JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: June 24, 2016

Title
Jury Instructions: New and Revised Civil Jury Instructions and Verdict Forms

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
June 24, 2016

Date of Report
May 6, 2016

Contact
Bruce Greenlee, 415-865-7698
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new and revised civil jury instructions and verdict forms prepared by the committee.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective June 24, 2016, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the instructions will be published in the official June supplement to the 2016 edition of the *Judicial Council of California Civil Jury Instructions*.

A table of contents and the proposed new and revised civil jury instructions and verdict forms are attached at pages 47–201.

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 voted to approve 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.*

This is the 28th release of *CACI.* The council approved *CACI* release 27 at its December 2015 meeting.

Rationale for Recommendation

The committee recommends proposed revisions to the following 40 instructions and verdict forms: 426, 461, 1100, 1123, 1700, 1701, 1702, 1703, 1704, 1705, 1722, 2020, 2021, 2332, 2334, 2505, 2506, 2512, 3020, 3021, 3060, 3710, 3923, 4000, 4005, 4013, 4200, 4201, 4202, 4203, 4204, 4205, 4206, 4207, 4208, VF-4200, VF-4201, VF-4202, 4603, and 5018. The committee further recommends addition of 8 new instructions: 440, 450C, 1248, 2210, 3051, 4560, 4561, and 4606.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 49 additional instructions under a delegation of authority from the council to RUPRO.[2]

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 changes recommended to the council.

New instructions

Two recent cases, *Green v. County of Riverside*[3] and *Hayes v. County of San Diego*,[4] address the issue of the reasonableness of the use of lethal force in law enforcement and the extent to which officers' decisions in the lead-up to the use of force affect the reasonableness determination.

---

[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] 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.

[3] *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363.

[4] *Hayes v. County of San Diego* (2013) 57 Cal.4th 622.

Under *Hayes*, California law differs from federal constitutional and civil rights law on this issue. Proposed new CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements,* presents the standard under California negligence law. Current CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements,* presents the standard under federal law.

Several recent cases[5] address the doctrine of negligent undertaking, which is set forth in the Restatement Second of Torts, section 324A. A negligent undertaking is a variation on the Good Samaritan rule of CACI No. 450A. CACI No. 450A is for use in a case in which the person aided is the injured plaintiff.[6] Proposed new CACI No. 450C, *Negligent Undertaking,* is for use in a case in which the defendant's failure to exercise reasonable care in acting to aid one person has resulted in harm to another person.

Another recent case, *Fiorini v. City Brewing Co., LLC*,[7] discussed Civil Code section 1714.45, which provides an affirmative defense for injury from an inherently unsafe consumer product. Proposed new CACI No. 1248, *Affirmative Defense—Inherently Unsafe Consumer Product,* addresses this statute.

An attorney informed the committee that in preparing for a trial, counsel and court realized that there was no existing *CACI* affirmative defense instruction to respond to CACI No. 2201, *Intentional Interference With Contractual Relations—Essential Factual Elements*. A defense allows the defendant to claim that its conduct was justified if the defendant acted to protect its own financial interest, acted reasonably and in good faith to protect it, and used appropriate means to protect it. The committee proposes new CACI No. 2210, *Affirmative Defense—Privilege to Protect Own Financial Interest*.

An active area of constitutional law is the wrongful, warrantless removal of a child from parental custody by social services. Three 2015 Ninth Circuit cases involved this claim,[8] as well as a 2012 California case.[9] In response, the committee proposes new CACI No. 3051, *Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements*.

For some time, the committee has been looking at the issue of claims involving unlicensed contractors under Business and Professions Code section 7031 for the Construction Law series. But there was no clear indication of any jury role in resolving these cases. But a recent case,

---

[5] See *Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763 and *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214.

[6] See Restatement 2d of Torts, § 323.

[7] *Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306.

[8] *Kirkpatrick v. County of Washoe* (9th Cir. 2015) 792 F.3d 1184; *Watson v. City of San Jose* (9th Cir. 2015) 800 F.3d 1135; *Jones v. County of L.A.* (9th Cir. 2015) 802 F.3d 990.

[9] *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455.

Jeff Tracy, Inc. v. City of Pico Rivera[10] did identify an issue of fact to be resolved by the jury. The committee now proposes two new instructions, CACI No. 4560, *Recovery of Payments to Unlicensed Contractor*, and CACI No. 4561, *Damages—All Payments Made to Unlicensed Contractor*, for use in unlicensed contractor cases.

In release 26 (June 2015), the council approved a new series on Whistleblower Protection (CACI No. 4600 et seq.). The committee now proposes expanding the series with an instruction under Health and Safety Code section 1278.5, which creates a private right of action for a patient or medical professional who was retaliated against for exercising enumerated rights with regard to unsafe conditions in a medical facility. The committee proposes new CACI No. 4606, *Whistleblower Protection—Unsafe Patient Care and Conditions—Essential Factual Elements*.

CACI Nos. 1700–1705: elements of defamation claims

A committee member judge wondered why the CACI defamation instructions did not include an element that the communication was unprivileged. In researching a demurrer on defamation (libel), she realized that CACI No. 1702, *Defamation per se—Essential Factual Elements (Private Figure—Matter of Public Concern)*, did not have an element that the alleged defamatory statement was "unprivileged." She correctly noted that whether or not a statement is unprivileged is an element of a defamation cause of action.[11]

But an element that simply says that the communication was "unprivileged" would mean nothing to a jury. A specific privilege would have to be expressed in plain English.

The privilege that is usually at issue in a defamation case is the common interest privilege of Civil Code section 47(c), which is the subject of CACI No. 1723, *Common Interest Privilege—Malice*. For this privilege, the defense must raise the possible application of the privilege. The plaintiff then has to prove malice to defeat the privilege.[12] If the common interest privilege is alleged, CACI No. 1723 must be given to state the "unprivileged" element of the basic claim.

To better guide the court and counsel with regard to lack of privilege, the interplay between the defamation essential factual elements instructions (CACI Nos. 1700−1705) and CACI No. 1723 is now explained in the Directions for Use to each of the essential factual elements instructions.

CACI No. 2505, *Retaliation—Essential Factual Elements*

Changes are proposed to CACI No. 2505 based on three different sources: a request from a committee member trial judge, a response to 2015 legislation, and a response to a recent unpublished case.

---

[10] *Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510.

[11] *Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118.

[12] *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203.

In *Miller v. Department of Corrections*,[13] the California Supreme Court held that an employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination, even if it is ultimately determined that no violation occurred. The member-judge reported that this situation arises often. She requested that the point be included in the text of the instruction. A new paragraph is proposed at the end of the instruction to set forth this rule.

In *Nealy v. City of Santa Monica*,[14] the court held that activity protected from retaliation does not include a mere request for reasonable accommodation. This holding has now been reversed by statute. In Assembly Bill 987,[15] Government Code section 12940, subdivisions (*l*) (religious accommodation) and (m) (disability accommodation) were amended to make it an unlawful practice

> [f]or an employer or other entity covered by this part to . . . retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

This new rule is now noted in the Directions for Use, and the excerpt from *Nealy* has been removed from the Sources and Authority.

Finally, the recent unpublished case of *Moore v. JMK Golf* [16] had a result that caused the committee some significant concerns. In a FEHA case, the jury failed to grasp the difference between the two causation elements: causation between the protected activity and the adverse action, and that the adverse action was a substantial factor in causing harm.[17] The jury found for the plaintiff on the first causation element, finding that her pregnancy was a motivating reason for her dismissal. But it found that her dismissal was not a substantial factor in causing her harm. This result would seem to be impossible given that lost future income was clearly implicated.

While the difference between the two causation elements is clearly noted in the Directions for Use, the committee wondered if anything more could be done to the instruction itself to avoid this confusion. The committee proposes a small change to the substantial-factor element 5. The element currently reads:

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

---

[13] *Miller v. Department of Corr.* (2005) 36 Cal.4th 446, 473–474.

[14] *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 381.

[15] Stats. 2015, ch. 122.

[16] *Moore v. JMK Golf* (Nov. 18, 2015, H039522) 2015 Cal.App.Unpub. LEXIS 8286.

[17] See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.

The proposed change would make element 5 read:

> 5. That [*name of defendant*]'s [decision to [discharge/demote/[*specify other adverse employment action*] [*name of plaintiff*] was a substantial factor in causing [him/her] harm.

It is hoped that this change will focus the attention of the jury more properly on the ultimate harm from the adverse action.

CACI No. 2334: *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements*

The committee's proposal to revise this instruction generated major controversy, resulting in receipt of over 170 comment letters. This instruction is the subject of a separate report and comment document.

CACI No. 3710: *Ratification*

A judge pointed out that in a 2012 employment harassment case,[18] the court did not give the first element of CACI No. 3710 on ratification. This element requires that the person whose prior acts were subsequently ratified intended to act on behalf of the principal. The judge asked for the committee's thoughts on the court's decision.

The committee concluded that the court was correct in not giving element 1. If in an employment case the claim is that the employer subsequently ratified the harassing conduct of a supervisor or coemployee (such as by refusing to discipline the harasser), the harasser's intent with regard to agency is irrelevant. This point is now made in the Directions for Use.

But the committee also concluded that intent was not actually required in a traditional principal-agent transaction either. According to case law, what is required is that the agent have purported to act on behalf of the principal in making the representation.[19] Element 1 has been revised accordingly.

Some additional changes to the instruction are also proposed. The initial representation must not have been authorized by the principal; otherwise there would be no need for subsequent ratification. While lack of initial authorization is implicit in ratification, the committee has decided to make it explicit in the instruction.

Finally, the principal must have learned all the material facts of the transaction and the agent's role in it before a ratification can be found.[20] This requirement has been added to element 2.

---

[18] *Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258.

[19] *Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73.

[20] *Bate v. Marsteller* (1959) 175 Cal.App.2d 573, 582.

CACI Nos. 4000, 4005, 4013: Lanterman-Petris-Short Act instructions

An Orange County deputy counsel requested changes to three Lanterman-Petris-Short Act instructions. For CACI No. 4000, *Conservatorship—Essential Factual Elements,* the attorney pointed out that there is a split of authority as to whether the third element—that the proposed conservatee is unwilling or unable voluntarily to accept meaningful treatment—must be shown. This element has been made optional and the split is explained in the Directions for Use.

With regard to CACI No. 4005, *Obligation to Prove—Reasonable Doubt,* the attorney argued that the presumption that the proposed conservatee is not gravely disabled (in the first sentence of the instruction) has been undermined by subsequent California Supreme Court decisions. The committee thought that the attorney made a very strong case in support of his position. However, no court has yet expressly stated that there is no presumption. The committee elected to leave the presumption in the instruction, but to present the attorney's argument briefly in the Directions for Use.

Finally, the attorney called the committee's attention to 2015 legislation that significantly changed the standards for disqualifying a conservatee from voting. Instead of "unable to complete an affidavit of voter registration per Elections Code section 2150," it is now "cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process."[21] CACI No. 4013, renamed *Disqualification From Voting,* has been rewritten to reflect the new standards.

Uniform Voidable Transfers Act series (CACI No. 4200 et seq.)

Legislation in 2015 changed the name of the Uniform Fraudulent Transfer Act to the Uniform Voidable Transactions Act and made other changes throughout the act.[22] The primary substantive thrust of the legislation was to take the emphasis off of fraud in order to set aside a transfer that prejudiced creditors. Instead of "fraudulent," the transfer is now just "voidable."[23]

The legislation actually made few changes that affected jury instructions. The required changes to *CACI* are more cosmetic than substantive. Nevertheless, in response to the legislation, some changes have been made to all of the instructions and verdict forms in the series.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 25 to March 4, 2016. Comments were received from 179 different commentators. Of these, 168 expressed opposition to the proposed changes to CACI No. 2334. Of these 168, 97 letters were

[21] See Sen. Bill 589, Stats. 2015, ch. 736.

[22] See Sen. Bill 161, Stats. 2015, ch. 44.

[23] Nevertheless, fraud remains as one of the grounds to void a transfer. See Civ. Code, § 3439.04(a)(1); CACI No. 4200, renamed *Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements*.

identical except for the identity of the commentator;[24] 21 were almost identical, but contained slight variations; and 50 were different letters drafted by the commentators. There were three letters generally supporting the changes to CACI No. 2334. Only 12 commentators addressed instructions other than CACI No. 2334.

The committee evaluated all comments and, as a result, revised some of the instructions, including CACI No. 2334. Two instructions, proposed new CACI No. 2548, *Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing*, and current CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*, were dropped from the release based on the comments. Two commentators on CACI No. 2548 raised numerous concerns and issues that the committee had not considered. With regard to CACI No. 3040, a commentator called the committee's attention to the fact that the Ninth Circuit had granted review en banc for the case that had caused the committee to revise the instruction. These instructions will be considered again in the next release cycle.

A chart summarizing all comments received on the instructions (except CACI No. 2334) and the committee's responses is attached at pages 10–46. A separate document summarizing the comments received on CACI No. 2334 and the committee's responses is attached to the committee's supplemental report on that instruction.

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. The proposed new and revised instructions are presented to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish a supplement to the 2016 edition 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.

[24] This is a template letter that the Consumer Attorneys of California sent to their members with a request to forward it on to the committee.

Attachments

1. Chart of comments, at pages 10–46
2. Table of Contents and CACI instructions at pages 47-201

Instruction	Commentator	Comment	Committee Response
426, *Negligent Hiring, Supervision, or Retention of Employee*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Some of the brackets in the instruction appear to be misplaced. In element 2, we would delete one of the opening brackets before "was" and the closing bracket after "incompetent," so it reads: "That [*name of employee*] [was/became] [unfit/ [or] incompetent/*other particular risk*] to perform the work for which [he/she] was hired;	There is a bracketing error, which has been corrected. The "other particular risk" is an alternative to all of the words currently in the element, including "to perform the work for which s/he was hired.
		In element 3, we would delete one of the opening brackets before "was," the closing bracket after "incompetent," one of the opening brackets before "unfitness," and the closing bracket after "incompetence," so it reads: "That [*name of employer defendant*] knew or should have known that [*name of employee*] [was/became] [unfit/ [or] incompetent/*other particular risk*] and that this [unfitness/ [or]incompetence/*other particular risk*] created a particular risk to others;"	The bracketing depends on whether the "other particular risk" can be expressed in words that don't require "was/became." In the first instance in element 3, for the other risk, one could want "had a propensity for molesting students." That doesn't follow from was/became," so it is bracketed correctly. Because the second instance does not follow "was/became," the "other particular risk" would have to be expressed as a single noun. So the bracketing has been changes as suggested.

Instruction	Commentator	Comment	Committee Response
		In element 4, we would delete one of the opening brackets before "unfitness" and the closing bracket after "incompetence," so it reads: "That [*name of employee*]'s [unfitness/ [or] incompetence/*other particular risk*] harmed[*name of plaintiff*]; and" We believe that these modification are consistent with element 5 where there are no double brackets around "[hiring/ supervising/ [or] retaining].	The bracketing has been changed as suggested. There is no structural similarity between elements 2. 3, and 4 on the one hand, and element 5 on the other.
		We suggest adding authority to the Sources and Authority supporting the addition of the optional language "other particular risk."	The case that led the committee to propose this change was depublished. Nevertheless, the committee believes that other risks are possible besides unfitness and incompetence.
440, *Unreasonable Force by Law Enforcement Officer*	Misha D. Igra, Supervising Deputy Attorney General, California Department of Justice	As written, the Directions for Use explain that sections (a) through (c) of the proposed new jury instruction are referred to as the "*Graham* Factors." The proposed factor (d), relating to the officer's conduct leading up to the need for force, should also track *Graham v. Connor* (1989) 490 U.S. 386. Specifically, that case provides that "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the	The committtee declines to make this change because the proposed revised language is not balanced; it overly emphasizes the law enforcement position.

Instruction	Commentator	Comment	Committee Response
		scene, rather than with the 20/20 vision of hindsight." (*Graham*, 490 U.S. at 396.) The High Court instructed that "reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." (*Id.* at 396-397.) Proposed Alternative Language: factor (d) should be revised as follows: [(d) [Name of defendant]'s tactical conduct and decisions before using [deadly] force on [name of plaintiff], <u>allowing for the fact that peace officers are forced to make split-second judgments in uncertain situations about the amount of force that is necessary</u>] This revision is consistent with the sources and authority cited in support of the new instruction. "The most important of these [Graham factors, above] is whether the suspect posed an immediate threat to the officers or others, *as measured objectively under the circumstances*." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [emphasis added].)	

Instruction	Commentator	Comment	Committee Response
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree, except we would delete the word "reasonably" in factor (a) as superfluous.	The committee sees the commentator's point. But "reasonably" is also used in *Graham* factor 1 in CACI Nos. 1305, *Battery by Peace Officer*, and 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*. The committee prefers that the three instructions be worded the same. The point is not sufficiently important to change all three instructions.
450C, *Negligent Undertaking*	Orange County Bar Association, by Todd G. Friedland, President	Elements should more closely track the language of the elements from *Paz v. State of California* (2000) 22 Cal.4th, 550, 553, 559 and Restatement 342A, especially elements one and two. The new instruction uses the terms "steps" but I only find the term "steps" one time in the *Paz* case. There is no use of the term "steps" in the Restatement Second of Torts, and none in the section of *Paz* case where the elements are stated. I think using the term "steps" is more confusing than using the terms actions or services. Suggested revised version:	The committee agrees that "took steps," while a better plain-English expression, is not quite accurate. "Rendered services" is a narrower concept. The committee has made this change.

Instruction	Commentator	Comment	Committee Response
		"[*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 in taking action or rendering services to others. 1. That [*name of defendant*] voluntarily, or for a charge, took action or rendered services for another; 2. That [*name of defendant*]'s actions or services were of a kind that [*name of defendant*] should have recognized as needed for the protection of [*name of third person*] including [*name of plaintiff.*]; 3. That [*name of defendant*] failed to exercise reasonable care in the actions taken or services provided; (and) "5.[(b) That [*name of defendant*]'s actions or services were done to perform a duty that [*name of defendant*] owed to third persons including [*name of plaintiff*];] [(c) That [*name of plaintiff*] suffered harm because [*name of third person*] or [*name of plaintiff*] relied on [*name of defendant*]'s actions or services. Elements 4 and 5(a) unchanged.	

Instruction	Commentator	Comment	Committee Response
1123, *Affirmative Defense—Design Immunity*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We consider both the proposed new optional language "[its/specifically delegated]" in element 1 and the proposed new third paragraph in the Directions for Use confusing and unnecessary, so we would delete them. Current element 1 adequately states the requirement that the body or employee must have exercised discretionary authority. One cannot exercise discretionary authority that one does not have. The proposed optional language and the proposed new paragraph in the Directions for Use explaining how to select between "its" and "specifically delegated" seem to suggest that only a governing body can have its own discretionary authority, and any other body or employee can have only discretion specifically delegated, presumably by a governing body. The authorities cited in the Sources and Authority do not seem to support this proposition.	The committee does not find the language confusing. It is an effort to express "vested" and to explain that authority cannot be implied.
2020, *Public Nuisance*, and 2021, *Private Nuisance*	Orange County Bar Association, by Todd G. Friedland, President	The proposed revisions to Instructions 2020 and 2021 are being proposed based on two cases from the 1940s, and thus it is unclear why these changes now.	The proposed revisions are in response to a request from an attorney who had a case that involved a fire hazard, but no fire had happened yet.
		The proposed revisions are too limiting, and incorrectly condition the "fire hazard" or "potentially dangerous condition" on being hazardous or	The essence of a private nuisance (CACI No. 2021) is interference with the plaintiff's land.

Instruction	Commentator	Comment	Committee Response
		dangerous to "plaintiff's property." This is a misstatement of the law. Propose the following alternative language: "[was/is] a hazard or other dangerous or deleterious condition."	So removing that qualifier in 2021, would not be right. The essence of a public nuisance (CACI No. 2020) is a condition that is harmful (or potentially so) to a substantial number of people. But element 6 requires that the plaintiff suffer harm different from that suffered by the general public. So there has to be some particular danger to the plaintiff. Hence, no change should be made to 2020 either.
		Change the first option for element 2 in the existing instructions as follows: "was/is harmful to health, including but not limited to the illegal sale of controlled substances, so as not to interfere with the comfortable enjoyment of life or property [or]."	The committee does not find this more specific language to be appropriate.
		The second option should similarly be changed to read as follows: "was/is indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life or property."	Interference with the enjoyment of property is expressed in element 3 of both instructions.

Instruction	Commentator	Comment	Committee Response
		Last, the third condition should be modified by changing the word “was” an obstruction to “was/is” an obstruction.	The committee does not see a need for both “was” and “is.”
2332, *Bad Faith (First Party)—Failure to Properly Investigate Claim−Essential Factual Elements*	Montie S. Day, Attorney at Law, Williams	The words "prompt", "promptly," and "delaying," as used in several subsections of Insurance Code Section 790.03(h) describing deceptive insurance claims practices, have actual and significant meaning. I have been dealing with the fact that in the automobile insurance cases, the insurance company delays and refuses to "promptly" conduct the proper investigation and uses such deceptive claim tactic for the purpose of continuing to damage unless the claimant accepts the settlement offer and/or settles the case for a "lowball" figure. I suggest the following modification be made to add the words necessary to complete the instruction: A. In the first paragraph, add the word “promptly” so that it reads: “promptly conduct a proper investigation," or, in the alternative: "failing to conduct a prompt and proper investigation ... " B. In element "3," add the word “prompt” so that it reads: "unreasonable failed to promptly conduct a full, fair and through investigation ... "	The committee agrees that section 790.03(h) can be support for what a proper investigation requires. “Prompt” has been added to element 3. The committee does not believe any change is needed to the opening paragraph. The opening paragraph requires a “proper” investigation. Element 3 refines what is needed for “proper.”

Instruction	Commentator	Comment	Committee Response
	Professor Kenneth S. Klein, California Western School of Law	The jury instruction misstates the law. The change that the Advisory Committee is considering collapses "unreasonably" and "without proper cause" into a single inquiry. Decades of appellate decisions in California hold that an insurer is liable for "bad faith" if acts "unreasonably" or "without proper cause." (*See, e.g., Jordan v. Allstate Ins. Co.* {2007) 148 Cal.App.4th 1062, 1072.) An insurer need not "act without proper cause" and behave "unreasonably" in order to establish liability. Yet, the proposed instruction eliminates this meaningful distinction without any supporting authority.	See response to United Policyholders, below and *Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [Croskey, J.].)
		I can verify the following from personal experience: Most insurance companies handle most insurance claims fairly and ethically. Some insurance companies, however, handle some insurance claims in bad faith. This is because doing so increases profits. The profit motive to handle insurance claims in bad faith increases with every incremental step eliminating bad faith exposure or increasing the threshold for a successful assertion of bad faith. These proposed revisions incentivize more bad faith claims handling.	Whether or not the commentator is correct in his description of how insurance companies operate, these are policy arguments, which are not considerations in drafting jury instructions.
	Orange County Bar Association, by Todd G.	Change first paragraph to "[*Name of plaintiff*] claims that [*name of defendant*] breached the obligation of good faith and fair dealing and acted unreasonably by	This language has been restored to the opening paragraph.

