last release, the council approved revisions to CACI No. 430, *Causation: Substantial Factor,* in response to the recent case of *Petitpas v. Ford Motor Co. (Petitpas)*[15] A conforming change to CACI No. 435 added a cross-reference to the discussion in CACI No. 430.

CACI No. 435 provides that the plaintiff must prove that exposure to asbestos from the defendant's *product* was a substantial factor causing the illness. Thus, the instruction is limited to defendants who put asbestos into the stream of commerce; that is, manufacturers and suppliers. Those who don't make or supply an asbestos-containing product are not within the instruction.

Numerous commenters from the asbestos plaintiff bar pointed out that CACI No. 435 was incomplete or inaccurate in its limitation to manufacturers and suppliers of asbestos. In the view of the commenters, CACI No. 435 should be given in all cases of asbestos exposure regardless of the status of the defendant. They contended that there is no medical or scientific reason why asbestos causation should depend on whether the defendant was a manufacturer or supplier as opposed to someone who exposed the plaintiff to asbestos in some other way, such as a premises owner or a construction project contractor. Comments were also received from the asbestos defense bar asserting that CACI No. 435 should not be given with regard to defendants other than manufacturers or suppliers.

The committee had not considered this issue in the last release as it was not part of the proposal. Therefore, it was placed on the agenda for this current release. After considerable research and consideration, the committee concluded that there was no clear answer in the case law. But the committee considered the issue an important one that should be flagged for bench and bar. Therefore, an addition to the Directions for Use was approved that presented the issue but labeled it as "not settled."

On posting for public comment, numerous comments were received from the asbestos plaintiff bar taking issue with the characterization of "not settled."[16] These commenters all expressed the view that it has long been the rule that there is a single standard for asbestos causation, which applies regardless of the nature of the defendant. Many cases were cited in the comments. The committee reconsidered the issue in light of the comments and cases cited but remains

[15] (2017) 13 Cal.App.5th 261, 298–299.

[16] A single comment was received from the asbestos defense side, also objecting to the "not settled" conclusion. But in the view of this commenter, it is settled that CACI No. 435 applies *only* to manufacturers and suppliers.

unconvinced that the cases settled the issue. The proposed revision presented for council approval continues to consider the issue as unsettled.

CACI No. 435 is based on *Rutherford v. Owens-Illinois, Inc. (Rutherford),* which addresses exposure to asbestos from "defendant's defective asbestos-containing products."[17] The commenters' claim that *Rutherford* applies to all defendants is based on a single word in the opinion. At one point, the court refers to "a product produced, distributed, or *installed* by a particular defendant."[18] The court's reference to installers is proposed as authority that the holding applies beyond manufacturers and suppliers. But the problem with this theory is that the language is dicta. And since the defendant in the case was a manufacturer, there is no discussion (nor any need for discussion) of asbestos causation for other categories of defendants.

Beyond *Rutherford,* among the many cases presented by the plaintiff bar in support of their position, a few offer some support by implication. In *Casey v. Perini Corp.*[19] and *Whitmire v. Ingersoll-Rand Co.*[20] the courts do cite *Rutherford* and appear to apply its causation standard to defendants who were not manufacturers or suppliers. But the status of the defendant was not an issue in either case. There is no analysis, nor anything resembling a holding that *Rutherford* is not limited to manufacturers and suppliers. And in *Petitpas,* the court noted that the trial court, over opposition, gave CACI No. 435 with regard to a premises defendant.[21] But again, there was no analysis or holding. Nor did the committee find any other case with such a holding. Thus, the committee confirmed its decision to present the issue as unsettled.

CACI Nos. 2400, 2401, 2402, 2404, 2407, 2430, and 2433 (Wrongful Termination series). An attorney from a law firm labor and employment group presented a number of proposals for revisions to and revocations of instructions in the Wrongful Termination series. Most of his proposals addressed things like duplication, inconsistencies, and potential inconsistencies in the series. The committee proposes that many of them be adopted.

The attorney proposed combining CACI No. 2401, *Breach of Employment Contract—Unspecified Term—Essential Factual Elements*, and CACI No. 2402, *Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements*. His point was that constructive discharge could be incorporated into 2401 with the new title *Breach of Employment Contract—Unspecified Term—**Actual or Constructive Discharge**—Essential Factual Elements* and then 2402 could be revoked. He pointed out that CACI No. 2510, *"Constructive Discharge" Explained*, defines constructive discharge and can be given with CACI No. 2401. This approach would eliminate some inconsistency that currently exists

[17] (1997) 16 Cal.4th 953, 982–983.

[18] *Id.* at p. 975.

[19] (2012) 206 Cal.App.4th 1222, 1236–1239.

[20] (2010) 184 Cal.App.4th 1078, 1084.

[21] *Petitpas, supra,* 13 Cal.App.5th at p. 290.

between CACI Nos. 2402 and 2510 with regard to constructive discharge. The committee agreed and proposes this combination and revocation.

The attorney pointed out that with regard to damages for wrongful termination, the measure of damages for lost earnings is the same whether the claim is for breach of contract, violation of public policy, or for discrimination under the Fair Employment and Housing Act. CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages,* is for use only for the second claim. The attorney noted that for other claims, a general instruction from the Damages series is often given. If wrongful termination is alleged based on multiple theories, the jury could get different instructions for the same damages.

The attorney proposed moving CACI No. 2433 to the Damages series and making it applicable to all claims against an employer for lost income. The committee agreed with this approach and proposes new CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage)*. This new instruction is essentially CACI No. 2433 with the part of the instruction that refers to noneconomic damages removed.[22]

The attorney made a similar point with regard to CACI No. 2407, *Affirmative Defense—Employee's Duty to Mitigate Damages*. CACI Nos. 3961 and 3962 in the Damages series address mitigation of damages in general for past and future lost earnings. CACI No. 2407 presents some variations applicable to termination of employment. But again, it should apply regardless of the basis of the claim for wrongful termination and lost earnings. The committee proposes moving 2407 to the Damages series as CACI No. 3963, *Affirmative Defense—Employee's Duty to Mitigate Damages,* without any substantive changes.[23]

Revoked instruction

No instruction is proposed to be revoked for substantive reasons. CACI Nos. 2402, 2407, and 2433 will be revoked and the numbers will be gone, but as explained above, 2402 is being consolidated with 2401, and 2407 and 2433 are being moved to the Damages series.

Policy implications

Jury instructions express the law; there are no policy implications.

Comments

The proposed additions and revisions to *CACI* circulated for comment from July 23 through August 31, 2018. Comments were received from 22 different commenters. Some submitted comments on multiple instructions, and some commented on only a single instruction. Nineteen comments were received on asbestos causation, all but one from the asbestos plaintiff bar. Other

[22] CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage),* can be given for noneconomic damages.

[23] The committee proposes numbering this instruction as 3963 to group the three mitigation of damages instructions together. Current CACI No. 3963, *No Deduction for Workers' Compensation Benefits Paid,* would be renumbered as 3965.

than CACI No. 435 and asbestos causation, discussed above, no instruction garnered a particularly large number of comments.

The committee evaluated all comments and revised some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions and the committee's responses is attached at pages 9–38.

Alternatives considered

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval; therefore, the advisory committee did not consider any alternative actions.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the 2019 edition of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the Judicial Council will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the Judicial Council provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Chart of comments and the committee's responses, at pages 9–38
2. *CACI* instructions at pages 39–136

Instruction	Commentator	Comment	BG Proposed Response
206, *Evidence Admitted for Limited Purpose*	Association of Southern California Defense Counsel, by David P. Pruett, Carroll, Kelly, Trotter, Franzen, McBride & Peabody	ASCDC supports the proposed revisions to CACI No. 206 as an improvement upon the instruction that focuses on the rule. We believe removing the aspects of the instruction regarding a judge's prior explanation of admission for limited purpose amplifies the rule, regardless of the juror's recollection of how the judge previously described the rule.	No response is required.
		ASCDC also supports the proposed reference to *Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1060-1061, in the Sources and Authority as that citation confirms the vitality of the rule.	No response is required.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We prefer the current instruction, which explicitly states in active voice that the court ("I") previously explained that certain evidence was admitted for a limited purpose. We believe this helps to remind the jury of a specific admonition. The statement that "certain evidence was admitted for a limited purpose" is less definite, more abstract, and does not clearly state that evidence was admitted for a limited purpose only if the court expressly so stated during trial.	The trial judges on the committee report that often the judge does not actually explain during the trial that "certain evidence was admitted for a limited purpose"; in those cases the current wording would not be accurate.
		We would modify the first sentence in the Directions for Use for greater clarity: "It is recommended that the judge, when reading this instruction, remind the jury of the limited purpose to which the evidence applies and of the admonition made at the time of the limiting request ~~call attention to the purpose to which the evidence relates~~."	As the judge might not have addressed any limited-purpose evidence during the trial, it would not be a reminder.
435. *Causation for Asbestos-Related Cancer Claims*	Association of Southern Defense Counsel, by David K Schultz	The proposed addition to the "Directions For Use" is not accurate—which will foster uncertainty and protracted litigation in the trial and appellate courts—because it erroneously suggests that there is a conflict concerning whether CACI 430 or 435 should be applied in asbestos cases based on *Whitmire v. Ingersoll-Rand Co.* (2010) 184	Neither *Petitpas* nor *Whitmire* really addresses the causation standard for defendants other than manufacturers and suppliers. The comment states that in *Petitpas* "the trial judge commented that '[C]ounsel has cited no authority that would extend 435, which is specifically for manufacturers and suppliers of asbestos-containing products, to a

Instruction	Commentator	Comment	BG Proposed Response
		Cal.App.4th 1078 and *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261. *Petitpas* establishes that 435 does not apply to defendants other than manufacturers or suppliers. Because *Whitmire* involved a pre-trial motion for summary judgment, it obviously did not involve the issue of whether a jury should be instructed under CACI 430 or 435. Moreover, in *Petitpas*, the same court did not in any way suggest or state that its decision was in conflict with its prior decision in *Whitmire*. Nor did the plaintiffs in *Petitpas* argue that *Whitmire* should be read as supporting their position concerning which jury instruction should be given. The appellate court in *Petitpas* noted that, when jury instructions were argued in the trial court, the trial judge commented that "[C]ounsel has cited no authority that would extend 435, which is specifically for manufacturers and suppliers of asbestos-containing products, to a premises defendant." (*Petitpas, supra,* 13 Cal.App.5th at 291.) The court also discussed that, on appeal, "plaintiffs have presented us with no authority supporting their argument" that CACI 430 is inapplicable to claims asserted against a defendant "that is not a manufacturer or supplier." (*Id.* at 299.)	premises defendant;' " This statement is not correct. (13 Cal.App.5th at p. 291.) That sentence was spoken by counsel for the premises defendant. The trial court in *Petitpas* did give CACI No. 435 with regard to the premises defendant. (13 Cal.App.5th at p. 290.) So in no way can it be said that "*Petitpas* establishes that 435 does not apply to defendants other than manufacturers or suppliers." But because *Petitpas* does not support the defense on this point, the committee saw that the proposed sentence comparing *Petitipas* as a case favoring the defense with *Whitmire* as a case favoring the plaintiff's position could not remain as constructed. The committee has removed this parenthetical and replaced it with the following sentence: "However, at least one court has given CACI No. 435 with regard to a defendant other than an asbestos manufacturer or supplier, but there was no analysis of the issue on appeal. (See Petitpas v. Ford Motor Co. (2017) 13 Cal.App.5th 261, 290 [220 Cal.Rptr.3d 185] [court gave CACI No. 435 with regard to premises liability defendant] ; see also Casey v. Perini Corp. (2012) 206 Cal. App. 4th 1222, 1236–1239 [142 Cal.App.4th 678] [Rutherford causation standards cited in case against contractor alleged to have created exposure to asbestos at job site].)"
	Waters, Kraus, & Paul, El Segundo, by Michael B. Gurien	The *Rutherford* causation standard is not limited to claims against manufacturers, distributors, or suppliers of asbestos-containing products (i.e., product liability defendants). It is applicable to all types of defendants in asbestos-injury cases, including contractors, premises owners, and any other type of defendant, as it is the	Jury instructions must be based on settled law. If the law is unsettled and the uncertainty will affect an instruction, in many cases, the committee sees its proper role of alerting bench and bar to the status of the issue via the Directions for Use.

Instruction	Commentator	Comment	BG Proposed Response
		standard for "[c]ausation specific to asbestos cases." (*Petitpas*, *supra*, 13 Cal.App.5th at p. 298.) Because the proposed revisions to the Directions for Use to CACI No. 435 suggest otherwise, particularly the revision stating that it is "not settled" whether the *Rutherford* causation standard applies to defendants who are "not manufacturers or suppliers of asbestos-containing products," the revisions are misleading and will likely result in confusion and misapplication of the law.	As will be noted in its responses to the many comments below, the committee disagrees with the view expressed in this and other comments, that the law with regard to the applicability of CACI No. 435 to defendants other than manufacturers and suppliers is settled. The committee agrees with the language in *Petitpas* that the ASCDC misattributes above to the trial judge but actually was spoken by counsel for the premises liability defendant. The language is quoted in the opinion: "[C]ounsel [for plaintiff] has cited no authority that would extend 435, which is specifically for manufacturers and suppliers of asbestos-containing products, to a premises defendant." The committee also finds no authority sufficient to extend CACI No. 435 to all defendants. There is no case in which the court was faced with having to decide and hold that *Rutherford* applies to all defendants regardless of status. No court has looked at that issue and stated as a holding that there is a single causation standard for asbestos; that that standard is stated in *Rutherford*; and that 435 applies in every case of asbestos exposure regardless of the status of the defendant.
		Nowhere in *Rutherford* did the court indicate or suggest that the causation standard it articulated was limited to asbestos-injury claims against manufacturers or distributors of asbestos-containing products, or that a different standard should apply to asbestos-injury claims against defendants who are not product manufacturers or distributors, such as contractors or premises owners who	The comment is correct in noting what *Rutherford* does not say. But the failure to state that something is true does not establish that it is false.

Instruction	Commentator	Comment	BG Proposed Response
		expose others to asbestos through their acts or omissions involving the use of asbestos or asbestos-containing products in their work or on their premises.	
		The court's reference to "a product produced, distributed, or *installed* by a particular defendant," (ibid., italics added), indicates that it was not confining or limiting its causation analysis to manufacturers and distributors of products, but was also addressing causation as to other types of defendants, including defendants who install asbestos-containing products.	The reference at p. 975 of *Rutherford* to products "produced, distributed or *installed* by a particular defendant" is only this sentence: "Apart from the uncertainty of the causation, at a much more concrete level uncertainty frequently exists whether the plaintiff was even exposed to dangerous fibers from a product produced, distributed or installed by a particular defendant." The first problem is that the word "installed" may not have the fixed meaning that the comment attributes to it, someone other than a manufacturer or supplier. The second problem is that even if the court intended the attributed meaning, the sentence is dicta. The defendant in *Rutherford* was a manufacturer. But the biggest problem is that there in no analysis of causation with regard to different classes of defendants. The committee does not believe that one word in *Rutherford* is sufficient to make all defendants subject to *Rutherford's* causation standard.
		For purposes of causation, it does not matter whether the defendant who exposed the plaintiff to asbestos was a product manufacturer or distributor, an installer, contractor, or premises owner, or some other type of defendant, as the asbestos fibers and resulting disease do not distinguish between, or vary in their behavior and effect depending on, the type of defendant involved, and because the requirements of exposure and disease causation are the same as to all defendants. Regardless of the type of defendant, the plaintiff must prove that he or	There is no authority that establishes this view as the law.

Instruction	Commentator	Comment	BG Proposed Response
		she was exposed to asbestos by that defendant, whether from a product the defendant manufactured, distributed, or used in its work, premises the defendant owned, possessed, or controlled, or in some other way, and must further prove that the exposure was a substantial factor in causing his or her disease.	
		Since *Rutherford*, several published California appellate decisions have applied the Rutherford causation standard to asbestos-injury claims against defendants who "are not manufacturers or suppliers of asbestos-containing products." These decisions include (in addition to *Whitmire*, *Casey*, and *Kesner*, discussed below):	The comment is correct in noting that the *Rutherford* standard has been applied in a few cases, including *Whitmire* and *Casey*, to defendants other than manufacturers and suppliers. But "applied" does not mean "held." None of these cases actually address and analyze the issue.
		Petitpas v. Ford Motor Co. (2017) 13 Cal.App.5th 261. In *Petitpas*, the Court of Appeal cited and applied the *Rutherford* causation standard in its review of a nonsuit granted in favor of a premises liability defendant (Rossmoor Corporation) on claims alleging direct and secondary ("take-home") exposure to asbestos from the defendant's construction sites. (*Id.* at pp. 267, 278-279, 285-290.)	The court in *Petitpas* cited *Rutherford* in upholding the nonsuit granted to premises defendant Rossmoor. So again, implicitly once could conclude that *Rutherford* and CACI No. 435 apply to premises liability defendants. But as noted above, there is no analysis in the opinion as to why 435 is appropriate for premises defendants. Nor is there any holding in the case to that effect.
		Ganoe v. Metalclad Insulation Corp. (2014) 227 Cal.App.4th 1577. In *Ganoe*, plaintiffs claimed that the decedent was exposed to asbestos at his workplace from insulation work by the defendant insulation contractor (Metalclad Insulation Corporation). (Id. at pp. 1578-1581.) The defendant moved for summary judgment based on causation, arguing "that plaintiffs had no evidence that Ganoe was exposed to asbestos for which [the defendant] was responsible." (*Id.* at p. 1579.) The trial court agreed and granted the motion; the Court of Appeal reversed. (*Id.* at pp. 1578-1579, 1581.) In addressing causation, although it did not expressly cite *Rutherford*, the Court of Appeal did cite and discuss the causation analysis in *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, where the court analyzed causation under the	The status of the defendant in *Ganoe* is not clear, but the claim was apparently that the plaintiff "worked with or around … asbestos-containing products supplied, installed or removed by [defendant]." That language could be broad enough to implicate all defendants, but again, there is no holding or analysis that helps the plaintiffs. *McGonnell* cites *Rutherford* but is of even less help. Summary judgment was affirmed because there was "no evidence decedent had been exposed to *asbestos-containing products manufactured by defendants.*"

Instruction	Commentator	Comment	BG Proposed Response
		Rutherford standard. (*Ganoe, supra,* 227 Cal.App.4th at pp. 1585-1586; *McGonnell, supra,* 98 Cal.App.4th at p. 1103.)	
		The comment cites several pre-*Rutherford* cases that are alleged to support the plaintiff position. *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409 and *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, disapproved on another ground in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854, fn. 3 refer to the defendant's *conduct* rather than the defendant's asbestos-containing product. In *Smith v. ACandS, Inc.* (1994) 31 Cal.App.4th 77, disapproved on another ground in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245, the court said that there must be proof that the defendant's asbestos products *or activities* were present at plaintiff's work site.	To the extent that language in any of these cases supports the plaintiff position, the committee does not believe that language in pre-*Rutherford* cases can support a current jury instruction.
	Consumer Attorneys of California, by James P. Nevin, Brayton Purcell, Novato	We urge the committee to reject the proposed changes to the Directions for Use as they do not accurately state California law. The proposed additions seek to incorporate one view in an area of law that is, at best, under commentary and debate, and must be analyzed by a trial court on a case-by-case basis on the specific facts involved. As such, it is not appropriate to present in settled, uniform, and omnibus jury instructions. The existing language' of the Directions for Use should remain unchanged at the present time.	The committee is not certain what the comment means. Does "under commentary and debate" mean "unsettled?" If so, that would support the committee's conclusion that the law "is not settled."
		In *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261,298–301, the court declined to rule that the trial court's giving of both CACI 430 and CACI 435 was error, finding both that the Directions for Use were confusing, and finding the error harmless. This *minority view* is the sole basis for the proposed additional language in the Directions for Use, which would have the affect (sic) of suggesting the *Petitpas'* court's opinion as some statement of California law on this point. It is not.	As noted above, the proposed parenthetical comparing *Petitpas* and *Whitmire* has been replaced.