Instruction	Commentator	Comment	Committee Response
	Friedland, President	failing to conduct a proper investigation of [his/her/its] claim."	
		Change element 2 from "That [*name of plaintiff*] filed a claim" to "That [*name of plaintiff*] filed <u>or presented</u> a claim" to make it clearer.	The committee agreed with the comment and has changed "filed" to "presented a claim."
		Change element 3 to delete the word "unreasonably" because the unreasonable conduct IS failing to properly investigate the claim.	The committee also agreed with this comment and has removed "unreasonably" from element 3.
		Last paragraph, sentence: "To act or fail to act 'unreasonably' means that the insurer had no proper cause for its conduct." should be changed to "[*Name of defendant*] acted, or failed to act, "unreasonably" if [*name of defendant*]'s conduct was without proper cause.". This change is suggested to make the instruction more understandable and clear.	The committee does not find the proposed change to improve clarity.
		The proposed instruction fails to include as an element of the cause of action that the claim was timely filed and filed in compliance with claims procedures contained in the policy: (*See Shoppers Inc. v. Royal Globe Insurance Co.*) or that the insured made a good faith effort to comply with the claims procedures. (*Paulfrey v. Blue Chip Stamps*) [both included in the Sources and Authority to the instruction.]	The committee has added "properly" to element 2. The insured must "properly present" a claim to the insurer.
		This omission is also in 2331 on which we have not been asked to comment but	These instructions were revised (or in the case of

Instruction	Commentator	Comment	Committee Response
		which has been revised. [as have 2330, 2336, 2337 & 2351 (new) on which we have also not been asked to comment.] 2336 element 3 does contain the word "timely" in conjunction with providing notice of a lawsuit.	2351, added) in the last release. Element 2 of 2331 requires notice to the insurer.
		Element 3 parrots the words "full, fair and thorough investigation of all of the bases of" [the claim] from *Jordan v. Allstate*. Other courts have simply required a thorough or proper investigation into relevant facts. The concern is that this language could mislead the jury that all stones must be uncovered or the carrier faces liability for bad faith.	The committee believes that all of the "stones" "full," "fair," and "thorough" (and now "prompt" also) do need to be uncovered.
	United Policyholders, by David B. Goodwin	For the second year in a row, the proposed CACI revisions seek to obscure the distinction in California law that permits an insurer to be found liable on a "bad faith" claim for acting "unreasonably" or "without proper cause." CACI No. 2332—as amended in December 2015, over United Policyholder's objection—conflated these two separate and distinct standards by stating that an insurer can be found to have "acted unreasonably, that is, without proper cause" where it fails to conduct an adequate investigation of an insured's claim. That test has no appellate authority whatsoever supporting it, and is contrary to more than two dozen published California appellate decisions.	The commentator's argument that "unreasonably" and "without proper cause" are two separate tests was considered and rejected in the previous release. "[L]iability in tort arises only if the conduct was unreasonable, that is, without proper cause." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [Croskey, J.].)

Instruction	Commentator	Comment	Committee Response
		CACI No. 2332 as proposed to be revised inserts as essential factual elements of a bad faith claim for failure to properly investigate a claim that (1) the insured have "filed" a "claim to be compensated" and (2) that the insurer "unreasonably" failed to investigate this claim. The former is confusing—a policyholder "gives notice" of a claim or "tenders" it, but does not "file" a claim; a lay juror could easily decide to reject liability under the mistaken assumption that the policyholder failed to perfect the claim because no "filing" of a claim was involved.	As noted above, the committee agreed and has changed "filed" to "presented."
		Element 3: Delete "unreasonably." Final paragraph: Delete sentence stating "To act or fail to act 'unreasonably' means that the insurer had no proper cause for its conduct." The proposed revision to CACI No. 2332 further misstates California law by stating in element 3 that one of the essential factual elements of bad faith for failure to properly investigate an insured's claim is that the insurer "*unreasonably* failed to conduct a full, fair, and thorough investigation of all of the bases of" the insured's claim. California law does *not require that the insurer's failure to investigate the insured's claim be unreasonable* to	As noted above, the committee agreed and removed "unreasonably" from element 3 and the language from the last paragraph.

Instruction	Commentator	Comment	Committee Response
		maintain a claim for bad faith. None of the cases cited in the "Sources and Authority" section stands for such a requirement. These cases hold only that an insurer cannot reasonably and in good faith reject an insured's claim without conducting an investigation – with no mention made of the basis for failing to so investigate, or any additional requirement of unreasonableness. (See, e.g., *Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 819.) The only case cited that arguably supports the proposed language is *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880, in which the Court of Appeal wrote in dictum that "[a]n unreasonable failure to investigate amounting to such unfair dealing *may* be found when an insurer fails to consider, or seek to discover, evidence relevant to the issues of liability and damages." This language describes one situation in which a court may conclude that an insurer unreasonably failed to investigate, but falls well short of imposing the burden set forth in the proposed amended jury instruction, that the failure to investigate be unreasonable in order to maintain a claim of bad faith in all instances. Indeed, in that case the court did not rest its ultimate finding of bad faith on any "unreasonable" motivation for the failure to investigate, but instead on the insurer's	

Instruction	Commentator	Comment	Committee Response
		mere failure to conduct a reasonable investigation. Id. at 882.	
2505, *Retaliation—Essential Factual Elements*	California Employment Lawyers Association, by David M. deRubertis	The proposed addition does not link the "reasonable belief' standard to the element it actually relates to (protected activity); rather, it makes it seem as if this concept of "reasonable belief' is not part of the protected activity element. More specifically, by stating "If [***name of plaintiff***] **establishes the elements above,** [he/she] does not have to prove [discrimination/ harassment/*specify other protected activity*] in order to be protected from retaliation," the bolded portion of the proposed instruction suggests to the jury that the "reasonable belief' concept is only considered if and after the jury determines all elements (including protected activity) are met. This is an incorrect analysis. The "reasonable belief standard is part of the protected activity requirement; that is, it is embedded within element one. To properly instruct the jury that "reasonable belief' is part of the protected-activity analysis, the proposed addition could be re-written as follows (with our proposed changes in bold): **To establish that [*name of plaintiff*] [*describe protected activity*],** [he/she] does not have to prove [discrimination/harassment/[*specify other protected activity*]] in order to be	The committee partially agrees with the comment. "If [*name of plaintiff*] establishes the elements above," has been deleted from the instruction**.** The committee does not find it necessary or helpful to include "**To establish that [*name of plaintiff*] [*describe protected activity*]**."

Instruction	Commentator	Comment	Committee Response
		protected from retaliation. If [he/she] [reasonably believed that [*name of defendant*]' s conduct was unlawful/requested a [disability/religious] accommodation, [he/she] may prevail on a retaliation claim even if [he/she] does not **present or prevail** on a separate claim for [discrimination/harassment/*other*].]	
		We suggest including the bold text of "present or prevail" to cover situations in which the plaintiff does not present the underlying harassment or discrimination claim to the jury, but only presents a retaliation claim. The language "prevail on a separate claim for [discrimination/harassment]" would be appropriate if such a claim were actually submitted to the jury. But, if no such claim is submitted to the jury (either because it was not pursued by the plaintiff, was dismissed voluntarily or was adjudicated pre-trial by the court), then only stating "prevail" suggests to the jury that the plaintiff did pursue (but lost) such a claim. That would be improper as an instruction.	The committee has added “present” to the instruction.
		The citation found in the "Sources and Authority" to *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 381 should be removed. The Legislative amendments to Government Code section 12940(m)(2) effectively overruled this part of *Nealy*.	The excerpt from *Nealy* has been removed.

Instruction	Commentator	Comment	Committee Response
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The instruction is revised in accordance with subdivisions (*l*)(4) and (m)(2) of the statute, so we would add those two subdivisions to the citation in the title.	It is not necessary that the title include every relevant statute. The statute that creates the cause of action is sufficient.
		We believe that element 5 should refer to the actual discharge or demotion as a substantial factor rather than the decision as a substantial factor: "That [~~*name of defendant*~~]'s [~~decision to~~ the [discharge/demotion/[*specify other adverse employment action*]] [~~*name of plaintiff*~~] was a substantial factor in causing [*name of plaintiff*]'s [~~him/her~~] harm.	The committee does not find the suggested revision to be an improvement.
		We would change "*specify other protected activity*" within brackets in the second line of the final paragraph to "specify other unlawful activity" because the bracketed language should refer to the discrimination, harassment, or other unlawful activity rather than the plaintiff's protected activity	The committee believes that "unlawful" is a broader word that what is protected by the FEHA.
		The proposed new sentence in the first paragraph in the Directions for Use refers to retaliation or discrimination against a person for requesting "a reasonable accommodation," but subdivisions (*l*)(4) and (m)(2) prohibit retaliation against a person for "requesting accommodation." We would delete the word "reasonable." This is consistent with the final sentence in the instruction, which refers to	The committee has made the proposed change.

Instruction	Commentator	Comment	Committee Response
		requesting "a [disability/religious] accommodation" without the need to show that the requested accommodation was a reasonable accommodation.	
		We suggest adding to the Sources and Authority the following quotation from *Yanowitz v. L'Oreal, USA, Inc.* (2005) 36 Cal.4th 1028, 1043, which we find particularly clear and succinct: "It is well established that a retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA."	The Sources and Authority include an excerpt from *Miller v. Department of Corr.* (2005) 36 Cal.4th 446. 473–474 that makes this point.
		We believe that the quoted language from *Nealy v. City of Santa Monica* (2015) 235 Cal.App.4th 359, 381, is no longer good law in light of recent amendments to Government Code section 12940 prohibiting retaliation because of a request for a disability or religious accommodation, as reflected in the revised instruction.	The language has been deleted
2506, *Limitation on Remedies—After-Acquired Evidence*	California Employment Lawvers Association, by David M. deRubertis	CELA supports the proposed changes.	No response is necessary.
	State Bar of California, Litigation	The proposed revisions change this instruction from an affirmative defense to a limitation on remedies, according	It is not clear if the commentator wants the instruction revoked or

Instruction	Commentator	Comment	Committee Response
	Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	to the title, but the instruction itself is unchanged and does not inform the jury what to do if it finds the three elements are satisfied. The last sentence in the first paragraph in the Directions for Use seems to state that it is not clear how this instruction should be used. In our view, this instruction and the Directions for Use lack sufficient guidance for either the jury or counsel and the court, and should be withdrawn until the law is more certain.	just the changes deferred. An affirmative defense means a bar to liability. That is not the case with this instruction. After-acquired evidence limits the employee's possible recovery, but is not a complete defense to liability. The uncertainty is over whether it is the court or the jury that determines what damages are barred by after-acquired evidence. That does not impact the determination of whether the elements of the limitation have been established.
		The first sentence in the Directions for Use states that the doctrine of after-acquired evidence is an equitable defense. In light of the rule from *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 430-431, that the doctrine is not a defense to liability, we consider it more accurate to state that the doctrine can limit remedies. Accordingly, we suggest the following	It is not clear from the comment why a revision is requested. The proposed revision is not in plain English.

Instruction	Commentator	Comment	Committee Response
		modifications to the first sentence in the Directions for Use: "The doctrine of after-acquired evidence doctrine is an equitable defense that is determined by the court based on the facts of the case can limit available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. (*Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1172-1173.)"	
2512, *Limitation on Remedies—Same Decision*	California Employment Lawvers Association, by David M. deRubertis	CELA supports the proposed changes.	No response is necessary.
2548, *Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing*	California Apartment Association, by Heidi Palutke, Research Counsel	Two Separate Instructions for Reasonable Modification and Reasonable Accommodation are Necessary. A reasonable accommodation is distinct from a reasonable modification in that a modification is a structural change's to a tenant's dwelling and an accommodation is an exception to the established policies, procedures or services of the housing provider.	The committee finds that the various comments on this instruction raise important points that have not been considered. Therefore, the committee is withdrawing this instruction from this release. It may be returned to the agenda for the next release cycle.

Instruction	Commentator	Comment	Committee Response
		Element #3 should refer to a "disability", not a "physical condition" since the law protects persons with disabilities, not "conditions" and also applies to mental disabilities.	See response above
		In the case of a "reasonable modification" element #8 should read "That [*defendant*] refused to allow this modification." The proposed text reads "refused to make this accommodation." This is correct in the case of reasonable accommodations, but not modifications.	See response above
	The Law Foundation of Silicon Valley the law firm of Brancart & Brancart, Pescadero the Los Angeles Housing Rights Center California Rural Legal Assistance the Legal Aid Foundation of Los Angeles National Housing Law Project	Courts Look To Cases Construing Federal Fair Housing Laws When Interpreting The Fair Employment And Housing Act. An excellent explication of the reasonable accommodation and reasonable modification provisions of the FHA are set forth in the Joint Statement of the Department of Housing and Urban Development And the Department of Justice on Reasonable Accommodations under the Fair Housing Act (May 17, 2004) ("Joint Statement on Reasonable Accommodations") and the Joint Statement of the Department of Housing and Urban Development And the Department of Justice on Reasonable Modifications under the Fair Housing Act (March 3, 2008), both of which are available on the Department of Justice's website, https://www.justice.gov/crt/us-department-housing-and-urban-	See response above

Instruction	Commentator	Comment	Committee Response
	Inner City Law Center Campbell & Farahani, Los Angeles The Law Office of Michelle Uzeta, Monrovia Western Center on Law and Poverty Neighborhood Legal Services of Los Angeles County Disability Rights California	development. Both would be helpful references in the Source and Authority section.	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	This instruction should be appropriate for both rental housing and condominiums, so we would delete the word "rental" in element 1.	See response above
		We would make elements 6 and 7 optional by using brackets in the instruction and in the Directions for Use explain when to give those elements.	See response above
3020, *Excessive Use of Force—Unreasonabl*	Misha D. Igra, Supervising Deputy Attorney General, California	As written, the Directions for Use explain that factors (a) through (c) are referred to as the "*Graham* Factors." Factor (c) is constraining, applicable only to active resistance or attempted flight. The	Factors a-c are presented as stated in *Graham*. There is no reason to expand them

Instruction	Commentator	Comment	Committee Response
e Arrest or Other Seizure—Essential Factual Elements	Department of Justice	myriad of situations faced by peace officers that may give rise to an application of force is not so limited, and so the instruction should expressly allow for a wider range of circumstances.	beyond the current language.
		Factor (d) provides only [*specify other factors particular to the case*]. Before turning to this catch-all provision, the model instruction should track the directive from *Graham v. Connor* (1989) 490 U.S. 386, that the "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham*, 490 U.S. at 396.) The High Court instructed that "reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." (*Id.* at 396-97.) Proposed Alternative Language Factors (c) and (d) should be revised and added as follows: (c) Whether [~~name of~~ plaintiff]'s conduct necessitated a use of force to [gain compliance or control of the plaintiff]/[to protect others from risk of harm] ~~was actively [resisting [arrest/detention]/ [or]~~	The proposed language overly emphasizes the law enforcement position.

Instruction	Commentator	Comment	Committee Response
		~~attempting to avoid [arrest/detention] by flight~~][./; and] [(d) [Name of defendant]'s efforts to temper the severity of a forceful response, allowing for the fact that peace officers are forced to make split-second judgments in uncertain situations about the amount of force that is necessary] [(e) [specify other factors particular to the case]. This revision is consistent with the sources and authority cited in support of the proposed instruction, including *Graham*. "If the officers' conduct required a reaction to fast-paced circumstances presenting competing public safety obligations, the plaintiff must prove intent to harm. (See *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372.) And, "[plaintiff] was required to prove that the officers acted with a purpose to cause harm to her son." (*Green*, *supra*, 238 Cal.App.4th at p. 1372.)	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We would clarify the first sentence in the third paragraph in the Directions for Use as follows: "~~Additional considerations and verdict form questions will be needed~~ The instruction needs to be modified if there is a question of fact . . . ."	The committee now prefers not to simply suggest that an instruction "may need to be modified." Suggesting "additional considerations and verdict form questions"

Instruction	Commentator	Comment	Committee Response
			gives the user more specific information on the issue that may require some modifications.
		We believe that the proposed new fourth paragraph in the Directions for Use goes further than it should by identifying an issue and seeming to offer an answer by citing two statutes, while stating that the answer is unknown. We would delete this paragraph and wait for a case on point.	The committee believes that it is part of its charge to point out unresolved issues. If a case involves the issue, the committee believes that bench and bar would like the issue flagged.
		The proposed new bullet point in the Sources and Authorities quoting *Scott v. Harris* (2007) 550 U.S. 372, 381, footnote 8, relates exclusively to summary judgment and is not relevant to jury instructions given at trial, so we would delete this bullet point.	This language suggests that the US Supreme Court may view the ultimate issue of reasonableness as one of law. The committee believes that CACI users might want to know that.
3021, *Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that the jury should be instructed on the probable cause requirement only if the jury is also instructed that the court will decide that issue, so the jury does not decide for itself whether there was probable cause. We therefore would make the language "and without probable cause" in element 1 optional:	The committee agreed and has made this change.

Instruction	Commentator	Comment	Committee Response
		"That [*name of defendant*] arrested [*name of plaintiff*] without a warrant [and without probable cause]:"	
		We would explain in the Directions for Use that this optional language should be given only if the optional paragraph at the end of the instruction is given.	The committee agreed.
		We would modify the optional paragraph at the end of the instruction for clarity as follows: "~~[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] was arrested without probable cause.~~ The plaintiff must also prove that [*name of defendant*] arrested [name of plaintiff] without probable cause. The trial judge, rather than the jury, must decide if [name of defendant] arrested [name of plaintiff] without probable cause. But in order for me to do so, you must first decide:"	The committee sees no improvement with the suggested revised language.
3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with the revision to this instruction. But note that The Ninth Circuit Court of Appeals granted an en banc hearing in *Castro v. County of Los Angeles* (9th Cir. 2015) 797 F.3d 654 on December 28, 2015, so the prior opinion should not be cited in the Directions for Use and Sources and Authority.	Based on the grant of hearing en banc in *Castro*, the committee has elected not to proceed with changes to this instruction at this time.

Instruction	Commentator	Comment	Committee Response
3051, *Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements*	Shawn A. McMillan, Attorney at Law, San Diego	In addition to the proposed new CACI Instruction 3051, you should also craft a new instruction covering circumstances in which government actors present false or misleading evidence to the courts. This is a common occurrence for which no current jury instruction exists. (See *Marshall v. Cty. of San Diego* (2015) 238 Cal.App.4th 1095, 1115.) My firm, and others in the state, regularly litigate and try these "judicial deception" cases. See, e.g., *Fogarty-Hardwick v.Cty. of Orange*, No. G039045, 2010 Cal. App. Unpub. LEXIS 4436, at *10 (Ct. App. June 14, 2010).	This suggestion will be considered in the next release cycle.
		Jury instruction 3051, should be paired with a "nominal" damages instruction. At a minimum, a due process violation gives rise to a constitutional injury. Thus, where the only harm is a technical violation of one's constitutional rights, the jury should be advised that it may award nominal damages.	The committee does not think it likely that a jury instruction will be needed if only nominal damages are available.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We would substitute "[*name of plaintiff*]" for "[his/her]" twice in the first line of the instruction for greater clarity.	The committee agreed with once but not twice. The first "[his/her]" follows "name of defendant" so that is technically ambiguous (though there could be no actual confusion given the context). Once the name of the plaintiff is entered for

Instruction	Commentator	Comment	Committee Response
			the first "[his/her]", there is no ambiguity about "[his/her]" in the second spot.
		We would substitute "[*name of defendant*]" for "[he/she] in the second line for the same reason.	The committee agreed and has made the change.
3060, *Unruh Civil Rights Act—Essential Factual Elements*	Inner City Law Center	ICLC strongly supports the addition of "citizenship/primary language/immigration status" to the list of enumerated characteristics in the Unruh Act instruction. This change will bring the instruction into line with the text of the Unruh Act itself (Civil Code section 51). It will also significantly clarify for jurors the range of characteristics that are actionable under the statute. Making this change will help ensure that factfinders fairly evaluate claims of discrimination on the basis of immigration status and primary language.	No response is necessary.
3710, *Ratification*	California Employment Lawvers Association, by David M. deRubertis	CELA supports the proposed changes.	No response is necessary.
	Orange County Bar Association, by Todd G. Friedland, President	In subpart 1, the words "although not authorized to do so" are confusing and unnecessary. We propose deleting that partial sentence.	Ratification comes into play if there was initially no express authority for the agent to do the act. So it is an essential part of the instruction.

Instruction	Commentator	Comment	Committee Response
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The plaintiff may claim both that the defendant had authorized the agent to act on the defendant's behalf and, alternatively, that the defendant ratified the agent's conduct after the fact. The language "although not authorized to do so" in element 1 would contradict the first part of such a claim, and we believe this language is unnecessary in these instructions. We would delete this language.	This instruction is not for use if there was direct authorization.
		Element 3 largely repeats element 2. We could consolidate the two elements by deleting element 3 and modifying element 2 as follows: "That [*name of defendant*] learned of all the material facts involved in [*name of agent*]'s conduct after it occurred;"	The two elements address two different things. Element 2 means that the principal learned what the agent had done. Element 3 means that the principal learned all of the surrounding facts leading to why the agent did what s/he did. But the committee does see how the two elements might be confusing to the jury and has combined them in a similar, but slightly different way from that suggested.
		The second sentence in the final paragraph refers to the defendant's conduct, which occurred in the past, so	The committee thinks that the present tense is best. The paragraph is explaining what

Instruction	Commentator	Comment	Committee Response
		we would change "keeps" to "kept" and "learns" to "learned" as follows: "Approval can be inferred if [*name of defendant*] voluntarily ~~keeps~~ kept the benefits of [*name of agent*]'s unauthorized conduct after [he/she/it] ~~learns~~ learned of it."	constitutes approval, not referring to the particular events in the case.
3923, *Public Entities—Collateral Source Payments*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We would change "shall" to "must" in both the first line and the second line of the instruction. The word "may" in the second line could suggest some discretion, when the statement should be clearly mandatory.	"May" could suggest discretion. "May not" does not.
		We also suggest adding language to clarify the meaning of "speculate," which is not a common word for many jurors, and "benefit," and would modify the final sentence for clarity: "You must award damages in an amount that fully compensates [*name of plaintiff*] for [his/her/its] damages in accordance with instructions from the court. You ~~may~~ must not speculate, wonder, guess, or consider any other possible sources of money or benefit that [*name of plaintiff*] may have received for [his/her/its] harms. After you have returned your verdict the court will make whatever adjustments are necessary in this regard."	The language of this instruction is compelled by Government Code 985(j). The committee is comfortable with minor changes to replace "shall" with "must," and to change "plaintiff" to "[*name of plaintiff*]" per CACI standards. The committee is not comfortable with any further changes from the statute.

Instruction	Commentator	Comment	Committee Response
4005, *Obligation to Prove—Reasonable Doubt*	Orange County Bar Association, by Todd G. Friedland, President	The "Directions for Use" are confusing and not (*sic*) unhelpful. The first paragraph of CACI 4005 correctly states that in LPS proceeding, the LPS respondent is presumed to not be gravely disabled. (See *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1340; *Conservatorship of Walker* (1988) 196 Cal.App.3d 1082, 1099.) However, the Directions for Use suggest that this principle "is perhaps open to question" and cite *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 for this proposition on a theory that "an LPS respondent is not entitled to all of the same protections as a criminal defendant." However, that case only held that the appellate review procedures under *Wende* and *Anders* are not applicable in LPS proceedings as they are in criminal cases. Because *Conservatorship of Ben C.* did not address the burden of proof, it is confusing and misleading for the "Directions for Use" to suggest that it undermined that principle as articulated in *Conservatorship of Walker* and *Conservatorship of Law*. "[C]ases are not authority for propositions not considered …." (*People v. Brown* (2012) 54 Cal.4th 314, 330.)	The committee received a very well-crafted argument that *Walker* and *Law* are no longer good law. This commentator disagrees with that argument. While jury instructions should not be revised based solely on well-crafted arguments, the committee does believe that it is worth of mention in the Directions for Use.
4200, *Actual Intent to*	Orange County Bar Association,	At the first Use Note paraphrasing Civil Code section 3439.04(a)(1), it is	The committee disagrees. "Any" is a

Instruction	Commentator	Comment	Committee Response
Hinder, Delay, or Defraud a Creditor—Essential Factual Elements	by Todd G. Friedland, President	suggested that "any" rather than "a" be used in the phrase ". . . with actual intent to hinder, delay, or defraud a creditor," to reflect the language and sense of the statute. Accordingly, the phrase would read, "… with actual intent to hinder, delay, or defraud <u>any</u> creditor."	very good statutory word. That does not make it a good jury instructions word.
4205, *"Insolvency" Explained*	Orange County Bar Association, by Todd G. Friedland, President	At the second paragraph of the Use Note, first sentence, to make it more accurate, it is suggested the sentence be redrafted as follows: "Property, <u>the transfer of which</u> is potentially voidable under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), is to be excluded from the computation of the debtor's assets for purposes of determining insolvency."	The committee agreed and has made this change.
4560, *Recovery of Payments to Unlicensed Contractor*	Orange County Bar Association, by Todd G. Friedland, President	At line one of the introductory paragraph, add "applicable to the services being performed" after the term "valid contractor's license."	While the proposed addition may technically be more accurate, the committee finds it to be unnecessary words for an introductory paragraph.
		In the last sentence of the opening paragraph, substitute "each" instead of "both.	There are three elements, so "both" won't work. "All" is the standard word for use with more than two elements.

Instruction	Commentator	Comment	Committee Response
		In element 2, add "applicable to the services being performed" after "valid contractor's license."	The element states "That a valid contractor's license was required *to perform these services*." The committee trusts the jury to understand that if "these services" are for roofing, a plumbing license will not suffice.
		In element three, change to read: "That [*name of defendant*] was compensated for contractor services by the….".	The committee agreed that there is a language problem in element 3. It has to be "performed *for*" and "was compensated *by*."
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We would change "both" in the second sentence to "all" because there are three (not two) required elements.	Agreed and changed
		We would insert "and" after element 2.	Also agreed
		We would modify element 3 as follows for clarity: "That ~~[name of defendant] performed and was compensated~~ [*name of plaintiff*] paid [*name of defendant*] for contractor services ~~for the [name of plaintiff] as required by~~ performed under the contract;"	The committee agreed that the proposed revised language is better.
		We would modify the final sentence as follows for clarity and because we think this instruction should expressly state that the plaintiff is entitled to recover damages (unless the defendant meets its	While finding that the proposed revised language is more words than necessary to get this point across, "at all times" has been moved

Instruction	Commentator	Comment	Committee Response
		burden of proof), and specifically all compensation paid to the defendant. The following instruction (CACI No. 4561) then would only clarify the meaning of "all compensation paid." "~~[Name of defendant] must then~~ If [*name of plaintiff*] proves these three things, [name of plaintiff] is entitled to recover all compensation [he/she/it] paid to [*name of defendant*]. However, plaintiff is not entitled to recover any compensation if [*name of defendant*] proves that while performing these services, [he/she/it] had a valid contractor's license at all times as required by law."	to modify "while performing."
4561, *Damages—All Payments Made to Unlicensed Contractor*	Orange County Bar Association, by Todd G. Friedland, President	At line one, change the language to read: "A person who pays money under a contract to a person or entity acting as a contractor who is not licensed at all times during performance of the particular services may recover all…"	The committee finds the proposed revised language to be more words than needed.
		In the second paragraph, change the language to read: "for services under the contract and that [*name of defendant*] was acting as an unlicensed contractor at any time during…"	The committee finds the proposed revised language to be more words than needed.
	State Bar of California, Litigation Section, Jury	Our proposed revisions to the prior instruction (CACI No. 4560) make the first sentence of this instruction unnecessary, so we would delete it.	The committee disagreed with the proposed revision to 4560.

Instruction	Commentator	Comment	Committee Response
	Instructions Committee, by Reuben Ginsberg, Chair	Language in the second paragraph in the instruction could be misconstrued to mean that the plaintiff has the burden to prove not only that the plaintiff paid money for services under the contract, but also that defendant was unlicensed. We would modify this paragraph to clarify the defendant's burden of proof: "If you decide that [*name of plaintiff*] has proved that [he/she/it] paid money to [*name of defendant*] for services under the contract and that [*name of defendant*] <u>has failed to prove that</u> [*name of defendant*] was ~~un~~licensed at ~~any~~ <u>all</u> times during performance, then [*name of plaintiff*] is entitled to the return of all amounts paid, not just the amounts paid while [name of defendant] was unlicensed. The fact that [*name of plaintiff*] may have received some or all of the benefits of [*name of defendant*]'s performance does not affect [his/her/its] right to the return of all amounts paid."	The committee agreed with the comment and has revised the language to make it abundantly clear that the contractor has the burden to prove the license.
4603, *Whistleblower Protection—Essential Factual Elements*	California Employment Lawvers Association, by David M. deRubertis	CELA supports the proposed changes.	No response is necessary.
	State Bar of California, Litigation	The proposed revision states that the instruction should be modified "if the retaliation is against a family member of	The committee agreed with the comment and

Instruction	Commentator	Comment	Committee Response
	Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	the person who engaged in the protected activity." Strictly speaking, this is correct, but using the words "family member" first to refer to the employee's family member and then to refer to the employee may be confusing. We would revise the final sentence in the first paragraph of the Directions for Use so that "family member" consistently refers not to the employee but to the employee's family member: "Modifications will also be required if the retaliation is against an employee whose family member ~~of the person who~~ engaged in the protected activity."	has made the proposed change.
4606, *Whistleblower Protection—Unsafe Patient Care and Conditions —Essential Factual Elements*	California Employment Lawvers Association, by David M. deRubertis	CELA's concern about the proposed instruction is that it fails to encompass cases in which the rebuttable presumption of discrimination/retaliation applies. In the experience of CELA members, many cases brought under section 1278.5 have facts that do trigger the rebuttable presumption of Health and Safety Code section 1278.5(d)(l) and, therefore, the standard instruction should incorporate it.	1278.5(e) specifies that the rebuttable presumptions (there is another one in subdivision (c)) affect only the burden of producing evidence. A presumption affecting only the burden of producing evidence ceases to exist when the defendant produces evidence rebutting the presumption, such as a reason for the action other than retaliation. (Evid. Code, § 604.) So juries should not be instructed on

Instruction	Commentator	Comment	Committee Response
			presumptions affecting only the burden of producing evidence. However, the committee has revised the Directions for Use to explain this point.
5018, *Audio or Video Recording and Transcription*	Hon. Alan S. Rosenfield, Judge, Los Angeles Superior Court	I support the proposed revised version of this instruction as I believe that the revision would be helpful to trial judges and juries. There are times when trial judges tell juries during trials about asking for read back of testimony and that the reporter's record (i.e. transcript) must prevail over a juror's notes, and that a deposition transcript may be read to the jury that has the same potential evidentiary value as sworn testimony given in open court. This modification better explains to jurors that there is a distinction between a transcription created by the parties of an audio or audio/visual trial exhibit played as evidence for the jury, and an official transcript or read back by a certified shorthand reporter.	No response is necessary.
Multiple	Orange County Bar Association, by Todd G. Friedland, President	Agree with all except as noted above.	No response is necessary.

Instruction	Commentator	Comment	Committee Response
Multiple	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree with all except as noted above.	No response is necessary.

TABLE OF CONTENTS

Release 28: June 2016

426. Negligent Hiring, Supervision, or Retention of Employee

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of employee***] and that [***name of employer defendant***] is responsible for that harm because [***name of employer defendant***] negligently [hired/ supervised/ [or] retained] [***name of employee***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of employer defendant***] hired [***name of employee***];]**

2. **That [***name of employee***] [[was/became] [unfit/ [or] incompetent] to perform the work for which [he/she] was hired/[*specify other particular risk*]];**

3. **That [***name of employer defendant***] knew or should have known that [***name of employee***] [[was/became] [unfit/ [or] incompetent]/[*other particular risk*]] and that this [unfitness/incompetence [or] [*other particular risk*]] created a particular risk to others;**

4. **That [***name of employee***]'s [unfitness/incompetence [or] [*other particular risk*]] harmed [***name of plaintiff***]; and**

5. **That [***name of employer defendant***]'s negligence in [hiring/ supervising/ [or] retaining] [***name of employee***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2009; Revised December 2015, June 2016

Directions for Use

Give this instruction if the plaintiff alleges that the employer of an employee who caused harm was negligent in the hiring, supervision, or retention of the employee after actual or constructive notice ~~of~~ that the employee created a particular risk or hazard to others~~'s unfitness~~. For instructions holding the employer vicariously liable (without fault) for the acts of the employee, see the Vicarious Responsibility series, CACI No. 3700 et seq.

Include optional question 1 if the employment relationship between the defendant and the negligent person is contested. (See *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1185−1189 [183 Cal.Rptr.3d 394].) It appears that liability may also be imposed on the hirer of an independent contractor for the negligent selection of the contractor. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 662–663 [109 Cal.Rptr. 269].) Therefore, it would not seem to be necessary to instruct on the test to determine whether the relationship is one of employer-employee or hirer-independent contractor. (See CACI No. 3704, *Existence of "Employee" Status Disputed*.)

Choose "became" in elements 2 and 3 in a claim for negligent retention.

In most cases, "unfitness" or "incompetence" (or both) will adequately describe the particular risk that

the employee represents. However, there may be cases in which neither word adequately describes the risk that the employer should have known about.

Sources and Authority

- "California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 [58 Cal.Rptr.2d 122].)

- "Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' " (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [91 Cal.Rptr.3d 864].)

- "Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 [52 Cal.Rptr.3d 376].)

- "Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees. The tort has developed in California in factual settings where the plaintiff's injury occurred in the workplace, or the contact between the plaintiff and the employee was generated by the employment relationship." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339–1340 [78 Cal.Rptr.2d 525].)

- "To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act." (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 [189 Cal.Rptr.3d 570]~~We are cited to no authority, nor have we found any authority basing liability on lack of, or on inadequate, supervision, in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised." (*Noble*, *supra*, 33 Cal.App.3d at p. 664~~.)

- "Apparently, [defendant] had no actual knowledge of [the employee]'s past. But the evidence recounted above presents triable issues of material fact regarding whether the [defendant] had reason to believe [the employee] was unfit or whether the [defendant] failed to use reasonable care in investigating [the employee]." (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843 [10 Cal.Rptr.2d 748]; cf. *Flores v. AutoZone West Inc.* (2008) 161 Cal.App.4th 373, 384–386 [74 Cal.Rptr.3d 178] [employer had no duty to investigate and discover that job applicant had a juvenile delinquency record].)

- "A claim that an employer was negligent in hiring or retaining an employee-driver rarely differs in substance from a claim that an employer was negligent in entrusting a vehicle to the employee. Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining that person as a driver. (See Judicial Council of Cal. Civ. Jury Instns. (2011) CACI No. 426.) That same awareness underlies a claim for negligent entrustment. (See CACI No. 724.) In a typical case, like this, the two claims are

functionally identical." (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157 [126 Cal.Rptr.3d 443, 253 P.3d 535].)

- "[I]f an employer admits vicarious liability for its employee's negligent driving in the scope of employment, 'the damages attributable to both employer and employee will be coextensive.' Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer admits vicarious liability for its employee's negligent driving, the universe of defendants who can be held responsible for plaintiff's damages is reduced by one—the employer—for purposes of apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors, and the employer is liable only for whatever share of fault the jury assigns to the employee." (*Diaz, supra*, 41 Cal.4th at p. 1159, internal citations omitted.)

- "[A] public school district may be vicariously liable under [Government Code] section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 879 [138 Cal.Rptr.3d 1, 270 P.3d 699].)

- "[P]laintiff premises her direct negligence claim on the hospital's alleged failure to properly screen [doctor] before engaging her and to properly supervise her after engaging her. Since hiring and supervising medical personnel, as well as safeguarding incapacitated patients, are clearly within the scope of services for which the hospital is licensed, its alleged failure to do so necessarily states a claim for professional negligence. Accordingly, plaintiff cannot pursue a claim of direct negligence against the hospital." (*So v. Shin* (2013) 212 Cal.App.4th 652, 668 [151 Cal.Rptr.3d 257].)

- "[Asking] whether [defendant] hired [employee] was necessary given the dispute over who hired [employee]—[defendant] or [decedent]. As the trial court noted, 'The employment was neither stipulated nor obvious on its face.' However, if the trial court began the jury instructions or special verdict form with, 'Was [employee] unfit or incompetent to perform the work for which he was hired,' confusion was likely to result as the question assumed a hiring. Therefore, the jury needed to answer the question of whether [defendant] hired [employee] before it could determine if [defendant] negligently hired, retained, or supervised him." (*Jackson, supra*, 233 Cal.App.4th at pp. 1187−1188.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1190

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-H, *Negligence,* ¶ 5:615 et seq. (The Rutter Group)

3 California Torts, Ch. 40B, *Employment Discrimination and Harassment,* § 40B.21 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.22 (Matthew Bender)

440. Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

---

A law enforcement officer may use reasonable force to [arrest/detain] a person when the officer has reasonable cause to believe that that person has committed or is committing a crime. However, the officer may use only that degree of force necessary to accomplish the [arrest/detention].

[*Name of plaintiff***] claims that [***name of defendant***] used unreasonable force in [arresting/detaining] [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] used force in [arresting/detaining] [***name of plaintiff***];**

2. That the amount of force used by [*name of defendant***] was unreasonable;**

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

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

In deciding whether [*name of defendant***] used unreasonable force, you must consider all of the circumstances of the [arrest/detention] and determine what force a reasonable [***insert type of peace officer***] in [***name of defendant***]'s position would have used under the same or similar circumstances. Among the factors to be considered are the following:**

(a) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others;**

(b) The seriousness of the crime at issue;

(c) Whether [*name of plaintiff***] was actively resisting [arrest/detention] or attempting to avoid [arrest/detention] by flight[; and/.]**

[(d) [*Name of defendant***]'s tactical conduct and decisions before using [deadly] force on [***name of plaintiff***].]**

New June 2016

Directions for Use

Use this instruction if the plaintiff makes a negligence claim under state law arising from the force used in effecting an arrest or detention. Such a claim is often combined with a claimed civil rights violation under 42 United States Code section 1983 (See CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements.* It might also be combined with a claim for battery. See CACI No. 1305, *Battery by Peace Officer*. For additional authorities on excessive force by a law

enforcement officer, see the Sources and Authority to these two CACI instructions.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are to be applied under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) They are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.); additional factors may be added if appropriate to the facts of the case. If negligence, civil rights, and battery claims are all involved, the instructions can be combined so as to give the *Graham* factors only once. A sentence may be added to advise the jury that the factors apply to all three claims.

Give optional factor (d) if the officer's conduct leading up to the need to use force is at issue. Liability can arise if the earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of force was unreasonable. In this respect, California negligence law differs from the federal standard under the Fourth Amendment. (*Hayes v. County of San Diego* (2014) 57 Cal. 4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].)

Sources and Authority

- Use of Reasonable Force to Arrest. California Penal Code section 835a.

- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez, supra,* 46 Cal.4th at p. 514, internal citation omitted.)

- "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citations omitted.)

- "The most important of these [*Graham* factors, above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553].)

- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)

- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. … [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. …" ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)

- " '[A]s long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the "most reasonable" action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence.' " (*Hayes v. County of San Diego* (2014) 57 Cal. 4th 622, 632 [160 Cal. Rptr. 3d 684, 305 P.3d 252].)

- "A police officer's use of deadly force is reasonable if ' " 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' …" …' " (*Brown, supra,* 171 Cal.App.4th at p. 528.)

- "Law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable." (*Hayes, supra,* 57 Cal.4th at p. 639.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2010) Torts, § 424

3 Levy et al., California Torts, Ch. 41, *Assault and Battery,* § 41.24 seq. (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery,* § 58.22 (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 [***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 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

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 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.

- "Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone's aid, he or she has a duty to exercise due care. Thus, a 'good Samaritan' who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)

- "[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*].)

- "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.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1996) Pleadings, § 553

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

461. Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***]'s [***insert type of animal***] harmed [him/her] and that [***name of defendant***] is responsible for that harm.**

People who own, keep, or control wild animals are responsible for the harm that these animals cause to others, no matter how carefully they guard or restrain their animals.

To establish [his/her] claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] owned, kept, or controlled [a/an] [***insert type of animal***];**

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

3. **That [***name of defendant***]'s [***insert type of animal***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2015, June 2016

Directions for Use

Give this instruction to impose strict liability on an animal owner for injuries caused by an animal of a type that is inherently dangerous without the need to show the owner's knowledge of dangerousness. (See *Baugh v. Beatty* (1949) 91 Cal.App.2d 786, 791–792 [205 P.2d 671].) For an instruction for use for a domestic animal if it is alleged that the owner knew or should have known that the animal had a dangerous propensity, see CACI No. 462, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensity*. (See *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 665 [142 Cal.Rptr.3d 24].) For an instruction on statutory strict liability under the dog-bite statute, see CACI No. 463, *Dog Bite Statute—Essential Factual Elements.*

Whether the determination that the animal that caused injury is a "wild animal" triggering this instruction is a matter of law for the court or can be a question of fact for the jury has apparently not been addressed by the courts.

Sources and Authority

- "The keeper of an animal of a species dangerous by nature … is liable, without wrongful intent or negligence, for damage to others resulting from such a propensity. The liability of the keeper is absolute, for '[the] gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. [Citation.] In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case.' " (*Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626 [283 P.2d 1033].)

- "[I]f the animal which inflicted the injury is vicious and dangerous, known to the defendant to be such, an allegation of negligence on the part of defendant is unnecessary and the averment, if made, may be treated as surplusage." (*Baugh*, *supra*, ~~*v. Beatty* (1949)~~ 91 Cal.App.2d at p.~~786,~~ 791 ~~[205 P.2d 671]~~.)

- "[A] wild animal is presumed to be vicious and since the owner of such an animal … is an insurer against the acts of the animal to anyone who is injured, and unless such person voluntarily or consciously does something which brings the injury on himself, the question of the owner's negligence is not in the case." *Baugh, supra,* 91 Cal.App.2d at p. 791.)

- "The court instructed the jury with respect to the liability of the keeper of a vicious or dangerous animal, known to be such by its owner. Although plaintiff has not raised any objection to this instruction, it was not proper in the instant case since the animal was of the class of animals *ferae naturae,* of known savage and vicious nature, and hence an instruction on the owner's knowledge of its ferocity was unnecessary." (*Baugh, supra,* 91 Cal.App.2d at pp. 791–792.)

- "[Strict] liability has been imposed on 'keepers of lions and tigers, bears, elephants, wolves [and] monkeys.' " (*Rosenbloom v. Hanour Corp.* (1998) 66 Cal.App.4th 1477, 1479, fn. 1 [78 Cal.Rptr.2d 686].)

- "The owner of a naturally dangerous animal may be excused from the usual duty of care: 'In cases involving "primary assumption of risk"—where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine ... operates as a complete bar to the plaintiff's recovery.' " (*Rosenbloom, supra,* 66 Cal.App.4th at p. 1479, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1403

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 3.3-3.6

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals,* §§ 6.01-6.10 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability,* § 23.23 (Matthew Bender)

1 California Civil Practice: Torts §§ 2:20–2:21 (Thomson Reuters)

1100. Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)

[*Name of plaintiff***] claims that [he/she] was harmed by a dangerous condition of [***name of defendant***]'s property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] owned [or controlled] the property;**

2. **That the property was in a dangerous condition at the time of the incident;**

3. **That the dangerous condition created a reasonably foreseeable risk of the kind of ~~incident~~ injury that occurred;**

4. **[That negligent or wrongful conduct of [***name of defendant***]'s employee acting within the scope of his or her employment created the dangerous condition;]**

   [or]

   [That [*name of defendant***] had notice of the dangerous condition for a long enough time to have protected against it;]**

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

6. **That the dangerous condition was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised October 2008, June 2016

Directions for Use

For element 4, choose either or both options depending on whether liability is alleged under Government Code section 835(a), 835(b), or both.

See also CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice*.

Sources and Authority

- Liability of Public Entity for Dangerous Condition of Property. Government Code section 835.
- Actual Notice. Government Code section 835.2(a).
- Constructive Notice. Government Code section 835.2(b).
- Definitions. Government Code section 830.

- ‘The Government Claims Act (§ 810 et seq.; the Act) ‘is a comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public employees for torts.’ Section 835 … prescribes the conditions under which a public entity may be held liable for injuries caused by a dangerous condition of public property. Section 835 provides that a public entity may be held liable for such injuries ‘if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, [and] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.’ In addition, the plaintiff must establish that either: (a) ‘[a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition,’ or (b) ‘[t]he public entity had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.’ ” (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)

- “[A] public entity may be liable for a dangerous condition of public property even when the immediate cause of a plaintiff's injury is a third party's negligent or illegal act (such as a motorist's negligent driving), if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. Public entity liability lies under section 835 when some feature of the property increased or intensified the danger to users from third party conduct.” (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457−1458 [192 Cal.Rptr.3d 376], internal citation omitted.)