Instruction	Commentator	Comment	BG Proposed Response
		In *Whitmire v. lngersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084, the same court, without any indication of confusion or harmless error, unambiguously and correctly applied the asbestos causation standard (as set forth in CACI 435) to the contractor defendant Bechtel Corporation. This finding was in full accord with the asbestos causation standard set forth by the California Supreme Court in *Rutherford v. Owens Illinois, Inc.* (1997) 16 Cal.4th 953, and its progeny, none of which sought to carve out any exception for a defendant who is not a manufacturer or supplier. See, e.g., *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990; *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659; *Izell v. Union Carbide Corp*. (2014) 231 Cal.App.4th 962; and *Davis v. Honeywell International, Inc.* (2016) 245 Cal.App.4th 477.	While all of the comment's description of Whitmire is true, the court provided no analysis of why *Rutherford* applies to all defendants. None of the other four cases cited are on point. All four involved manufacturer and supplier defendants. There was no reason for the courts to consider other defendants.
		Since *Rutherford*, there have been at least fifty-five (55) published and unpublished California appellate decisions involving defendants who are not manufacturers or suppliers, and again none of those decisions observed or suggested the requested amendment to the Directions For Use of CACI 435, nor did they hold or carve out any exception regarding CACI 435. (The comment then cites 53 of these cases in three categories: Contractors; Premises; and Take Home.)	Nineteen of the cases are published; the commenter provided incorrect citations for two; and two were superseded by a grant of review. The theory of the comment seems to be that because none of the cases said that *Rutherford* does NOT apply to all defendants, that means that *Rutherford* applies to all defendants; i.e., silence establishes the authority of what is not said. But not one of these cases analyzes causation with regard to all defendants. Many of them have nothing to do with asbestos causation. Only two of the cases even cite *Rutherford*. In *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132, the California Supreme Court expressly declined to address causation. The other case does apply the *Rutherford* standard to a general contractor. (See *Casey v. Perini Corp.* (2012) 206 Cal. App. 4th

Instruction	Commentator	Comment	BG Proposed Response
			1222.) But the court does not analyze the issue, and there is no express statement that *Rutherford* applies to all defendants and why. Because *Casey* is two years newer than *Whitmire*, the committee decided to use *Casey* instead of *Whitmire* in the Directions for Use as an example of a case in which Rutherford was cited for a defendant who was not a manufacturer or supplier.
	Baron & Budd, Dallas TX, by Kathryn Pryor	In *Rutherford* the court applied "percentages of fault" (16 Cal.4th 953 at 962) to non-asbestos product manufacturers, including the plaintiff and each employer that contributed to the exposure. [*Id.*] Neither the "plaintiff" nor the "employers" were asbestos-product manufacturers, yet the *Rutherford* causation standard applies to allow the jury to allocate a percentage of contribution to them where their negligence contributes to the risk of the plaintiff's development of an asbestos-related cancer. Therefore, the proposed revision to CACI No. 435 would contravene the standard as set forth in *Rutherford* by the California Supreme Court.	It is not disputed that those other than manufacturers or suppliers may be liable for asbestos exposure. That is not the issue. The issue is whether the *Rutherford* causation standard can vary depending on the status of the defendant. The fact that a defendant other than a manufacturer or supplier may be liable for a share of comparative fault does not establish that the same causation requirement applies to it.
	Dean Omar Branham, Dallas Tx, by Charles Branham and Jessica Dean (two comments making essentially the same points)	In using the term "defendant's asbestos-containing products," the Supreme Court meant asbestos fibers emitted as a result of defendant's tortious conduct.	The committee must rely on what the Supreme Court opinion says, not on conjecture as to what it meant.
		If the Navy "installs" asbestos insulation on its ships, by definition it is not manufacturing or supplying asbestos-containing products. [See, e.g. *AOB* at 29-30]. Yet it is well-settled that the Navy is properly allocated fault in an asbestos-cancer case, even though the Navy is not an asbestos-product manufacturer. [See *Collins v. Plant Insulation Co.* (2010) 185 Cal.App.4th 260, 270 (Navy properly allocated fault in an asbestos cancer case)].	The two points made in the comment are both addressed above: *Rutherford's* use of "installed" and the comparative fault point. *Collins* does allocate fault to the Navy, but there is no discussion of causation. *Rutherford* is not cited. (The comment provides no full citation for "AOB.")
		Decades of case law apply the *Rutherford* causation standard to allocate liability to all parties whose	*Taylor,* like *Collins* addressed above, only establishes the undisputed proposition hat defendants other than

Instruction	Commentator	Comment	BG Proposed Response
		negligence or fault contributes to the plaintiff's risk of developing asbestos cancer, and not just "asbestos product manufacturers and suppliers:" (*Taylor v. John Crane, Inc.* (2003) 113 Cal.App.4th 1063, 1071 (fault for plaintiff's asbestos-related injuries properly allocated to both manufacturer of asbestos-containing products and to Navy as plaintiff's former employer); *Collins, supra,* 185 Cal.App.4th at 270, 274; (following *Taylor*); *Bockrath v. Aldrich Chem. Co, Inc.* (1999) 21 Cal.4th 71, 79-80 (holding that *Rutherford* causation standard applies to non-asbestos chemicals that cause multiple myeloma); *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664 (holding that in asbestos case, a carpenter employed by an independent contractor that installed scaffolding for workers who replaced asbestos insulation in an oil refinery facility may sue the refinery owners for injuries caused by exposure to asbestos, when it is claimed that only the refinery owner knew the carpenter was being exposed to a hazardous substance). Pursuant to *Bockrath,* the *Rutherford* causation standard applies to those cases "presenting complicated and possibly esoteric medical causation issues . . ." [*Id.* at 79], and not just to cases involving asbestos-product manufacturers.	manufacturers and suppliers can be liable for asbestos exposure. *Rutherford* is not cited, and causation is not addressed. In *Bockrath,* while the plaintiff sued 55 defendants, the California Supreme Court construed the pleading as alleging that "each defendant *manufactured* a chemical product that, as used or foreseeably misused, caused injury." (emphasis added) While the case addresses causation after *Rutherford,* there is no discussion of any variations depending on the status of the defendants. *Kinsman* did involve an asbestos claim against a property owner. But the opinion is about owner liability for injuries to an employee of an independent contractor. The case has little to do with asbestos.
	Gori Julian & Associates, Torrance, by Rebecca A. Cucu	The comment reiterates points made by others: The court's use of "installed" in *Rutherford*; point, the allocation of comparative fault to defendants other than manufacturers and suppliers; and the claim that "decades of well-settled case law" leave the issue settled.	These points are addressed above in response to other comments. See response to comments of Waters Kraus, Baron and Budd, and Dean Omar Branham.
		In any asbestos-related case involving both product manufacturers and nonmanufacturers, the finder of fact must evaluate each entity's contribution to an indivisible injury. Applying a "but for" causation standard to the nonproduct manufacturers would absolve each such entity	The comment seems to be well off point. It would seem to be settled that the optional "but for" sentence of CACI No. 430, *Causation: Substantial Factor,* does not apply in asbestos. (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3.) The issue is

Instruction	Commentator	Comment	BG Proposed Response
		of fault, due to the fact that it is not possible to determine which fibers caused the disease.	not what standard does not apply; the issue is what standard does apply.
	Trey Jones, Law Office of Trey Jones	The suggestion that *Petitpas v. Ford Motor Company* found that it was "not error to give both CACI Nos. 430 and 435 in case with both product liability and premises liability defendants" is terribly misleading. First, it ignores the *Petitpas* court's acknowledgment that the correct instruction is CACI 435 – "CACI No. 430 is a correct statement of the law relating to substantial factor causation, even though, as *Rutherford* noted, more specific instructions also must be given in a mesothelioma case." (*Petitpas. supra*, at 299). It would be more correct to say that the court found that it was harmless error to give 430 in that particular case because 435 was also given. The suggested citation in CACI to pages 298-299 stops before the three-page harmless error analysis beginning at page 300. If *Petitpas* found that a court should give both 430 and 435 in an asbestos case, then why did it also go through an extensive harmless error analysis on that very issue?	The committee agrees with much of the comment. The committee has removed the "Compare" parenthetical from the Directions for Use so that it does not imply that *Petitpas* suggests that 435 should not be given for defendants other than manufacturers and suppliers.
		The proposed revision will be used to suggest that 430, and not 435, should both be given if a defendant is not an asbestos product manufacturer.	That is the position of the defense. But by calling the issue "not settled," the committee is in no way suggesting that the defense is right.
		Giving CACI No. 430 will then introduce the concept of "but for" causation in asbestos case and cases that involve multiple causes of an indivisible injury. The Supreme Court has repeatedly held that "but for" causation is an impossible standard for cases involving multiple exposures from different sources resulting in the same injury, beginning with *Rutherford*.	There is no case that holds or even suggests that the "but for" sentence from CACI No. 430 should be given in an asbestos case. It was not given in *Petitpas*.
		This change will result in giving both instructions for identical exposures. For example, a case involving asbestos exposure from pipe covering would result in giving 430 and 435 if one defendant manufactured the pipe covering and another defendant negligently ripped	That is what happened in *Petitpas*. While the committee sees the point of the comment (excepting the characterization as "absurd"), it is up to a court to resolve the matter.

Instruction	Commentator	Comment	BG Proposed Response
		off the same pipe covering in the plaintiff's presence. Same product, same toxin, same exposure, but two different causation standards. This is an absurd result.	
	Jeffrey A. Kaiser, Kaiser Gornick, Walnut Creek	The proposed additional language may be read as suggesting that CACI 435 should not be given in an asbestos cancer case. However, there is no case supporting that position.	There is nothing that suggests that CACI No. 435, an instruction specifically to be given in an asbestos cancer case, should not be given in an asbestos cancer case.
		Petitpas does not create any conflict over whether CACI No. 435 should be given with regard to defendants other than manufacturers and suppliers.	This point is addressed above in response to the comment of Trey Jones.
		The concern that the "but for" sentence of CACI No. 430 will be given.	This point is addressed above in response to the comment of Gori Julien and Associates.
		The first sentence of the Directions for Use should be modified to read: "This instruction should be given in a case in which the plaintiff's claim is that he or she contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product <u>and/or as a result of the defendant's conduct.</u>"	The comment takes the position that the issue is, in fact, settled. For the many reasons expressed above, the committee disagrees.
		If the committee traces back the origins of the Directions for Use language in 435 it will find that the sentence was added at the request of 3M. The notes indicated there may be defendants in asbestos cancer cases who are entitled to the "but for" instruction in CACI 430. It is not clear on what basis 3M, a respirator defendant, would be entitled to this instruction as no authority was apparently provided at the time. Regardless, other defendants try to advantage of the Directions for Use language to get a CACI 430 instruction including the bracketed "but for language". In particular, premises defendants in asbestos cancer cases repeatedly have done so.	3M did submit a comment on CACI No. 430 last release, but no language adopted by the committee in either CACI No. 430 and 435 came from 3M. There are no "notes" that indicate that there may be defendants who are entitled to the "but for" instruction from CACI No. 430. There is not the vaguest hint anywhere that that could be the case.
	Kazan, McClain, Satterley & Greenwood, by Laurel Halbany	The proposed comments misstate the law as set forth by our Supreme Court in *Rutherford*. *Rutherford* does not hold that it only applies to asbestos manufacturers and suppliers. On the contrary, *Rutherford* confirmed that its holding applies to all parties who contribute to the risk of	As noted above, the fact that *Rutherford* did not hold something does not confirm that it did hold something else. There is no such confirmation in *Rutherford,* on page 985 or anywhere else.

Instruction	Commentator	Comment	BG Proposed Response
		the asbestos disease, including the plaintiff and the employer. [*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 985]	
		Should the proposed revisions guide courts and counsel to the "but-for" causation standard in CACI 430 for all parties except asbestos "manufacturers or suppliers," this will have the perverse effect of absolving responsible parties from any liability whatsoever. Premises owners, employers, the Navy, and the plaintiff himself would be accorded no liability under the jury's Proposition 51 analysis of comparative fault, thereby upending the Legislature's express purpose that "[e]ach defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault . . ." [Cal. Civ. Code § 1431.2].	To reach the conclusion posited by the comment, two logical leaps are required, neither of which is valid. First, the statement that x may be unsettled does not in any way imply that y is the law, when x and y are minimally related. Second, there is no authority that the "but for" sentence of 430 should ever be given with regard to any asbestos defendant. In fact, the authority is all to the contrary.
		The comment repeats arguments addressed above as to why the issue is settled; the inclusion of "installed" in *Rutherford;* the fact that defendants other than manufacturers and suppliers be allocated a percent under comparative fault; the cases previously addressed.	These points are addressed above
		Bettencourt v. Hennessy Indus., Inc. (2012) 205 Cal.App.4th 1103, 1122-1123 rejected defendant brake grinder's argument that plaintiffs must prove but-for causation for a brake grinder who contributed to the plaintiff's asbestos disease, and instead held the *Rutherford* standard applies.	*Bettencourt,* like *Whitmire* and *Casey,* is a case in which the court did apply the *Rutherford* standard to a defendant other than an asbestos manufacturer or supplier. But like *Whitmire* and *Casey,* there was no analysis of why *Rutherford* applies to all who bring the plaintiff into contact with asbestos.
		The Honorable John J. Kralik, now sitting as the presiding asbestos judge for all cases in Los Angeles Superior Court joint coordinated proceedings (JCCP 4674) similarly followed this logic in refusing to apply the CACI 430 instruction in an asbestos cancer case involving a faulty respirator that allowed the plaintiff to breath asbestos (not an asbestos product):	No matter how wise his words may be, Judge Kralik was not writing an appellate opinion.

Instruction	Commentator	Comment	BG Proposed Response
		I'll tell you, I don't think that the whole—the whole method and scheme of *Rutherford* doesn't work unless everybody is subject to the same rule. And what *Rutherford* does, is it gives you an opportunity to push off liability on other parties, including Mr. Tyler, who's not a manufacturer of anything relating to asbestos. So everybody—it doesn't—the system doesn't work unless everybody's judged by the same standard. [*Tyler v. American Optical Corporation* (LASC Case No. BC588866), Reporter's Transcript on Appeal, at 28RT.3494:26-3495:6	
	The Lanier Law Firm, Houston TX, by Mark A. Linder	[Makes many of the same points made by the Texas commentators above.]	See responses above to comments of Baron & Budd and Dean Omar Branham.
		Because *Rutherford* and CACI 435 look to whether an exposure or series of exposures was a legal cause of one's indivisible cancer, it would be improper to give any instruction other than CACI 435 in an asbestos cancer case.	The trial court in *Petitpas* gave CACI No. 430 because one defendant was a premises owner, and the appellate court found no error requiring reversal.
		To the extent the proposed revision to CACI 435 includes citation to *Petitpas,* it must be noted that in *Petitpas*, both CACI 430 and 435 were given. In other words, there is no authority for insinuating that CACI 430 alone might constitute a proper instruction in a case in which a defendant other than a manufacturer or supplier is the only remaining tortfeasor.	The committee gleans no "insinuation" that CACI 430 alone might constitute a proper instruction in a case in which a defendant other than a manufacturer or supplier is the only remaining tortfeasor.
	Maune Reichle Hartley French & Mudd, Oakland, by Marissa Y. Uchimura	Makes many of the same points made by other commentators above.	No further responses are necessary.
		The Supreme Court in *Rutherford* created a specific causation standard for cases involving asbestos-related cancer because of the scientific impossibility of determining which specific asbestos fibers actually caused enough damage to set the final disease process underway. (*Id.* at 976-977.) Requiring a plaintiff to show that a specific exposure actually caused the development of	If this argument is ever adopted as the holding of an appellate opinion, the committee will respond appropriately.

Instruction	Commentator	Comment	BG Proposed Response
		cancer to begin, reasoned the *Rutherford* court, would hold a plaintiff to a burden that is "medically impossible to sustain…because of the irreducible uncertainty regarding the cellular formation of an asbestos-related cancer." (*Id.* at 977.) This medical impossibility is the same regardless of whether the exposure is to asbestos from a product manufactured by a product defendant or to asbestos installed or disturbed by a premises or contractor defendant. Applying a different causation standard to nonmanufacturer or supplier defendants undermines the fundamental rationale underlying *Rutherford.*	
	Timothy Pearce, Pearce Lewis, San Francisco	[The comment makes only points already addressed.]	No further responses are necessary.
	Ronald J. Shingler, Shinglerlaw, Walnut Creek	[Makes many of the same points made by other commentators above.]	No further responses are necessary.
		If you adopt a "but for" test for all non-manufacturer defendants, then it will be impossible to find a nonmanufacturer defendant liable in ANY case where there is more than one defendant. All the non-manufacture defendants would have to do is point to each other and assert that liability cannot be asserted against any of them under the but for standard because the plaintiff was exposed to asbestos from sources other than any single nonmanufacturer. The problem with this approach, as recognized by *Rutherford,* is if you have 20 defendants and every one of those defendants assert the but for standard, they are relieved of liability even though they all contributed to fiber burden that ultimately lead to disease.	The committee agrees with the comment and with the many cases that have so held but finds it irrelevant to the matter at issue.
	Simmons Hanly Conroy, San Francisco, by Deborah Rosenthal	[Makes some of the same points made by other commentators above.]	No further responses are necessary.
		Injecting discussion into the Use Notes about unsettled aspects of appellate law, provides no guidance. On the contrary, it obfuscates an otherwise straightforward and well-settled subject and sets bad precedent for overloading	The committee finds that the issue of asbestos causation is not a "straightforward and well-settled subject." Nor is it a collateral issue. When unsettled issues in the law are directly germane to the

Instruction	Commentator	Comment	BG Proposed Response
		Use Notes with law-review style debate about collateral issues.	applicability of a jury instruction, the committee sees its proper role as identifying the issue for bench and bar.
	Simon Greenstone Panatier, Los Angeles, by Lisa M. Barley	[Makes only points already addressed.]	No further responses are necessary.
	Simon Greenstone Panatier, Los Angeles, by Nectaria Belantis	[Makes only points already addressed.]	No further responses are necessary.
	Weitz & Luxenberg, Los Angeles, by Benno Ashrafi	[Makes only points already addressed.]	No further responses are necessary.
1208, *Component Parts Rule*	Kazan, McClain, Satterley & Greenwood, by Laurel Halbany	While the proposed Directions for Use mention that a component-parts defendant may be liable if the component itself was defective, the instruction itself completely omits this element. As phrased, CACI 1208 incorrectly tells jurors that there is no liability for a component part which is itself defective.	The Directions for Use make it clear that the instruction is only for use with the second exception to the component parts defense; integration making the new product defective. If the claim is that the component itself is defective, it is just like any other product liability claim for a defective product.
		While the Directions for Use agree that the component-parts doctrine is a defense, CACI 1208 incorrectly attempts to shift the burden of proof to plaintiffs. The component-parts doctrine is unquestionably a defense which may be raised by a products defendant. [*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 183 (component parts doctrine is a "defense" which protects manufacturers and sellers of component parts from liability to users of finished products); Romine v. Johnson Controls, Inc. (2014) 224 Cal.App.4th 990, 1006 fn. 6 ("The California Supreme Court has not determined whether the component parts defense is limited to fungible	The committee considered and debated this point extensively. It concluded, unanimously, that even though the component parts rule is an affirmative defense, the plaintiff must have the burden of proof to avoid the rule via one of the exceptions. Otherwise, the defense would be in the position of having to prove that its product is *not* defective, and that would be contrary to the principles of product liability law.

Instruction	Commentator	Comment	BG Proposed Response
		products.".] Further, it is well-established California law that a defendant raising an affirmative defense bears the burden of proving that defense; plaintiffs are not required to first disprove the defense. [*Major v. R.J. Reynolds Tobacco Company* (2017) 14 Cal.App.4th 1179, 1201; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.] CACI 1208's instruction that "the plaintiff has the burden of avoiding the defense by proving one of the exceptions" cites no supporting authority which might distinguish it from this well-established rule.	
1730. *Slander of Title—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The word "disparagement," appearing for the first time in element 6, refers to the defendant's statement or other conduct that cast doubt on plaintiff's title. We believe a more explicit reference to that statement or conduct is preferable, as in element 5 and earlier in element 6. We would also insert the word "plaintiff's" before "title" for greater clarity. Accordingly, we propose: 6. "That [*name of plaintiff*] did in fact suffer immediate and direct financial harm [because someone else acted in reliance on the [statement/e.g., deed]/ [or] by incurring legal expenses necessary to remove the doubt cast by the ~~disparagement~~ [statement/e.g., deed] and to clear plaintiff's title."	The committee agreed that the word "disparagement" should not be introduced in the new text for element 6. The committee saw no need to add "plaintiff's" to "title" at the end of the element. Thee format requires that it be "[*name of plaintiff*]'s," not just "plaintiff's." There is no benefit to adding extra words.
2023. Failure to Abate Artificial Condition on Land Creating Nuisance	Orange County Bar Association, by Niki Miliband, President	The change from "publication" to "publicly disclosed' should not be made. There is no authority cited for the proposed change Of all the privacy claims (intrusion into private affairs, public disclosure of private facts, false light in the public eye, appropriation/use of name or likeness, stalking, recording of confidential information, and distribution of explicit materials), false light is the only one which deals with an untruth. For this reason, false light claims always pattern, and often constitute, defamation claims. Per Civil	The committee sees no problem with the proposed change. It is not the word "publication" In Civil Code sections 35 and 46 that connotes falsity; it the modifier "false." The committee feels free to adopt a plain-language translation of "publication."

Instruction	Commentator	Comment	BG Proposed Response
		Code section 44, defamation is effected by either libel or slander. The definition of libel at Civil Code section 45, and of slander at Civil Code section 46, indicate that committing either involves the "false and unprivileged **publication**" of allegedly offensive information or material (emphasis added).	
		The Directions for Use include the following statement: For defamation, utterance of a defamatory statement to a single third person constitutes sufficient publication. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 307 [81 Cal.Rptr. 855, 461 P.2d 39]; but see *Warfield v. Peninsula Golf & Country Club* (1989) 214 Cal.App.3d 646, 660 [262 Cal.Rptr. 890] [false light case holding that "account" published in defendant's membership newsletter does not meet threshold allegation of a general public disclosure].) The holding in *Warfield*, however, is not squarely directed to a false light case. Based on some seeming confusion in pleading, the court appeared to recast Warfield's false light claim as a claim for disclosure of private facts (emphasis added). Having done this, the court then decided the case based on an analysis of the elements of a cause of action for public disclosure of private facts. It concluded the relevant portion of its opinion with the observation that, "as a written communication to interested club members, the statement [in the subject membership newsletter] would appear to be privileged under the provisions of Civil Code section 47, subdivision 3 [now subdivision c]." This observation makes clear that the court was not addressing a false light claim wherein there are no facts to be disclosed, only a published untruth difficult to see as ever privileged or the subject of legitimate interest.	While it's not clear, it appears that the comment advocates deleting the "but see" citation to *Warfield*. The committee agrees with the comment's view of *Warfield* and has removed the citation. The court did recast the claim as one for public disclosure of private facts. And the court did invoke the common interest privilege. The only treatment of what constitutes a public disclosure is the single statement that "the required threshold allegation of a general public disclosure is absent." The committee agreed that this is insufficient authority to constitute a "but see."

Instruction	Commentator	Comment	BG Proposed Response
2023. *Failure to Abate Artificial Condition on Land Creating Nuisance*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The second sentence of this instruction states that the plaintiff must prove the following elements "in addition to proving that the condition created a nuisance." We believe a prior instruction using the term "nuisance" and explaining its elements is necessary for the jury to understand the term "nuisance" as used in this instruction. CACI No. 2020, *Public Nuisance—Essential Factual Elements*, uses the term "nuisance," but CACI No. 2021, *Private Nuisance—Essential Elements*, does not. We suggest modifying the first paragraph of CACI No. 2021 as follows: [*Name of plaintiff*] claims that [*name of defendant*] ~~interfered with [*name of plaintiff*]'s use and enjoyment of [his/her] land~~ created a nuisance.	No changes to CACI No. 2021 are proposed for this release, so the comment is outside of the scope of matters that may be addressed. The comment may be placed on the agenda for the next release cycle.
		We understand the last sentence in the Directions for Use to mean that when this instruction is given with CACI No. 2021 element 3 of that instruction should be deleted. We would modify the sentence for greater clarity and to avoid any misunderstanding that this instruction should be substituted in the place of (i.e. replace) element 3: "For private nuisance, ~~this instruction replaces~~ delete element 3 of CACI No. 2021."	The committee sees no greater clarity. "Delete" does not make it clear that the new instruction gives the intent element for CACI No. 2021.
	Orange County Bar Association, by Nikki P. Miliband President	As written, Element No. 2 improperly suggests that "an unreasonable risk of nuisance" is actionable. To avoid this concern, we suggest replacing Element No. 2 with the following new Element No. 2: "2. That [*name of defendant*] knew or should have known of the condition that resulted in the nuisance or that there was an unreasonable risk of the nuisance that resulted."	The committee assumes that the commenter's intent was to say that the element suggests that a "reasonable" (not an unreasonable) risk is actionable. Assuming that is the case, the committee finds the proposed revised element to be awkwardly phrased.
2401. *Breach of Employment*	California Employment Lawyers	CELA supports the proposed modifications to CACI 2401 which accomplishes combining the actual and constructive	No response is necessary.