- “Subdivisions (a) and (b) of section 835 obviously address two different types of cases. However, what distinguishes the two types of cases is not simply whether the public entity has notice of the dangerous condition. Instead, what distinguishes the two cases in practice is who created the dangerous condition. Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can also support suits based on dangerous conditions not created by the entity or its employees.” (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836 [15 Cal.Rptr.2d 679, 843 P.2d 624].)

- “[T]he res ipsa loquitur presumption does not satisfy the requirements for holding a public entity liable under section 835, subdivision (a). Res ipsa loquitur requires the plaintiff to show only (1) that the accident was of a kind which ordinarily does not occur in the absence of negligence, (2) that the instrumentality of harm was within the defendant's exclusive control, and (3) that the plaintiff did not voluntarily contribute to his or her own injuries. Subdivision (a), in contrast, requires the plaintiff to show that an employee of the public entity ‘created’ the dangerous condition; in view of the legislative history … ,the term ‘created’ must be defined as the sort of involvement by an employee that would justify a presumption of notice on the entity’s part.” (*Brown, supra*, 4 Cal.4th at p. 836.)

- “Focusing on the language in *Pritchard, supra*, 178 Cal. App. 2d at page 256, stating that where the public entity ‘has itself created the dangerous condition it is per se culpable,’ plaintiff argues that the negligence that section 835, subdivision (a), refers to is not common law negligence, but something that exists whenever the public entity creates the dangerous condition of property. We disagree. If the Legislature had wanted to impose liability whenever a public entity created a dangerous condition, it

would merely have required plaintiff to establish that an act or omission of an employee of the public entity within the scope of his employment created the dangerous condition. Instead, section 835, subdivision (a), requires the plaintiff to establish that a '*negligent or wrongful* act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.' (Italics added.) Plaintiff's interpretation would transform the highly meaningful words 'negligent or wrongful' into meaningless surplusage, contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [72 Cal.Rptr.3d 382, 176 P.2d 654], original italics, internal citation omitted.)

- "In order to recover under Government Code section 835, it is not necessary for plaintiff to prove a negligent act *and* notice; either negligence *or* notice will suffice." (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843], original italics.)

- "A public entity may not be held liable under section 835 for a dangerous condition of property that it does not own or control." (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 359 [196 Cal.Rptr.3d 625].)

- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted.)

- "Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties. However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition-absent some concurrent contributing defect in the property itself." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472 [113 Cal.Rptr. 599, 521 P.2d 855], internal citations omitted.)

- "[P]laintiffs in this case must show that a dangerous condition of property--that is, a condition that creates a substantial risk of injury to the public--proximately caused the fatal injuries their decedents suffered as a result of the collision with [third party]'s car. But nothing in the statute requires plaintiffs to show that the allegedly dangerous condition also caused the third party conduct that precipitated the accident." (*Cordova, supra,* 61 Cal. 4th at p. 1106.)

- "The existence of a dangerous condition is ordinarily a question of fact but 'can be decided as a matter of law if reasonable minds can come to only one conclusion.' " (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347 [75 Cal.Rptr.3d 168].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 249–285

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-C, *Immunity From Liability*, ¶ 6:91 et seq. (The Rutter Group)

Hanning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, *Liability For "Dangerous Conditions" Of Public Property*, ¶ 2:2785 et seq. (The Rutter Group)

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.9-12.55

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1123. Affirmative Defense—Design Immunity (Gov. Code, § 830.6)

[*Name of defendant***] claims that it is not responsible for harm to [***name of plaintiff***] caused by the plan or design of the [***insert type of property, e.g., highway***]. In order to prove this claim, [***name of defendant***] must prove both of the following:**

1. **That the plan or design was [prepared in conformity with standards previously] approved before [construction/improvement] by the [[***legislative body of the public entity, e.g., city council***]/[***other body or employee, e.g., city civil engineer***]] exercising [its/specifically delegated] discretionary authority to approve the plan or design; and**

2. **That the plan or design of the [***e.g., highway***] was a substantial factor in causing harm to [***name of plaintiff***].**

New December 2014; Revised June 2016

Directions for Use

Give this instruction to present the affirmative defense of design immunity to a claim for liability caused by a dangerous condition on public property. (Gov. Code, § 830.6; see *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, 369 [169 Cal.Rptr.3d 880] [design immunity is an affirmative defense that the public entity must plead and prove].)

A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design before construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332].) The first two elements, causation and discretionary approval, are issues of fact for the jury to decide. (*Id.* at pp. 74–75; see also *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550 [100 Cal.Rptr.3d 494] [elements may be resolved as issues of law only if facts are undisputed].) The third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Cornette, supra,* 26 Cal.4th at pp. 66−67; see Gov. Code, § 830.6.)

In element 1, select "its" if it is the governing body that has exercised its discretionary authority. Select "specifically delegated" if it is some other body or employee.

The discretionary authority to approve the plan or design must be "vested," which means that the body or employee actually had the express authority to approve it. This authority cannot be implied from the circumstances. (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457 [192 Cal.Rptr.3d 376].)

Sources and Authority

- Design Immunity. Government Code section 830.6.

- "The purpose of design immunity 'is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.]' ' "[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested." ' " (*Martinez, supra,* 225 Cal.App.4th at p. 369, internal citations omitted.)

- "Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' " (*Cornette, supra,* 26 Cal.4th at p. 66.)

- "To prove [the discretionary approval element of design immunity], the entity must show that the design was approved 'in advance' of the construction 'by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved … .' 'Approval … is a vital precondition of the design immunity.' " (*Martinez, supra,* 225 Cal.App.4th at p. 369, internal citations omitted.)

- "In many cases, the evidence of discretionary authority to approve a design decision is clear, or even undisputed. For example, '[a] detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element of prior approval. [Citation.]' When the discretionary approval issue is disputed, however, as it was here, we must determine whether the person who approved the construction had the discretionary authority to do so." (*Martinez, supra,* 225 Cal.App.4th at pp. 370−371, internal citations omitted.)

- "[T]he focus of discretional authority to approve a plan or design is fixed by law and will not be implied. '[T]he public entity claiming design immunity must prove that the person or entity who made the decision is vested with the authority to do so. Recognizing "implied" discretionary approval would vitiate this requirement and provide public entities with a blanket release from liability that finds no support in section 830.6.' " (*Castro, supra,* 239 Cal.App.4th at p. 1457~~[T]he public entity claiming design immunity must prove that the person or entity who made the decision is vested with the authority to do so. Recognizing 'implied' discretionary approval would vitiate this requirement and provide public entities with a blanket release from liability that finds no support in section 830.6." (*Martinez, supra,* 225 Cal.App.4th at p. 373~~.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 229, 280 et seq.

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, Liability For "Dangerous Conditions" Of Public Property, ¶ 2:2855 et seq. (The Rutter Group)

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.85[2] (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.12 (Matthew Bender)

1248. Affirmative Defense—Inherently Unsafe Consumer Product (Civ. Code, § 1714.45)

[*Name of defendant***] claims that it is not responsible for [***name of plaintiff***]'s claimed harm because [***specify product***] is an inherently unsafe consumer product. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***product***] is a common consumer product intended for personal consumption; and**

2. **That [***product***] is inherently unsafe;**

3. **But [***product***] is no more dangerous than what an ordinary consumer of the product with knowledge common to the community would expect.**

New June 2016

Directions for Use

This instruction sets forth an immunity defense to product liability for a product that is clearly recognizable as inherently dangerous. (See Civ. Code, § 1714.45(a).) The statute requires that the product be "a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts." (Civ. Code, § 1714.45(a)(2).) This reference is perhaps somewhat confusing because the Restatement comment makes it clear that sugar, castor oil, alcohol, and butter are not *unreasonably* dangerous. The implication from the statutory references is that although they are not unreasonably dangerous, they are inherently unsafe and thus within the protection provided to the manufacturer by the statute.

Sources and Authority

- Nonliability for Inherently Unsafe Consumer Product. Civil Code section 1714.45

- Comment i to Section 402A of the Restatement (Second) of Torts provides: "*Unreasonably dangerous*. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably

dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

- "Additional limitations on the scope of the immunity may be deduced from the history and purpose of the Immunity Statute … . The statute's express premise … was 'that suppliers of certain products which are "inherently unsafe," but which the public wishes to have available despite awareness of their dangers, should not be responsible in tort for resulting harm to those who voluntarily consumed the products despite such knowledge.' … [T]he Immunity Statute [is] based on the principle that 'if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user.' " (*Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 862 [123 Cal.Rptr.2d 61, 50 P.3d 769], internal citations omitted.)

- "The law should not ignore interactive effects that might render a product more dangerous than is contemplated by the ordinary consumer who purchases it and possesses the ordinary knowledge common to the community as to the product's characteristics. Therefore, when a court addresses whether a multi-ingredient product is a common consumer product for purposes of Civil Code section 1714.45 and the ingredients have an interactive effect, the product and its inherent dangers must be considered as a whole so that the interactive effects of its ingredients are not overlooked or trivialized." (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 325 [179 Cal.Rptr.3d 827].)

- "The foregoing inferences preclude us from finding, as a matter of law, that [product] was a common consumer product for purposes of Civil Code section 1714.45, subdivision (a). As a result, that factual question should be presented to the trier of fact." (*Fiorini, supra,* 231 Cal.App.4th at p. 326, footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2010) Torts, § 1745 et seq.

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11[5] (Matthew Bender)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.04 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.70 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.80A et seq. (Matthew Bender)

1700. Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove that all of the following are more likely true than not true:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]]; and**

4. **That the statement(s) [was/were] false.**

In addition, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [***name of plaintiff***]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

Assumed Damages

Even if [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law nonetheless assumes that [he/she] has suffered this harm. Without presenting evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, June 2016

Directions for Use

Special verdict form CACI No. VF-1700, *Defamation per se (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should 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 some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Sources and Authority

- Defamation. Civil Code section 44.
- Libel Defined. Civil Code section 45.
- Libel per se. Civil Code section 45a.
- Slander Defined. Civil Code section 46.
- "Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486 [183 Cal.Rptr.3d 867].)

- "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369 [117 Cal.Rptr.3d 747].)

- "[S]tatements cannot form the basis of a defamation action if they cannot be reasonably interpreted as stating actual facts about an individual. Thus, rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of contempt and language used in a loose, figurative sense will not support a defamation action." (*Grenier, supra,* 234 Cal.App.4th at p. 486.)

- " ' "If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then … there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then … the libel cannot be libel per se but will be libel per quod," requiring pleading and proof of special damages.' " (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351−352 [192 Cal.Rptr.3d 511].)

- ~~California does not follow the majority rule, which is that all libel is actionable per se. If the court determines that the statement is reasonably susceptible to a defamatory interpretation, it is for the jury to determine if a defamatory meaning was in fact conveyed to a listener or reader. (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244].)~~

- ~~A plaintiff is not required to allege special damages if the statement is libelous per se (either on its face or by jury finding). (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)~~

- "A slander that falls within the first four subdivisions of Civil Code section 46 is slander per se and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander." (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882], internal citations omitted.)

- "With respect to slander per se, the trial court decides if the alleged statement falls within Civil Code section 46, subdivisions 1 through 4. It is then for the trier of fact to determine if the statement is defamatory. This allocation of responsibility may appear, at first glance, to result in an overlap of responsibilities because a trial court determination that the statement falls within those categories would seemingly suggest that the statement, if false, is necessarily defamatory. But a finder of fact might rely upon extraneous evidence to conclude that, under the circumstances, the statement was not defamatory." (*The Nethercutt Collection, supra,* 172 Cal.App.4th at pp. 368–369.)

- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the

publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶] … [¶] … [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, 'must be provable as false before there can be liability under state defamation law.' " (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802], internal citations omitted.)

- In matters involving public concern, the First Amendment protection applies to nonmedia defendants, putting the burden of proving falsity of the statement on the plaintiff. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)

- "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the 'public' at large; communication to a single individual is sufficient." (*Smith, supra,* 72 Cal.App.4th at p. 645, internal citations omitted.)

- "[W]hen a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor." (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26 [80 Cal.Rptr.2d 1], internal citation omitted.)

- "At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. California has adopted the common law in this regard, although by statute the republication of defamatory statements is privileged in certain defined situations." (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 268 [79 Cal.Rptr.2d 178, 965 P.2d 696], internal citations omitted.)

- The general rule is that "a plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." There is an exception to this rule. [When it is foreseeable that the plaintiff] " 'will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its

contents.' " (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198], internal citations omitted.)

- Whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 [208 Cal.Rptr. 137, 690 P.2d 610].)

- "To qualify as a limited purpose public figure, a plaintiff 'must have undertaken some voluntary [affirmative] act[ion] through which he seeks to influence the resolution of the public issues involved.' " (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190 [31 Cal.Rptr.2d 193]; see also *Mosesian v. McClatchy Newspapers* (1991) 233 Cal.App.3d 1685, 1689 [285 Cal.Rptr. 430].)

- "Characterizing a plaintiff as a limited purpose public figure requires the presence of certain elements. First, there must be a public controversy about a topic that concerns a substantial number of people. In other words, the issue was publicly debated. Second, the plaintiff must have voluntarily acted to influence resolution of the issue of public interest. To satisfy this element, the plaintiff need only attempt to thrust himself or herself into the public eye. Once the plaintiff places himself or herself in the spotlight on a topic of public interest, his or her private words and acts relating to that topic become fair game. However, the alleged defamation must be germane to the plaintiff's participation in the public controversy." (*Grenier, supra,* 234 Cal.App.4th at p. 484, internal citations omitted.)

- "The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.' Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of ... probable falsity.' " (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510 [111 S.Ct. 2419, 115 L.Ed.2d 447], internal citations omitted; see *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [88 S.Ct. 1323, 20 L.Ed.2d 262]; *New York Times v. Sullivan* (1964) 376 U.S. 254, 279–280 [84 S.Ct. 710, 11 L.Ed.2d 686].)

- The *New York Times v. Sullivan* standard applies to private individuals with respect to presumed or punitive damages if the statement involves a matter of public concern. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 349 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- "California ... permits defamation liability so long as it is consistent with the requirements of the United States Constitution." (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1359 [78 Cal.Rptr.2d 627], citing *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 740–742 [257 Cal.Rptr. 708, 771 P.2d 406].)

- "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. ... In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." (*Masson, supra,* 501 U.S. at pp. 510–511, internal citations omitted.)

- Actual malice "does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she knows to be false or acting in reckless disregard of the truth." (*Jackson, supra,* 68 Cal.App.4th at p. 35.)

- "The law is clear [that] the recklessness or doubt which gives rise to actual or constitutional malice is subjective recklessness or doubt." (*Melaleuca, Inc., supra,* 66 Cal.App.4th at p. 1365.)

- To show reckless disregard, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (*St. Amant, supra,* 390 U.S. at p. 731.)

- " 'A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice. [Citation.] "A failure to investigate [fn. omitted] [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication." ' " (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 873 [162 Cal.Rptr.3d 188].)

- " ' "[Evidence] of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." [Citations.] A failure to investigate [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication. [¶] We emphasize that such evidence is relevant only to the extent that it reflects on the subjective attitude of the publisher. [Citations.] The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. [Citations.] Similarly, mere proof of ill will on the part of the publisher may likewise be insufficient. [Citation.]' " (*Young v. CBS Broadcasting, Inc.* (2012) 212 Cal.App.4th 551, 563 [151 Cal.Rptr.3d 237], quoting *Reader's Digest Assn., supra,* 37 Cal.3d at pp. 257–258, footnote omitted.)

- "An entity other than a natural person may be libeled." (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1283.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 601–612

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5-D, *Employment Torts And Related Claims—Defamation,* ¶ 5:372 (The Rutter Group)

4 Levy et al., California Torts, Ch. 45, *Defamation,* §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander,* § 340.10 et seq. (Matthew

Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.24–142.27 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:44–21:52 (Thomson Reuters)

1701. Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per quod defamatory statements***].**

Liability

To establish this claim, [*name of plaintiff***] must prove that all of the following are more likely true than not true:**

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff*]**;**

3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That the statement(s) [was/were] false;**

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

6. **That the statement(s) [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

In addition, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves it is more likely true than not true that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [***name of plaintiff***]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, June 2016

Directions for Use

Special verdict form VF-1701, *Defamation per quod (Public Officer/Figure and Limited Public Figure),* should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should 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 some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

See also the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Sources and Authority

- Defamation. Civil Code section 44.
- Libel Defined. Civil Code section 45.
- Libel per se. Civil Code section 45a.
- Slander Defined. Civil Code section 46.
- Special Damages. Civil Code section 48a(4)(b).

- "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2011) 189 Cal.App.4th 1354, 1369 [117 Cal.Rptr.3d 747].)

- " ' "If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then … there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then … the libel cannot be libel per se but will be libel per quod," requiring pleading and proof of special damages.' " (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351−352 [192 Cal.Rptr.3d 511].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73], internal citation omitted.)

- "The question whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. However, … , some statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. 'In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion . . . .' " (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244].)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7.)

- "A libel 'per quod,' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354], internal citations omitted.)

- "A slander that falls within the first four subdivisions of Civil Code section 46 is slander per se and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander." (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 601–612

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.10–340.75 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.24–142.27 (Matthew Bender)

1 California Civil Practice: Torts, §§ 21:1–21:2, 21:22–21:25, 21:44–21:52 (Thomson Reuters)

1702. Defamation per se—Essential Factual Elements (Private Figure—Matter of Public Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statement(s)***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff***];**

[3. That [this person/these people] reasonably understood the statement(s) to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***];]**

4. **That the statement(s) [was/were] false; and**

5. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [***name of plaintiff***]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

Assumed Damages

If [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings but proves by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or that [he/she] had serious doubts about the truth of the statement(s), then the law assumes that [***name of plaintiff***]'s reputation has been harmed and that [he/she] has suffered shame, mortification, or hurt feelings. Without presenting evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, October 2008, December 2009, June 2016

Directions for Use

Special verdict form CACI No. VF-1702, *Defamation per se (Private Figure—Matter of Public Concern),* should be used in this type of case.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should 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 some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Sources and Authority

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)

- A private plaintiff is not required to prove malice to recover actual damages. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347-348 [94 S.Ct. 2997, 41 L.Ed.2d 789]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 742 [257 Cal.Rptr. 708, 771 P.2d 406].)

- " '[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.' " (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831]~~, quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297~~.)

- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶¶] … [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)

- "When the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation." (*Brown, supra,* 48 Cal.3d at p. 747.)

- "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." (*Gertz, supra,* 418 U.S. at p. 350.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273-274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)

- "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice ... to recover presumed or punitive damages. This malice must be established by 'clear and convincing proof.' " (*Brown, supra,* 48 Cal.3d at p. 747, internal citations omitted.)

- When the court is instructing on punitive damages, it is error to fail to instruct that *New York Times* malice is required when the statements at issue involve matters of public concern. (*Carney, supra,* 221 Cal.App.3d at p. 1022.)

- "To prove actual malice ... a plaintiff must 'demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.' " (*Khawar, supra,* 19 Cal.4th at p. 275, internal citation omitted.)

- "Because actual malice is a higher fault standard than negligence, a finding of actual malice generally includes a finding of negligence ...." (*Khawar, supra,* 19 Cal.4th at p. 279.)

- "The inquiry into the protected status of speech is one of law, not fact." (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781], quoting *Connick v. Myers* (1983) 461 U.S. 138, 148, fn. 7 [103 S.Ct. 1684, 75 L.Ed.2d 708].)

- "For the *New York Times* standard to be met, 'the publisher must come close to willfully blinding itself to the falsity of its utterance.' " (*Brown, supra,* 48 Cal.3d at p. 747, internal citation omitted.)

- " 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 613–615

4 Levy et al., California Torts, Ch. 45, *Defamation,* §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander,* §§ 340.12–340.13, 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation),* §§ 142.30–142.40, 142.87 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson Reuters~~West~~) §§ 21:1–21:2, 21:22–21:25, 21:51

1703. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***insert all claimed per quod defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff*]**;**

3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That the statement(s) [was/were] false;**

5. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s);**

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

7. **That the statements [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [***name of plaintiff***]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, December 2009, June 2016

Directions for Use

Special verdict form VF-1703, *Defamation per quod (Private Figure—Matter of Public Concern),* should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should 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 some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

~~Presumed damages either are not available or will likely not be sought in a per quod case.~~

Sources and Authority

- Libel per se. Civil Code section 45a.
- Special Damages. Civil Code section 48a(4)(b).
- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'),

and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7, footnote omitted.)

- "A libel 'per quod' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)

- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)

- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)

- " '[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.' " (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831], quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297.)

- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.*

(1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)

- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345–347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 613–615

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.11, 340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.30–142.40 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1704. Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statement(s)***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]];**

4. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [***name of plaintiff***]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

Assumed Damages

Even if [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law assumes that [he/she] has suffered this harm. Without presenting evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, December 2009, June 2016

Directions for Use

Special verdict form VF-1704, *Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)*, may be used in this type of case.

~~For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*~~

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should 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 some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Sources and Authority

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- "The question whether a plaintiff is a public figure [or not] is to be determined by the court, not the

jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740], internal citation omitted.)

- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)

- "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice ... to recover presumed or punitive damages." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [257 Cal.Rptr. 708, 771 P.2d 406].)

- "The First Amendment trumps the common law presumption of falsity in defamation cases involving private-figure plaintiffs when the allegedly defamatory statements pertain to a matter of public interest." (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)

- "Thus, in a defamation action the burden is normally on the defendant to prove the truth of the allegedly defamatory communications. However, in accommodation of First Amendment considerations (which are implicated by state defamation laws), where the plaintiff is a public figure, the 'public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.' " (*Stolz, supra*, 30 Cal.App.4th at p. 202, internal citations omitted.)

- "Since the statements at issue here involved a matter of purely private concern communicated between private individuals, we do not regard them as raising a First Amendment issue. 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 760 [105 S.Ct. 2939, 86 L.Ed.2d 593], internal citation omitted.)

- "We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." (*Dun & Bradstreet, Inc., supra*, 472 U.S. at p. 763.)

- "When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775 [106 S.Ct. 1558, 89 L.Ed.2d 783].)

- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of

such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶¶] … [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff." (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 615

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.87 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1705. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Private Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***insert all claimed per quod defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff*]**;**

3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s);**

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

6. **That the statement(s) [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [***name of plaintiff***]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by**

clear and convincing evidence that [*name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, December 2009, June 2016

Directions for Use

Special verdict form VF-1705, *Defamation per quod (Private Figure—Matter of Private Concern),* should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should 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 some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Sources and Authority

- Libel per se. Civil Code section 45a.
- Special Damages. Civil Code section 48a(4)(b).
- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)
- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7, footnote omitted.)

- "A libel 'per quod' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154 [185 Cal.Rptr. 244, 649 P.2d 886].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)

- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)

- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are required to prove only negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273-274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)

- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)

- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345-347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 615

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.12–340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.20–142.32 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1722. Retraction: News Publication~~paper~~ or Broadcast (Civ. Code, § 48a)

Because [*name of defendant***] is a [news ~~paper~~publication/broadcaster], [***name of plaintiff***] may recover only the following:**

(a) Damages to property, business, trade, profession, or occupation; and

(b) Damages for money spent as a result of the defamation.

However, this limitation does not apply if [*name of plaintiff***] proves both of the following:**

1. That [*name of plaintiff***] demanded a correction of the statement within 20 days of discovering the statement; and**

2. That [*name of defendant***] did not publish an adequate correction;**

[or]

That [*name of defendant***]'s correction was not substantially as conspicuous as the original [publication/broadcast];**

[or]

That [*name of defendant***]'s correction was not [published/broadcast] within three weeks of [***name of plaintiff***]'s demand.**

New September 2003; Revised June 2016

Directions for Use

The judge should decide whether the demand for a retraction was served in compliance with the statute. (*O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1110 [282 Cal.Rptr. 712].)

Sources and Authority

- Demand for Correction. Civil Code section 48a.
- "Under California law, a newspaper gains immunity from liability for all but 'special damages' when it prints a retraction satisfying the requirements of section 48a." (*Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631 [263 Cal.Rptr. 410]; see also *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656, 660-661 [256 Cal.Rptr. 310].)
- "An equivocal or incomplete retraction obviously serves no purpose even if it is published in 'substantially as conspicuous a manner ... as were the statements claimed to be libelous.' " (*Weller v.*

American Broadcasting Companies, Inc. (1991) 232 Cal.App.3d 991, 1011 [283 Cal.Rptr. 644].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 629–639

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.24 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.53 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.37 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:55–21:57 (Thomson Reuters)

2020. Public Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***], by acting or failing to act, created a condition that [***insert one or more of the following:***]**

   _____[was harmful to health;] [or]

   _____[was indecent or offensive to the senses;] [or]

   _____[was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   _____[unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]

   _____[was [a/an] [fire hazard/*specify other potentially dangerous condition***] to [***name of plaintiff***]'s property;**

2. **That the condition affected a substantial number of people at the same time;**

3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**

4. **That the seriousness of the harm outweighs the social utility of [***name of defendant***]'s conduct;**

5. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

6. **That [***name of plaintiff***] suffered harm that was different from the type of harm suffered by the general public; and**

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

New September 2003; Revised December 2007, June 2016

Directions for Use

Private nuisance concerns injury to a property interest. Public nuisance is not dependent on an interference with rights of land: "[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an

interference with the rights of the community at large." (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124 [99 Cal.Rptr. 350], internal citation omitted.)

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Public Nuisance. Civil Code section 3480.
- Action by Private Person for Public Nuisance. Civil Code section 3493.
- Act Done Under Express Authority of Statute. Civil Code section 3482.
- Property Used for Dogfighting and Cockfighting. Civil Code section 3482.8.
- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ...' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." ' " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)
- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra,* 22 Cal.App.3d at p. 124, internal citations omitted; but see *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1550 [87 Cal.Rptr.3d 602] ["to the extent *Venuto* … can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law"].)
- "Unlike the private nuisance-tied to and designed to vindicate individual ownership interests in land-the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596].)
- "[W]hen the nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public. That is, the plaintiff ' "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree … ." ' " (*Birke, supra,* 169 Cal.App.4th at p. 1551, internal citations omitted.)
- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify ... the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105.)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke, supra,* 169 Cal.App.4th at p. 1552 [citing this instruction], internal citation omitted.)

- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' "where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …" [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422], internal citations omitted.)

- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)

- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property… ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)

- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)

- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)

- "The elements 'of a cause of action for public nuisance include the existence of a duty and causation.' Public nuisance liability 'does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.' " (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 [107 Cal.Rptr.3d 481], internal citations omitted.)

- " 'Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim.' The nuisance claim 'stands or falls with the determination of the negligence cause of action' in such cases." (*Melton, supra,* 183 Cal.App.4th at p. 542, internal citations omitted.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 133

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 5-D, *Common Law Environmental Hazards Liability*, ¶¶ 5:140-5:179 (The Rutter Group)

California Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.) Ch. 11, Remedies for Nuisance and Trespass, § 11.7

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.04, 17.06 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.12 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 17:1–17:3 (Thomson Reuters)

2021. Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] interfered with [***name of plaintiff***]'s use and enjoyment of [his/her] land. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***], by acting or failing to act, created a condition or permitted a condition to exist that [***insert one or more of the following:***]**

   _____[was harmful to health;] [or]

   _____[was indecent or offensive to the senses;] [or]

   _____[was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   _____[unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]

   _____[was [a/an] [fire hazard/*specify other potentially dangerous condition***] to [***name of plaintiff***]'s property;**

3. **That this condition interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] land;**

4. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

5. **That an ordinary person would be reasonably annoyed or disturbed by** [*name of defendant*]**'s conduct;**

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

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

8. **That the seriousness of the harm outweighs the public benefit of [***name of defendant***]'s conduct.**

New September 2003; Revised February 2007, December 2011, December 2015, June 2016

Directions for Use

Element 8 must be supplemented with CACI No. 2022, *Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App. 4th 123, 160−165 [184 Cal.Rptr.3d 26].) For instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Acts Done Under Express Authority of Statute. Civil Code section 3482.
- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ... ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' " " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)
- "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669].)
- "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property,' such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)
- "Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land. A nuisance may be both public and private, but to proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664], internal citation omitted.)
- "Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. 'So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.' " (*Koll-Irvine Center Property Owners Assn., supra,* 24 Cal.App.4th at p. 1041, internal citation omitted.)

- "The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement recognizes the same requirement as the need for proof of 'significant harm,' which it variously defines as 'harm of importance' and a 'real and appreciable invasion of the plaintiff's interests' and an invasion that is 'definitely offensive, seriously annoying or intolerable.' The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' This is, of course, a question of fact that turns on the circumstances of each case." (*San Diego Gas & Electric Co., supra,* 13 Cal.4th at p. 938, internal citations omitted.)

- "The second additional requirement for nuisance is superficially similar but analytically distinct: 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' "(*San Diego Gas & Electric Co., supra,* 13 Cal.4th at pp. 938-939, internal citations omitted.)

- "Appellant first argues that the judgment is erroneous because there is no showing that any act or conduct of his caused the damage. It is true that there is neither showing nor finding of any negligent or wrongful act or omission of defendant proximately causing the falling of the trees. But no such showing is required. If the trees remained upright, with some of their branches extending over or upon plaintiff's land, they clearly would constitute a nuisance, which defendant could be required to abate." (*Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 42 [328 P.2d 269].)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 [87 Cal.Rptr.3d 602], internal citations omitted.)

- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' " 'where liability for the

nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …" [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422, internal citations omitted.)

- "We acknowledge that to recover on a nuisance claim the harm the plaintiff suffers need not be a physical injury. Thus, the absence of evidence in this case to establish that [plaintiff] 's physical injuries were caused by the stray voltage would not preclude recovery on her nuisance claim." (*Wilson, supra,* 234 Cal.App.4th at p. 159, internal citations omitted.)

- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property… ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)

- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)

- Restatement Second of Torts, section 822 provides:
  One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
  (a) intentional and unreasonable, or
  (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

- Restatement Second of Torts, section 826 provides:
  An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

  (a) the gravity of the harm outweighs the utility of the actor's conduct, or
  (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 153

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.05 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.13 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 (Matthew Bender)

California Civil Practice: Torts §§ 17:1, 17:2, 17:4 (Thomson Reuters)

2210. Affirmative Defense—Privilege to Protect Own Financial Interest

[*Name of defendant***] claims that there was no intentional interference with contractual relations because [he/she/it] acted only to protect [his/her/its] legitimate financial interests. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] had a [legitimate] financial interest in the contractual relations because [***specify financial interest***];**

2. **That [***name of defendant***] acted only to protect [his/her/its] own financial interest;**

3. **That [***name of defendant***] acted reasonably and in good faith to protect it; and**

4. **That [***name of defendant***] used appropriate means to protect it.**

New June 2016

Directions for Use

Give this instruction as an affirmative defense to a claim for intentional interference with contractual relations. (See CACI No. 2201.) The defense presents a justification based on the defendant's right to protect its own financial interest.

In element 1, the jury should be told the specific financial interest that the defendant was acting to protect. Include "legitimate" if the jury will be asked to determine whether that financial interest was legitimate, as opposed perhaps to pretextual or fraudulent.

Sources and Authority

- "In harmony with the general guidelines of the test for justification is the narrow protection afforded to a party where (1) he has a legally protected interest, (2) in good faith threatens to protect it, and (3) the threat is to protect it by appropriate means. Prosser adds: 'Where the defendant acts to further his own advantage, other distinctions have been made. If he has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it; and for obvious reasons of policy he is likewise privileged to assert an honest claim, or bring or threaten a suit in good faith.' " (*Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73, 81 [159 Cal.Rptr. 285], internal citation omitted.)

- "Justification for the interference is an affirmative defense and not an element of plaintiff's cause of action." (*Richardson, supra,* 98 Cal.App.3d at p. 80.)

- "Something other than sincerity and an honest conviction by a party in his position is required before justification for his conduct on the grounds of 'good faith' can be established. There must be an objective basis for the belief which requires more than reliance on counsel." (*Richardson, supra*, 98 Cal.App.3d at pp. 82−83.)

- "A thoroughly bad motive, that is, a *purpose solely to harm the plaintiff,* of course, is sufficient to exclude any apparent privilege which the interests of the parties might otherwise create, just as such a motive will defeat the immunity of any other conditional privilege. If the defendant does not act in a bona fide attempt to protect his own interest or the interest of others involved in the situation, he forfeits the immunity of the privilege. . . . *Conduct is actionable, when it is indulged solely to harm another, since the legitimate interest of the defendant is practically eliminated from consideration*. The defendant's interest, although of such a character as to justify an invasion of another's similar interest, is not to be taken into account when the defendant acts, not for the purpose of protecting that interest, but *solely* to damage the plaintiff." (*Bridges v. Cal-Pacific Leasing Co.* (1971) 16 Cal.App.3d 118, 132 [93 Cal.Rptr. 796], original italics.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 760

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.119 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition,* § 565.137 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference,* § 122.42 et seq. (Matthew Bender)

2332. Bad Faith (First Party)—Failure to Properly Investigate Claim–Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] acted unreasonably, that is, without proper cause, by failing to conduct a proper investigation of [his/her/its] claim. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] suffered a loss covered under an insurance policy issued by [*name of defendant*];**

2. **That [*name of plaintiff*] properly presented a claim to [*name of defendant*] to be compensated for the loss;**

3. **That [*name of defendant*], failed to conduct a full, fair, prompt, and thorough investigation of all of the bases of [*name of plaintiff*]'s claim.**

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

5. **That [*name of defendant*]'s failure to properly investigate the claim was a substantial factor in causing [*name of plaintiff*]'s harm.**

~~**[*Name of defendant*] acted unreasonably, that is, without proper cause, if it failed to conduct a full, fair, and thorough investigation of all of the bases of the claim.**~~ **When investigating [*name of plaintiff*]'s claim, [*name of defendant*] had a duty to diligently search for and consider evidence that supported coverage of the claimed loss.**

New September 2003; Revised December 2005, December 2007, April 2008, December 2015, June 2016

Directions for Use

This instruction sets forth a claim for breach of the implied covenant of good faith and fair dealing based on the insurer's failure or refusal to conduct a proper investigation of the plaintiff's claim.~~must be used with CACI No. 2331, *Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements*, if it is alleged~~. The claim alleges that the insurer acted unreasonably, that is ~~or~~ without proper cause, by failing to properly investigate the claim. (See *Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245].)

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

Sources and Authority

- "[A]n insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 817 [169 Cal.Rptr. 691, 620 P.2d 141].)

- "To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. And an insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial." (*Frommoethelydo v. Fire Insurance Exchange* (1986) 42 Cal.3d 208, 214–215 [228 Cal.Rptr. 160, 721 P.2d 41], internal citation omitted.)

- "To protect [an insured's] interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim. Although we recognize that distinguishing fraudulent from legitimate claims may occasionally be difficult for insurers, ... an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." (*Egan, supra*, 24 Cal.3d at p. 819.)

- "When investigating a claim, an insurance company has a duty to diligently search for evidence which supports its insured's claim. If it seeks to discover only the evidence that defeats the claim it holds its own interest above that of the insured." (*Mariscal v. Old Republic Ins. Co.* (1996) 42 Cal.App.4th 1617, 1620 [50 Cal.Rptr.2d 224].)

- "While we agree with the trial court … that the insurer's interpretation of the language of its policy which led to its original denial of [the insured]'s claim was reasonable, it does not follow that [the insurer]'s resulting claim denial can be justified in the absence of a full, fair and thorough investigation of *all* of the bases of the claim that was presented." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1066 [56 Cal.Rptr.3d 312], original italics.)

- "An unreasonable failure to investigate amounting to ... unfair dealing may be found when an insurer fails to consider, or seek to discover, evidence relevant to the issues of liability and damages. ... [¶] The insurer's willingness to reconsider its denial of coverage and to continue an investigation into a claim has been held to weigh in favor of its good faith." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880 [93 Cal.Rptr.2d 364], internal citation omitted.)

- "[The insurer], of course, was not obliged to accept [the doctor]'s opinion without scrutiny or investigation. To the extent it had good faith doubts, the insurer would have been within its rights to investigate the basis for [plaintiff]'s claim by asking [the doctor] to reexamine or further explain his findings, having a physician review all the submitted medical records and offer an opinion, or, if necessary, having its insured examined by other physicians (as it later did). What it could not do, consistent with the implied covenant of good faith and fair dealing, was *ignore* [the doctor]'s conclusions without any attempt at adequate investigation, and reach contrary conclusions lacking any discernable medical foundation." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 722 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics.)

- "[W]hether an insurer breached its duty to investigate [is] a question of fact to be determined by the particular circumstances of each case." (*Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 196 [197 Cal.Rptr. 501].)

- "[L]iability in tort arises only if the conduct was unreasonable, that is, without proper cause." (*Rappaport-Scott, supra*, 146 Cal.App.4th at p. 837.)

- "[W]ithout actual presentation of a claim by the insured in compliance with claims procedures contained in the policy, there is no duty imposed on the insurer to investigate the claim." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 57 [221 Cal.Rptr. 171].)

- "It would seem reasonable that any responsibility to investigate on an insurer's part would not arise unless and until the threshold issue as to whether a claim was filed, or a good faith effort to comply with claims procedure was made, has been determined. In no event could an insured fail to keep his/her part of the bargain in the first instance, and thereafter seek recovery for breach of a duty to pay seeking punitive damages based on an insurer's failure to investigate a nonclaim." (*Paulfrey, supra*, 150 Cal.App.3d at pp. 199–200.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 245

Croskey et al., California Practice Guide: Insurance Litigation, Chapter 12C-D, *Bad Faith—First Party Cases--Application—Matters Held "Unreasonable"* ~~(The Rutter Group)~~ ¶¶ 12:848–12:904 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Investigating the Claim, §§ 9.2-9.3, 9.14–9.22A

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.04[1]–[3] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.11 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.153, 120.184 (Matthew Bender)

2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of the obligation of good faith and fair dealing because [***name of defendant***] failed to accept a reasonable settlement demand in a lawsuit against [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff in underlying case***] brought a lawsuit against [***name of plaintiff***] for a claim that was covered by [***name of defendant***]'s insurance policy;**

2. **That [***name of defendant***] failed to accept a reasonable settlement demand for an amount within policy limits; and**

3. **That a monetary judgment was entered against [***name of plaintiff***] for a sum greater than the policy limits.**

"Policy limits" means the highest amount available under the policy for the claim against [*name of plaintiff***].**

A settlement demand for an amount within policy limits is reasonable if [*name of defendant***] knew or should have known at the time the ~~settlement~~ demand was rejected that the potential judgment was likely to exceed the amount of the ~~settlement~~ demand based on [***name of plaintiff in underlying case***]'s injuries or loss and [***name of plaintiff***]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded.**

New September 2003; Revised December 2007, June 2012, December 2012, June 2016

Directions for Use

This instruction is for use in an "excess judgment" case; that is one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits.

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

~~This instruction is intended for use if the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. It may also be used if the insurer rejects the defense, but did in fact owe its insured a duty to indemnify (i.e., coverage can be established). (See *Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705].)~~ For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should

have contributed the policy limits, then this instruction will need to be modified.

This instruction should also be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other claimants.

Under this instruction, if the jury finds that the policy-limits demand was reasonable, then the insurer is automatically liable for the entire excess judgment. Language from the California Supreme Court supports this view of what might be called insurer "strict liability" if the demand is reasonable. (See *Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744] ["[W]henever it is likely that the judgment against the insured will exceed policy limits 'so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest *requires the insurer to settle* the claim,' " italics added].)

However, there is language in numerous cases, including several from the California Supreme Court, that would require the plaintiff to also prove that the insurer's rejection of the demand was "unreasonable." (See, e.g., *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724-725 [117 Cal.Rptr.2d 318, 41 P.3d 128] ["An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits," italics added]; *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717] [claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably* failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance, italics added].) Under this view, even if the policy-limits demand was reasonable, the insurer may assert that it had a legitimate reason for rejecting it. However, this option, if it exists, is not available in a denial of coverage case. (*Johansen*, *supra*, 15 Cal.3d at pp. 15−16.)

None of these cases, however, neither those seemingly creating strict liability nor those seemingly providing an opportunity for the insurer to assert that its rejection was reasonable, actually discuss, analyze, and apply this standard to reach a result. All are determined on other issues, leaving the pertinent language as arguably dicta.

For this reason, the committee has elected not to change the elements of the instruction at this time. Hopefully, some day there will be a definitive resolution from the courts. Until then, the need for an additional element requiring the insurer's rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement. For a thorough analysis of the issue, see the committee's report to the Judicial Council for its June 2016 meeting, found at (link).

Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires

the insurer to settle the claim." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra*, 66 Cal.2d at p. 429.)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen*, *supra*, ~~*v. California State Auto. Asso. Inter-Insurance Bureau* (1975)~~ 15 Cal.3d ~~9,~~ at p. 16 ~~[123 Cal.Rptr. 288, 538 P.2d 744]~~, internal citation omitted.)

- "[A]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." (*Hamilton*, *supra*, 27 Cal.4th at pp. 724–725.)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra*, 66 Cal.2d at p. 431.)

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an

enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure." (*Graciano, supra, ~~v. Mercury General Corp.~~ (2014)* 231 Cal.App.4th ~~414,~~ at p. 425 ~~[179 Cal.Rptr.3d 717]~~, internal citations omitted.)

- "A bad faith claim requires 'something beyond breach of the contractual duty itself, and that something more is ' "refusing, *without proper cause*, to compensate its insured for a loss covered by the policy … ." [Citation.] Of course, the converse of "without proper cause" is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant.' " (*Graciano, supra*, 231 Cal.App.4th at p. 433, original italics.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

- ~~"A claim for bad faith based on an alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance." (*Graciano, supra*, 231 Cal.App.4th at p. 425.)~~

- "The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal … ." (*Graciano, supra,* 231 Cal.App.4th at p. 434.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)

- "An insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)

- " 'An insurer who denies coverage *does so at its own risk and although its position may not have been entirely groundless*, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract.' Accordingly, contrary to the defendant's suggestion, an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen, supra,* 15 Cal.3d at pp. 15−16, original italics, footnotes and internal citation omitted.)

- "~~[A]n insurer who refused a reasonable settlement offer, on the ground of no coverage, does so at its own risk, so that the insurer has no defense that its refusal was in good faith if coverage is, in fact, found. However, w~~[W]here the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because 'The insurer does not … insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.…' " (*Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705]~~*DeWitt, supra,* 204 Cal.App.4th at p. 244~~, original italics.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton, supra, ~~v. Maryland Casualty Co.~~* ~~(2002)~~ 27 Cal.4th at p.~~718,~~ 725~~ [117 Cal.Rptr.2d 318, 41 P.3d 128]~~, internal citations omitted.)

- "[I]nsurers do have a 'selfish' interest (that is, one that is peculiar to themselves) in imposing a blanket rule which effectively precludes disclosure of policy limits, and that interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request." (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1398−1399 [93 Cal.Rptr.3d 763].)

- "For bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no "opportunity to settle" that an insurer may be taxed with ignoring." (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)

- **"(4) [12:245] Insurer culpability required? A number of cases suggest that some degree of insurer 'culpability' is required before an insurer's refusal to settle a third party claim can be found to constitute 'bad faith.' [*Howard v. American Nat'l Fire Ins. Co.* (2010) 187 CA4th 498, 529, 115 CR3d 42, 69 (quoting text)]**

  (a) [12:246] **Good faith or mistake as excuse:** 'If the insurer has exercised good faith in all of its dealings … and if the settlement which it has rejected has been fully and fairly considered and has been based upon an *honest belief* that the insurer could defeat the action or keep any possible

judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment.' [See *Brown v. Guarantee Ins. Co.* (1957) 155 CA2d 679, 684, 319 P2d 69, 72 (emphasis added); *Howard v. American Nat'l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69—'an insurer may reasonably underestimate the value of a case, and thus refuse settlement' on this basis (acknowledging but not applying rule)]

'In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake.' [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 CA4th 1445, 1460, 7 CR2d 513, 521]

1) [12:246.1] **Comment: These cases are difficult to reconcile with the 'only permissible consideration' standard of a 'reasonable settlement demand' set out in *Johansen* and CACI 2334 (see ¶12:235.1). A possible explanation is that these cases address the 'reasonableness' of the insurer's refusal to settle based on a dispute as to the value of the case (or other matters unrelated to coverage), whereas *Johansen* addressed 'reasonableness' in the context of a coverage dispute (see ¶12:235). [See *Howard v. American Nat'l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69 (quoting text)]" (**Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:245–12:246.1 (The Rutter Group), bold in original.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 257–258

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-A, *Implied Covenant Liability—Introduction*, ¶¶ 12:202–12:224 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:226–12:548 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-C, *Bad Faith Liability Despite Settlement Of Third Party Claims*, ¶¶ 12:575–12:581.12 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Refusal To Defend Cases*, ¶¶ 12:582–12:686, (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1–26.35

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.07[1]–[3] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.195, 120.199, 120.205, 120.207 (Matthew Bender)

2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [***describe activity protected by the FEHA***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***describe protected activity***];**

2. **[That [***name of defendant***] [discharged/demoted/[***specify other adverse employment action***]] [***name of plaintiff***];]**

   [**or**]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [**or**]

   [That [*name of plaintiff***] was constructively discharged;]**

3. **That [***name of plaintiff***]'s [***describe protected activity***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

5. **That [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***] [***name of plaintiff***]~~conduct~~ was a substantial factor in causing ~~[***name of plaintiff***]'s~~ [him/her] harm.**

[[*Name of plaintiff***] does not have to prove [discrimination/harassment] in order to be protected from retaliation. If [he/she] [reasonably believed that [***name of defendant***]'s conduct was unlawful/requested a [disability/religious] accommodation], [he/she] may prevail on a retaliation claim even if [he/she] does not present, or prevail on, a separate claim for [discrimination/harassment/[***other***]].]**

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010, June 2012, December 2012, June 2013, June 2014, June 2016

Directions for Use

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]." It is also unlawful to retaliate or

otherwise discriminate against a person for requesting an accommodation for religious practice or disability, regardless of whether the request was granted. (Gov. Code, § 12940(*l*)(4) [religious practice], (m)(2) [disability].)