Instruction	Commentator	Comment	BG Proposed Response
Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements and 2402, *Breach of Employment Contract – Unspecified Term – Constructive Discharge - Essential Factual Elements*	Association, by David deRobertis	breach of employment contract instructions (2401 and 2402) into one instruction (new 2401).	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the proposed new language "[by forcing [*name of plaintiff*] to resign]" in the introductory paragraph, and believe the instruction should provide the same specificity with respect to an actual discharge: "[*Name of plaintiff*] claims that [name of defendant] breached their employment contract [by [discharging [*name of plaintiff*]/forcing [*name of plaintiff*] to resign]"	The committee finds the proposed revision to use more words than necessary to convey the same meaning.
		In element 4, we would insert the language "by forcing [*name of plaintiff*] to resign" for greater clarity: "That [*name of defendant*] [constructively] discharged [name of plaintiff] by forcing [*name of plaintiff*] to resign [e.g., without good cause]; and"	If constructive discharge is alleged, it will be developed in CACI No. 2510. There is no need to include more words than needed here.
		We believe the reference in the Directions for Use to the need to modify elements 4 and 5 for adverse employment actions other than discharge should be to elements 2 and 4.	The comment is correct, and this error has been corrected.
	Orange County Bar Association, by Nikki P. Miliband President	The combination of CACI 2401 and 2402 is potentially confusing to jurors and unwarranted by existing law. To combine these forms is potentially confusing, causes additional work in crafting this instruction to fit those cases or results in counsel creating their own, which potentially leads to error. It also forces jurors to review and understand this instruction in the context of CACI 2510, *"Constructive Discharge" explained*.	The committee is concerned with presenting the law of constructive discharge in two different instructions; CACI No. 2402 and 2510. Currently, the two instructions have some differences. By combining 2401 and 2402 and then relying solely on 2510 for the law of constructive discharge, inconsistencies and potential inconsistencies are avoided. Future maintenance is facilitated because possible changes in the law of constructive discharge need be addressed only in 2510.
		The elimination of the language "by the discharge/demotion" in element no. 5 is confusing because it leaves it open to interpretation of the jurors, rather than explaining the harm was caused by the discharge/demotion.	The committee has simply modified the instruction to conform to standards with regard to the elements for harm and substantial factor causation.

Instruction	Commentator	Comment	BG Proposed Response
2404, *Breach of Employment Contract—Unspecified Term—"Good Cause" Defined*	California Employment Lawyers Association, by David deRobertis	CELA objects to the use, within CACI 2404, of the phrase: "An employer has substantial but not unlimited discretion regarding personnel decisions[, particularly with respect to an employee in a sensitive or confidential managerial position]." CELA acknowledges that this phrase was pulled from *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 330. That, however, does not justify its inclusion in a jury instruction. Indeed, case law strongly disfavors instructions consisting of language pulled verbatim from published appellate decisions as this "practice [is] often criticized as tending to produce instructions which are repetitive, misleading and inaccurate statements of the law as to the particular case." (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 4 79, 487; see *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675.)	The committee disagrees that "case law strongly disfavors" using language from court opinions for jury instructions." It is true that sometimes it is unwise if the court's language is in legalese or otherwise unduly wordy. But jury instructions come from the law, primarily from cases and statutes.
		The problem is compounded by the fact that there is no definition given to the jury to determine what constitutes "an employee in a sensitive or confidential managerial position." Literally, nothing defines, or provides any guidance regarding, what constitutes a "sensitive or confidential managerial position." It thus leaves the jury to utterly speculate as to what positions do or do not qualify as "sensitive or confidential managerial positions." Without any legal guidance on this point, it is confusing to include this phrase in the instruction and it merely invites jury speculation on whether this undefined phrase applies to the facts of a given case.	The committee does not believe that it is necessary to define "a sensitive or confidential managerial position." This language is in brackets, meaning that it will not be given unless whether the plaintiff might have a sensitive or confidential managerial position is a disputed issue in the case. If so, the point will be extensively argued by both sides.
	California Lawyers Association, Litigation Section, Jury Instructions	We believe the proposed new language "An employer has substantial but not unlimited discretion regarding personnel decisions" provides no useful guidance to the jury, raises more questions than it answers, and should be stricken. The existing instruction explains the scope of the employer's discretion, without using the potentially	The language "substantial but not unlimited discretion" is not new; it is in the instruction now, in the last paragraph. The committee shared some of the commentator's concerns with the language in its current location. But by moving it up to precede the explanation of what is NOT good cause, the

Instruction	Commentator	Comment	BG Proposed Response
	Committee, by Reuben A. Ginsberg, Chair	unfamiliar word "discretion," and this new gloss on that is not helpful.	committee believes that the concerns are adequately addressed. As a general principle, the employer has substantial discretion to terminate someone's employment. But that discretion is not unlimited, and the limitations are then presented. But to aid clarity, "However," has been added to the second sentence.
		We believe the instruction should refer to the employer's substantial discretion regarding managerial employees using plainer language than "discretion": "[An employer ~~has substantial but not unlimited discretion regarding personnel decisions[, particularly~~ must be allowed a substantial scope for the exercise of subjective judgment with respect to an employee in a sensitive or confidential managerial position]."	The committee does not find "a substantial scope for the exercise of subjective judgment with respect to an employee …" to be plain language.
2430. *Wrongful Discharge in Violation of Public Policy—Essential Factual Elements*	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed changes which ensure the instruction captures both the "causal nexus" requirement (element 3) and the causation of damages element (proposed new element 5). CELA further supports the new proposed "Directions for Use" which make clear that in reality this element should not be contested in typical termination cases.	No response is necessary.
		The "Directions for Use" should note that the trial court must give CACI No.430, *Causation: Substantial Factor*, to define "substantial factor." "Substantial factor" is a term of art defined in CACI 430. Thus, the "Directions for Use" should point this out. (Note: This same "Direction for Use" should be given in connection with CACI Instructions 2431, 2432, 2440, 2441, 2442, 2500, 2502, 2505, 2520, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2527, 2528, 2540, 2541, 2546, 2547, 2560, 2570, 2600, 2620, 2630, 2710, 2711, 2730, 2732, 2743, all of which include the concept of "substantial factor" in terms of the causation of harm element.)	As the comment notes, there are many instructions that have a substantial factor causation element; the ones noted in the comment for employment law and many more for virtually every Essential Factual Elements instruction. Adding a cross reference to CACI No. 430 to each one would be burdensome on everyone in the CACI production process. The committee believes that CACI No. 430 is so well known to bench and bar that cross references are not needed.
		We agree with the proposed revisions to this instruction.	No response is necessary.

Instruction	Commentator	Comment	BG Proposed Response
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	In light of the new reference to "substantial factor," we would add to the Directions for Use a cross-reference to CACI No. 430, *Causation: Substantial Factor*.	See response to CELA above.
		We believe the language reference in the second paragraph of the Directions for Use "causation between the public policy and the discharge" should state "causation between the public policy violation and the discharge."	The committee made the proposed revision.
	Orange County Bar Association, by Nikki P. Miliband President	Agree as modified. Propose removing second and third sentences of 3rd paragraph ("It is unlikely this element will be contested in termination cases…."). What does this portion of the directions add? These sentences do not seem to be helpful because they do not provide meaningful direction. There is no need to suggest this to practitioners; there is a damages instruction to cover this (CACI 3903P).	The committee agreed and removed this language.
2510. *"Constructive Discharge" Explained*	California Employment Lawyers Association, by David deRobertis	The proposed new language, "To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff*]'s position;" is taken from *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247. But the existing CACI 2510 has been used for years with success without this additional language being required. This language fails to accurately, completely and appropriately capture the foregoing concepts for the following reasons.	The language currently appears at the end of 2402. In combining CACI Nos.2401 and 2402, the committee looked for any language in 4102 on constructive discharge that would be lost in the merger. This language was found moved into 2510. Presumably existing 2402 has also been used for years with success with this language included.
		First, the proposed language requires the jury to find "unusually or repeatedly offensive" misconduct in all cases. But, *Turner* recognized that "single, trivial, or isolated acts of [misconduct]" are only insufficient "[i]n general." *Turner, supra,* 7 Cal.4th at 1247. *Turner* acknowledged that "[i]n some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employee, or an employer's ultimatum that an employee commit a crime, may constitute a	But the committee agreed with this comment. To be accurate, the sentence would have to be qualified with In general." And then it would have address the "single intolerable incident" exception.

Instruction	Commentator	Comment	BG Proposed Response
		constructive discharge.'" *Turner, supra,* 7 Cal.4th at 1247 fn. 3.	
		Second, *Turner* also made clear that the "unusually 'aggravated' or amount to a 'continuous pattern'" standard is not an independent requirement beyond proving intolerable working conditions; rather, ultimately, "[t]he essence of the test is whether, under all the circumstances, the working conditions are so unusually adverse that a reasonable employee in plaintiffs position 'would have felt compelled to resign.'" (*Turner, supra,* 7 Cal.4th at 1247.) That is, the ultimate requirement is simply proving that the working conditions were such "that a reasonable employee in plaintiff's position 'would have felt compelled to resign.'" (*Ibid.*) CELA submits that it is improper and unnecessary to further instruct that "[t]o be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff*]' s position."	The fact that the "ultimate requirement" may be x does not necessarily mean that the jury shouldn't be instructed on y and z if y and z will assist in finding x.
		Third, the proposed language sets forth a comparative inquiry, but the comparison is never actually made. By this we mean, the proposed language that "the adverse working conditions must be unusually or repeatedly offensive" begs the question of "unusually" compared to what? To suggest something must be "unusually ... offensive" but not given any context into what is considered a usual level of offensiveness is confusing rather than enlightening. CELA is concerned that this language, without any context to compare it to, will impose an improper barrier to constructive termination cases.	The committee was not swayed by this argument. The committee doubts that "a usual level of offensiveness" can be defined.
		Fourth, CELA is concerned that this instruction's requirement of "unusually or repeatedly offensive" misconduct in all cases will create an artificial barrier to proving some legitimate constructive termination cases. For example, an employer's failure to provide a reasonable	Looking at the language from *Turner* (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247.), the committee concluded that the apparent attempt in CACI No. 2402 to shorten and summarize the language is not adequate.

Instruction	Commentator	Comment	BG Proposed Response
		accommodation can give rise to a constructive termination, such as where the effect of denying the accommodation is to cause additional injury to the employee who is required to work in violation of restrictions. In such a case, the failure to provide the reasonable accommodation (itself, a personnel action) should be a sufficient basis for a constructive termination claim. (See, e.g., *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 821-824; cf. *Colores v. Board of Trustees of Calif. State Univ*. (2003) 105 Cal.App.4th 1293, 1310-1311 (constructive discharge shown in part from evidence that employer's conduct aggravated underlying medical condition that was made worse by stress). But, under this instruction, an employer could improperly argue that the underlying failure to provide a reasonable accommodation is not an "unusually or repeatedly offensive" conduct because it was simply a mere personnel decision regarding whether or not to accommodate.	"Unusually or repeatedly offensive" seems to be a translation of "unusually 'aggravated' or amount to a 'continuous pattern' … ." The committee finds that effort to be problematic at best. And the instruction does not include that "[i]n general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim." If *Turner* is to be fully presented, whether that language should be included must be considered. Therefore, CACI No. 2510 is being removed from the release and returned for further consideration in the next release cycle.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We find the proposed new language somewhat unclear and suggest modifying it for greater clarity. We would refer to "an unusually offensive incident" and "repeated offensive conduct" rather than "adverse working conditions" that were "unusually or repeatedly offensive." We also believe the new language should be optional because in many cases instructing the jury on this point would not help the jury to understand whether the working conditions were intolerable under the standard set forth in element 1 (i.e. so intolerable that a reasonable person in plaintiff's position would have no reasonable alternative but to resign). Accordingly, we suggest: ~~"To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [name of plaintiff]'s position.~~ [Working conditions may be intolerable because of an unusually	Because the instruction is being removed from the release, the comment is moot here. The comment will be considered in the next release cycle.

Instruction	Commentator	Comment	BG Proposed Response
		offensive incident or because of repeated offensive conduct.]"	
	Consumer Attorneys of California, by Jacqueline Serna, Legislative Counsel	We object to the addition of the following language: "To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in plaintiff's position." This change would set the burden too high for constructive discharge. To prove a constructive termination, plaintiff must show that a reasonable person in plaintiff's position would have considered the conduct severe or pervasive. (*Oncale v. Sundower Offshore Servs., Inc.* (1998) 523 U.S. 75; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872 [objective standard is reasonable woman if plaintiff is female, reasonable man standard if male.].) Although situations may exist in which the employee's decision to resign is unreasonable as a matter of law, "[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]" (*Vasquez v. Franklin Mgmt. Real Estate Fund, Inc.* (2013) 222 Cal. App. 4th 819, 827; Valdez v. City of Los Angeles (1991) 231 Cal.App.3d 1043, 1056; accord, Scotch v. Art Institute of California (2009) 173 Cal.App.4th 986, 1022.)	Because the instruction is being removed from the release, the comment is moot here. The comment will be considered in the next release cycle.
2528, *Failure to Prevent Sexual Harassment by Nonemployee*	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed new CACI 2528	No response is necessary.
	California Lawyers Association, Litigation Section, Jury Instructions	We would identify the nonemployee by name in the introductory paragraph and element 2 for greater clarity: "[*Name of plaintiff*] claims that [*name of defendant*] failed to take reasonable steps to prevent harassment by a nonemployee, [*name of person*].	The committee agreed that identifying the nonemployee by name in element 2 is a good idea. The committee does not think that it need be done in the opening paragraph.

Instruction	Commentator	Comment	BG Proposed Response
	Committee, by Reuben A. Ginsberg, Chair	"2. That while in the course of employment, [*name of plaintiff*] was subjected to sexual harassment by a nonemployee, [*name of person*];"	
		Language in elements 2 and 3 seems to assume the plaintiff was an employee. We would add language to the Directions for Use to suggest modifying those elements if the plaintiff was not an employee: "If the plaintiff was not an employee, the references to the course of employment and employees in elements 2 and 3 should be modified."	The FEHA protects not only employees, but also applicants, unpaid interns or volunteers, and persons providing services under a contract. Unpaid interns and volunteers have been added to element 1. A sentence has been added to the Directions for Use to advise modifications to elements 2 and 3 if the plaintiff has a status other than an employee.
		We suggest the Advisory Committee consider citing the following secondary sources: 41 Cal. Jur. 3d Labor § 82, Sexual harassment under Fair Employment and Housing Act—Employer's obligation to ensure workplace free of sexual harassment California Civil Practice, Employment Litigation § 2:95, Matters to consider in bringing civil action for violation of FEHA"	The future of Secondary Sources is uncertain in light of the difficulties involved in keeping them updated.
2705, *Affirmative Defense to Wage Order Violations—Plaintiff Was Not Defendant's Employee*	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed CACI 2705 as accurately reflecting the California Supreme Court's decision in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903.	No response is necessary.

Instruction	Commentator	Comment	BG Proposed Response
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Other CACI instructions based on wage order violations (CACI No. 2701, *Nonpayment of Minimum Wages—Essential Factual Elements*, CACI No. 2072, *Nonpayment of Overtime Compensation—Essential Factual Elements*) do not use the language "wage order violations." That language in this instruction would be unfamiliar to lay jurors. We would eliminate that language and specify the particular wage order violation: [*Name of defendant*] claims that [he/she/it] is not liable for any ~~wage order violations~~ nonpayment of [minimum wages/overtime pay] because [*name of plaintiff*] was not [his/her/its] employee, but rather an independent contractor.	Minimum wage and overtime are not the only two wage order violations to which *Dynamex* applies. (See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 913–914 [California wage orders impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions such as minimally required meal and rest breaks].) So just limiting the instruction to 2701 and 2702 violations would not be appropriate. But the committee did modify the language to "[*specify alleged wage order violations, e.g., failure to pay minimum wage*]."
		We believe the Directions for Use should cross-reference the CACI instructions based on wage order violations with which this instruction may be given: CACI Nos. 2701 and 2702.	The proposed cross reference would suggest that *Dynamex* applies to just minimum wage and overtime violations, which, as noted above, is not the case.
3210, *Breach of Implied Warranty of Merchantability—Essential Factual Elements*, and 3211, *Breach of Implied Warranty of*	Association of Southern Defense Counsel, by Allison W. Meredith, Horvitz & Levy, Burbank	ASCDC supports the committee's proposed revisions to CACI Nos. 3210 and 3211. The addition of two elements to each instruction—requiring the jury to find that the plaintiff was harmed, and that the breach of the implied warranty was a substantial factor in causing the harm—are consistent with the requirements of claims for breach of the implied warranty of merchantability and breach of the implied warranty of fitness for a particular purpose. (E.g., *Guitierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1247; Civ. Code, § 1791.1, subd. (d).) The revisions will therefore more clearly instruct the	No response is necessary.

Instruction	Commentator	Comment	BG Proposed Response
Fitness for a Particular Purpose—Essential Factual Elements		jury on all the elements they must find in order for plaintiff to prevail on a breach of implied warranty claims.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the proposed revisions to these two instructions.	No response is necessary.
		In light of the new reference to "substantial factor," we would add to the Directions for Use a cross-reference to CACI No. 430, *Causation: Substantial Factor*.	Addressed above in response to the similar comment from the California Employment Lawyers Associaton (CELA).
3244, *Civil Penalty—Willful Violation*	Association of Southern Defense Counsel, by Allison W. Meredith, Horvitz & Levy, Burbank	The proposed new paragraph in the "Directions for Use" section states, correctly, that an automobile buyer may seek penalties under both subdivision (c) and subdivision (e) of Civil Code section 1794 but may not recover two penalties for the same violation. (See Civ. Code, § 1794(e)(5).) However, the revised paragraph is somewhat unclear insofar as it does not specify the circumstances under which a penalty can be awarded under subdivision (e). As written, that paragraph might suggest that CACI No. 3244 could be used for subdivision (e) penalties as well as subdivision (c) penalties. ASCDC therefore recommends the following modification to the proposed "Directions for Use" paragraph: An automobile buyer may also obtain a penalty of two times actual damages without a showing of willfulness **for violations of the Tanner Consumer Protection Act, if the manufacturer failed to maintain a third-party dispute resolution process** ~~under some circumstances~~. (See Civ. Code, §**§ 1793.22(d)**, 1794(e).) However, a buyer who recovers a civil penalty for a willful violation	The committee sees nothing in the new added paragraph might "suggest that CACI No. 3244 could be used for subdivision (e) penalties." The committee does not find the proposed replacement for "under some circumstances" to be complete or helpful. The nonwillful violation of 1794(e) has more requirements than just a failure to have a third-party dispute resolution process. There is also a notice requirement. The committee did agree that adding a sentence to the Directions for Use on the need for a special instruction if nonwillful penalties are sought is a good idea and made the revision.

Instruction	Commentator	Comment	BG Proposed Response
		under Civil Code section 1794, subdivision (c) may not also recover a second civil penalty **under Civil Code section 1794, subdivision (e)** for the same violation. (Civ. Code, § 1794(e)(5).) If the buyer seeks a penalty for either a willful or a nonwillful violation in the alternative, the jury must be instructed on both remedies. (See *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 11 [28 Cal.Rptr.2d 133]; see also *Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1322 [46 Cal.Rptr.2d 507] (Suman II) [setting forth instructions to be given on retrial].) **A special instruction will need to be crafted for cases in which the consumer seeks a civil penalty for violation of the Tanner Consumer Protection Act.**	
3704, *Existence of "Employee" Status Disputed*	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed clarifications within the "Directions for Use" to CACI 3704 as accurately reflecting the purpose of the *Borello* test following our Supreme Court's decision in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903.	No response is necessary.
3903P, *Damages From Employer for Wrongful Discharge (Economic Damage)*	California Employment Lawyers Association, by David deRobertis	CELA supports moving what was previously CACI 2433 into the damages section by renumbering it as CACI 3903P. Moreover, CELA supports the proposed text of this instruction. Finally, CELA supports the changes to the "Directions for Use" making clear it applies to all employment cases.	No response is necessary.
		The title should be changed from "*Damages from Employer for Wrongful Discharge (Economic Damage)*" to *"Damages from Employer for Wrongful Discharge (Past and Future Lost Earnings*)" to accurately reflect the instruction's content. This instruction relates specifically and exclusively to lost past and future earnings from the Defendant employer. This instruction is not a generalized "economic damage" instruction and thus, the title should appropriately reflect this. There could be economic damages in employment cases other than merely lost past and future wages, earnings and/or benefits, and these	All of the 3903# instructions have (Economic Damage) as a parenthetical. There is no suggestion that any of these instructions are the only economic damages that can be recovered.

Instruction	Commentator	Comment	BG Proposed Response
		economic damages do not fit into this instruction. Therefore, the title should be changed to make clear that this instruction only applies to lost earnings, wages and/or benefits rather than all types of recoverable economic damages in an employment case.	
3963, *Affirmative Defense—Employee's Duty to Mitigate Damages*	California Employment Lawyers Association, by David deRobertis	CELA supports the moving of prior CACI 2407 into the damages section by renumbering it as CACI 3963. Moreover, CELA supports the changes to the "Directions for Use" making clear it applies to all employment cases.	No response is necessary.
All others except as noted above	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
All others except as noted above	Orange County Bar Association, by Nikki P. Miliband President	Agree	No response is necessary

TABLE OF CONTENTS

Release 33: November 2018

206. Evidence Admitted for Limited Purpose

During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.~~I explained to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I described, and not for any other purpose~~.

New September 2003; Revised May 2018, November 2018

Directions for Use

It is recommended that the judge call attention to the purpose to which the evidence applies.

~~-~~If appropriate, an instruction limiting the purpose for which evidence is to be considered must be given upon request. (Evid. Code, § 355; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 Cal.2d 655, 665-666 [313 P.2d 557]; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 412 [264 Cal.Rptr. 779].) ~~It is recommended that the judge call attention to the purpose to which the evidence applies.~~

A limited-purpose instruction is insufficient to cure hearsay problems with case-specific testimony given by an expert witness. (*People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320].)

For an instruction on evidence applicable to one party or a limited number of parties, see CACI No. 207, *Evidence Applicable to One Party*.

Sources and Authority

- Evidence Admitted for Limited Purpose. Evidence Code section 355.
- Refusal to give a requested instruction limiting the purpose for which evidence is to be considered may constitute error. (*Adkins v. Brett* (1920) 184 Cal. 252, 261–262 [193 P. 251].)
- "The effect of the statute—here, the municipal code section—is to make certain hearsay evidence admissible *for a limited purpose*, i.e., supplementing or explaining other evidence. This triggers the long-standing rule codified in Evidence Code section 355, which states, 'When evidence is admissible … for one purpose and is inadmissible … for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly.' In the absence of such a request, the evidence is ' "usable for any purpose." ' (*Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1060-1061 [202 Cal.Rptr.3d 890], original italics.)
- ~~Courts have observed that~~ "~~[w]~~Where the information is admitted for a purpose other than showing the truth of the matter asserted ... , prejudice is likely to be minimal and a limiting instruction under section 355 may be requested to control the jury's use of the information." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525 [3 Cal.Rptr.2d 833].)