Read the first option for element 2 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Give both the first and second options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select "conduct" in element 3 if the second option or both the first and second options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee's position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, give the third option for element 2 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Also select "conduct" in element 3 if the third option is included for element 2.

Element 3 requires that the protected activity be a substantial motivating reason for the retaliatory acts. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472].) The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA. The jury in the case was instructed per element 3 "that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant." The committee believes that the instruction as given is correct for the intent element in a retaliation case. However, in cases such as *Joaquin* that involve allegations of a prohibited motivating reason (based on a report of sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified), the instruction may need to be modified to make it clear that plaintiff must prove that defendant acted based on the *prohibited* motivating reason and not the *permitted* motivating reason.

Sources and Authority

- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).
- Retaliation for Requesting Reasonable Accommodation for Religious Practice and Disability Prohibited. Government Code section 12940(*l*)(4), (m)(2).
- "Person" Defined Under Fair Employment and Housing Act. Government Code section 12925(d).
- Prohibited Retaliation. Title 2 California Code of Regulations section 11021.
- "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz, supra*, 36 Cal.4th at p. 1042, internal citations omitted.)
- "Actions for retaliation are 'inherently fact-driven'; it is the jury, not the court, that is charged with determining the facts." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 299 [156 Cal.Rptr.3d 851].)
- "It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)
- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz, supra,* 36 Cal.4th at p. 1052.)
- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)
- "Clearly, section 12940, subdivision (h) encompasses a broad range of protected activity. An employee need not use specific legal terms or buzzwords in opposing discrimination. Nor is it

necessary for an employee to file a formal charge. The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination, or by evidence an employer believed the plaintiff was a potential witness in another employee's FEHA action." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 652 [163 Cal.Rptr.3d 392], internal citations and footnote omitted.)

- ~~"But protected activity does not include a mere request for reasonable accommodation. Without more, exercising one's rights under FEHA to request reasonable accommodation or engage in the interactive process does not demonstrate some degree of opposition to or protest of unlawful conduct by the employer." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 381 [184 Cal.Rptr.3d 9], internal citation omitted.)~~

- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger, supra,* 157 Cal.App.4th at p. 424, internal citations omitted.)

- "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger, supra,* 157 Cal.App.4th at p. 421, internal citation omitted.)

- "Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.' Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)

- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)

- "[A]n employer generally can be held liable for the retaliatory actions of its supervisors." (*Wysinger, supra,* 157 Cal.App.4th at p. 420.)

- "Plaintiff, although a partner, is a person whom section 12940, subdivision (h) protects from retaliation for opposing the partnership-employer's harassment against those employees." (*Fitzsimons*

v. California Emergency Physicians Medical Group (2012) 205 Cal.App.4th 1423, 1429 [141 Cal.Rptr.3d 265].)

- "[A]n employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under section 12940(h), 'by permitting … fellow employees to punish [him] for invoking [his] rights.' We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 213 [126 Cal.Rptr.3d 651], internal citation omitted.)

- "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

- "[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446,. 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints … .' Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra,* 162 Cal.App.4th at p. 1255, internal citations omitted.)

- " 'The plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. … In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot " 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee '"must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," … and hence infer "that the employer did not act for the [asserted] non-discriminatory reasons." ' " ' " (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1409 [194 Cal.Rptr.3d 689].)

- "Government Code section 12940, subdivision (h), does not shield an employee against termination or lesser discipline for either lying or withholding information during an employer's internal investigation of a discrimination claim. In other words, public policy does not protect deceptive activity during an internal investigation. Such conduct is a legitimate reason to terminate an at-will employee." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1528 [152

Cal.Rptr.3d 154], footnotes omitted.)

- "Although appellant does not argue she was constructively discharged, such a claim is not necessary to find unlawful retaliation." (*McCoy, supra,* 216 Cal.App.4th at p. 301.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:680–7:841 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.37, 115.94 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:74–2:75 (Thomson Reuters)

2506. Limitation on Remedies~~Affirmative Defense~~—After-Acquired Evidence

[*Name of defendant***] claims that [he/she/it] would have discharged [***name of plaintiff***] anyway if [he/she/it] had known that [***name of plaintiff***] [***describe misconduct***]. You must decide whether [***name of defendant***] has proved all of the following:**

1. **That [***name of plaintiff***] [***describe misconduct***];**

2. **That [***name of plaintiff***]'s misconduct was sufficiently severe that [***name of defendant***] would have discharged [him/her] because of that misconduct alone had [***name of defendant***] known of it; and**

3. **That [***name of defendant***] would have discharged [***name of plaintiff***] for [his/her] misconduct as a matter of settled company policy.**

New September 2003; Revised June 2016

Directions for Use

The after-acquired-evidence doctrine is an equitable defense that is determined by the court based on the facts of the case. This instruction assists the judge ~~where~~ if the facts are in dispute. (See, e.g., *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1173 [104 Cal.Rptr.2d 95].) After-acquired evidence is not a complete defense to liability, but may foreclose otherwise available remedies. (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 430−431 [173 Cal.Rptr.3d 689, 327 P.3d 797].) It is not clear if there is a role for the jury in deciding what remedies are available.

After-acquired evidence cases must be distinguished from mixed motive cases in which the employer at the time of the employment action has two or more motives, at least one of which is unlawful. (See *Salas supra*, 59 Cal.4th at p. 430; CACI No. 2512, *Limitation on Remedies—Same Decision*.)

Sources and Authority

- "In general, the after-acquired-evidence doctrine shields an employer from liability or limits available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. Employee wrongdoing in after-acquired-evidence cases generally falls into one of two categories: (1) misrepresentations on a resume or job application; or (2) posthire, on-the-job misconduct." (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 632 [41 Cal.Rptr.2d 329].)

- "The after-acquired-evidence doctrine serves as a complete or partial defense to an employee's claim of wrongful discharge ... To invoke this doctrine, '... the employer must establish "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it" ... [T]he employer ... must show that such a firing would have taken place as a matter of "settled" company policy.' " (*Murillo v. Rite Stuff Foods, Inc.*

(1998) 65 Cal.App.4th 833, 842, 845-846 [77 Cal.Rptr.2d 12], internal citations omitted.)

- "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." (*McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 362-363 [115 S.Ct. 879, 130 L.Ed.2d 852].)

- "Courts must tread carefully in applying the after-acquired-evidence doctrine to discrimination claims ... . Where, as here, the discriminatory conduct was pervasive during the term of employment, therefore, it would not be sound public policy to bar recovery for injuries suffered while employed. In applying the after-acquired-evidence doctrine, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim tied to the employee's discharge." (*Murillo*, *supra*, 65 Cal.App.4th at pp. 849–850.)

- "As the Supreme Court recognized in *McKennon*, the use of after-acquired evidence must 'take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.' We appreciate that the facts in *McKennon* ... presented a situation where balancing the equities should permit a finding of employer liability-to reinforce the importance of antidiscrimination laws-while limiting an employee's damages-to take account of an employer's business prerogatives. However, the equities compel a different result where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications. In such a situation, the employee should have no recourse for an alleged wrongful termination of employment." (*Camp*, *supra*, 35 Cal.App.4th at pp. 637-638, internal citation omitted.)

- "We decline to adopt a blanket rule that material falsification of an employment application is a complete defense to a claim that the employer, while still unaware of the falsification, terminated the employment in violation of the employee's legal rights." (*Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, 617 [29 Cal.Rptr.2d 642].)

- "The doctrine [of after-acquired evidence] is the basis for an equitable defense related to the traditional defense of 'unclean hands' ... [¶] In the present case, there were conflicts in the evidence concerning respondent's actions, her motivations, and the possible consequences of her actions within appellant's disciplinary system. The trial court submitted those factual questions to the jury for resolution and then used the resulting special verdict as the basis for concluding appellant was not entitled to equitable reduction of the damages award." (*Thompson, supra,* 86 Cal.App.4th at p. 1173.)

- "By definition, after-acquired evidence is not known to the employer at the time of the allegedly unlawful termination or refusal to hire. In after-acquired evidence cases, the employer's alleged wrongful act in violation of the FEHA's strong public policy precedes the employer's discovery of information that would have justified the employer's decision. To allow such after-acquired evidence to be a complete defense would eviscerate the public policies embodied in the FEHA by allowing an employer to engage in invidious employment discrimination with total impunity." (*Salas*, *supra*, 59 Cal.4th at p. 430.)

- "In after-acquired evidence cases, therefore, both the employee's rights and the employer's

prerogatives deserve recognition. The relative equities will vary from case to case, depending on the nature and consequences of any wrongdoing on either side, a circumstance that counsels against rigidity in fashioning appropriate remedies in those actions where an employer relies on after-acquired evidence to defeat an employee's FEHA claims." (*Salas*, *supra*, 59 Cal.4th at p. 430.)

- "Generally, the employee's remedies should not afford compensation for loss of employment during the period after the employer's discovery of the evidence relating to the employee's wrongdoing. When the employer shows that information acquired after the employee's claim has been made would have led to a lawful discharge or other employment action, remedies such as reinstatement, promotion, and pay for periods after the employer learned of such information would be 'inequitable and pointless,' as they grant remedial relief for a period during which the plaintiff employee was no longer in the defendant's employment and had no right to such employment." (*Salas*, *supra*, 59 Cal.4th at pp. 430−431.)

- The remedial relief generally should compensate the employee for loss of employment from the date of wrongful discharge or refusal to hire to the date on which the employer acquired information of the employee's wrongdoing or ineligibility for employment. Fashioning remedies based on the relative equities of the parties prevents the employer from violating California's FEHA with impunity while also preventing an employee or job applicant from obtaining lost wages compensation for a period during which the employee or applicant would not in any event have been employed by the employer. In an appropriate case, it would also prevent an employee from recovering any lost wages when the employee's wrongdoing is particularly egregious." (*Salas*, *supra*, 59 Cal.4th at p. 431, footnote omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 211

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 7:930–7:932, 16:615–16:616, 16:625, 16:635–16:637, 16:647

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.107

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.92 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.54[2] (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~ § 2:88 (Thomson Reuters)

2512. Limitation on Remedies—Same Decision

[*Name of plaintiff***] claims that [he/she] was [discharged/[***other adverse employment action***]] because of [his/her] [***protected status or action, e.g., race, gender, or age***], which is an unlawful [discriminatory/retaliatory] reason. [***Name of defendant***] claims that [***name of plaintiff***] [was discharged/[***other adverse employment action***]] because of [***specify reason, e.g., plaintiff's poor job performance***], which is a lawful reason.**

If you find that [discrimination/retaliation] was a substantial motivating reason for [*name of plaintiff***]'s [discharge/[***other adverse employment action***]], you must then consider [***name of defendant***]'s stated reason for the [discharge/[***other adverse employment action***]].**

If you find that [*e.g., plaintiff's poor job performance***] was also a substantial motivating reason, then you must determine whether the defendant has proven that [he/she/it] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time based on [***e.g., plaintiff's poor job performance***] even if [he/she/it] had not also been substantially motivated by [discrimination/retaliation].**

In determining whether [*e.g., plaintiff's poor job performance***] was a substantial motivating reason, determine what actually motivated [***name of defendant***], not what [he/she/it] might have been justified in doing.**

If you find that [*name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***] ~~only~~ for a [discriminatory/retaliatory] reason, you will be asked to determine the amount of damages that [he/she] is entitled to recover. If, however, you find that [***name of defendant***] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time for [***specify defendant's nondiscriminatory/nonretaliatory reason***], then [***name of plaintiff***] will not be entitled to reinstatement, back pay, or damages.**

New December 2013; Revised June 2015, June 2016

Directions for Use

Give this instruction along with CACI No. 2507, *"Substantial Motivating Reason" Explained*, if the employee has presented sufficient evidence for the jury to find that the employer took adverse action against him or her for a prohibited reason, but the employer has presented sufficient evidence for the jury to find that it had a legitimate reason for the action. In such a "mixed-motive" case, the employer is relieved from an award of damages, but may still be liable for attorney fees and costs and injunctive relief. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 211 [152 Cal.Rptr.3d 392, 294 P.3d 49].)

Mixed-motive must be distinguished from pretext though both require evaluation of the same evidence, i.e., the employer's purported legitimate reason for the adverse action. In a pretext case, the only actual motive is the discriminatory one and the purported legitimate reasons are fabricated in order to disguise

the true motive. (See *City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716].) The employee has the burden of proving pretext. (*Harris, supra,* 56 Cal.4th at pp. 214−215.) If the employee proves discrimination or retaliation and also pretext, the employer is liable for all potential remedies including damages. But if the employee proves discrimination or retaliation but fails to prove pretext, then a mixed-motive case is presented. To avoid an award of damages, the employer then has the burden of proving that it would have made the same decision anyway solely for the legitimate reason, even though it may have also discriminated or retaliated.

Sources and Authority

- "[U]nder the FEHA, when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability. In light of the FEHA's express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may be eligible for reasonable attorney's fees and costs." (*Harris, supra,* 56 Cal.4th at p. 211.)

- "Because employment discrimination litigation does not resemble the kind of cases in which we have applied the clear and convincing standard, we hold that preponderance of the evidence is the standard of proof applicable to an employer's same-decision showing" (*Harris, supra,* 53 Cal.4th at p. 239.)

- "[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*." (*Harris, supra,* 56 Cal.4th at p. 224, original italics.)

- "In light of today's decision, a jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer's action was substantially motivated by discrimination before the burden shifts to the employer to make a same-decision showing, and that a same-decision showing precludes an award of reinstatement, backpay, or damages." (*Harris, supra,* 56 Cal.4th at p. 241.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of

discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." (*Harris, supra,* 56 Cal.4th at pp. 214−215.)

- " '[Plaintiff] further argues that for equitable reasons, an employer that wishes to make a same-decision showing must concede that it had mixed motives for taking the adverse employment action instead of denying a discriminatory motive altogether. But there is no inconsistency when an employer argues that its motive for discharging an employee was legitimate, while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then its lawful motive alone would have led to the discharge.' " (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 199 [167 Cal.Rptr.3d 24] [quoting *Harris, supra,* 56 Cal.App.4th at p. 240].)

- "As a preliminary matter, we reject [defendant]'s claim that the jury could have found no liability on the part of [defendant] had it been properly instructed on the mixed-motive defense at trial. As discussed, the Supreme Court in *Harris* held that the mixed-motive defense is available under the FEHA, but only as a limitation on remedies and not as a complete defense to liability. Consequently, when the plaintiff proves by a preponderance of the evidence that discrimination was a substantial motivating factor in the adverse employment decision, the employer is liable under the FEHA. When the employer proves by a preponderance of the evidence that it would have made the same decision even in the absence of such discrimination, the employer is still liable under the FEHA, but the plaintiff's remedies are then limited to declaratory or injunctive relief, and where appropriate, attorney's fees and costs. As presently drafted, BAJI No. 12.26 does not accurately set forth the parameters of the defense as articulated by the Supreme Court, but rather states that, in a mixed-motive case, 'the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision.' By providing that the mixed-motive defense, if proven, is a complete defense to liability, [defendant]'s requested instruction directly conflicts with the holding in *Harris*. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 481 [161 Cal.Rptr.3d 758], internal citations omitted.)

- "Pretext may … be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 272 [100 Cal.Rptr.3d 296].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 928, 950

7 Witkin, California Procedure (5th ed. 2008), Judgment § 217

3 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.11 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23 (Matthew Bender)

3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] used excessive force in [arresting/detaining] [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force in [arresting/detaining] [***name of plaintiff***];**

2. **That the force used by [***name of defendant***] was excessive;**

3. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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

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

Force is not excessive if it is reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider the following:

(a) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others;**

(b) The seriousness of the crime at issue; [and]

(c) Whether [*name of plaintiff***] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight][./; and]**

(d) [*specify other factors particular to the case***].**

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised June 2015, June 2016

Directions for Use

The "official duties" referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The three factors (a), (b), and (c) listed are often referred to as the "*Graham* factors." (See *Graham v.*

Connor (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case.

Additional considerations and verdict form questions will be needed if there is a question of fact as to whether the defendant law enforcement officer had time for reflective decision-making before applying force. If the officers' conduct required a reaction to fast-paced circumstances presenting competing public safety obligations, the plaintiff must prove intent to harm. (See *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)

No case has yet determined, and therefore it is unclear, whether the defense has either the burden of proof or the burden of producing evidence on reaction to fast-paced circumstances. (See Evid. Code, §§ 500 [party has burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted], 550 [burden of producing evidence as to particular fact is on party against whom a finding on the fact would be required in absence of further evidence].)

For an ~~This~~ instruction ~~may be modified~~ for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305, *Battery by Police Officer*. ~~The *Graham* factors apply under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) Liability under California negligence law can arise if tactical conduct and decisions preceding the use of force, as part of the totality of circumstances, make the ultimate use of force unreasonable. In this respect, California negligence law differs from the federal standard under the Fourth Amendment, which focuses more narrowly on the moment when force is used. (*Hayes v. County of San Diego* (2014) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].) If the negligence claim is based in part on tactical conduct and decisions made before the use of force, this instruction may be modified to specifically instruct the jury to consider the officers' pre-force decisions and conduct.~~

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra,* 490 U.S. at p. 395, internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "[A]ll claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process'

approach." (*Graham, supra,* 490 U.S. at p. 395.)

- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "The most important of these [factors from *Graham,* above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra*, 661 F.3d at p. 467, internal citations omitted.)

- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)

- "Justice Stevens incorrectly declares [the 'objective reasonableness' standard under *Graham*] to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.'. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of [defendant]'s actions--or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' is a pure question of law." (*Scott v. Harris* (2007) 550 U.S. 372, 381, fn. 8 [127 S. Ct. 1769; 167 L. Ed. 2d 686], original italics, internal citations omitted.)

- "To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. But in weighing the evidence in favor of the officers, rather than the [plaintiffs], the district court unfairly tipped the reasonableness inquiry in the officers' favor." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1167, internal citation omitted.)

- "The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes, supra,* 57

Cal.4th at p. 639.)

- "[S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." (*Hayes, supra,* 57 Cal.4th at p. 639, internal citations omitted.)

- "We are cognizant of the Supreme Court's command to evaluate an officer's actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We also recognize the reality that 'police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.' This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is ' "objectively reasonable" in light of the facts and circumstances confronting them' without regard for an officer's subjective intentions." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)

- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

- "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)

- " In any event, the court correctly instructed the jury on the mental state required in a Fourteenth Amendment excessive use of force case under section 1983 because this case did not involve reflective decisionmaking by the officers, but instead their reaction to fast-paced circumstances presenting competing public safety obligations. Given these circumstances, [plaintiff] was required to prove that the officers acted with a purpose to cause harm to her son." (*Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)

- "[T]he fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)

- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported

[defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)

- "Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself*, we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution' could be worse than the problem." (*Glenn, supra,* 661 F.3d at p. 468.)

- "[W]e have stated that if the police were summoned to the scene to protect a mentally ill offender from himself, the government has less interest in using force. By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force." (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)

- "[P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." (*Hayes, supra,* 57 Cal.4th at p. 632, internal citation omitted.)

- "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 875.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment,

or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)

- "[T]he district court effectively required the jury to presume that the arrest *was* constitutionally lawful, and so not to consider facts concerning the basis for the arrest. Doing so removed critical factual questions that were within the jury's province to decide. For instance, by taking from the jury the question whether [officer]'s arrest of [plaintiff] for resisting or obstructing a police officer was lawful, the district judge implied simultaneously that [plaintiff] was in fact resisting or failing to obey the police officer's lawful instructions. Presuming such resistance could certainly have influenced the jury's assessment of 'the need for force,' as well as its consideration of the other *Graham* factors, including 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. By erroneously granting judgment as a matter of law on [plaintiff]'s unlawful arrest claim, the district court impermissibly truncated the jury's consideration of [plaintiff]'s excessive force claim." (*Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, --, original italics.)

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1526 et seq. (The Rutter Group)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3021. Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully arrested [him/her] because [he/she] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] arrested [***name of plaintiff***] without a warrant[and without probable cause];**

2. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] was arrested without probable cause. But in order for me to do so, you must first decide:**

[*List all factual disputes that must be resolved by the jury.***]]**

New April 2009; Revised December 2009; Renumbered from CACI No. 3014 December 2012, June 2016

Directions for Use

Give this instruction in a false arrest case brought under title 42 United States Code section 1983. For an instruction for false arrest under California law, see CACI No. 1401, ~~*Essential Factual Elements—*~~*False Arrest Without Warrant by Peace Officer—Essential Factual Elements*.

The ultimate determination of whether the arresting officer had probable cause (element 1) is to be made by the court as a matter of law. (*Hunter v. Bryant* (1991) 502 U.S. 224, 227−228 [112 S.Ct. 534, 116 L.Ed.2d 589].) However, in exercising this role, the court does not sit as the trier of fact. It is still the province of the jury to determine the facts on conflicting evidence as to what the arresting officer knew at the time. (See *Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1018−1023; see also *King v. State of California* (2015) 242 Cal.App.4th 265, 289 [195 Cal.Rptr.3d 286].) Include "without probable cause" and the last optional paragraph if the jury will be asked to find facts with regard to probable cause.

The "official duties" referred to in element 2 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 2.

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)

- " 'A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification.'. 'Probable cause exists if the arresting officers "had knowledge and reasonably trustworthy information of facts and circumstances sufficient to lead a prudent person to believe that [the arrestee] had committed or was committing a crime." ' " (*Gravelet-Blondin v. Shelton* (9th Cir. 2013) 728 F.3d 1086, 1097−1098.)

- "The Court of Appeals' confusion is evident from its statement that 'whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." (*Hunter*, *supra*, 502 U.S. at pp. 227−228, internal citations omitted.)

- "The mere existence of some evidence that could suggest self-defense does not negate probable cause. [Plaintiff]'s claim of self-defense apparently created doubt in the minds of the jurors, but probable cause can well exist (and often does) even though ultimately, a jury is not persuaded that there is proof beyond a reasonable doubt." (*Yousefian v. City of Glendale* (9th Cir. 2015) 779 F.3d 1010, 1014.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant." (*Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 965.)

- “There is no bright-line rule to establish whether an investigatory stop has risen to the level of an arrest. Instead, this difference is ascertained in light of the ‘ “totality of the circumstances.” ’ This is a highly fact-specific inquiry that considers the intrusiveness of the methods used in light of whether these methods were ‘reasonable *given the specific circumstances*.’ ” (*Green v. City & County of San Francisco* (9th Cir. 2014) 751 F.3d 1039, 1047, original italics, internal citations omitted.)

- “Because stopping an automobile and detaining its occupants, ‘even if only for a brief period and for a limited purpose,’ constitutes a ‘seizure’ under the Fourth Amendment, an official must have individualized ‘reasonable suspicion’ of unlawful conduct to carry out such a stop.” (*Tarabochia v. Adkins* (9th Cir. 2014) 766 F.3d 1115, 1121, internal citation omitted.)

- “ ‘[Q]ualified immunity is a question of law, not a question of fact. [Citation.] But Defendants are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to [the plaintiff], they violated no clearly established constitutional right. The court must deny the motion for judgment as a matter of law if reasonable jurors could believe that Defendants violated [the plaintiff's] constitutional right, and the right at issue was clearly established.’ ‘The availability of qualified immunity after a trial is a legal question informed by the jury's findings of fact, but ultimately committed to the court's judgment.’ ‘‘ ‘[D]eference to the jury's view of the facts persists throughout each prong of the qualified immunity inquiry.’ ” ‘[T]he jury's view of the facts must govern our analysis once litigation has ended with a jury's verdict.’ ‘Where, as here, the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.’ ” (*King, supra*, 242 Cal.App.4th at p. 289, internal citations omitted.)

- “[I]f what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the correct version, that factual dispute must be resolved by a fact finder. [Citations.] [¶] … [W]e do not find the facts relative to probable cause to arrest, and the alleged related conspiracy, so plain as to lead us to only a single conclusion, i.e., a conclusion in defendants' favor. The facts are complex, intricate and in key areas contested. Even more important, the inferences to be drawn from the web of facts are disputed and unclear—and are likely to depend on credibility judgments.” (*King, supra*, 242 Cal.App.4th at p. 291, internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 181

5 Levy et al., California Torts, Ch. 60, *Principles of Liability and Immunity of Public Entities and Employees*, § 60.06 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.36A (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Institutional and Individual Immunity*, § 2.03 (Matthew Bender)

3051. Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements (42 U.S.C., § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully removed [***name of plaintiff***]'s child from [his/her] parental custody because [***name of defendant***] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] removed [***name of plaintiff***]'s child from [his/her] parental custody without a warrant;**

2. **That [***name of defendant***] was performing or purporting to perform [his/her] official duties;**

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

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

New June 2016

Directions for Use

This instruction is a variation on CACI No. 3021, *Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements*, and CACI No. 3023, *Unreasonable Search—Search Without a Warrant—Essential Factual Elements*, in which the warrantless act is the removal of a child from parental custody rather than an arrest or search. This instruction asserts a parent's due process right to familial association under the Fourteenth Amendment. It may be modified to assert or include the child's right under the Fourth Amendment to be free of a warrantless seizure. (See *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1473−1474 [150 Cal.Rptr.3d 735].)

Warrantless removal is a constitutional violation unless the authorities possess information at the time of the seizure that establishes reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury. (*Arce, supra,* 211 Cal.App.4th at p. 1473.) The committee believes that the defendant bears the burden of proving imminent danger. (See Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."]; cf. *Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [104 S.Ct. 2091, 80 L.Ed.2d 732] ["Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."].) CACI No. 3026, *Affirmative Defense─Exigent Circumstances* (to a warrantless search), may be modified to respond to this claim.

If the removal of the child was without a warrant and without exigent circumstances, but later found to be justified by the court, damages are limited to those caused by the procedural defect, not the removal. (See

Watson v. City of San Jose (9th Cir. 2015) 800 F.3d 1135, 1139.)

Sources and Authority

- " ' "Parents and children have a well-elaborated constitutional right to live together without governmental interference.' [Citation.] 'The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies." This 'right to family association' requires '[g]overnment officials … to obtain prior judicial authorization before intruding on a parent's custody of her child unless they possess information at the time of the seizure that establishes "reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1473, internal citations omitted.)

- " 'The Fourth Amendment also protects children from removal from their homes [without prior judicial authorization] absent such a showing. [Citation.] Officials, including social workers, who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.' Because 'the same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children," we may "analyze [the claims] together.' " (*Arce, supra*, 211 Cal.App.4th at pp. 1473−1474.)

- "While the constitutional source of the parent's and the child's rights differ, the tests under the Fourteenth Amendment and the Fourth Amendment for when a child may be seized without a warrant are the same. The Constitution requires an official separating a child from its parents to obtain a court order unless the official has reasonable cause to believe the child is in 'imminent danger of serious bodily injury.' Seizure of a child is reasonable also where the official obtains parental consent." (*Jones v. County of L.A.* (9th Cir. 2015) 802 F.3d 990, 1000, internal citations omitted.)

- "[W]hether an official had 'reasonable cause to believe exigent circumstances existed in a given situation … [is a] "question[] of fact to be determined by a jury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1475.)

- "Importantly, 'social workers who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm *in the time that would be required to obtain a warrant*.' " (*Kirkpatrick v. County of Washoe* (9th Cir. 2015) 792 F.3d 1184, 1194, original italics.)

- "[A] child is seized for purposes of the Fourth and Fourteenth Amendments when a representative of the state takes action causing a child to be detained at a hospital as part of a child abuse investigation, such that a reasonable person in the same position as the child's parent would believe that she cannot take her child home." (*Jones, supra*, 802 F.3d at p. 1001.)

- "[A] jury is needed to determine what a reasonable parent in the [plaintiffs'] position would have believed and whether [defendant]'s conduct amounted to a seizure. (*Jones, supra*, 802 F.3d at p.

1002.)

- "In sum, although we do not dispute that Shaken Baby Syndrome is a serious, life-threatening injury, we disagree with the County defendants' assertion that a child may be detained without prior judicial authorization based solely on the fact that he or she has suffered a serious injury. Rather, the case law demonstrates that the warrantless detention of a child is improper unless there is "specific, articulable evidence" that the child would be placed at imminent risk of serious harm absent an immediate interference with parental custodial rights." (*Arce, supra,* 211 Cal.App.4th at p. 1481.)

- "[I]n cases where 'a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure.' In such cases, … a plaintiff must 'convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself.' " (*Watson, supra,* 800 F.3d at p. 1139, internal citation omitted; see *Carey v. Piphus* (1978) 435 U.S. 247, 263 [98 S.Ct. 1042, 55 L.Ed.2d 252].)

Secondary Sources

3 Civil Rights Actions, Ch. 12B, *Deprivation of Rights Under Color of State Law--Family Relations*, ¶ 12B.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3 California Points and Authorities, Ch. 35A, *Civil Rights: Equal Protection*, § 35A.29 et seq. (Matthew Bender)

3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her] [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***name of plaintiff***];**

2. **[That a substantial motivating reason for** [*name of defendant*]**'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[***insert other actionable characteristic***]];]**

   [That the [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[*insert other actionable characteristic***]] of a person whom [***name of plaintiff***] was associated with was a substantial motivating reason for [***name of defendant***]'s conduct;]**

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

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

New September 2003; Revised December 2011, June 2012; Renumbered from CACI No. 3020 December 2012; Revised June 2013, June 2016

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (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*.) Whether the FEHA standard applies under the Unruh Act has not been addressed by the courts.

With the exception of claims that are also violations of the Americans With Disabilites Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional discrimination is required for violations of the Unruh Act. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

For an instruction on damages under the Unruh Act, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000 regardless of any actual damages. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Act violations are per se injurious]; Civ. Code, § 52(a) [provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

The Act is not limited to the categories expressly mentioned in the statute. Other forms of arbitrary discrimination by business establishments are prohibited. (*In re Cox* (1970) 3 Cal.3d 205, 216 [90 Cal.Rptr. 24, 474 P.2d 992].) Therefore, this instruction allows the user to "*insert other actionable characteristic*" throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393 [127 Cal.Rptr.3d 794]; see *Harris, supra,* 52 Cal.3d at pp. 1159–1162.) However, these issues are most likely to be resolved by the court rather than the jury. (See *Harris, supra,* 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an "other actionable characteristic." If there are contested factual issues, additional instructions or special interrogatories may be necessary.

Sources and Authority

- Unruh Civil Rights Act. Civil Code section 51.
- Remedies Under Unruh Act. Civil Code section 52.
- "The Unruh Act was enacted to 'create and preserve a nondiscriminatory environment in California business establishments by "banishing" or "eradicating" arbitrary, invidious discrimination by such establishments.' " (*Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 937 [190 Cal.Rptr.3d 33].)

- "Invidious discrimination is the treatment of individuals in a manner that is malicious, hostile, or damaging." (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1404 [195 Cal.Rptr.3d 706]

- " 'The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position, (as in life or business)." ' " (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427], internal citations omitted.)

- Whether a defendant is a "business establishment" is decided as an issue of law. (*Rotary Club of Duarte, supra,* 178 Cal.App.3d at p. 1050.)

- "Here, the City was not acting as a business establishment. It was amending an already existing municipal code section to increase the minimum age of a responsible person from the age of 21 years to 30. The City was not directly discriminating against anyone and nothing in the plain language of the Unruh Civil Rights Act makes its provisions applicable to the actions taken by the City." (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 175 [196 Cal.Rptr.3d 267].)

- "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.' These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)

- "[T]here is no dispute that California courts have applied the Act to discrimination based on age. Furthermore, the Act targets not just the practice of outright exclusion, but pricing differentials as well." (*Javorsky, supra*, 242 Cal.App.4th at p. 1394, internal citations omitted.)

- "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act." (*Harris, supra,* 52 Cal.3d at p. 1149.)

- "On examining the language, statutory context, and history of section 51, subdivision (f), we conclude … [t]he Legislature's intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52." (*Munson, supra,* 46 Cal.4th at p. 665.)

- "Civil Code section 51, subdivision (f) states: 'A violation of the right of any individual under the federal [ADA] shall also constitute a violation of this section.' The ADA provides in pertinent part: 'No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who … operates a place of public accommodation.' The ADA defines discrimination as 'a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.' " (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825], internal citations omitted.)

- " 'Although the Unruh Act proscribes "any form of arbitrary discrimination", certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' Thus, for example, 'legitimate business interests may justify limitations on consumer access to public accommodations.' " (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)

- "Discrimination may be reasonable, and not arbitrary, in light of the nature of the enterprise or its facilities, legitimate business interests (maintaining order, complying with legal requirements, and protecting business reputation or investment), and public policy supporting the disparate treatment." (*Javorsky, supra,* 242 Cal.App.4th at p. 1395.)

- "[T]he Act's objective of prohibiting 'unreasonable, arbitrary or invidious discrimination' is fulfilled by examining whether a price differential reflects an 'arbitrary, class-based generalization.' … [A] policy treating age groups differently in this respect may be upheld, at least if the pricing policy (1) ostensibly provides a social benefit to the recipient group; (2) the recipient group is disadvantaged economically when compared to other groups paying full price; and (3) there is no invidious discrimination." (*Javorsky, supra,* 242 Cal.App.4th at p. 1399.)

- "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris, supra,* 52 Cal.3d at p. 1165, internal citations omitted.)

- "It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one's right of association on account of the associates' color, is violative of the Act. It follows ... that discrimination by a business establishment against persons on account of their association with others of the black race is

actionable under the Act." (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

- "Appellant is disabled as a matter of law not only because she is HIV positive, but also because it is undisputed that respondent 'regarded or treated' her as a person with a disability. The protection of the Unruh Civil Rights Act extends both to people who are currently living with a physical disability that limits a life activity and to those who are regarded by others as living with such a disability. … 'Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the "regarded as" definition casts a broader net and protects *any* individual "regarded" or "treated" by an employer "as having, or having had, any physical condition that makes achievement of a major life activity difficult" or may do so in the future.' Thus, even an HIV-positive person who is outwardly asymptomatic is protected by the Unruh Civil Rights Act." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 529−530 [155 Cal.Rptr.3d 620], original italics, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10-116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 et seq. (Matthew Bender)

3710. Ratification

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for the harm caused by [***name of agent***]'s conduct because [***name of defendant*~~he/she/it~~**] approved that conduct after it occurred. If you find that [***name of agent***] harmed [***name of plaintiff***], you must decide whether [***name of defendant***] approved that conduct. To establish [his/her] claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of agent***], although not authorized to do so, purported ~~intended~~ to act on behalf of [***name of defendant***];**

2. **That [***name of defendant***] learned of [***name of agent***]'s unauthorized conduct, and all of the material facts involved in the unauthorized transaction, after it occurred; and**

3. **That [***name of defendant***] then approved [***name of agent***]'s conduct.**

Approval can be shown through words, or it can be inferred from a person's conduct. [Approval can be inferred if [*name of defendant***]~~a person~~ voluntarily keeps the benefits of [***name of agent*~~his/her/its~~]'s ~~[representative/employee]'s~~ unauthorized conduct after [he/she/it] learns of it~~the unauthorized conduct~~.]**

New September 2003; Revised June 2016

Directions for Use

This instruction is for use in a traditional principal-agent relationship. The last bracketed sentence should be read only if it is appropriate to the facts of the case.

This instruction should not be given without modifications in an employment law case, in which an employee seeks to hold the employer liable for the tortious conduct of a supervisor or other employee. Ratification involves different considerations in employment law. For example, element 1 should not be given because it is not necessary for the culpable employee to purport to act on behalf of the employer. (See *Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 271−272 [150 Cal.Rptr.3d 861] [CACI 3710 given without element 1].)

For an instruction for use for governmental entity liability in a civil rights case under Title 42 United States Code section 1983, see CACI No. 3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- Agency Created by Ratification. Civil Code section 2307.
- Ratification by Acceptance of Benefits. Civil Code section 2310.

- Partial Ratification. Civil Code section 2311.

- Vicarious Liability for Ratified Acts. Civil Code section 2339.

- "Ratification is the subsequent adoption by one person of an act which another without authority assumed to do as his agent." (*Anderson v. Fay Improv. Co.* (1955) 134 Cal.App.2d 738, 748 [286 P.2d 513].)

- " '[S]ince ratification contemplates an act by one person in behalf of another, there must exist at the time the unauthorized act was done a relationship, either actual or assumed, of principal and agent, between the person alleged to have ratified and the person by whom the unauthorized act was done.' " (*Anderson*, *supra*, 134 Cal.App.2d at p. 748, citing 2 California Jurisprudence 2d 741, section 83.)

- " 'Furthermore, the prevailing view is that there can be no ratification if the person who performed the unauthorized act did not at the time profess to be an agent.' " (*Anderson*, *supra*, 134 Cal.App.2d at p. 748, citing 2 California Jurisprudence 2d 741, section 83.)~~The concept of ratification is more commonly associated with contract law than tort law. Nevertheless, "[r]atification has, in fact, been a basis for imputed tort liability under the common law for centuries." (Kraus, *Ratification of Torts: An Overview and Critique of the Traditional Doctrine and Its Recent Extension to Claims of Workplace Harassment* (1997) 32 Tort & Ins. L.J. 807.)~~

- "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him. A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.' " (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 [104 Cal.Rptr. 57, 500 P.2d 1401].)

- "Ratification is essentially a matter of assent. Consequently, a principal is not bound by ratification unless he acts with knowledge of all the material facts involved in the unauthorized transaction, particularly with knowledge of the acts of the person who assumed to act as his agent. This knowledge is equally necessary whether the ratification be express or implied." (*Bate v. Marsteller* (1959) 175 Cal.App.2d 573, 582 [346 P.2d 903].)

- "Ratification is the subsequent adoption by one claiming the benefits of an act, which without authority, another has voluntarily done while ostensibly acting as the agent of him who affirms the act and who had the power to confer authority. A principal cannot split an agency transaction and accept the benefits thereof without the burdens." (*Reusche v. California Pacific Title Ins. Co.* (1965) 231 Cal.App.2d 731, 737 [42 Cal.Rptr. 262], internal citation omitted.)

- "[A]n employer may be liable for an employee's act where the employer … subsequently ratified an originally unauthorized tort. [Citations.] The failure to discharge an employee who has committed misconduct may be evidence of ratification. [Citation.] The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an

intentional tort, such as assault or battery. [Citations.] Whether an employer has ratified an employee's conduct is generally a factual question. [Citation.]" (*Ventura, supra, ~~v. ABM Industries Inc.~~ (2012)* 212 Cal.App.4th at p.~~258,~~ 272 ~~[150 Cal.Rptr.3d 861]~~.)

- "On this issue, the jury was instructed that in order to establish her claim that defendants were responsible for [supervisor]'s conduct, [plaintiff] 'must prove … that [defendants] learned of [supervisor]'s conduct after it occurred,' and that 'defendants approved [supervisor]'s conduct.' The instruction concluded, 'Approval can be shown through words, or it can be inferred from a person's conduct.' " [¶] Defendants contend that the instruction was erroneous because it did not tell the jury that there is ratification only if the employee intended to act on behalf of the employer, the employer actually knows that the wrongful conduct occurred, and the employer benefitted from the conduct, and that a disputed allegation is not actual knowledge. …We can see no error." (*Ventura*, *supra*, 212 Cal.App.4th at pp. 271−272.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 139–143

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[7] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, §§ 30.02, 30.07 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.13 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.18 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.21 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:4 (Thomson Reuters)

3923. Public Entities—Collateral Source Payments (Gov. Code, § 985)

You ~~shall~~ must award damages in an amount that fully compensates [*name of plaintiff*] for [his/her/its] damages in accordance with instructions from the court. You ~~shall~~ may not speculate or consider any other possible sources of benefit ~~the~~ that [*name of plaintiff*] may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.

New September 2003; Revised June 2016

Directions for Use

Per Government Code section 985(j), this language is mandatory.

Sources and Authority

- Collateral Source Evidence Inadmissible in Action Against Public Entity. Government Code section 985(b).
- Mandatory Instruction. Government Code section 985(j).
- "[T]he [collateral source rule] also covers payments *such as pensions* paid to a plaintiff who, as a result of his injuries, can no longer work. Like insurance benefits, such payments are considered to have been secured by the plaintiff's efforts as part of his employment contract, and the tortfeasor is entitled to no credit for them. 'With respect to pension benefits, the justification for the rule is that the plaintiff secured the benefits by his labors, and the fact that he may obtain a double recovery is not relevant.' Pension benefits are a commonly cited example of a collateral source that may not be used to decrease a plaintiff's recovery." (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 872−873 [136 Cal.Rptr.3d 259], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1637

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, § 15.21

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.50 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Torts*, § 64.190 et seq. (Matthew Bender)

2 California Civil Practice: Torts, § 31:47 (Thomson Reuters)

4000. Conservatorship—Essential Factual Elements

[*Name of petitioner***] claims that [***name of respondent***] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] and therefore should be placed in a conservatorship. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled due to a mental disorder or chronic alcoholism. To succeed on this claim, [***name of petitioner***] must prove beyond a reasonable doubt all of the following:**

1. **That [***name of respondent***] [has a mental disorder/is impaired by chronic alcoholism]; [and]**

2. **That [***name of respondent***] is gravely disabled as a result of the [mental disorder/chronic alcoholism][; and/.]**

[3. **That [***name of respondent***] is unwilling or unable voluntarily to accept meaningful treatment.]**

New June 2005; Revised June 2016

Directions for Use

~~Element 3 may not be necessary in every case~~ There is a split of authority as to whether element 3 is required. (Compare~~see~~ *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 [257 Cal.Rptr. 860] ["[M]any gravely disabled individuals are simply beyond treatment."] with *Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369] [jury should be allowed to consider all factors that bear on whether person should be on LPS conservatorship, including willingness to accept treatment].)~~.~~

Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008–1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].)

- "The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33], internal citations omitted.)

- "[T]he trial court erred in accepting counsel's waiver of [conservatee]'s right to a jury trial … . (*Estate of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 [193 Cal.Rptr.3d 237].)

- "Noting that a finding of grave disability may result in serious deprivation of personal liberty, the [Supreme Court] held that the due process clause of the California Constitution requires that proof beyond a reasonable doubt and jury unanimity be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Benvenuto*, *supra*, 180 Cal.App.3d at p. 1038, internal citations omitted.)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis*, *supra*, ~~(1981)~~ 124 Cal.App.3d at p.~~313,~~ 328 ~~[177 Cal.Rptr. 369]~~.)

- "The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 [242 Cal.Rptr. 289].)

- "Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. ... Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act's reach, according to the argument presented in this appeal." (*Conservatorship of Symington*, *supra*, 209 Cal.App.3d at p. 1469.)

- "The party seeking imposition of the conservatorship must prove the proposed conservatee's grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury." (*Conservatorship of Susan T.*, *supra*, 8 Cal.4th at p. 1009, internal citation omitted.)

Secondary Sources

14 Witkin, Summary of California Law (10th ed. 2005) Wills and Probate, § 945

3 Witkin, California Procedure (5th ed. 2008) Actions, § 97

2 California Conservatorship Practice (Cont.Ed.Bar) Ch. 23

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.30 et seq. (Matthew Bender)

4005. Obligation to Prove—Reasonable Doubt

[*Name of respondent*] is presumed not to be gravely disabled. [*Name of petitioner*] has the burden of proving beyond a reasonable doubt that [*name of respondent*] is gravely disabled. The fact that a petition has been filed claiming [*name of respondent*] is gravely disabled is not evidence that this claim is true.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that [*name of respondent*] is gravely disabled as a result of [a mental disorder/impairment by chronic alcoholism]. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether [*name of respondent*] is gravely disabled, you must impartially compare and consider all the evidence that was received throughout the entire trial.

Unless the evidence proves that [*name of respondent*] is gravely disabled because of [a mental disorder/impairment by chronic alcoholism] beyond a reasonable doubt, you must find that [he/she] is not gravely disabled.

Although a conservatorship is a civil proceeding, the burden of proof is the same as in criminal trials.