- An adverse party may be excused from the requirement of requesting a limiting instruction and may be permitted to assert error if the trial court unequivocally rejects the argument upon which a limiting instruction would be based. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 298-299 [85 Cal.Rptr. 444, 466 P.2d 996].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 32–36

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 20.11–20.13

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.66, 551.77 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) §§ 4.106, 13.26 (Cal CJER 2010)

435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

[*Name of plaintiff***] may prove that exposure to asbestos from [***name of defendant***]'s product was a substantial factor causing [his/her/[***name of decedent***]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her] risk of developing cancer.**

New September 2003; Revised December 2007, May 2018, November 2018

Directions for Use

This instruction is to be given in a case in which the plaintiff's claim is that he or she contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product. This instruction is based on *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], which addresses only exposure to asbestos from "defendant's defective asbestos-containing products." Whether the same causation standards from *Rutherford* would apply to defendants who are alleged to have created exposure to asbestos but are not manufacturers or suppliers of asbestos-containing products is not settled. However, at least one court has given CACI No. 435 with regard to a defendant other than an asbestos manufacturer or supplier, but there was no analysis of the issue on appeal. (See *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 290 [220 Cal.Rptr.3d 185] [court gave CACI No. 435 with regard to premises liability defendant] ; see also *Casey v. Perini Corp.* (2012) 206 Cal. App. 4th 1222, 1236–1239 [142 Cal.App.4th 678] [*Rutherford* causation standards cited in case against contractor alleged to have created exposure to asbestos at job site].) See the discussion in the Directions for Use to CACI No. 430, *Causation: Substantial Factor,* with regard to whether CACI No. 430 may also be given.

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, CACI No. 431, *Causation: Multiple Causes,* may also be given.

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and

should also be given." (*Rutherford, supra, ~~v. Owens-Illinois, Inc.~~ (1997)* 16 Cal.4th at pp.~~953,~~ 982–983 ~~[67 Cal.Rptr.2d 16, 941 P.2d 1203]~~, original italics, internal citation and footnotes omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra*, 16 Cal.4th at p. 969, internal citations omitted.)

- "[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citation omitted.)

- "Contrary to defendant's assertion, the California Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.~~-~~Rptr.~~-~~2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that 'the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,' 'demonstrates how the "substantial factor" test subsumes the traditional "but for" test of causation.' Defendant argues that *Viner* required plaintiffs to show that defendant's product 'independently caused [plaintiff's] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.' *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that 'plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.' " *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144], internal citations omitted.)

- " 'A threshold issue in asbestos litigation is exposure to the defendant's product. … If there has been no exposure, there is no causation.' Plaintiffs bear the burden of 'demonstrating that exposure to [defendant's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff's] risk of developing cancer.' 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].' Therefore, '[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.' " (*Whitmire v. Ingersoll-Rand Co.* (2010)

184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)

- "Further, '[t]he mere "possibility" of exposure' is insufficient to establish causation. '[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff's] burden' of persuasion." (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "To support an allocation of liability to another party in an asbestos case, a defendant must 'present evidence that the aggregate dose of asbestos particles arising from' exposure to that party's asbestos 'constituted a substantial factor in the causation of [the decedent's] cancer.' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205 [191 Cal.Rptr.3d 263].)

- " '[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,' our Supreme Court has held that a plaintiff 'need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.' Rather, a 'plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer.' " (*Izell, supra,* 231 Cal.App.4th at p. 975, original italics, internal citation omitted.)

- "Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury. [Citations.] 'Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.' [Citation.] " (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363−1364 [169 Cal.Rptr.3d 373].)

- "In this case, [defendant] argues the trial court's refusal to give its proposed instruction was error because the instruction set forth 'the requirement in *Rutherford* that causation be decided by taking into account "the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed." ' But *Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff's exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion." (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation omitted.)

- "Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure." (*Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252 [192 Cal.Rptr.3d 346].)

- "We disagree with the trial court's view that *Rutherford* mandates that a medical doctor must expressly link together the evidence of substantial factor causation. The *Rutherford* court did not

create a requirement that specific words must be recited by appellant's expert. Nor did the *Rutherford* court specify that the testifying expert in asbestos cases must always be 'somebody with an M.D. after his name.' The *Rutherford* court agreed with the *Lineaweaver* court that 'the reference to "medical probability" in the standard "is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence." [Citation.]' The Supreme Court has since clarified that medical evidence does not necessarily have to be provided by a medical doctor." (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 [156 Cal.Rptr.3d 90], internal citations omitted.)

- "Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the 'every exposure' and 'insignificant exposure' camps, and recognizes that the conflict is one for the jury to resolve." (*Izell, supra,* 231 Cal.App.4th at p. 977.)

- "[T]he identified-exposure theory is a more rigorous standard of causation than the every-exposure theory. As a single example of the difference, we note [expert]'s statement that it 'takes significant exposures' to increase the risk of disease. This statement uses the plural 'exposures' and also requires that those exposures be 'significant.' The use of 'significant' as a limiting modifier appears to be connected to [expert]'s earlier testimony about the concentrations of airborne asbestos created by particular activities done by [plaintiff], such as filing, sanding and using an airhose to clean a brake drum." (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1088 [217 Cal.Rptr.3d 147].)

- "Nor is there a requirement that 'specific words must be recited by [plaintiffs'] expert.' [¶] The connection, however, must be made between the defendant's asbestos products and the risk of developing mesothelioma suffered by the decedent." (*Paulus, supra,* 224 Cal.App.4th at p. 1364.)

- "We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 570

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, Theories of Recovery—Causation Issues, ¶ 2:2409 (The Rutter Group)

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

450C. Negligent Undertaking

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for [***name of plaintiff***]'s harm because [***name of defendant***] failed to exercise reasonable care ~~to protect~~in rendering services to [***name of third person***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***], voluntarily or for a charge, rendered services to~~for the protection of~~ [***name of third person***];**

2. That these services were of a kind that [*name of defendant***] should have recognized as needed for the protection of [***name of plaintiff***];**

3. That [*name of defendant***] failed to exercise reasonable care in rendering these services;**

4. That [*name of defendant***]'s failure to exercise reasonable care was a substantial factor in causing harm to [***name of plaintiff***]; and**

5. [(a) That [*name of defendant***]'s failure to use reasonable care added to the risk of harm;]**

[or]

[(b) That [*name of defendant***]'s services were rendered to perform a duty that [***name of third person***] owed to third persons including [***name of plaintiff***];]**

[or]

[(c) That [*name of plaintiff***] suffered harm because [[***name of third person***]/ [or] [***name of plaintiff***]] relied on [***name of defendant***]'s services.]**

New June 2016; Revised November 2018

Directions for Use

This instruction presents the theory of liability known as the "negligent undertaking" rule. (See Restatement Second of Torts, section 324A.) The elements are stated in *Paz v. State of California* (2000) 22 Cal.4th 550, 553 [93 Cal.Rptr.2d 703, 994 P.2d 975].

In *Paz*, the court said that negligent undertaking is "sometimes referred to as the 'Good Samaritan' rule," by which a person generally has no duty to come to the aid of another and cannot be liable for doing so unless the person aiding's acts increased the risk to the person aided or the person aided relied on the person aiding's acts. (*Paz, supra*, 22 Cal.4th at p. 553; see CACI No. 450A, *Good Samaritan—Nonemergency*.) It is perhaps more accurate to say that negligent undertaking is another application of the Good Samaritan rule. CACI No. 450A is for use in a case in which the person aided is

the injured plaintiff. (See Restatement 2d of Torts, § 323.) This instruction is for use in a case in which the defendant's failure to exercise reasonable care in ~~acting to aid~~performing services to one person has resulted in harm to another person.

Select one or more of the three options for element 5 depending on the facts.

Sources and Authority

- Negligent Undertaking. Restatement Second of Torts section 324A.

- "[T]he [Restatement Second of Torts] section 324A theory of liability--sometimes referred to as the "Good Samaritan" rule--is a settled principle firmly rooted in the common law of negligence. Section 324A prescribes the conditions under which a person who undertakes to render services for another may be liable to third persons for physical harm resulting from a failure to act with reasonable care. Liability may exist *if* (a) the failure to exercise reasonable care increased the risk of harm, (b) the undertaking was to perform a duty the other person owed to the third persons, or (c) the harm was suffered because the other person or the third persons relied on the undertaking." (*Paz, supra,* 22 Cal.4th at p. 553, original italics.)

- "Thus, as the traditional theory is articulated in the Restatement, and as we have applied it in other contexts, a negligent undertaking claim of liability to third parties requires evidence that: (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor's failure to exercise reasonable care resulted in physical harm to the third persons; and (5) *either* (a) the actor's carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on the actor's undertaking. [¶] Section 324A's negligent undertaking theory of liability subsumes the well-known elements of any negligence action, viz., duty, breach of duty, proximate cause, and damages." (*Paz, supra,* 22 Cal.4th at p. 559, original italics, internal citation omitted; see also *Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 775 [180 Cal.Rptr.3d 479] [jury properly instructed on elements as set forth above in *Paz*].)

- "Section 324A is applied to determine the 'duty element' in a negligence action where the defendant has ' "specifically … undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully." ' The negligent undertaking theory of liability applies to personal injury and property damage claims, but not to claims seeking only economic loss." (*Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914, 922 [224 Cal.Rptr.3d 725], internal citations omitted.)

- "[U]nder a negligent undertaking theory of liability, the scope of a defendant's duty presents a jury issue when there is a factual dispute as to the nature of the undertaking. The issue of 'whether [a defendant's] alleged actions, if proven, would constitute an "undertaking" sufficient … to give rise to an actionable duty of care is a legal question for the court.' However, 'there may be fact questions "about precisely what it was that the defendant undertook to do." That is, while "[t]he 'precise nature

and extent' of [an alleged negligent undertaking] duty 'is a question of law … "it depends on the nature and extent of the act undertaken, a question of fact." ' " [Citation.] Thus, if the record can support competing inferences [citation], or if the facts are not yet sufficiently developed [citation], " 'an ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits' " [citation], and summary judgment is precluded. [Citations.]' (see CACI No. 450C [each element of the negligent undertaking theory of liability is resolved by the trier of fact].)" (*O'Malley v. Hospitality Staffing Solutions* (2018) 20 Cal.App.5th 21, 27-28 [228 Cal.Rptr.3d 731], internal citations omitted.)

- "To establish as a matter of law that defendant does not owe plaintiffs a duty under a negligent undertaking theory, defendant must negate all three alternative predicates of the fifth factor: '(a) the actor's carelessness increased the risk of such harm, or (b) the undertaking was to perform a duty owed by the other to the third persons, or (c) the harm was suffered because of the reliance of the other or the third persons upon the undertaking.' " (*Lichtman, supra,* 16 Cal.App.5th at p. 926.)

- "The undisputed facts here present a classic scenario for consideration of the negligent undertaking theory. This theory of liability is typically applied where the defendant has contractually agreed to provide services for the protection of others, but has negligently done so." (*Lichtman, supra,* 16 Cal.App.5th at p. 927.)

- "The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking. Section 324A integrates these two basic principles in its rule." (*Paz. supra,* 22 Cal.4th at pp. 558−559.)

- "[T]he 'negligent undertaking' doctrine, like the special relationship doctrine, is an exception to the 'no duty to aid' rule." (*Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1231 [186 Cal.Rptr.3d 26].)

- "Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ' "made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions." ' Nonfeasance that leaves the citizen in exactly the same position that he or she already occupied cannot support a finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required." (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)

- "A operates a grocery store. An electric light hanging over one of the aisles of the store becomes defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the

store who is walking down the aisle. B Company is subject to liability to C." (Restat 2d of Torts, § 324A, Illustration 1.)

Secondary Sources

4 Witkin, California Procedure (~~4th~~ 5th ed. ~~1996~~2008) Pleadings, § ~~553~~594

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 1205–1210~~1060–1065~~

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) ¶¶ 2:583.10–2:583.11, 2:876

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[2][d], [5][c] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.150, 165.241 (Matthew Bender)

1208. Component Parts Rule

[*Name of defendant***] [manufactured/distributed/supplied] [a/an] [***component part***], which was then integrated into [a/an] [***end product***]. [***Name of defendant***] may be liable for harm caused by a defective [***end product***] if [***name of plaintiff***] proves that (1) [***name of defendant***] substantially participated in the integration of its [***component part***] into the design of the [***end product***] and (2) as a result of the integration of the [***component part***] into the [***end product***], the [***end product***] was defective under the instruction(s) you have been given on [manufacturing defect/design defect/failure to warn].**

New November 2018

Directions for Use

Give this instruction if the component parts rule is at issue. This rule generally relieves a component parts manufacturer, distributor, or supplier of liability for injuries caused by a defect in the product into which the component was integrated. However, there are two exceptions to the rule so that a component-parts defendant may nevertheless be found liable. First, the component itself may have been defective; or second, (a) the defendant may have substantially participated in the integration of the component into the design of the end product, (b) the integration of the component caused the end product to be defective, and (c) the defect in the product causes the harm. (*Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500, 508 [203 Cal.Rptr.3d 273, 372 P.3d 200].) While the component parts rule is labelled a defense, (see *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 183 [202 Cal.Rptr.3d 460, 370 P.3d 1022]; see also *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1006 fn. 6 [169 Cal.Rptr.3d 208].), the plaintiff has the burden of avoiding the defense by proving one of the exceptions.

This instruction is for use under the second exception. To prove that the end product was defective or lacked a required warning, the plaintiff must prove a manufacturing or design defect, or a failure to warn, as with any other strict product liability claim, using CACI No. 1201, *Strict Liability—Manufacturing Defect—Essential Factual Elements*, CACI Nos. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements,* or 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements* (or both), or CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*. The plaintiff has the same burden if the claim is that the component itself was defective or lacked a required warning.

The component parts rule does not apply if the injury is caused by the component when it is being used as intended before integration into another product. (See *Ramos, supra,* 63 Cal.4th at p. 504.)

Sources and Authority

- "Another defense protects manufacturers and sellers of component parts from liability to users of finished products incorporating their components. Under the component parts doctrine, the supplier of a product component is not liable for injuries caused by the finished product unless (1) the component itself was defective and caused injury or (2) the supplier participated in integrating the component into a product, the integration caused the product to be defective, and that defect

caused injury." (*Webb, supra,* 63 Cal.4th at p. 183.)

- "In *Webb* [*supra*], we explained that the component parts doctrine… and as accurately reflected in section 5 of the Restatement Third of Torts, Products Liability—applies (1) when a supplier provides a component or raw material that is not itself defective (by virtue of a manufacturing, design, or warning defect), (2) the component or raw material is changed or transformed when incorporated through the manufacturing process into a different finished or end product, and (3) an end user of the finished product is allegedly injured by a defect in the finished product." (*Ramos, supra,* 63 Cal.4th at pp. 507–508, internal citations omitted.)

- "[T]he component parts doctrine provides protection to the supplier of the component or raw material, subjecting that entity to liability for harm caused by a product into which the component has been integrated only if the supplier "(b)(1) … substantially participates in the integration of the component into the design of the product; and [¶] (2) the integration of the component causes the product to be defective … ; and [¶] (3) the defect in the product causes the harm." (*Ramos, supra,* 63 Cal.4th at p. 508.)

- " 'Component parts are products, whether sold or distributed separately or assembled with other component parts.' 'Product components include raw materials, bulk products, and other constituent products sold for integration into other products.' Component manufacturers and suppliers, as sellers of 'products,' are subject to products liability. 'Like manufacturers, suppliers, and retailers of complete products, component manufacturers and suppliers are "an integral part of the overall producing and marketing enterprise," and may in a particular case "be the only member of that enterprise reasonably available to the injured plaintiff," and may be in the best position to ensure product safety.' " (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 33 [192 Cal.Rptr.3d 158], internal citations omitted.)

- "[T]he duty of a component manufacturer or supplier to warn about the hazards of its products is not unlimited. … 'Making suppliers of inherently safe raw materials and component parts pay for the mistakes of the finished product manufacturer would not only be unfair, but it also would impose and [*sic*] intolerable burden on the business world . . . . Suppliers of versatile materials like chains, valves, sand gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components.' Thus, cases have subjected claims made against component suppliers to two related doctrines, the 'raw material supplier defense' and 'the bulk sales/sophisticated purchaser rule.' Although the doctrines are distinct, their application oftentimes overlaps and together they present factors which should be carefully considered in evaluating the liability of component suppliers. Those factors include whether the raw materials or components are inherently dangerous, whether the materials are significantly altered before integration into an end product, whether the supplier was involved in designing the end-product and whether the manufacturer of the end product was in a position to discover and disclose hazards." (*Artiglio, supra,* 61 Cal.App.4th at p. 837.)

- "[T]he protection afforded to defendants by the component parts doctrine does not apply when the product supplied has not been incorporated into a different finished or end product but instead, as here, itself allegedly causes injury when used in the manner intended by the product supplier." (*Ramos, supra,* 63 Cal.4th at p. 504.)

- "The Restatement further explains 'Product components include raw materials. … Thus, when raw materials are contaminated or otherwise defective within the meaning of § 2(a), the seller of the raw material is subject to liability for harm caused by such defects.' California courts have generally adopted the component parts doctrine as it is articulated in the Restatement." (*Brady v. Calsol, Inc.* (2015) 241 Cal.App.4th 1212, 1219 [194 Cal.Rptr.3d 243], internal citation omitted.)

- "The California Supreme Court has not determined whether the component parts defense is limited to fungible products." (*Romine, supra,* 224 Cal.App.4th at p. 1006, fn. 6.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1617, 1666

1730. Slander of Title—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by [making a statement/taking an action] that cast doubts about [***name of plaintiff***]'s ownership of [***describe real or personal property, e.g., the residence located at [address]***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [made a statement/[***specify other act, e.g., recorded a deed***] that cast doubts about [***name of plaintiff***]'s ownership of the property;**

2. **That the [statement was made to a person other than [***name of plaintiff***]/[***specify other publication, e.g., deed became a public record***];**

3. **That [the statement was untrue and] [***name of plaintiff***] did in fact own the property;**

4. **That [***name of defendant***] [knew that/acted with reckless disregard of the truth or falsity as to whether] [***name of plaintiff***] owned the property;**

5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the [statement/***e.g., deed***], causing [***name of plaintiff***] financial loss;**

6. **That [***name of plaintiff***] did in fact suffer immediate and direct financial harm [because someone else acted in reliance on the [statement/***e.g., deed***]/ [or] by incurring legal expenses necessary to remove the doubt cast by the [statement/***e.g., deed***] and to clear title];**

7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2012; Revised May 2018; November 2018

Directions for Use

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by means other than words, specify the means in element 1. If the slander is by words, select the first option in element 2.

An additional element of a slander of title claim is that the alleged slanderous statement was without privilege or justification. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1335 [220 Cal.Rptr.3d 408].) If this element presents an issue for the jury, an instruction on it must be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the

statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is alleged, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Beyond the privilege of Civil Code section 47(c), it would appear that actual malice in the sense of ill will toward and intent to harm the plaintiff is not required and that malice may be implied in law from absence of privilege (See *Gudger v. Manton* (1943) 21 Cal.2d 537, 543–544 [134 P.2d 217], disapproved on other grounds in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381 [295 P.2d 405]) or from the attempt to secure property to which the defendant had no legitimate claim (see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 623 [44 Cal.Rptr. 683]) or from accusations made without foundation (element 4) (See *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67 [7 Cal.Rptr. 358].)

Sources and Authority

- "[S]lander of title is not a form of deceit. It is a form of the separate common law tort of disparagement, also sometimes referred to as injurious falsehood." (*Finch Aerospace Corp. v. City of San Diego* (2017) 8 Cal.App.5th 1248, 1253 [214 Cal.Rptr.3d 628].)

- "The Supreme Court has recently determined a viable disparagement claim, which necessarily includes a slander of title claim, requires the existence of a 'misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication.' " (*Finch Aerospace Corp., supra,* 8 Cal.App.5th at p. 1253

- " 'Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Damages usually consist of loss of a prospective purchaser. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership.' 'However, it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had for the depreciation in the market value of the property.' " (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198–199 [143 Cal.Rptr.3d 160], internal citations omitted.)

- "Slander of title 'occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. [Citation.]' The false statement must be ' "maliciously made with the intent to defame." ' " (*Cyr v. McGovran* (2012) 206 Cal.App.4th

645, 651 [142 Cal.Rptr.3d 34], internal citations omitted.)

- "One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity." (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214 [206 Cal.Rptr. 259], quoting Rest. 2d Torts § 623A.)

- "One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused." (*Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674 [117 Cal.Rptr. 167], quoting Rest. Torts, § 624 [motor vehicle case].)

- "Sections 623A, 624 and 633 of the Restatement Second of Torts further refine the definition so it is clear included elements of the tort are that there must be (a) a publication, (b) which is without privilege or justification and thus with malice, express or implied, and (c) is false, either knowingly so or made without regard to its truthfulness, and (d) causes direct and immediate pecuniary loss." (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263–264 [169 Cal.Rptr. 678], footnote and internal citations omitted.)

- "In an action for wrongful disparagement of title, a plaintiff may recover (1) the expense of legal proceedings necessary to remove the doubt cast by the disparagement, (2) financial loss resulting from the impairment of vendibility of the property, and (3) general damages for the time and inconvenience suffered by plaintiff in removing the doubt cast upon his property." (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 624 [225 Cal.Rptr.3d 711].)

- "While it is true that an essential element of a cause of action for slander of title is that the plaintiff suffered pecuniary damage as a result of the disparagement of title, the law is equally clear that the expense of legal proceedings necessary to remove the doubt cast by the disparagement and to clear title is a recognized form of pecuniary damage in such cases." (*Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1032 [141 Cal.Rptr.3d 109], internal citations omitted; see Rest.2d Torts, § 633, subd. (1)(b).)

- "Although attorney fees and litigation expenses reasonably necessary to remove the memorandum from the record were recoverable, those incurred merely in pursuit of damages against … defendants were not." (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 865-866 [237 Cal.Rptr. 282].)

- "Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code." (*Albertson, supra,* 46 Cal.2d at pp. 378–379, internal citations omitted.)

- "[The privilege of Civil Code section 47(c)] is lost, however, where the person making the communication acts with malice. Malice exists where the person making the statement acts out of hatred or ill will, or has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege is given." (*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767], disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219 [266 Cal.Rptr. 638, 786 P.2d 365].)

- "The existence of privilege is a defense to an action for defamation. Therefore, the burden is on the defendant to plead and prove the challenged publication was made under circumstances that conferred the privilege." (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [1 Cal.Rptr.3d 116] [applying rule to slander of title].)

- "The principal issue presented in this case is whether the trial court properly instructed the jury that, in the jury's determination whether the common-interest privilege set forth in section 47(c) has been established, defendants bore the burden of proving not only that the allegedly defamatory statement was made upon an occasion that falls within the common-interest privilege, but also that the statement was made without malice. Defendants contend that, in California and throughout the United States, the general rule is that, although a defendant bears the initial burden of establishing that the allegedly defamatory statement was made upon an occasion falling within the purview of the common-interest privilege, once it is established that the statement was made upon such a privileged occasion, the plaintiff may recover damages for defamation only if the plaintiff successfully meets the burden of proving that the statement was made with malice. As stated above, the Court of Appeal agreed with defendants on this point. Although, as we shall explain, there are a few (primarily early) California decisions that state a contrary rule, both the legislative history of section 47(c) and the overwhelming majority of recent California decisions support the Court of Appeal's conclusion. Accordingly, we agree with the Court of Appeal insofar as it concluded that the trial court erred in instructing the jury that defendants bore the burden of proof upon the issue of malice, for purposes of section 47(c)." (*Lundquist, supra,* 7 Cal.4th at pp. 1202–1203, internal citations omitted.)

- "Civil Code section 47(b)(4) clearly describes the conditions for application of the [litigation] privilege to a recorded lis pendens as follows: 'A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.' Those conditions are (1) the lis pendens must identify a previously filed action and (2) the previously filed action must be one that affects title or right of possession of real property. We decline to add a third requirement that there must also be evidentiary merit." (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 476 [149 Cal.Rptr.3d 716], internal citation omitted.)

- "[T]he property owner may recover for the impairment of the vendibility 'of his property' without showing that the loss was caused by prevention of a particular sale. 'The most usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. . . . The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land

or other thing might with reasonable certainty have found a purchaser.' " (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424 [96 Cal.Rptr. 902].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts § 747

6 Witkin, Summary of California Law (11th ed. 2017) Torts § 1886

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.80 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander,* § 340.90 (Matthew Bender)

1802. False Light

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] ~~publicized~~ publicly disclosed information or material that showed [***name of plaintiff***] in a false light;**

2. **That the false light created by the disclosure~~publication~~ would be highly offensive to a reasonable person in [***name of plaintiff***]'s position;**

3. **[That there is clear and convincing evidence that [***name of defendant***] knew the ~~publication~~ disclosure would create a false impression about [***name of plaintiff***] or acted with reckless disregard for the truth;]**

   [*or*]

   [That [*name of defendant***] was negligent in determining the truth of the information or whether a false impression would be created by its ~~publication~~disclosure;]**

4. **[That [***name of plaintiff***] was harmed; and]**

   [*or*]

   [That [*name of plaintiff***] sustained harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and]**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised November 2017, May 2018, November 2018

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

False light claims are subject to the same constitutional protections that apply to defamation claims. (*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34], overruled on other grounds in *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 696, fn. 9 [21 Cal.Rptr.3d 663, 101 P.3d 552] [false light claim should meet the same requirements of a libel claim, including proof of malice when required].) Thus, a knowing violation of or reckless disregard for the plaintiff's rights is required if the plaintiff is a public figure. (See *Brown v. Kelly Broadcasting Co.*

(1989) 48 Cal.3d 711, 721–722 [257 Cal.Rptr. 708, 771 P.2d 406].) Give the first option for element 3 if the ~~publication~~ disclosure involves a public figure. Give the second option for a private citizen, at least with regard to a matter of private concern. (See *id.* at p. 742 [private person need prove only negligence rather than malice to recover for defamation].)

There is perhaps some question as to which option for element 3 to give for a private person if the matter is one of public concern. For defamation, a private figure plaintiff must prove malice to recover presumed and punitive damages for a matter of public concern, but not to recover for damages to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].) No case has been found that provides for presumed damages for a false light violation. Therefore, the court will need to decide whether proof of malice is required from a private plaintiff even though the matter may be one of public concern.

If the jury will also be instructed on defamation, an instruction on false light would be superfluous and therefore need not be given. (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [88 Cal.Rptr.2d 802]; see also *Briscoe, supra,* 4 Cal.3d at p. 543.) For defamation, utterance of a defamatory statement to a single third person constitutes sufficient publication. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 307 [81 Cal.Rptr. 855, 461 P.2d 39].)

Sources and Authority

- " 'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264 [217 Cal.Rptr.3d 234].)

- "A 'false light' claim, like libel, exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 865 [230 Cal.Rptr.3d 625].)

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)

- "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238-239 [228 Cal.Rptr. 215, 721 P.2d 97], internal citation omitted.)

- "When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (*Eisenberg, supra,* 74 Cal.App.4th at p. 1385, fn. 13, internal citations omitted.)

- "[A] 'false light' cause of action 'is in substance equivalent to ... [a] libel claim, and should meet the same requirements of the libel claim ... including proof of malice and fulfillment of the requirements

of [the retraction statute] section 48a [of the Civil Code].” ’ ” (*Briscoe, supra,* 4 Cal.3d at p. 543, internal citation omitted.)

- “Because in this defamation action [plaintiff] is a private figure plaintiff, he was required to prove only negligence, and not actual malice, to recover damages for actual injury to his reputation. But [plaintiff] was required to prove actual malice to recover punitive or presumed damages … .” (*Khawar, supra,* 19 Cal.4th at p. 274.)

- “To defeat [defendant] 's anti-SLAPP motion on her false light claim, [plaintiff], as a public figure, must demonstrate a reasonable probability she can prove [defendant] broadcast statements that are (1) assertions of fact, (2) actually false or create a false impression about her, (3) highly offensive to a reasonable person or defamatory, and (4) made with actual malice.” (*DeHavilland, supra*, 21 Cal.App.5th at p. 865.)

- “[Plaintiff] does not dispute that she is a public figure. … Accordingly, the Constitution requires [plaintiff] to prove by clear and convincing evidence that [defendant] ‘knew the [docudrama] would create a false impression about [her] or acted with reckless disregard for the truth.’ (CACI No. 1802.)” (*DeHavilland, supra*, 21 Cal.App.5th at p. 869.)

- “Publishing a fictitious work about a real person cannot mean the author, by virtue of writing fiction, has acted with actual malice.” (*DeHavilland, supra*, 21 Cal.App.5th at p. 869.)

- “[I]n cases where the claimed highly offensive or defamatory aspect of the portrayal is implied, courts have required plaintiffs to show that the defendant ‘ “intended to convey the defamatory impression.” ’ [Plaintiff] must demonstrate ‘that [defendant] either deliberately cast [her] statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that [it] knew or acted in reckless disregard of whether [its] words would be interpreted by the average reader as defamatory statements of fact.’ Moreover, because actual malice is a ‘deliberately subjective’ test, liability cannot be imposed for an implication that merely ‘ “should have been foreseen.” ’ ” (*De Havilland, supra*, 21 Cal.App.5th at pp. 869–870, internal citations omitted.)

- “The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action; it bars not only actions for defamation, but also claims for invasion of privacy.” (*Reader’s Digest Assn., Inc. v. Superior Court* (1984) 37 Cal.3d 244, 265 [208 Cal.Rptr. 137, 690 P.2d 610], internal citations omitted.)

- “[T]he constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.” (*Time, Inc. v. Hill* (1967) 385 U.S. 374, 387–388 [87 S.Ct. 534, 17 L.Ed.2d 456].)

- “We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required.” (*Fellows, supra,* 42 Cal.3d at p. 251.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 784–786

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.04 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.33 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

1 California Civil Practice: Torts §§ 20:12–20:15 (Thomson Reuters)

2023. Failure to Abate Artificial Condition on Land Creating Nuisance

[*Name of plaintiff*] claims that [*name of defendant*] unreasonably failed to put an end to an artificial condition on [*name of defendant*]'s land that was a [public/private] nuisance. To establish this claim, in addition to proving that the condition created a nuisance, [*name of plaintiff*] must also prove all of the following:

1. **That [*name of defendant*] was in possession of the land where the artificial condition existed;**

2. **That [*name of defendant*] knew or should have known of the condition and that it created a nuisance or an unreasonable risk of nuisance;**

3. **That [*name of defendant*] knew or should have known that [[*name of plaintiff*]/the affected members of the public] did not consent to the condition; and**

4. **That after a reasonable opportunity, [*name of defendant*] failed to take reasonable steps to put an end to the condition or to protect [[*name of plaintiff*]/the public] from the nuisance.**

New November 2018

Directions for Use

This instruction is based on the Restatement Second of Torts, section 839 (see *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 618–622 [200 Cal.Rptr. 575]), which applies to both public and private nuisances. (Rest. 2d Torts, § 839, comment (a).) For a private nuisance, select the plaintiff in elements 3 and 4.

Give this instruction with either CACI No. 2020, *Public Nuisance—Essential Factual Elements,* or CACI No. 2021, *Private Nuisance—Essential Factual Elements.* For public nuisance, modify element 1 of CACI No. 2020 to replace "created a condition" with "allowed a condition to exist." For private nuisance, this instruction replaces element 3 of CACI No. 2021.

Sources and Authority

- Under the common law, liability for a public nuisance may result from the failure to act as well as from affirmative conduct. Thus, for example, section 839 of the Restatement Second of Torts declares that 'A possessor of land is subject to liability for a nuisance caused while he is in possession by an abatable artificial condition on the land [such as the placement of fill], if the nuisance is otherwise actionable [e.g., prohibited by statute], and [para.] (a) the possessor knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved, and [para.] (b) he knows or should know that it exists without the consent of those affected by it, and [para.] (c) he has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect the affected persons against it.'" (*Leslie Salt Co., supra,* 153 Cal.App.3d at pp. 619–620.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 160

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 1045

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1230, 1300 (2018)

2400. Breach of Employment Contract—Unspecified Term—"At-Will" Presumption

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An employment relationship may be ended by either the employer or the employee, at any time, for any [lawful] reason, or for no reason at all. This is called "at-will employment."

An employment relationship is not "at will" if the employee proves that the parties, by words or conduct, agreed that [*specify the nature of the alleged agreement, e.g., the employee would be discharged only for good cause***].**

New September 2003; Revised June 2006, November 2018

Directions for Use

If the plaintiff has made no claim other than the contract claim, then the word "lawful" may be omitted. If the plaintiff has made a claim for wrongful termination or violation of the Fair Employment and Housing Act, then the word "lawful" should be included in order to avoid confusing the jury.

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- Contract of Employment. Labor Code section 2750.
- "Labor Code section 2922 has been recognized as creating a presumption. The statute creates a presumption of at-will employment which may be overcome 'by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on "good cause." ' " (*Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1488 [28 Cal.Rptr.2d 248], internal citations omitted.)
- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- "Because the presumption of at-will employment is premised upon public policy considerations, it is one affecting the burden of proof. Therefore, even if no substantial evidence was presented by defendants that plaintiff's employment was at-will, the presumption of Labor Code section 2922 required the issue to be submitted to the jury." (*Alexander v. Nextel Communications, Inc.* (1997) 52 Cal.App.4th 1376, 1381–1382 [61 Cal.Rptr.2d 293], internal citations omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that … the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, § ~~231~~238

Chin et al., Cal. Practice Guide: Employment Litigation ¶¶ 4:2-4:4, 4:65 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.4-8.14

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.10, 249.11, 249.13, 249.21, 249.43 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Wrongful Termination and Discipline*, §§ 100.20–100.23 (Matthew Bender)

2401. Breach of Employment Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached their employment contract [by forcing [***name of plaintiff***] to resign]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [***name of defendant***] promised, by words or conduct, to [discharge/demote] [***name of plaintiff***] [***specify the nature of the alleged agreement, e.g., only for good cause***];**

3. **That [***name of plaintiff***] substantially performed [his/her] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**

4. **That [***name of defendant***] [constructively] [discharged/demoted] [***name of plaintiff***] [***e.g., without good cause***]; and**

5. **That [***name of plaintiff***] was harmed by the [discharge/demotion]; and**

6. **That [***name of defendant***]'s breach of contract was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised November 2018

Directions for Use

In cases where constructive discharge is alleged, use CACI No. 2402 instead of this one.

The eElement 3 of on substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 3 may be deleted if substantial performance is not a disputed issue.

See also CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

An employee may be "constructively" discharged if the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person would have had no reasonable alternative except to resign. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32

Cal.Rptr.2d 223, 876 P.2d 1022].) If constructive rather than actual discharge is alleged, include "by forcing [*name of plaintiff*] to resign" in the introductory paragraph and "constructively" in element 4, Then also give CACI No. 2510, *"Constructive Discharge" Explained*.

Elements ~~4~~2 and ~~5~~4 may be modified for adverse employment actions other than discharge, for example demotion. The California Supreme Court has extended the implied contract theory to encompass ~~demotions or~~ adverse employment actions~~other similar employment decisions~~ that violate the terms of an implied contract. (See *Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 473-474 [46 Cal.Rptr.2d 427, 904 P.2d 834].) See CACI No. 2509, *"Adverse Employment Action" Explained*.~~As a result, the bracketed language regarding an alleged wrongful demotion may be given, or other appropriate language for other similar employment decisions, depending on the facts of the case.~~

For an instruction on damages, give CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage)*. See also CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- Contractual Conditions Precedent. Civil Code section 1439.
- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)
- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)
- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include ' "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336-337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing *constructive* discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for *wrongful discharge*." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223, 876 P.2d 1022], original italics, internal citation omitted.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra,* 7 Cal.4th at pp. 1245-1246, internal citation omitted.)

- "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner*, *supra*, 7 Cal.4th at p. 1247, internal citation and fns. omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726].)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner*, *supra*, 7 Cal.4th at p. 1247, fn. 3.)

- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner*, *supra*, 7 Cal.4th at p. 1251.)

- "The length of time the plaintiff remained on the job may be *one* relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive." (*Turner*, *supra*, 7 Cal.4th at p. 1254, original

italics.)

- ~~Civil Code sections 1619-1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."~~

- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason," ' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra,* 24 Cal.4th at p. 351.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-FoxFilm Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation ¶¶ 4:2, 4:8, 4:15, 4:65, 4:81, 4:105, 4:270–4:273 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.4–8.20B

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* §§ 60.05, 60.07 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline,* §§ 249.90, 249.43, Ch. 250, *Employment Law: Wage and Hour Disputes,* § 250.66 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts,* §§ 50.10, 50.11, 50.350 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline,* §§ 100.21, 100.22, 100.28, 100.29 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:9–6:11 (Thomson Reuters)

2402. Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*] breached their employment contract by forcing [*name of plaintiff*] to resign. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of defendant*] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [*name of defendant*] promised, by words or conduct, to discharge [*name of plaintiff*] only for good cause;**

3. **That [*name of plaintiff*] substantially performed [his/her] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented]];**

4. **That [*name of defendant*] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign;**

5. **That [*name of plaintiff*] resigned because of the intolerable conditions; and**

6. **That [*name of plaintiff*] was harmed by the loss of employment.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff*]'s position.

New September 2003

Directions for Use

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 3 may be deleted if substantial performance is not a disputed issue.

Sources and Authority

- At-Will Employment. Labor Code section 2922.

- Contractual Conditions Precedent. Civil Code section 1439.

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)

- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for wrongful discharge." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include "'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336-337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- Civil Code sections 1619–1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason," ' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.'

Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra*, 24 Cal.4th at p. 351.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner*, *supra*, 7 Cal.4th at pp. 1245-1246, internal citation omitted.)

- "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner*, *supra*, 7 Cal.4th at p. 1247, internal citation and fns. omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726].)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner*, *supra*, 7 Cal.4th at p. 1247, fn. 3.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner*, *supra*, 7 Cal.4th at p. 1248, internal citations omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner*, *supra*, 7 Cal.4th at p. 1251.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive." (*Turner*, *supra*, 7 Cal.4th at p. 1254.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount

of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§223–227

Chin et al., Cal. Practice Guide: Employment Litigation ¶¶ 4:2, 4:65, 4:81, 4:105, 4:405–4:407, 4:409–4:410, 4:270–4:273, 4:420, 4:422, 4:440 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.1–8.21

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.05, 60.07 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:9–6:11 (Thomson Reuters)

2404. Breach of Employment Contract—Unspecified Term—"Good Cause" Defined

Good cause exists when an employer's decision to ~~[~~discharge~~/demote]~~ an employee is made in good faith and based on a fair and honest reason. An employer has substantial but not unlimited discretion regarding personnel decisions[, particularly with respect to an employee in a sensitive or confidential managerial position]. However, ~~G~~good cause does not exist if the employer's reasons for the ~~[~~discharge~~/demotion]~~ are trivial, arbitrary, inconsistent with usual practices, ~~[~~or~~]~~ unrelated to business needs or goals, ~~[~~or if the stated reasons conceal the employer's true reasons~~]~~.

In deciding whether [*name of defendant***] had good cause to ~~[~~discharge~~/demote]~~ [***name of plaintiff***], you must balance [***name of defendant***]'s interest in operating the business efficiently and profitably against the interest of [***name of plaintiff***] in maintaining employment.**

~~[If [*name of plaintiff***] had a sensitive managerial position, then [***name of defendant***] had substantial, though not unlimited, discretion in [discharging/demoting] [him/her].]~~**

New September 2003; Revised November 2018

Directions for Use

This instruction may not be appropriate in the context of an implied employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Include the bracketed language in the opening paragraph if the defense alleges that the plaintiff was in a sensitive or confidential managerial position~~Only read the last bracketed phrase in the first paragraph in cases where there is an issue involving pretext~~.

~~The last optional paragraph should be given when the employee is in such a position that the employer would be allowed greater discretion in its decision to discharge the employee: "[W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment." (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917], disapproved on other grounds in *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 350–351 [100 Cal.Rptr.2d 352, 8 P.3d 1089].) Note that the term "confidential position" has not been defined by California case law.~~

When the reason given for the discharge is misconduct, and there is a factual dispute whether the misconduct occurred, then the court should give CACI No. 2405, *Breach of Implied Employment Contract—Unspecified Term—"Good Cause" Defined—Misconduct*, instead of this instruction. (See *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 107 [69 Cal.Rptr.2d 900, 948 P.2d 412].)

Sources and Authority

- "If the evidence is uncontradicted and permits only one conclusion, then the issue [of good cause] is legal, not factual. Where, however, as here, the evidence is contradicted, the issue is one for the trier of fact to decide." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 733 [269 Cal.Rptr. 299], disapproved on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 394 fn. 2 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

- " 'Good cause' in the context of implied employment contracts is defined as: 'fair and honest' reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 872 [172 Cal.Rptr.3d 732], internal citations omitted.)

- "The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. … Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

- "[W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment." (*Pugh v. See's Candies, Inc.* (Pugh I) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917], disapproved on other grounds in *Guz, supra*, 24 Cal.4th at pp. 350–351.)

- " '[G]ood cause' in [the context of wrongful termination based on an implied contract] is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term." (*Pugh, supra,* 116 Cal.App.3d at p. 330.)

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra,* 116 Cal.App.3d at pp. 329-330, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 219–221, 244~~208, 209, 231~~

Chin et al., Cal. Practice Guide: Employment Litigation ¶¶ 4:270–4:273, 4:300 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22–8.25

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.09[5][b] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21, 249.63 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation, § 6:19 (Thomson Reuters)

2407. Affirmative Defense—Employee's Duty to Mitigate Damages

(*Renumbered as CACI No. 3923, November 2018*)

[*Name of defendant***] claims that if [***name of plaintiff***] is entitled to any damages, they should be reduced by the amount that [he/she] could have earned from other employment. To succeed, [***name of defendant***] must prove all of the following:**

1. **That employment substantially similar to [***name of plaintiff***]'s former job was available to [him/her];**

2. **That [***name of plaintiff***] failed to make reasonable efforts to seek [and retain] this employment; and**

3. **The amount that [***name of plaintiff***] could have earned from this employment.**

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

(a) The nature of the work was different from [*name of plaintiff***]'s employment with [***name of defendant***];**

(b) The new position was substantially inferior to [*name of plaintiff***]'s former position;**

(c) The salary, benefits, and hours of the job were similar to [*name of plaintiff***]'s former job;**

(d) The new position required similar skills, background, and experience;

(e) The job responsibilities were similar; [and]

(f) The job was in the same locality; [and]

(g) [*insert other relevant factor(s)***].**

[In deciding whether [*name of plaintiff***] failed to make reasonable efforts to retain comparable employment, you should consider whether [***name of plaintiff***] quit or was discharged from that employment for a reason within [his/her] control.]**

New September 2003; Revised February 2007, December 2014

Directions for Use

This instruction may be given when there is evidence that the employee's damages could have

been mitigated. The bracketed language at the end of the instruction regarding plaintiff's failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [44 Cal.Rptr.2d 565].

In deciding whether the plaintiff could have obtained a substantially similar job, the trier of fact may consider several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (See *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 [106 Cal.Rptr. 283].) Read only those factors that have been shown by the evidence.

This instruction should be given in all employment cases, not just in breach of contract cases. See Chin et al., California Practice Guide: Employment Litigation, ¶ 17:492 (Rutter Group).

This instruction should not be used for wrongful demotion cases.

Sources and Authority

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see also *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98 [127 Cal.Rptr. 222] ["Plaintiff concedes that the trial court was entitled to deduct her actual earnings"]; but see *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432 [165 Cal.Rptr.3d 441] [wages actually earned from an inferior job may not be used to mitigate damages].)

- "[B]efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived … ." (*Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 454 [177 Cal.Rptr.3d 145].)

- "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez, supra,* 55 Cal.App.3d at p. 99.)

- "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have

earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield*, *supra*, 37 Cal.App.4th at pp. 1502-1503.)

- "The location of the new job is one of the factors to consider in determining whether the new job is inferior." (*Villacorta*, *supra*, 221 Cal.App.4th at p. 1432.)

- "There is some authority for the proposition that whether or not the other employment is comparable or substantially similar or equivalent to the prior position is a question of fact. On the other hand the issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California." (*California School Employees Assn.*, *supra*, 30 Cal.App.3d at pp. 253–254, internal citations omitted.)

- "The court could reasonably admit the evidence of other available jobs and leave the question of their substantial similarity to the jury." (*Kao*, *supra*, 229 Cal.App.4th at p. 454.)

- "[S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284–1285 [134 Cal.Rptr.3d 883].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490, 17:495, 17:497, 17:499–17:501 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40–8.41

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

2430. Wrongful Discharge in Violation of Public Policy—Essential Factual Elements

[*Name of plaintiff***] claims [he/she] was discharged from employment for reasons that violate a public policy. It is a violation of public policy [***specify claim in case, e.g., to discharge someone from employment for refusing to engage in price fixing***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] discharged [***name of plaintiff***];**

3. **That [***insert alleged violation of public policy, e.g., "***[***name of plaintiff***]***'s refusal to engage in price fixing"***] was a substantial motivating reason for [***name of plaintiff***]'s discharge;**

4. **That [***name of plaintiff***] was harmed; and**

45. **That the discharge was a substantial factor in ~~caused~~ causing [***name of plaintiff***] harm.**

New September 2003; Revised June 2013, June 2014, December 2014, November 2018

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680]; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 fn. 6 [78 Cal. Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Note that there are two causation elements. First, there must be causation between the public policy violation and the discharge (element 3). ~~this~~ This instruction uses the term "substantial motivating reason" to express this causation element. ~~between the public policy and the discharge (see element 3).~~ "Substantial motivating reason" has been held to be the appropriate standard for cases alleging termination in violation of public policy. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Element 5 then expresses a second causation requirement; that the plaintiff was harmed as a result of the wrongful discharge.

~~This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.*~~ If plaintiff alleges he or she was forced or coerced to resign, then CACI No. 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*, or CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy*, should be given instead. See also CACI No. 2510,

"Constructive Discharge" Explained.

This instruction may be modified for adverse employment actions other than discharge, for example demotion, if done in violation of public policy. (See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561 [232 Cal.Rptr. 490], disapproved on other grounds in *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1093 [4 Cal.Rptr.2d 874, 824 P.2d 680] [public policy forbids retaliatory action taken by employer against employee who discloses information regarding employer's violation of law to government agency].) See also CACI No. 2509, *"Adverse Employment Action" Explained.*

For an instruction on damages, give CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage).*

Sources and Authority

- " '[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.' " (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1138–1139 [69 Cal.Rptr.3d 445], internal citations omitted.)

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154 [176 Cal.Rptr.3d 824].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)

- "Policies are not 'public' (and thus do not give rise to a common law tort claim) when they are derived from statutes that 'simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 926 [180 Cal.Rptr.3d 359].)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt, supra,* 1

Cal.4th at pp. 1090-1091, internal citations and footnote omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- " [T]ermination of an employee most clearly violates public policy when it contravenes the provision of a statute forbidding termination for a specified reason … ." (*Diego, supra,* 231 Cal.App.4th at p. 926)

- "[Discharge because of employee's] [r]efusal to violate a governmental regulation may also be the basis for a tort cause of action where the administrative regulation enunciates a fundamental public policy and is authorized by statute." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 708–709 [96 Cal.Rptr.3d 159].)

- "In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge ... ." (*Stevenson, supra,* 16 Cal.4th at p. 889.)

- "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Green, supra,* 19 Cal.4th at p. 87, internal citation omitted.)

- "[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order ... ." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- " [T]here is a 'fundamental public interest in a workplace free from illegal practices … .' '[T]he public interest is in a lawful, not criminal, business operation. Attainment of this objective requires that an employee be free to call his or her employer's attention to illegal practices, so that the employer may prevent crimes from being committed by misuse of its products by its employees.' " (*Yau, supra,* 229 Cal.App.4th at p. 157.)

- "An action for wrongful termination in violation of public policy 'can only be asserted against *an employer*. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which *an employer* commits that tort.' " (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1351 [172 Cal.Rptr.3d 686], original italics.)

- Employees in both the private and public sector may assert this claim. (*See Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407 [4 Cal.Rptr.2d 203].)

- "Sex discrimination in employment may support a claim of tortious discharge in violation of public policy." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 214 [126 Cal.Rptr.3d 651].)

- "In sum, a wrongful termination against public policy common law tort based on sexual harassment

can be brought against an employer of any size." (*Kim, supra,* 226 Cal.App.4th at p. 1351.)

- "To establish a claim for wrongful termination in violation of public policy, an employee must prove causation. (See CACI No. 2430 [using phrase 'substantial motivating reason' to express causation].) Claims of whistleblower harassment and retaliatory termination may not succeed where a plaintiff 'cannot demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse treatment by [the employer].' " (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1357 [181 Cal.Rptr.3d 68].)

- "It would be nonsensical to provide a different standard of causation in FEHA cases and common law tort cases based on public policies encompassed by FEHA." (*Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1341 [166 Cal.Rptr.3d 720].)

- "If claims for wrongful termination in violation of public policy must track FEHA, it necessarily follows that jury instructions pertinent to causation and motivation must be the same for both. Accordingly, we conclude the trial court did not err in giving the instructions set forth in the CACI model jury instructions." (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1323 [200 Cal.Rptr.3d 315].)

- "Under California law, if an employer did not violate FEHA, the employee's claim for wrongful termination in violation of public policy necessarily fails." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 [217 Cal.Rptr.3d 258].)

- "FEHA's policy prohibiting disability discrimination in employment is sufficiently substantial and fundamental to support a claim for wrongful termination in violation of public policy." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal. App. 4th 635, 660 [163 Cal.Rptr.3d 392].)t

- "Although the fourth cause of action references FEHA as one source of the public policy at issue, this is not a statutory FEHA cause of action. FEHA does not displace or supplant common law tort claims for wrongful discharge." (*Kim, supra,* 226 Cal.App.4th at p. 1349.)

- "[T]o the extent the trial court concluded Labor Code section 132a is the exclusive remedy for work-related injury discrimination, it erred. The California Supreme Court held '[Labor Code] section 132a does not provide an exclusive remedy and does not preclude an employee from pursuing FEHA and common law wrongful discharge remedies.' " (*Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1381 [196 Cal.Rptr.3d 68].)

- "California's minimum wage law represents a fundamental policy for purposes of a claim for wrongful termination or constructive discharge in violation of public policy." (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 831−832 [166 Cal.Rptr.3d 242].)

- " 'Labor Code section 1102.5, subdivision (b), which prohibits employer retaliation against an employee who reports a reasonably suspected violation of the law to a government or law enforcement agency, reflects the broad public policy interest in encouraging workplace "whistleblowers," who may without fear of retaliation report concerns regarding an employer's illegal conduct. This public policy is the modern day equivalent of the long-established duty of the citizenry

to bring to public attention the doings of a lawbreaker. [Citation.] …' " (*Ferrick, supra*, 231 Cal.App.4th at p. 1355.)

- "That [defendant]'s decision not to renew her contract for an additional season *might* have been influenced by her complaints about an unsafe working condition … does not change our conclusion in light of the principle that a decision not to renew a contract set to expire is not actionable in tort." (*Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682 [145 Cal.Rptr.3d 766], original italics.)

- " ' "[P]ublic policy' as a concept is notoriously resistant to precise definition, and … courts should venture into this area, if at all, with great care … ." [Citation.] Therefore, *when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action.* Stated another way, the common law cause of action cannot be broader than the constitutional provision or statute on which it depends, and therefore it 'presents no impediment to employers that operate within the bounds of law." [Citation.]' " (*Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 756 [146 Cal.Rptr.3d 922], original italics.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 235

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, *Wrongful Discharge In Violation Of Public Policy (Tameny Claims)*, ¶¶ 5:2, 5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220, 5:235 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, § 5.45

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.50–249.52 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.52–100.58 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

~~2433. Wrongful Discharge in Violation of Public Policy—Damages~~

(Renumbered as CACI No. 3903P and Revised November 2018)

~~**If you find that [***name of defendant***] [discharged/constructively discharged] [***name of plaintiff***] in violation of public policy, then you must decide the amount of damages that [***name of plaintiff***] has proven [he/she] is entitled to recover, if any. To make that decision, you must:**~~

~~**1. Decide the amount that [***name of plaintiff***] would have earned up to today, including any benefits and pay increases; [and]**~~

~~**2. Add the present cash value of any future wages and benefits that [he/she] would have earned for the length of time the employment with [***name of defendant***] was reasonably certain to continue; [and]**~~

~~**3. [Add damages for [***describe any other damages that were allegedly caused by defendant's conduct, e.g., "emotional distress"***] if you find that [***name of defendant***]'s conduct was a substantial factor in causing that harm.]**~~

~~**In determining the period that [***name of plaintiff***]'s employment was reasonably certain to have continued, you should consider such things as:**~~

~~**(a) [***Name of plaintiff***]'s age, work performance, and intent regarding continuing employment with [***name of defendant***];**~~

~~**(b) [***Name of defendant***]'s prospects for continuing the operations involving [***name of plaintiff***]; and**~~

~~**(c) Any other factor that bears on how long [***name of plaintiff***] would have continued to work.**~~

~~*New September 2003*~~

~~Directions for Use~~

~~This instruction should be followed by CACI No. 2407, *Employee's Duty to Mitigate Damages*, in cases where the employee's duty to mitigate damages is at issue.~~

~~Other types of tort damages may be available to a plaintiff. For an instruction on emotional distress damages, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*. See punitive damages instructions in the damages section (CACI No. 3940 et seq.).~~

~~Sources and Authority~~

- ~~Standard for Punitive Damages. Civil Code section 3294(a).~~

- Employer Liability for Punitive Damages. Civil Code section 3294(b).

- A tortious termination subjects the employer to " 'liability for compensatory and punitive damages under normal tort principles.' " (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citation omitted.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 518 [241 Cal.Rptr. 916].)

- "A plaintiff may recover for detriment reasonably certain to result in the future. While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [16 Cal.Rptr.2d 787], internal citations omitted, disapproved of on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179].)

- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202, 463 P.2d 426].)

- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, [and] the foreseeability of the continued future demand for tax return service to small taxpayers ... .' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)

- In adding subdivision (b) to section 3294 in 1980, "[t]he drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944], see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150-1151 [74 Cal.Rptr.2d 510].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation ¶¶ 17:237, 17:362, 17:365 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.64 -

~~5.67~~

~~4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[2] (Matthew Bender)~~

~~21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.50–249.55, 249.80–249.81, 249.90 (Matthew Bender)~~

~~10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.41–100.59 (Matthew Bender)~~

2528. Failure to Prevent Sexual Harassment by Nonemployee (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [***name of defendant***] failed to take reasonable steps to prevent sexual harassment by a nonemployee. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was an unpaid [intern/volunteer] for [***name of defendant***]/was a person providing services under a contract with [***name of defendant***]];**

2. **That while in the course of employment, [***name of plaintiff***] was subjected to sexual harassment by [***name***], who was not an employee of [***name of defendant***];**

3. **That [***name of defendant***] knew or should have known that the nonemployee's conduct placed employees at risk of sexual harassment;**

4. **That [***name of defendant***] failed to take immediate and appropriate [preventive/corrective] action;**

5. **That the ability to take [preventive/corrective] action was within the control of [***name of defendant***];**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of defendant***]'s failure to take immediate and appropriate steps to [prevent/put an end to] the sexual harassment was a substantial factor in causing [***name of plaintiff***]'s harm.**

New November 2018

Directions for Use

Give this instruction on a claim against the employer for failure to prevent sexual harassment by a nonemployee. The FEHA protects not only employees, but also applicants, unpaid interns or volunteers, and persons providing services under a contract (element 1). (Gov. Code, § 12940(j)(1).) Modify references to employment in elements 2 and 3 as necessary if the plaintiff's status is other than an employee. Note that unlike claims for failure to prevent acts of a coemployee (see Gov. Code, § 12940(k)), only sexual harassment is covered. (Gov. Code, § 12940(j)(1). If there is such a thing as discrimination or retaliation by a nonemployee, there is no employer duty to prevent it under the FEHA.

The employer's duty is to "take immediate and appropriate corrective action." (Gov. Code § 12940(j)(1).) In contrast, for the employer's failure to prevent acts of an employee, the duty is to "take *all* reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940(k).)

Whether the employer must prevent or later correct the harassing situation would seem to depend on the facts of the case. If the issue is to stop harassment from recurring after becoming aware of it, the employer's duty would be to "correct" the problem. If the issue is to address a developing problem before the harassment occurs, the duty would be to "prevent" it. Choose the appropriate words in elements 4, 5, and 7 depending on the facts.

Sources and Authority

- Prevention of Harassment by a Nonemployee. Government Code section 12940(j)(1).

- Prevention of Discrimination and Harassment. Government Code section 12940(k).

- "The FEHA provides: 'An employer may … be responsible for the acts of nonemployees, with respect to sexual harassment of employees … , where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered.' … ' A plaintiff cannot state a claim for failure to prevent harassment unless the plaintiff first states a claim for harassment." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 700-701 [224 Cal.Rptr.3d 542].)

- "Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to (1) end the current harassment and (2) to deter future harassment. [Citation.] The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and (2) that permanent remedial steps be implemented by the employer to prevent future harassment … ." (*M.F., supra,* 16 Cal.App.5th at p. 701.)

- "[T]he language of section 12940, subdivision (j)(1), does not limit its application to a particular fact pattern. Rather, the language of the statute provides for liability whenever an employer (1) knows or should know of sexual harassment by a nonemployee and (2) fails to take immediate and appropriate remedial action (3) within its control. (*M.F., supra,* 16 Cal.App.5th at p. 702.)

- "[W]hether an employer sufficiently complied with its mandate to 'take immediate and appropriate corrective action' is a question of fact." (*M.F., supra,* 16 Cal.App.5th at p. 703, internal citation omitted.)

- "The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims." (*M.F., supra,* 16 Cal.App.5th at p. 701.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency, § 363, 370

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1019, 1028, 1035

2705. Affirmative Defense to Wage Order Violations—Plaintiff Was Not Defendant's Employee

[*Name of defendant***] claims that [he/she/it] is not liable for [***specify wage order violations, e.g., failure to pay minimum wage***] because [***name of plaintiff***] was not [his/her/its] employee, but rather an independent contractor. To establish this defense, [***name of defendant***] must prove all of the following:**

a. That [*name of plaintiff***] is [under the terms of the contract and in fact] free from the control and direction of [***name of defendant***] in connection with the performance of the work that [***name of plaintiff***] was hired to do;**

b. That [*name of plaintiff***] performs work for [***name of defendant***] that is outside the usual course of [***name of defendant***]'s business; and**

c. That [*name of plaintiff***] is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for [***name of defendant***].**

New November 2018

Directions for Use

This instruction may be needed if there is a dispute as to whether the defendant was the plaintiff's employer for purposes of a claim covered by a California wage order. The wage orders, which are constitutionally-authorized, quasi-legislative regulations that have the force of law, impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees. (See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 913–914, & fn. 3 [232 Cal.Rptr.3d 1, 416 P.3d 1].) The defendant has the burden to prove independent contractor status. (*Id.*, *supra*, 4 Cal.5th at p. 916.)

Under the wage orders, "to employ" has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 64 [109 Cal.Rptr.3d 514, 231 P.3d 259].) In *Dynamex*, the Supreme Court found no need to address definition (a) on exercising control. It acknowledged that definition (c), the common law test, could be used, but held that the controlling test was definition (b), "to suffer or permit to work." It then defined this test, known as the ABC test, as involving the three factors of the instruction. (*Dynamex Operations W., supra*, 4 Cal.5th at pp. 916–917.)

The rule on employment status has been that if there are disputed facts, it's for the jury to decide whether one is an employee or an independent contractor. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342.) However, on undisputed facts, the court may decide that the relationship is employment as a matter of law. (*Dynamex Operations W. supra*, 4 Cal.5th at p. 963.) The court may

address the three factors in any order when making this determination, and if the defendant's undisputed facts fail to prove any one of them, the inquiry ends; the plaintiff is an employee as a matter of law and the question does not reach the jury.

If, however, there is no failure of proof as to any of the three factors without resolution of disputed facts, the determination of whether the plaintiff was defendant's employee should be resolved by the jury using this instruction. If the court concludes based on undisputed facts that the defendant *has* proved one or more of the three factors, that factor (or factors) should be removed from the jury's consideration and the jury should only consider whether the employer has proven those factors that cannot be determined without further factfinding.

Include the bracketed language in element 1 if there is a contract between the parties covering the work at issue.

Sources and Authority

- The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (*Dynamex Operations W., supra,* 4 Cal.5th at pp.955–956.)

- "[W]e conclude that there is no need in this case to determine whether the exercise control over wages, hours or working conditions definition is intended to apply outside the joint employer context, because we conclude that the suffer or permit to work standard properly applies to the question whether a worker should be considered an employee or, instead, an independent contractor, and that under the suffer or permit to work standard, the trial court class certification order at issue here should be upheld. (*Dynamex Operations W., supra,* 4 Cal.5th at p. 943.)

- "A business that hires any individual to provide services to it can always be said to knowingly 'suffer or permit' such an individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business--including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like--who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business." (*Dynamex Operations W., supra,* 4 Cal.5th at pp. 948–949.)

- "A multifactor standard--like the economic reality standard or the *Borello* standard--that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage

and hour context." (*Dynamex Operations W., supra*, 4 Cal.5th at p. 954.)

- "Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor." (*Dynamex Operations W., supra*,4 Cal.5th at pp.959–960, internal citations omitted.)

- "A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself." (*Dynamex Operations W., supra*, 4 Cal.5th at p. 962.)

- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences and, as such, must be affirmed on appeal if supported by substantial evidence. The question is one of law only if the evidence is undisputed. 'The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.' " (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342-343 [221 Cal.Rptr.3d 1].)

- "It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, *a court* is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for *a court* to determine whether or not part B or part C of the ABC standard has been satisfied than for *the court* to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard--in terms of increased clarity and consistency--will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question." (*Dynamex Operations W., supra,* 4 Cal.5th at p. 963, italics added.)

- "An entity that controls the business enterprise may be an employer even if it did not 'directly hire, fire or supervise' the employees. Multiple entities may be employers where they 'control different aspects of the employment relationship.' 'This occurs, for example, when one entity

(such as a temporary employment agency) hires and pays a worker, and another entity supervises the work.' 'Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the "working conditions" … .' " (*Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019 [177 Cal.Rptr.3d 581].)

Secondary Sources

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-B, Compensation—Coverage and Exemptions—In General, ¶ 11:115 et seq. (The Rutter Group)

3066. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threats, intimidation, or coercion. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. [**That by threats, intimidation or coercion, [***name of defendant***] ~~caused made threats of violence against [***name of plaintiff***] causing~~ [***name of plaintiff***] to reasonably believe that if [he/she] exercised [his/her] right [***insert right, e.g., "to vote"***], [***name of defendant***] would commit violence against [[him/her]/ [or] [his/her] property] and that [***name of defendant***] had the apparent ability to carry out the threats;]**

[*or***]**

[That [*name of defendant***] acted violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property] [to prevent [him/her] from exercising [his/her] right [~~*insert right*~~*e.g., to vote*]/to retaliate against [***name of plaintiff***] for having exercised [his/her] right [~~*insert right*~~*e.g., to vote*]];]**

[2. That **[***name of defendant***] intended to deprive [***name of plaintiff***] of [his/her] enjoyment of the interests protected by the right [***e.g., to vote***];]**

~~2~~3. **That [***name of plaintiff***] was harmed; and**

~~3~~4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Renumbered from CACI No. 3025 and Revised December 2012; Revised November 2018

Directions for Use

Select the first option for element 1 if the defendant's conduct involved threats of violence. (See Civ. Code, § 52.1(j).) Select the second option if the conduct involved actual violence.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(j).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) For example, it would not be a violation to threaten to report someone to immigration if the person exercises a right granted under labor law. No case has been found, however, that applies the speech limitation to foreclose such a claim, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we "need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1"];

City and County of San Francisco v. Ballard (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address].) To assert such a claim, modify element ~~2~~ 1, option 1 to allege coercion based on a nonviolent threat with severe consequences.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the reference to section 52 in subsection (b) of the Bane Act would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52.

Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable Therefore, omit elements 2 and 3 unless actual damages are sought. If actual damages are sought, combine CACI No. 3067, *Unruh Civil Rights Act—Damages*, and CACI No. 3068, *Ralph Act—Damages and Penalty*, to recover damages under both subsections (a) and (b) of section 52.

It has been the rule that in a wrongful detention case, the coercion required to support a Bane Act claim must be coercion independent from that inherent in the wrongful detention itself. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981, 981 [159 Cal.Rptr.3d 204].) One court, however, did not apply this rule in a wrongful arrest case. The court instead held that the "threat, intimidation or coercion" element requires a specific intent to violate protected rights. (*Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 790–804 [225 Cal.Rptr.3d 356].) Element 2 expresses this requirement.

Sources and Authority

- Bane Act. Civil Code section 52.1.
- Remedies Under Bane Act. Civil Code section 52.
- "The Bane Act permits an individual to pursue a civil action for damages where another person 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.' 'The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., "threat[], intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.' " (*King v. State of California* (2015) 242 Cal.App.4th 265, 294 [195 Cal.Rptr.3d 286], internal citation omitted.)
- "[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was

intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was 'to fill in the gaps left by the Ralph Act' by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges." (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3d 706], internal citation omitted.)

- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)

- "[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code section 51.7 or a group similarly protected by constitution or statute from hate crimes." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290 [217 Cal.Rptr.3d 275].)

- "The plaintiff must show 'the defendant interfered with or attempted to interfere with the plaintiff's legal right by threatening or committing violent acts.' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395 [218 Cal.Rptr.3d 38].)

- "However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons." (*Shoyoye, supra,* 203 Cal.App.4th at p. 956.)

- "The phrase 'under color of law' indicates, without doubt, that the Legislature intended to include law enforcement officers within the scope of Section 52.1 if the requisites of the statute are otherwise met." (*Cornell, supra,* 17 Cal.App.5th at p. 800.)

- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

- "[T]he Bane Act requires that the challenged conduct be intentional." (*Simmons v. Superior Court* (2016) 7 Cal.App.5th 1113, 1125 [212 Cal.Rptr.3d 884].)

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)

- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye, supra,* 203 Cal.App.4th at p. 958.)

- Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra,* 17 Cal.4th at p. 337 [right to be free from unreasonable search and seizure].)

- " '[W]here coercion is inherent in the constitutional violation alleged, … the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.' " (*Simmons, supra,* 7 Cal.App.5th at p. 1126.)

- Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282], which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1: "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things."

- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' ... The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S., supra,* 10 Cal.4th at p. 715, internal citation omitted.)

- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)

- "[A] wrongful detention that is 'accompanied by the requisite threats, intimidation, or coercion'—'coercion independent from the coercion inherent in the wrongful detention itself' that is 'deliberate or spiteful'—is a violation of the Bane Act." (*Bender*, *supra,* ~~*v. County of Los Angeles* (2013)~~ 217 Cal.App.4th at p.~~968,~~ 981 ~~[159 Cal.Rptr.3d 204]~~, internal citations omitted.)

- "Here, there clearly *was* a showing of coercion separate and apart from the coercion inherent in an unlawful arrest. [Defendant officer] wrongfully detained and arrested plaintiff, because he had no probable cause to believe plaintiff had committed any crime. But, in addition, [defendant officer] deliberately and unnecessarily beat and pepper sprayed the unresisting, already handcuffed plaintiff. That conduct was not the coercion that is inherent in a wrongful arrest." (*Bender, supra,* 217 Cal.App.4th at p. 979, original italics.)

- "We acknowledge that some courts have read *Shoyoye* as having announced 'independen[ce] from [inherent coercion]' as a requisite element of all Section 52.1 claims alleging search-and-seizure violations, but we think those courts misread the statute as well as the import of *Venegas*. By its plain terms, Section 52.1 proscribes any 'interfere[nce] with' or attempted 'interfere[nce] with' protected rights carried out 'by threat, intimidation or coercion.' Nothing in the text of the statute requires that the offending 'threat, intimidation or coercion' be 'independent' from the constitutional violation alleged." (*Cornell*, *supra*, 17 Cal.App.5th at pp. 799–800.)

- "[W]here, as here, an unlawful arrest is properly pleaded and proved, the egregiousness required by Section 52.1 is tested by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee's right to freedom from unreasonable seizure, not by whether the evidence shows something beyond the coercion 'inherent' in the wrongful detention." (*Cornell, supra*, 17 Cal.App.5th at pp. 801–802.)

- "[T]his test ' "essentially sets forth two requirements for a finding of 'specific intent' … . The first is a purely legal determination. Is the … right at issue clearly delineated and plainly applicable under the circumstances of the case? If the trial judge concludes that it is, then the jury must make the second, factual, determination. Did the defendant commit the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that … right? If both requirements are met, even if the defendant did not in fact recognize the [unlawfulness] of his act, he will be adjudged as a matter of law to have acted [with the requisite specific intent]—i.e., 'in reckless disregard of constitutional [or statutory] prohibitions or guarantees.' " ' " (*Cornell, supra*, 17 Cal.App.5th at p. 803.)

- "Civil Code section 52.1 does not address the immunity established by section 844.6 [public entity immunity for injury to prisoners]. Nothing in Civil Code section 52.1 indicates an intent to abrogate this specific immunity provision. The immunity that it creates therefore applies to [plaintiff]'s Bane Act claim." (*Towery v. State of California* (2017) 14 Cal.App.5th 226, 234 [221 Cal.Rptr.3d 692].)

Secondary Sources

8 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Constitutional Law, § ~~895~~989 et seq.

Cheng, et al., Calif. Fair Housing and Public Accommodations § 9:38 (The Rutter Group) (The Bane Act)

California Civil Practice: Civil Rights Litigation, §§ 3:1–3:15 (Thomson Reuters)

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws*, § 40.12 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, §§ 35.01, 35.27 (Matthew Bender)

3210. Breach of Implied Warranty of Merchantability—Essential Factual Elements

[*Name of plaintiff***] claims that the [***consumer good***] did not have the quality that a buyer would reasonably expect. This is known as "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/manufactured by] [***name of defendant***];**

2. **That at the time of purchase [***name of defendant***] was in the business of [selling [***consumer goods***] to retail buyers/manufacturing [***consumer goods***]];** ~~**and**~~

3. **That the [***consumer good***] [***insert one or more of the following:***]**

   [was not of the same quality as those generally acceptable in the trade;] [or]

   [was not fit for the ordinary purposes for which the goods are used;] [or]

   [was not adequately contained, packaged, and labeled;] [or]

   [did not measure up to the promises or facts stated on the container or label.]

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s breach of the implied warranty was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2005, December 2014, November 2018

Directions for Use

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof of notice is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] did not have the quality that a buyer would reasonably expect;

See also CACI No. 1243, *Notification/Reasonable Time.* Instructions on damages and causation may be necessary in actions brought under the California Uniform Commercial Code.

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (See Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving the implied warranty of merchantability in a lease of consumer goods.

Sources and Authority

- Buyer's Action for Breach of Implied Warranties. Civil Code section 1794(a).
- Damages. Civil Code section 1794(b).
- Implied Warranties. Civil Code section 1791.1(a).
- Duration of Implied Warranties. Civil Code section 1791.1(c).
- Remedies. Civil Code section 1791.1(d).
- Implied Warranty of Merchantability. Civil Code section 1792.
- Damages for Breach; Accepted Goods. California Uniform Commercial Code section 2714.
- "As defined in the Song-Beverly Consumer Warranty Act, 'an implied warranty of merchantability guarantees that 'consumer goods meet each of the following: [¶] (1) Pass without objection in the trade under the contract description. [¶] (2) Are fit for the ordinary purposes for which such goods are used. [¶] (3) Are adequately contained, packaged, and labeled. [¶] (4) Conform to the promises or affirmations of fact made on the container or label.' Unlike an express warranty, 'the implied warranty of merchantability arises by operation of law' and 'provides for a minimum level of quality.' 'The California Uniform Commercial Code separates implied warranties into two categories. An implied warranty that the goods "shall be merchantable" and "fit for the ordinary purpose" is contained in California Uniform Commercial Code section 2314. Whereas an implied warranty that the goods shall be fit for a particular purpose is contained in section 2315. [¶] Thus, there exists in every contract for the sale of goods by a merchant a warranty that the goods shall be merchantable. The core test of merchantability is fitness for the ordinary purpose for which such goods are used. (§ 2314.)' " (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 26–27 [65 Cal.Rptr.3d 695], internal citations omitted.)
- "Here the alleged wrongdoing is a breach of the implied warranty of merchantability imposed by the Song-Beverly Consumer Warranty Act. Under the circumstances of this case, which involves the sale of a used automobile, the element of wrongdoing is established by pleading and proving (1) the plaintiff bought a used automobile from the defendant, (2) at the time of purchase, the defendant was in the business of selling automobiles to retail buyers, (3) the defendant made express warranties with respect to the used automobile, and (4) the automobile was not fit for ordinary purposes for which the goods are used. Generally, '[t]he core test of merchantability is fitness for the ordinary purpose for which such goods are used.' " (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1246 [228 Cal.Rptr.3d 699] [citing this instruction], internal citations omitted.)
- "[T]he buyer of consumer goods must plead he or she was injured or damaged by the alleged breach of the implied warranty of merchantability." (*Gutierrez, supra,* 19 Cal.App.5th at p. 1247.)
- "Unless specific disclaimer methods are followed, an implied warranty of merchantability

accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)

- The implied warranty of merchantability "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The [Song Beverly] act provides for both express and implied warranties, and while under a manufacturer's express warranty the buyer must allow for a reasonable number of repair attempts within 30 days before seeking rescission, that is not the case for the implied warranty of merchantability's bulwark against fundamental defects." (*Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545 [173 Cal.Rptr.3d 454].)

- "The Song-Beverly Act incorporates the provisions of [California Uniform Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp., supra,* 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)

- "The implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale. Indeed, '[u]ndisclosed latent defects … are the very evil that the implied warranty of merchantability was designed to remedy.' In the case of a latent defect, a product is rendered unmerchantable, and the warranty of merchantability is breached, by the existence of the unseen defect, not by its subsequent discovery." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1304–1305 [95 Cal.Rptr.3d 285], internal citations omitted.)

- "[Defendant] suggests 'the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation.' As the trial court correctly recognized, however, a merchantable vehicle under the statute requires more than the mere capability of 'just getting from point "A" to point "B." ' " (*Brand, supra,* 226 Cal.App.4th at p. 1546.)

- "[A]llegations showing an alleged defect that created a substantial safety hazard would sufficiently allege the vehicle was not "fit for the ordinary purposes for which such goods are used" and, thus, breached the implied warranty of merchantability." (*Gutierrez, supra,* 19 Cal.App.5th at pp. 1247–1248.)

- "The notice requirement of [former Civil Code] section 1769 ... is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. 'As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Sales, §§ ~~70,~~ 71, 72

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.21–3.23, 3.25–3.26

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][a] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, Sales: *Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.42 (Matthew Bender)

5 California Civil Practice Business Litigation, §§ 53:5–53:7 (Thomson Reuters)

3211. Breach of Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because the [***consumer good***] was not suitable for [his/her] intended use. This is known as a "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/manufactured by/distributed by] [***name of defendant***];**

2. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] intended to use the [***consumer good***] for a particular purpose;**

3. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] was relying on [his/her/its] skill and judgment to select or provide a [***consumer good***] that was suitable for that particular purpose;**

4. **That [***name of plaintiff***] justifiably relied on [***name of defendant***]'s skill and judgment; and**

5. **That the [***consumer good***] was not suitable for the particular purpose;**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of defendant***]'s breach of the implied warranty was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised November 2018

Directions for Use

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] was not suitable for its intended use;

See also CACI No. 1243, *Notification/Reasonable Time.*

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d

583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases of consumer goods-see Civil Code sections 1791(g)-(i) and 1795.4. This instruction may be modified for use in cases involving the implied warranty of fitness in a lease of consumer goods.

Sources and Authority

- "Implied Warranty of Fitness" Defined. Civil Code section 1791.1(b).
- Remedies for Breach of Warranty of Fitness. Civil Code section 1791.1(d).
- Waiver of Warranty of Fitness. Civil Code section 1792.3.
- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).
- Measure of Damages. Civil Code section 1794(b).
- Manufacturer's Implied Warranty of Fitness. Civil Code section 1792.1.
- Retailer's or Distributor's Implied Warranty of Fitness. Civil Code section 1792.2(a).
- Damages for Nonconforming Goods. California Uniform Commercial Code section 2714(1).
- Damages for Breach of Warranty. California Uniform Commercial Code section 2714(2).
- "The Consumer Warranty Act makes ... an implied warranty [of fitness for a particular purpose] applicable to retailers, distributors, and manufacturers. ... An implied warranty of fitness for a particular purpose arises only where (1) the purchaser at the time of contracting intends to use the goods for a particular purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer is relying on such skill and judgment." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25 [220 Cal.Rptr. 392], internal citations omitted.)
- " 'A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295, fn. 2 [44 Cal.Rptr.2d 526], internal citation omitted.)
- "The reliance elements are important to the consideration of whether an implied warranty of fitness for a particular purpose exists. ... The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." (*Keith, supra*, 173 Cal.App.3d at p. 25, internal

citations omitted.)

- "The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2. ... [T]his section applies only when goods cannot be made to conform to the 'applicable *express* warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 620 [39 Cal.Rptr.2d 159].)

- "The Song-Beverly Act incorporates the provisions of [California Uniform Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp.*, *supra*, 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)

- "The notice requirement of [former Civil Code] section 1769 ... is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Sales, §§ ~~72,~~ 73, 74

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.33–3.40

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][b] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.64 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation §§ 53:5–53:7 (Thomson Reuters)

3220. Affirmative Defense—Unauthorized or Unreasonable Use

[*Name of defendant***] is not responsible for any harm to [***name of plaintiff***] if [***name of defendant***] proves that the [***specify defect in the ~~any [defect[s] in the [~~consumer good***]~~/] [~~failure to match ~~any~~ the [written/implied] warranty] [was/were] caused by unauthorized or unreasonable use of the [***consumer good***] after it was sold.**

New September 2003; Revised February 2005, November 2018

Sources and Authority

- Unauthorized or Unreasonable Use. Civil Code section 1794.3.

- "The Song-Beverly Act provides that a breach of the warranty of merchantability occurs when a good becomes unfit for the ordinary purpose for which it is used. An exception occurs when the defect or nonconformity is caused by the buyer's unauthorized or unreasonable use under Civil Code section 1794.3. 'It is a "familiar" and "longstanding" legal principle that " '[w]hen a proviso … carves an exception out of the body of a statute or contract those who set up such exception must prove it.' " [Citations.]' Defendant, as the party claiming the exemption from the Song-Beverly Act, had the burden to prove the exemption. … Plaintiff alleged the vehicle became unfit and presented uncontradicted evidence that the vehicle had ceased functioning; to avail itself of Civil Code section 1794.3, defendant had to allege and prove that, notwithstanding the unfitness, the Song-Beverly Act did not apply due to plaintiff's improper use or maintenance." (*Jones v. Credit Auto Center, Inc.* (2015) 237 Cal.App.4th Supp. 1, 10-11 [188 Cal.Rptr.3d 578], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Sales, §§ 321, 322~~314, 315~~

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07[7] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:59 (Thomson Reuters)

3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to [***describe obligation under Song-Beverly Consumer Warranty Act, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities***] was willful and therefore asks that you impose a civil penalty against [***name of defendant***]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing violations in the future.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was willful, you may impose a civil penalty against [him/her/it]. The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [***name of plaintiff***]'s actual damages.**

"Willful" means that [*name of defendant***] knew of [his/her/its] legal obligations and intentionally declined to follow them. However, a violation is not willful if you find that [***name of defendant***] reasonably and in good faith believed that the facts did not require [***describe statutory obligation, e.g., repurchasing or replacing the vehicle***].**

New September 2003; Revised February 2005, December 2005, December 2011, May 2018, November 2018

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). In the opening paragraph, set forth all claims for which a civil penalty is sought.

An automobile buyer may also obtain a penalty of two times actual damages without a showing of willfulness under some circumstances. (See Civ. Code, § 1794(e).) However, a buyer who recovers a civil penalty for a willful violation may not also recover a second civil penalty for the same violation. (Civ. Code, § 1794(e)(5).) If the buyer seeks a penalty for either a willful or a nonwillful violation in the alternative, the jury must be instructed on both remedies. (See *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 11 [28 Cal.Rptr.2d 133].) A special instruction will be needed for the nonwillful violation. (See *Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1322 [46 Cal.Rptr.2d 507] (*Suman II*) [setting forth instructions to be given on retrial].)

Depending on the nature of the claim at issue, factors that the jury may consider in determining willfulness may be added. (See, e.g., *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [41 Cal.Rptr.2d 295] [among factors to be considered by the jury are whether (1) the manufacturer knew the vehicle had not been repaired within a reasonable period or after a reasonable number of attempts, and (2) whether the manufacturer had a written policy on the requirement to repair or replace].)

Sources and Authority

- Civil Penalty for Willful Violation. Civil Code section 1794(c).

- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)

- "Whether a manufacturer willfully violated its obligation to repair the car or refund the purchase price is a factual question for the jury that will not be disturbed on appeal if supported by substantial evidence." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104 [109 Cal.Rptr.2d 583].

- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.'" (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)

- "In regard to the *willful* requirement of Civil Code section 1794, subdivision (c), a civil penalty may be awarded if the jury determines that the manufacturer 'knew of its obligations but intentionally declined to fulfill them. There is no requirement of blame, malice or moral delinquency. However, '. . . a violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present.' " (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249–1250 [40 Cal.Rptr.2d 576], original italics, internal citations omitted; see also *Bishop v. Hyundai Motor Am.* (1996) 44 Cal.App.4th 750, 759 [52 Cal.Rptr.2d 134] [defendant agreed that jury was properly instructed that it "acted 'willfully' if you determine that it knew of its obligations under the Song-Beverly Act but intentionally declined to fulfill them."].)

- "[A] violation … is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant *actually knew* of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations. Accordingly, '[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.' " (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051 [104 Cal.Rptr.3d 853], original italics, internal citation omitted.)

- "[Defendant] was entitled to an instruction informing the jury its failure to refund or replace was not willful if it reasonably and in good faith believed the facts did not call for refund or replacement. Such an instruction would have given the jury legal guidance on the principal issue before it in determining whether a civil penalty could be awarded." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187 [28 Cal.Rptr.2d 371], fn. omitted.)

- "There is evidence [defendant] was aware that numerous efforts to find and fix the oil leak had been unsuccessful, which is evidence a jury may consider on the question of willfulness. Additionally, the jury could conclude that [defendant]'s policy, which requires a part be replaced or adjusted before [defendant] deems it a repair attempt but excludes from repair attempts any visit during which a mechanic searches for but is unable to locate the source of the problem, is unreasonable and not a good faith effort to honor its statutory obligations to repurchase defective cars. Finally, there was evidence that [defendant] adopted internal policies that erected hidden obstacles to the ability of an unwary consumer to obtain redress under the Act. This latter evidence would permit a jury to infer that [defendant] impedes and resists efforts by a consumer to force [defendant] to repurchase a defective car, regardless of the presence of an unrepairable defect, and that [defendant]'s decision to reject [plaintiff]'s demand was made pursuant to [defendant]'s policies rather than to its good faith and reasonable belief the car did not have an unrepairable defect covered by the warranty or that a reasonable number of attempts to effect a repair had not yet occurred." (*Oregel, supra,* 90 Cal.App.4th at pp. 1104–1105, internal citations omitted.)

- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages. Neither punishment nor deterrence is ordinarily called for if the defendant's actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation. As our Supreme Court recently observed, '. . . courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions.' " (*Kwan, supra,* 23 Cal.App.4th at pp. 184–185, internal citation omitted.)

- "Thus, when the trial court concluded that subdivision (c)'s requirement of willfulness applies also to subdivision (e), and when it, in effect, instructed the jury that subdivision (c)-type willfulness is the sole basis for awarding civil penalties, the court ignored a special distinction made by the Legislature with respect to the seller of new automobiles. In so doing, the court erred. The error was prejudicial because it prevented the jurors from considering the specific penalty provisions in subdivision (e) and awarding such penalties, in their discretion, if they determined the evidence warranted such an award." (*Suman, supra,* 23 Cal.App.4th at p. 11.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.30 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.129 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:32 (Thomson Reuters)

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

(b) **[***Name of agent***] was paid by the hour rather than by the job;**

(c) **[***Name of defendant***] was in business;**

(d) **The work being done by [***name of agent***] was part of the regular business of [***name of defendant***];**

(e) **[***Name of agent***] was not engaged in a distinct occupation or business;**

(f) **The kind of work performed by [***name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of agent***] does not require specialized or professional skill;**

(h) **The services performed by [***name of agent***] were to be performed over a long period of time; [and]**

(i) **[***Name of defendant***] and [***name of agent***] believed that they had an employer-employee relationship[./; and]**

(j) **[***Specify other factor***].**

New September 2003; Revised December 2010, June 2015, December 2015, November 2018

Directions for Use

This instruction is based on *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399] and the Restatement Second of Agency, section 220. It is sometimes referred to as the *Borello* test or the common law test. (See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 934 [232 Cal.Rprt.3d 1, 416 P.3d 1].) It is ~~primarily~~ intended to address the~~for~~ employer-employee relationship for purposes of assessing vicarious responsibility on the employer for the employee's acts. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement ~~Second of Agency,~~ section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc.*, *supra*, ~~*v. Department of Industrial Relations* (1989)~~ 48 Cal.3d at pp.~~341,~~ 354–355 ~~[256 Cal.Rptr. 543, 769 P.2d 399]~~.) Therefore, an "other" option (j) has been included.

Borello was a workers' compensation case. In *Dynamex*, *supra*, the court, in holding that *Borello* did not control the specific wage order dispute at issue, noted that "it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue." (*Id.* at p. 934.) The court also said that "[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation." (*Id.* at p. 935.) With respondeat superior, there is no statutory provision or social welfare legislation to be considered.

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.
- "[S]ubject to certain policy considerations, a hirer … cannot be held vicariously liable for the negligence of his independent contractors." (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)
- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra,* 59 Cal.4th at p. 528.)
- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello &*

Sons, Inc., supra, 48 Cal.3d at p. 350, internal citations omitted.)

- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala, supra,* 59 Cal.4th at p. 532.)

- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 354.)

- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context--in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In the vicarious liability context, the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because ' "[t]he extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them . . . ." ' For this reason, the question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor." (*Dynamex Operations W., supra,* 4 Cal.5th at p. 927, internal citations omitted.)

- "[A]lthough we have sometimes characterized *Borello* as embodying the common law test or standard

for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue." (*Dynamex Operations W., supra*, 4 Cal.5th at p. 934, original italics, internal citation omitted.)

- "Whether a person is an independent contractor or an employee is a question of fact if dependent upon the resolution of disputed evidence or inferences." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 297, fn. 4 [111 Cal.Rptr.3d 787].)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 342.)

- "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala, supra,* 59 Cal.4th at p. 531.)

- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- "A finding of employment is supported where the workers are 'a regular and integrated portion of [the] business operation.' " (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)

- "Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship." (*Garcia, supra,* 238 Cal.App.4th at p. 1488.)

- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only

in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)

- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra,* 233 Cal.App.4th at p. 1184, original italics, internal citations omitted].)

- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides:
  (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
  (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
  (b) whether or not the one employed is engaged in a distinct occupation or business;
  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  (d) the skill required in the particular occupation;
  (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  (f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 2–~~42~~45

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.41 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

3903J. Damage to Personal Property (Economic Damage)

[*Insert number, e.g.,* "10."**] The harm to [***name of plaintiff***]'s [***item of personal property, e.g., automobile***].**

To recover damages for harm to personal property, [*name of plaintiff***] must prove the reduction in the [***e.g., automobile***]'s value or the reasonable cost of repairing it, whichever is less. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts.]**

[However, if you find that the [*e.g., automobile***] can be repaired, but after repairs it will be worth less than it was before the harm, the damages are (1) the difference between its value before the harm and its lesser value after the repairs have been made; plus (2) the reasonable cost of making the repairs. The total amount awarded may not exceed the [***e.g., automobile***]'s value before the harm occurred.]**

To determine the reduction in value if repairs cannot be made, you must determine the fair market value of the [*e.g., automobile***] before the harm occurred and then subtract the fair market value immediately after the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller are fully informed of the condition and quality of the [***e.g., automobile***].**

New September 2003; Revised December 2011, June 2013, December 2015, November 2018

Directions for Use

Do not give this instruction if the property had no monetary value either before or after injury. (See *Kimes v. Grosser* (2011) 195 Cal.App.4th 1556, 1560 [126 Cal.Rptr.3d 581] [CACI No. 3903J has no application to prevent proof of out-of-pocket expenses to save the life of a pet cat].) See CACI No. 3903O, *Injury to Pet (Economic Damage)*.

An insurer may draft around this rule in the policy by limiting recovery to either cost of repair or diminution in value, but not both. (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 550 [204 Cal.Rptr.3d 433].)

Give the optional second paragraph if the property can be repaired, but the value after repair may be less than before the harm occurred. (See *Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600 [170 P.2d 923].)

Sources and Authority

- "The general rule is that the measure of damages for tortious injury to personal property is the difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if that cost be less than the diminution in value. This rule stems from the basic code section fixing the measure of tort damage as 'the amount which will compensate for all the detriment proximately caused thereby.' [citations]" (*Pacific Gas & Electric Co. v. Mounteer* (1977) 66 Cal.App.3d 809, 812 [136 Cal.Rptr. 280].)

- "It has also been held that the price at which a thing can be sold at public sale, or in the open market, is some evidence of its market value. In *San Diego Water Co. v. San Diego,* the rule is announced that the judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been, and are being, made at ascertainable prices. In *Quint v. Dimond,* it was held competent to prove market value in the nearest market." (*Tatone v. Chin Bing* (1936) 12 Cal.App.2d 543, 545–546 [55 P.2d 933], internal citations omitted.)

- " 'Where personal property is injured but not wholly destroyed, one rule is that the plaintiff may recover the depreciation in value (the measure being the difference between the value immediately before and after the injury), and compensation for the loss of use.' In the alternative, the plaintiff may recover the reasonable cost of repairs as well as compensation for the loss of use while the repairs are being accomplished. If the cost of repairs exceeds the depreciation in value, the plaintiff may only recover the lesser sum. Similarly, if depreciation is greater than the cost of repairs, the plaintiff may only recover the reasonable cost of repairs. If the property is wholly destroyed, the usual measure of damages is the market value of the property." (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citations omitted.)

- The cost of replacement is not a proper measure of damages for injury to personal property. (*Hand Electronics Inc., supra,* 21 Cal.App.4th at p. 871.)

- "When conduct complained of consists of intermeddling with personal property 'the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.' " (*Itano v. Colonial Yacht Anchorage* (1968) 267 Cal.App.2d 84, 90 [72 Cal.Rptr. 823], internal citations omitted.)

- "The measure of damage for wrongful injury to personal property is that difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if such cost be less than the depreciation in value." (*Smith v. Hill* (1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49], internal citations omitted.)

- "[I]t is said ... that 'if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs. The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs.' The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases

in which the injured property 'can be entirely repaired.' This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value." (*Merchant Shippers Association, supra,* 28 Cal.2d at p. 600, internal citations omitted.)

- "In personal property cases, plaintiffs are entitled to present evidence of the cost of repairs even in cases where recovery is limited to the lost market value of property. The cost of repairs constitutes a prima facie measure of damages, and it is the defendant's burden to respond with proof of a lesser diminution in value." (*Kimes, supra,* 195 Cal.App.4th at p. 1560, internal citation omitted.)

- "In this case, the policy language was clear and explicit. Regarding coverage for car damage, it provided that [insurer] '*may* pay the loss in money *or* repair … damaged … property.' The policy's use of the term 'may' suggests [insurer] had the discretion to choose between the two options." (*Baldwin, supra,* 1 Cal.App.5th at p. 550, original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1718, 1719

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages,* ¶ 3:220 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, §§ 13.8–13.11

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss,* § 52.31 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* §§ 177.41, 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 5:16 (Thomson Reuters)

~~2433~~3903P. Damages From Employer for Wrongful Discharge (Economic Damage)~~in Violation of Public Policy—Damages~~

[*Insert number, e.g.,* "3."**] Past and future lost earnings.**

If you find that [*name of defendant***] [constructively] [discharged~~/constructively discharged~~] [***name of plaintiff***] in violation of [***specify, e.g., public policy and the Fair Employment and Housing Act***], then you must decide the amount of past and future lost earnings~~damages~~ that [***name of plaintiff***] has proven [he/she] is entitled to recover, if any. To make that decision, you must:**

1. **Decide the amount that [***name of plaintiff***] would have earned up to today, including any benefits and pay increases; ~~[~~and~~]~~**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned for the length of time the employment with [***name of defendant***] was reasonably certain to continue.~~; [and]~~**

~~3. [Add damages for [*describe any other damages that were allegedly caused by defendant's conduct, e.g., "emotional distress"*] if you find that [*name of defendant*]'s conduct was a substantial factor in causing that harm.]~~

In determining the period that [*name of plaintiff***]'s employment was reasonably certain to have continued, you should consider such things as:**

(a) **[***Name of plaintiff***]'s age, work performance, and intent regarding continuing employment with [***name of defendant***];**

(b) **[***Name of defendant***]'s prospects for continuing the operations involving [***name of plaintiff***]; and**

(c) **Any other factor that bears on how long [***name of plaintiff***] would have continued to work.**

New September 2003; Renumbered from CACI No. 2433 and Revised November 2018

Directions for Use

Give this instruction for any claim in which the plaintiff seeks to recover damages for past and future lost earnings from an employer for a wrongful termination of employment, for example in violation of public policy (see CACI No. 2400 et seq.) or under the Fair Employment and Housing Act (see CACI No. 2500 et seq.) Include "constructively" in the opening paragraph if the plaintiff alleges constructive discharge instead of an actual discharge. (See CACI No. 2510, *"Constructive Discharge" Explained*.)

This instruction should be followed by CACI No. 3963, *Affirmative Defense—Employee's Duty to*

Mitigate Damages, if ~~2407, *Employee's Duty to Mitigate Damages*, in cases where~~ the employee's duty to mitigate damages is at issue. Also give CACI Nos. 3904A, *Present Cash Value*, and 3904B, *Use of Present-Value Tables.*

Other types of tort damages may be available to a plaintiff. For an instruction on emotional distress damages, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage).* See punitive damages instructions in the ~~damages~~ Damages series~~section~~ (CACI No. 3940 et seq.).

Sources and Authority

- Standard for Punitive Damages. Civil Code section 3294(a).
- Employer Liability for Punitive Damages. Civil Code section 3294(b).
- A tortious termination subjects the employer to " 'liability for compensatory and punitive damages under normal tort principles.' " (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citation omitted.)
- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 518 [241 Cal.Rptr. 916].)
- "A plaintiff may recover for detriment reasonably certain to result in the future. While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [16 Cal.Rptr.2d 787], internal citations omitted, disapproved of on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179].)
- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202, 463 P.2d 426].)
- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, [and] the foreseeability of the continued future demand for tax return service to small taxpayers ... .' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)

- In adding subdivision (b) to section 3294 in 1980, "[t]he drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944], see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150-1151 [74 Cal.Rptr.2d 510].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation ¶¶ 17:237, 17:362, 17:365 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.64–5.67

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[2] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.50–249.55, 249.80–249.81, 249.90 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.41–100.59 (Matthew Bender)

~~2407~~3963. Affirmative Defense—Employee's Duty to Mitigate Damages

[*Name of defendant***] claims that if [***name of plaintiff***] is entitled to any damages, they should be reduced by the amount that [~~he/she~~*name of plaintiff*] could have earned from other employment. To succeed, [***name of defendant***] must prove all of the following:**

1. **That employment substantially similar to [***name of plaintiff***]'s former job was available to [him/her];**

2. **That [***name of plaintiff***] failed to make reasonable efforts to seek [and retain] this employment; and**

3. **The amount that [***name of plaintiff***] could have earned from this employment.**

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

(a) The nature of the work was different from [*name of plaintiff***]'s employment with [***name of defendant***];**

(b) The new position was substantially inferior to [*name of plaintiff***]'s former position;**

(c) The salary, benefits, and hours of the job were similar to [*name of plaintiff***]'s former job;**

(d) The new position required similar skills, background, and experience;

(e) The job responsibilities were similar; [and]

(f) The job was in the same locality; [and]

(g) [*insert other relevant factor(s)***].**

[In deciding whether [*name of plaintiff***] failed to make reasonable efforts to retain comparable employment, you should consider whether [***name of plaintiff***] quit or was discharged from that employment for a reason within [his/her] control.]**

New September 2003; Revised February 2007, December 2014; Renumbered From CACI No. 2407 November 2018

Directions for Use

This instruction may be given for any claim in which the plaintiff seeks to recover damages for

past and future lost earnings from an employer for a wrongful termination of employment, for example in violation of public policy (see CACI No. 2400 et seq.) or under the Fair Employment and Housing Act (see CACI No. 2500 et seq.), when there is evidence that the employee's damages could have been mitigated. The bracketed language at the end of the instruction regarding plaintiff's failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [44 Cal.Rptr.2d 565].

In deciding whether the plaintiff could have obtained a substantially similar job, the trier of fact may consider several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (See *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 [106 Cal.Rptr. 283].) Read only those factors that have been shown by the evidence.

~~This instruction should be given in all employment cases, not just in breach of contract cases. See Chin et al., California Practice Guide: Employment Litigation, ¶ 17:492 (Rutter Group).~~

~~This instruction should not be used for wrongful demotion cases.~~

Sources and Authority

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see also *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98 [127 Cal.Rptr. 222] ["Plaintiff concedes that the trial court was entitled to deduct her actual earnings"]; but see *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432 [165 Cal.Rptr.3d 441] [wages actually earned from an inferior job may not be used to mitigate damages].)

- "[B]efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived … ." (*Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 454 [177 Cal.Rptr.3d 145].)

- "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez, supra,*

55 Cal.App.3d at p. 99.)

- "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield, supra*, 37 Cal.App.4th at pp. 1502-1503.)

- "The location of the new job is one of the factors to consider in determining whether the new job is inferior." (*Villacorta, supra,* 221 Cal.App.4th at p. 1432.)

- "There is some authority for the proposition that whether or not the other employment is comparable or substantially similar or equivalent to the prior position is a question of fact. On the other hand the issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California." (*California School Employees Assn., supra,* 30 Cal.App.3d at pp. 253−254, internal citations omitted.)

- "The court could reasonably admit the evidence of other available jobs and leave the question of their substantial similarity to the jury." (*Kao, supra,* 229 Cal.App.4th at p. 454.)

- "[S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284–1285 [134 Cal.Rptr.3d 883].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490, 17.492, 17:495, 17:497, 17:499–17:501 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40–8.41

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

~~3963~~3965. No Deduction for Workers' Compensation Benefits Paid

Do not consider whether or not [*name of plaintiff*] received workers' compensation benefits for [his/her] injuries. If you decide in favor of [*name of plaintiff*], you should determine the amount of your verdict according to my instructions concerning damages.

New September 2003; Revised December 2009; Renumbered to CACI No. 3965 November 2018

Directions for Use

This instruction is intended for use in conjunction with a special verdict form~~, in which case~~ if the judge ~~can~~ may need to make ~~any necessary~~ deductions from the verdict to avoid a~~if~~ double recovery ~~is an issue~~. It may also be read ~~in cases in which~~if there are no allegations regarding the employer's comparative fault.

Sources and Authority

- "Since the employer was not negligent, the death benefits paid did ~~If the employer has not been negligent, the workers' compensation benefits do "~~not constitute an impermissible double recovery but rather a payment from a source wholly independent of the wrongdoer." (*Curtis v. State of California ex rel. Department of Transportation* (1982) 128 Cal.App.3d 668, 682 [180 Cal.Rptr. 843].)

- "Here the collateral source was workers' compensation benefits paid by the [defendant]'s policy. Under the general principles just described, this would not be an independent source; defendant is the policyholder, so the collateral source rule would not apply. Yet the California Supreme Court held that the rule did apply in a case in which an employee received benefits from the employer's workers' compensation policy and then sued a third party tortfeasor, the compensation insurer having waived its right of subrogation against the third party." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 637 [210 Cal.Rptr.3d 362] [action by employee against employer on claim alleged to not be within scope of employment].)

- " 'The average reasonably well-informed person who may be called to serve upon a jury knows that a workman injured in his employment receives compensation. It is a delusion to think that this aspect of the case can be kept from the minds of the jurors simply by not alluding to it in the course of the trial.' " (*Berryman v. Bayshore Construction Co.* (1962) 207 Cal.App.2d 331, 336 [24 Cal.Rptr. 380], internal citations omitted.)

- "To prevent a double recovery, the court may instruct the jury to segregate types of damage as between the employee and employer, awarding to the employee only those tort damages not recoverable by the employer." (*Demkowski v. Lee* (1991) 233 Cal.App.3d 1251, 1259 [284 Cal.Rptr. 919], footnote omitted.)

- "Alternatively, the jury may generally be instructed on the types of tort damages to which the

employee may be entitled and then given a special verdict form that requires the jury to find whether the defendant was negligent, whether the negligence was the proximate cause of the employee's injuries, what the employee's total tort damages are, without taking into account his or her receipt of workers' compensation benefits, and what the reasonable amount of benefits paid by the employer were. Thereafter, the court enters individual judgments on the special verdict for the amounts to which the employee and employer are entitled." (*Demkowski, supra,* 233 Cal.App.3d at p. 1259, footnote omitted.)

- "Prior to Proposition 51, a negligent third party was allowed an offset for the workers' compensation benefits paid to the plaintiff. This prevented double recovery under the then-existing joint and several liability rule. Proposition 51, however, limited joint and several liability to plaintiff's economic damages." (*Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 197 [78 Cal.Rptr.2d 861].)

- "The *Espinoza* approach has provided an effective solution for pre-verdict settlements, and we believe that it is also the most suitable means of dealing with workers' compensation benefits." (*Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 37 [56 Cal.Rptr.2d 455].)

Secondary Sources

2 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Workers' Compensation, §§ 23, 28–30, 35, 38, 43~~20, 24–26, 31, 34, 39–42~~

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law,* § 10.10 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation,* § 577.319 (Matthew Bender)

4550. Affirmative Defense—Statute of Limitations—Patent Construction Defect (Code Civ. Proc., § 337.1)

[*Name of plaintiff***] claims that [his/her] harm was caused by a defect in the [design/specifications/surveying/planning/supervision/ [or] observation] of [a construction project/a survey of real property/[***specify project, e.g., the roof replacement***]]. [***Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove both of the following:**

1. **That an average person during the course of a reasonable inspection would have discovered the defect; and**

2. **That the date on which the [construction project/survey of real property/[***specify project, e.g., roof replacement***]] was substantially complete was more than four years before [***insert date***], the date on which this action was filed.**

New December 2011; Revised November 2018

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.1 as a defense. This section provides a four-year limitation period from the date of substantial completion for harm caused by a patent construction defect. Do not give this instruction if the claim is for injuries to persons or property based on tort principles occurring in the fourth year after substantial completion. (See Code Civ. Proc., § 337.1(b).)

For discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance*.

Code of Civil Procedure section 337.1 does not apply to construction defect claims within the Right to Repair Act (Civ. Code, § 895 et seq.). (Civ. Code, § 941(d).) The act applies to all claims for property damage or economic loss except for breach of contract, fraud, personal injury, or violation of a statute. (Civ. Code, § 943(a); see *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 249 [227 Cal.Rptr.3d 191, 408 P.3d 797]; see also Civ. Code, § 941 [statute of limitations under Right to Repair Act].)

Sources and Authority

- Statute of Limitations for Patent Defects. Code of Civil Procedure section 337.1.

- "The statute of limitations in section 337.1 exists to 'provide a final point of termination, to protect some groups from extended liability.' " (*Delon Hampton & Associates, Chartered v.*

Superior Court (2014) 227 Cal.App.4th 250, 254 [173 Cal.Rptr.3d 407].)

- "[A] patent defect is one that can be discovered by the kind of inspection made in the exercise of ordinary care and prudence. In contrast, a latent defect is hidden, and would not be discovered by a reasonably careful inspection." (*The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 35 [108 Cal.Rptr.3d 606].)

- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 256 [99 Cal.Rptr.3d 258], internal citations omitted.)

- "[T]he [Right to Repair Act] leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury. In other areas, however, the Legislature's intent to reshape the rules governing construction defect actions is patent. Where common law principles had foreclosed recovery for defects in the absence of property damage or personal injury the Act supplies a new statutory cause of action for purely economic loss. And, of direct relevance here, even in some areas where the common law had supplied a remedy for construction defects resulting in property damage but not personal injury, the text and legislative history reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act." (*McMillin Albany LLC, supra*, 4 Cal.5th at p. 249, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § 1303~~1159~~

3 Witkin, California Procedure (5th ed. 2008) Actions, § 484

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.08 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.54, 104.267 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.248 (Matthew Bender)

4551. Affirmative Defense—Statute of Limitations—Latent Construction Defect (Code Civ. Proc., § 337.15)

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law. To succeed on this defense, [*name of defendant*] must prove that the date on which the [construction project/survey of real property/[*specify project, e.g., roof replacement*]] was substantially complete was more than 10 years before [*insert date*], the date on which this action was filed.

New December 2011; Revised November 2018

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.15 as a defense. This section provides a 10-year outside limitation period for harm caused by a latent construction defect regardless of delayed discovery.

The jury may also be instructed on the limitations periods for the particular theories of recovery alleged. (See, e.g., Code Civ. Proc., §§ 338 [three years for injury to real property], 337 [four years for breach of written contract].) However, for latent defects, delayed discovery (see CACI No. 455, *Statute of Limitations—Delayed Discovery*) generally defeats that otherwise applicable statute.

The most likely question of fact for the jury is the date of substantial completion. The statute provides four possible events, the earliest of which may constitute substantial completion of an improvement. (See Code Civ. Proc., § 337.15(g).) The latest date is one year from cessation of all work on the improvement. However, substantial completion of an improvement may occur before any of these dates. (See *Nelson v. Gorian & Assocs.* (1998) 61 Cal.App.4th 93, 97 [71 Cal.Rptr.2d 345].) The statute of limitations may start to run at a later date against the developer if the development includes many improvements. (*Id.* at p. 99; cf. *Schwetz v. Minnerly* (1990) 220 Cal.App.3d 296, 298 [269 Cal.Rptr. 417] ["developer" can be an "improver" and a "development" is a "work of improvement" for purposes of subsection (g)].) For further discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance*.

Code of Civil Procedure section 337.15 does not apply to construction defect claims within the Right to Repair Act (Civ. Code, § 895 et seq.). (Civ. Code, § 941(d).) The act applies to all claims for property damage or economic loss except for breach of contract, fraud, personal injury, or violation of a statute. (Civ. Code, § 943(a); see *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 249 [227 Cal.Rptr.3d 191, 408 P.3d 797]; see also Civ. Code, § 941 [statute of limitations under Right to Repair Act].)

Sources and Authority

- Statute of Limitations: Latent Defects. Code of Civil Procedure section 337.15.

- "The purpose of section 337.15 has been stated as 'to protect developers of real estate against liability extending indefinitely into the future.' … [We have] noted that '[a] contractor is in the business of constructing improvements and must devote his capital to that end; the need to provide reserves against an uncertain liability extending indefinitely into the future could seriously impinge upon the conduct of his enterprise.' " (*Martinez v. Traubner* (1982) 32 Cal.3d 755, 760 [187 Cal.Rptr. 251, 653 P.2d 1046], internal citations omitted.)

- "A 'latent' construction defect is one that is 'not apparent by reasonable inspection.' As to a latent defect that is alleged in the context of the challenged causes of action here—negligence, breach of warranty, and breach of contract—three statutes of limitations are in play: sections 338, 337 and 337.15. 'The interplay between these [three] statutes sets up a two-step process: (1) actions for a latent defect must be filed within three years (§ 338 [injury to real property]) or four years (§ 337 [breach of written contract]) of discovery, but (2) in any event must be filed within ten years (§ 337.15) of substantial completion.' " (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 257–258 [99 Cal.Rptr.3d 258], internal citations omitted.)

- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc., supra*, 177 Cal.App.4th at p. 256, internal citations omitted.)

- "Our reading of the express words of section 337.15, our giving consideration to its legislative history, and harmonizing that section in the context of the statutory framework as a whole, leads us to conclude that section 337.15 does not limit the time within which direct actions for personal injury damages or wrongful death may be brought against the persons specified in the statute." (*Martinez, supra*, 32 Cal.3d at p. 759.)

- "The 10-year period commences to run in respect to a person who has contributed towards 'an improvement' when such improvement has been substantially completed irrespective of whether or not the improvement is part of a development." (*Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 772 [167 Cal.Rptr. 440].)

- "In 1981, the Legislature codified the holding in *Liptak* by adding subdivision (g) to section 337.15. 'The Senate Committee on Judiciary and the Senate Republican Caucus digests for the bill that became Code of Civil Procedure section 337.15, subdivision (g) state in pertinent part: " 'In [*Liptak*], the [C]ourt of [A]ppeal held that with respect to a developer, the ten-year limitation period does not commence until the development is substantially completed. [¶] With respect to a person who has contributed to an improvement on the developed property, the court held that the period commences when that particular improvement has been substantially completed, regardless of the completion time of the development itself. [¶] AB 605 would codify the *Liptak* holding on these issues.' " [Citation.]' " (*Nelson, supra*, 61 Cal.App.4th at pp. 96–97, internal citations omitted.)

- "Turning to the plain meaning of the statute as well as the legislative intent of enactment of section 337.15, subdivision (g), it is clear the intent was to define what event triggered the 10-year period and not what label is used to define the person who performed the work of improvement. The particular development or work of improvement can be one 'improvement' such as grading. It can also be a 'particular development,' i.e., a completed structure or dwelling. When the work of improvement meets one of the four criteria of section 337.15, subdivision (g), the 'improver'—whether an architect, engineer, subcontractor, contractor, or developer—is entitled to raise the provisions of section 337.15, subdivision (g), as a bar to an action which seeks damages for latent defects after the 10-year period has passed." (*Schwetz, supra,* 220 Cal.App.3d at p. 308.)

- "Appellants claim that the 10-year period is calculated pursuant to section 337.15, subdivision (g)(1)–(4), which describes four events: (1) a final inspection, (2) the notice of completion, (3) use or occupancy of the property, or (4) termination or cessation of work for one year. Subdivision (g), however, states that the 10-year period '*shall commence upon substantial completion of the improvement,* but not later than' the occurrence of any one of the four events described in subdivision (g)(1) through (g)(4). … [¶] The trial court correctly ruled that the notice of completion date (§ 337.15, subd. (g)(2)) did not control if the improvement was substantially completed at an earlier date." (*Nelson, supra,* 61 Cal.App.4th at p. 97, original italics.)

- " 'As used in section 337.15 "an improvement" is in the singular and refers separately to each of the individual changes or additions to real property that qualifies as an "improvement" irrespective of whether the change or addition is grading and filling, putting in curbs and streets, laying storm drains or of other nature.' " (*Nelson, supra,* 61 Cal.App.4th at p. 97.)

- "The purpose of section 337.15 and its definition of the 'substantial completion' that begins the running of the 10-year period make clear that the statute's protection applies to claims for damage due to defects in how an improvement was designed and constructed, not to claims based on how the improvement was used *after* its construction is complete and independent of the manner in which it was designed and constructed." (*Estuary Owners Assn. v. Shell Oil Co.* (2017) 13 Cal.App.5th 899, 915 [221 Cal.Rptr.3d 190], original italics.)

- "[T]he [Right to Repair Act] leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury. In other areas, however, the Legislature's intent to reshape the rules governing construction defect actions is patent. Where common law principles had foreclosed recovery for defects in the absence of property damage or personal injury the Act supplies a new statutory cause of action for purely economic loss. And, of direct relevance here, even in some areas where the common law had supplied a remedy for construction defects resulting in property damage but not personal injury, the text and legislative history reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act." (*McMillin Albany LLC, supra,* 4 Cal.5th at p. 249, internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 488

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.08A (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.25, 104.267 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, § 143.49 (Matthew Bender)