New June 2005; Revised June 2016

Directions for Use

The presumption in the first sentence of the instruction is perhaps open to question. Two older cases have held that there is such a presumption. (See *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1340 [249 Cal.Rptr. 415]; *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1099 [242 Cal.Rptr. 289].) However, these holdings may have been based on the assumption that the California Supreme Court had incorporated all protections for criminal defendants into LPS proceedings. (See *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [proof beyond reasonable doubt and unanimous jury verdict required].) Subsequent cases have made it clear that an LPS respondent is not entitled to all of the same protections as a criminal defendant. (See *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 [53 Cal.Rptr.3d 856, 150 P.3d 738] [exclusionary rule and *Wende* review do not apply in LPS].)

Sources and Authority

- ~~"The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1].)~~

- "A proposed conservatee has a constitutional right to a finding based on proof beyond a reasonable

doubt. Without deciding whether the court has a sua sponte duty to so instruct, we are satisfied that, on request, a court is required to instruct in language emphasizing a proposed conservatee is presumed to not be gravely disabled until the state carries its burden of proof." (*Conservatorship of Walker*, *supra*, ~~(1987)~~ 196 Cal.App.3d at p.~~1082,~~ 1099 ~~[242 Cal.Rptr. 289]~~, internal citation omitted.)

- "[I]f requested, a court is required to instruct that a proposed conservatee is presumed not to be gravely disabled until the state carries its burden of proof." (*Conservatorship of Law*, *supra*, ~~(1988)~~ 202 Cal.App.3d at p.~~1336,~~ 1340 ~~[249 Cal.Rptr. 415]~~.)

- But see *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384]: "Even if we view the presumption in a more general sense as a warning against the consideration of extraneous factors, we cannot conclude that the federal and state Constitutions require a presumption-of-innocence-like instruction outside the context of a criminal case. Particularly, we conclude that, based on the civil and nonpunitive nature of involuntary commitment proceedings, a mentally ill or disordered person would not be deprived of a fair trial without such an instruction."

- "Neither mental disorder nor grave disability is a crime." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 330 [177 Cal.Rptr. 369].)

- "More recently this court has recognized, however, that the analogy between criminal proceedings and proceedings under the LPS Act is imperfect at best and that not all of the safeguards required in the former are appropriate to the latter." (See *Conservatorship of Ben C. supra*, 40 Cal.4th at p. 538.)

- "In *Roulet*, the California Supreme Court held that due process requires proof beyond a reasonable doubt and jury unanimity in conservatorship proceedings. However, subsequent appellate court decisions have not extended the application of criminal law concepts in this area." (*Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 147 [218 Cal.Rptr. 796].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 97, 104

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.81

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.33 (Matthew Bender)

4013. ~~Affidavit of Voter Registration~~Disqualification From Voting

If you find that [*name of respondent***], as a result of [a mental disorder/impairment by chronic alcoholism], is gravely disabled, then you must also decide whether [he/she] ~~is capable of completing an affidavit of voter registration~~should also be disqualified from voting. To ~~reach a verdict~~disqualify [***name of respondent***] from voting, all 12 jurors must find, by clear and convincing evidence, that [he/she~~*~~name of respondent~~*~~] cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process~~is not capable of completing an affidavit of voter registration, all 12 jurors must agree to that decision~~.**

~~**To complete an affidavit of voter registration, [***name of respondent***] must be able to state: the facts necessary to establish the [***name of respondent***] as a voter; [his/her] full name, residential address, and telephone number; [his/her] mailing address, if different from the residential address; [his/her] date of birth; the state or county of birth; [his/her] occupation; [his/her] political party affiliation; that [he/she] is not currently imprisoned or on parole for the conviction of a felony; and whether [he/she] has been registered at another address, under another name, or is intending to affiliate with another party, and if so the prior address, name, or party.**~~

New June 2005; Revised June 2016

Directions for Use

This instruction should be given if the petition prays for this relief.

In addition to the required jury finding, one of the following must apply (See Elec. Code, § 2208(a)):

(1) A conservator for the person or the person and estate is appointed under Division 4 (commencing with Section 1400) of the Probate Code;

(2) A conservator for the person or the person and estate is appointed under Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code.

(3) A conservator is appointed for the person under proceedings initiated under Section 5352.5 of the Welfare and Institutions Code, the person has been found not competent to stand trial, and the person's trial or judgment has been suspended pursuant to Section 1370 of the Penal Code.

(4) A person has pleaded not guilty by reason of insanity, has been found to be not guilty under Section 1026 of the Penal Code, and is deemed to be gravely disabled at the time of judgment as defined in paragraph (2) of subdivision (h) of Section 5008 of the Welfare and Institutions Code.

The court should determine if one of the above requirements has been met.

Sources and Authority

- ~~Jury Finding on Completion of Affidavit of Voter Registration~~Disqualification from Voting. Elections Code section 2208~~(b)~~.

- Affidavit of Voter Registration. Elections Code section 2150.

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 11.34

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

4200. Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements (Civ. Code, § 3439.04(a)(1))

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] ~~fraudulently~~ [transferred property/incurred an obligation] to [***name of defendant***] in order to avoid paying a debt to [***name of plaintiff***]. [This is called "actual fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**

2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**

3. **That [***name of debtor***] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors;**

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

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

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that [*name of debtor***] had a desire to harm [his/her/its] creditors. [***Name of plaintiff***] need only show that [***name of debtor***] intended to remove or conceal assets to make it more difficult for [his/her/its] creditors to collect payment.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

New June 2006; Revised June 2013, June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud a creditor. (Civ. Code, § 3439.04(a)(1).)

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence ~~in cases in which~~if the plaintiff is asserting ~~causes of action~~claims for both actual and constructive fraud. Read the last bracketed sentence ~~in cases in which~~if the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Note that in element 3, only the debtor-transferor's ~~fraudulent~~ intent is required. (See Civ. Code, §

3439.04(a)(1).) The intent of the transferee is irrelevant. However, a transferee who receives the property both in good faith and for a reasonably equivalent value has an affirmative defense. (See Civ. Code, § 3439.08(a); CACI No. 4207, *Affirmative Defense—Good Faith*.)

If the case concerns an ~~fraudulently~~ incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g., "a lien on the property."

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even ~~where~~ if a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Note that there may be a split of authority regarding the appropriate standard of proof of ~~fraudulent~~ intent. The Sixth District Court of Appeal has stated: "Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804].)" (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 58].) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291–292 [137 Cal.Rptr. 635, 562 P.2d 316]. The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: "In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence." (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [86 Cal.Rptr.2d 733], internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

Sources and Authority

- Uniform ~~Fraudulent Transfer~~Voidable Transactions Act. Civil Code section 3439~~.04~~ et seq.
- "Claim" Defined for ~~UFTA~~UVTA. Civil Code section 3439.01(b).
- Creditor Remedies Under ~~UFTA~~UVTA. Civil Code section 3439.07.
- "The UFTA permits defrauded creditors to reach property in the hands of a transferee." (*Mejia, supra*, 31 Cal.4th at p. 663.)
- "A fraudulent conveyance under the UFTA involves 'a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.'" (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829 [28 Cal.Rptr.3d 884].)
- "Under the UFTA, 'a transfer of assets made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay or defraud any creditor, or (2) without receiving reasonably equivalent value in

return, and either (a) was engaged in or about to engage in a business or transaction for which the debtor's assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became due.' " (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 121−122 [173 Cal.Rptr.3d 356], internal citations omitted.)

- "[A] conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor's conveyance of that exempt property to a third person is not fraudulent." (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283].)

- "A transfer is not voidable against a person 'who took in good faith and for a reasonably equivalent value or against any subsequent transferee.' " (*Filip, supra,* 129 Cal.App.4th at p. 830, internal citations omitted.)

- " '[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked'; they 'may also be attacked by, as it were, a common law action.' " (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)

- "[E]ven if the Legislature intended that all fraudulent conveyance claims be brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted." (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)

- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citations omitted.)

- "In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors." (*Economy Refining & Service Co. v. Royal Nat'l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706].)

- "There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

- "[G]ranting [plaintiff judgment creditor] an additional judgment against [defendant judgment debtor] under the UFTA for … 'the amount transferred here to avoid paying part of his underlying judgment, *would in effect allow [him] to recover more than the underlying judgment*, which the [UFTA] does not allow.' (Italics added.) We thus conclude that because [plaintiff] obtained a judgment in the prior action for the damages [defendant] caused him, the principle against double recovery for the same harm bars him from obtaining a second judgment against her under the UFTA for a portion of those same damages." (*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1238 [167 Cal.Rptr.3d 874], original italics.)

Secondary Sources

8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgment~~s~~, § 495 et seq.

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 4~~3~~-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:~~320~~ 291 et seq. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:528 (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

1 Goldsmith et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 4, *Fraudulent Transfers*, 4.05

4201. Factors to Consider in Determining Actual Intent to Hinder, Delay, or Defraud (Civ. Code, § 3439.04(b))

In determining whether [*name of debtor***] intended to hinder, delay, or defraud any creditors by [transferring property/incurring an obligation] to [***name of defendant***], you may consider, among other factors, the following:**

[(a) Whether the [transfer/obligation] was to [a/an] [*insert relevant description of insider, e.g., "relative," "business partner," etc.***];]**

[(b) Whether [*name of debtor***] retained possession or control of the property after it was transferred;]**

[(c) Whether the [transfer/obligation] was disclosed or concealed;]

[(d) Whether before the [transfer was made/obligation was incurred] [*name of debtor***] had been sued or threatened with suit;]**

[(e) Whether the transfer was of substantially all of [*name of debtor***]'s assets;]**

[(f) Whether [*name of debtor***] fled;]**

[(g) Whether [*name of debtor***] removed or concealed assets;]**

[(h) Whether the value received by [*name of debtor***] was not reasonably equivalent to the value of the [asset transferred/amount of the obligation incurred];]**

[(i) Whether [*name of debtor***] was insolvent or became insolvent shortly after the [transfer was made/obligation was incurred];]**

[(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;]

[(k) Whether [*name of debtor***] transferred the essential assets of the business to a lienholder who transferred the assets to an insider of [***name of defendant***];] [and]**

[(*l*) [*insert other appropriate factor***].]**

Evidence of one or more factors does not automatically require a finding that [*name of defendant***] acted with the intent to hinder, delay, or defraud creditors. The presence of one or more of these factors is evidence that may suggest the intent to delay, hinder, or defraud.**

New June 2006; Revised June 2016

Directions for Use

Some or all of the stated factors may not be necessary in every case. Other factors may be added as appropriate depending on the facts of the case.

Sources and Authority

- Determination of Actual Intent. Civil Code section 3439.04(b).

- "Over the years, courts have considered a number of factors, the 'badges of fraud' described in a Legislative Committee comment to section 3439.04, in determining actual intent. Effective January 1, 2005, those factors are now codified as section 3439.04, subdivision (b) and include considerations such as whether the transfer was made to an insider, whether the transferee retained possession or control after the property was transferred, whether the transfer was disclosed, whether the debtor had been sued or threatened with suit before the transfer was made, whether the value received by the debtor was reasonably equivalent to the value of the transferred asset, and similar concerns. According to section 3439.04, subdivision (c), this amendment 'does not constitute a change in, but is declaratory of, existing law.' " (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834 [28 Cal.Rptr.3d 884], internal citations omitted.)

- "[The factors in Civil Code section 3439.04(b)] do not create a mathematical formula to establish actual intent. There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)

- "Even the existence of several 'badges of fraud' may be insufficient to raise a triable issue of material fact." (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], internal citation omitted.)

- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citation omitted.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:528 (The Rutter Group)

9 California Forms of Pleading and Practice, Ch. 94, *Bankruptcy*, § 94.55[4][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

4202. Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received—Essential Factual Elements (Civ. Code, § 3439.04(a)(2))

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] and, as a result, was unable to pay [***name of plaintiff***] money that was owed. [This is called "constructive fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**

2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**

3. **That [***name of debtor***] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**

4. **[That [***name of debtor***] was in business or about to start a business or enter a transaction when [his/her/its] remaining assets were unreasonably small for the business or transaction;] [or]**

   [That [*name of debtor***] intended to incur debts beyond [his/her/its] ability to pay as they became due;] [or]**

   [That [*name of debtor***] believed or reasonably should have believed that [he/she/it] would incur debts beyond [his/her/its] ability to pay as they became due;]**

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

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

If you decide that [*name of plaintiff***] has proved all of the above, [he/she/it] does not have to prove that [***name of debtor***] intended to defraud any creditors.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

New June 2006; Revised June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or

obligation, and the debtor either: (1) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due. (Civ. Code, § 3439.04(a)(2).)

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence ~~in cases in which~~if the plaintiff is asserting ~~causes of action~~claims for both actual and constructive fraud. Read the last bracketed sentence ~~in cases where~~if the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even ~~where~~ if a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- ~~When Transfer Is Fraudulent~~Transfer Without Reasonably Equivalent Value in Exchange. Civil Code section 3439.04(a)(2).

- When Value Is Given. Civil Code section 3439.03.

- "There are two forms of constructive fraud under the UFTA. Civil Code section 3439.04 … provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' Civil Code section 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or ... became insolvent as a result of the transfer ... .' " (*Mejia v. Reed* (2003) 31 Cal.4th 657, 669–670 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:528 (The Rutter Group)

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70[5], 215.111[2][c] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.42, 270.193, 270.194 (Matthew Bender)

4203. Constructive Fraudulent Transfer—(Insolvency)—Essential Factual Elements (Civ. Code, § 3439.05)

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] and was unable to pay [***name of plaintiff***] money that was owed. [This is called "constructive fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**

2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**

3. **That [***name of debtor***] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**

4. **That [***name of plaintiff***]'s right to payment from [***name of debtor***] arose before [***name of debtor***] [transferred property/incurred an obligation];**

5. **That [***name of debtor***] was insolvent at that time or became insolvent as a result of the transfer or obligation;**

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

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

If you decide that [*name of plaintiff***] has proved all of the above, [he/she/it] does not have to prove that [***name of debtor***] intended to defraud creditors.**

New June 2006; Revised June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation. (Civ. Code, § 3439.05.)

This instruction assumes the defendant is a transferee of the debtor. This instruction may be used along with CACI No. 4202, *Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received—Essential Factual Elements*, in cases whereif it is alleged that the plaintiff became a creditor before the transfer was made or the obligation was incurred. Read the bracketed second sentence in cases

~~in which~~if the plaintiff is asserting causes of action for both actual and constructive fraud. Also give CACI No~~s~~. 4205, *"Insolvency" Explained*, and CACI No. 4206, *Presumption of Insolvency*.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even ~~where~~ if a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- ~~When Transfer Is Fraudulent~~Voidable Transaction Involving Insolvency. Civil Code section 3439.05.
- When Value Is Given. Civil Code section 3439.03.
- "There are two forms of constructive fraud under the UFTA. Civil Code section 3439.04 … provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' Civil Code section 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or ... became insolvent as a result of the transfer ... .' " (*Mejia v. Reed* (2003) 31 Cal.4th 657, 669–670 [3 Cal.Rptr.3d 390, 74 P.3d 166].)
- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

Secondary Sources

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:545 et seq. (The Rutter Group)

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70[5], 215.111[2][c] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.42, 270.191, 270.192 (Matthew Bender)

4204. "Transfer" Explained

"Transfer" means every method of parting with a debtor's property or an interest in a debtor's property.

[*Read one of the following options:***]**

[A transfer may be direct or indirect, absolute or conditional, ~~or~~ voluntary or involuntary. A transfer includes [the payment of money/a release/a lease/a license/ [and] the creation of a lien or other encumbrance].]

[In this case, [*describe transaction***] is a transfer.]**

New June 2006; Revised June 2016

Directions for Use

This instruction sets forth the statutory definition of a "transfer" within the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfers Act). (See Civ. Code, § 3439.01(m).) ~~Include only the bracketed terms at the end of the third sentence that are at issue in the case.~~ Read the second bracketed ~~sentence~~ option for the second sentence if the transaction has been stipulated to or determined as a matter of law. Otherwise, read the first bracketed option. Include only the bracketed terms at the end of the ~~third sentence~~first option that are at issue in the case.

Sources and Authority

- "Transfer" Defined. Civil Code section 3439.01(~~i~~m).

- ~~Nonvoidable Transfers. Civil Code section 3439.08(c).~~

- "On its face, the UFTA applies to all transfers. Civil Code, section § 3439.01, subdivision (i) defines '[t]ransfer' as 'every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset ... .' The UFTA excepts only certain transfers resulting from lease terminations or lien enforcement." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 664 [3 Cal.Rptr.3d 390, 74 P.3d 166], internal citations omitted.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:319 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[1], 270.37 (Matthew Bender)

4205. "Insolvency" Explained

[[*Name of debtor***] was insolvent [at the time/as a result] of the transaction if, at fair valuations, the total amount of [his/her/its] debts was greater than the total amount of [his/her/its] assets.]**

In determining [*name of debtor***]'s assets, do not include property that has been [transferred, concealed, or removed with intent to hinder, delay, or defraud creditors/ [or] transferred [***specify grounds for voidable transfer based on constructive fraud***]]. [In determining [***name of debtor***]'s debts, do not include a debt to the extent it is secured by a valid lien on [his/her/its] property that is not included as an asset.]**

New June 2006; Revised June 2016

Directions for Use

Give this instruction with CACI No. 4203, *Constructive Fraudulent Transfer—Insolvency—Essential Factual Elements*. Give also CACI No. 4206, *Presumption of Insolvency.*

Property the transfer of which is potentially voidable under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act) is to be excluded from the computation of the debtor's assets for purposes of determining insolvency. (Civ. Code, § 3439.02(c).) In the first sentence of the second paragraph select the first option if there is property transferred and alleged to be voidable for actual fraud (see Civ. Code, § 3439.04(a)(1).), and specify the grounds in the second option if there is property transferred and alleged to be voidable for constructive fraud. (See Civ. Code, §§ 3439.04(a)(2), 3904.05.)~~If the debtor is a partnership, refer to Civil Code section 3439.02(b). If there are issues regarding specific assets, see Civil Code sections 3439.02(e) and 3439.01(a).~~

Read the bracketed last sentence if appropriate to the facts. (See Civ. Code, § 3439.02(d).)

Sources and Authority

- When Debtor Is Insolvent. Civil Code section 3439.02.
- "Asset" Defined. Civil Code section 3439.01(a).
- "To determine solvency, the value of a debtor's assets and debts are compared. By statutory definition, a debtor's assets exclude property that is exempt from judgment enforcement. Retirement accounts are generally exempt." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 670 [3 Cal.Rptr.3d 390, 74 P.3d 166], internal citations omitted.)
- "We conclude … that future child support payments should not be viewed as a debt under the UFTA." (*Mejia, supra*, 31 Cal.4th at p. 671.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:327 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.42[3], 270.192 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 307, *Insolvency*, § 307.32 (Matthew Bender)

4206. Presumption of Insolvency

A debtor who is generally not paying [his/her/its] debts as they become due, other than because of a legitimate dispute, is presumed to be insolvent.

In determining whether [*name of debtor***] was generally not paying [his/her/its] debts as they became due, you may consider all of the following:**

(a) The number of [*name of debtor***]'s debts;**

(b) The percentage of debts that were not being paid;

(c) How long those debts remained unpaid;

(d) Whether ~~legitimate disputes or other~~ special circumstances explain any failure to pay the debts; and

(e) [*Name of debtor***]'s payment practices before the period of alleged nonpayment [and the payment practices of [***name of debtor***]'s [trade/industry]].**

If [*name of plaintiff***] proves that [***name of debtor***] was generally not paying debts as they became due, then you must~~should~~ find that [***name of debtor***] was insolvent unless [***name of defendant***] proves that [***name of debtor***] was solvent.**

New June 2006; Revised June 2016

Directions for Use

This instruction should be read in conjunction with CACI No. 4203, *Constructive Fraudulent Transfer—Insolvency—Essential Factual Elements*, and CACI No. 4205, *Insolvency Explained*.

Sources and Authority

- Presumption of Insolvency. Civil Code section 3439.02(~~c~~b).
- ~~The Legislative Committee Comment to Civil Code section 3439.02 states:~~ "Subdivision (c) [now subdivision (b)] establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. … The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in subdivision (a) is more probable than its existence." (Legislative Committee Comment to Civil Code section 3439.02.)
- ~~The Legislative Committee Comment to Civil Code section 3439.02 states:~~ "In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the

amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged." (Legislative Committee Comment to Civil Code section 3439.02.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:328 (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.42[3][e], [4] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 307, *Insolvency*, § 307.20 (Matthew Bender)

4207. Affirmative Defense—Good Faith (Civ. Code, § 3439.08(a), (f)(1))

[*Name of defendant***] ~~claims [he/she/it]~~ is not liable to [***name of plaintiff***] [on the claim for actual fraud] if ~~because [***name of defendant***] [***insert one of the following:***]~~**

> **~~[took the property from [***name of debtor***] in good faith and for a reasonably equivalent value.]~~**
>
> ***~~[or]~~***
>
> **~~[received the property from someone who had taken the property from [***name of debtor***] in good faith and for a reasonably equivalent value.]~~**

~~To succeed on this defense,~~ [*name of defendant***] ~~must~~ proves both of the following:**

[Use one of the following two sets of elements:]

> **[1. That [***name of defendant***] took the property from [***name of debtor***] in good faith; and**
>
> **2. That [he/she/it] took the property for a reasonably equivalent value.]**
>
> *[or]*
>
> **[1. That [***name of defendant***] received the property from [***name of third party***], who had taken the property from [***name of debtor***] in good faith; and**
>
> **2. That [***name of third party***] had taken the property for a reasonably equivalent value.]**

"Good faith" means that [*name of defendant/third party***] acted without actual fraudulent intent and that [he/she/it] did not conspire with [***name of debtor***] or otherwise actively participate in any fraudulent scheme. If you decide that [***name of debtor***] had fraudulent intent and that [***name of defendant/third party***] knew it, then you may consider [his/her/its] knowledge in combination with other facts in deciding the question of [***name of defendant/third party***]'s good faith.**

New June 2006; Revised June 2016

Directions for Use

This instruction ~~is appropriate~~presents a defense that is available to a good-faith transferee for value in cases involving allegations of actual fraud under the Uniform ~~Fraudulent Transfer~~Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act). (See Civ. Code, § 3439.08(a), (f)(1).) Include t~~T~~he bracketed language in the first sentence ~~is not necessary~~ if the plaintiff is bringing ~~a~~ claims for both actual fraud and constructive fraud~~only~~.

Sources and Authority

- Transaction Not Voidable as to Good-Faith Transferee for Reasonable Value~~; Remedies~~. Civil Code section 3439.08(a).

- Transferee's Burden of Proving Good Faith and Reasonable Value. Civil Code section 3439.08(f)(1).

- When Value is Given. Civil Code section 3439.03.

- "The Legislative Committee comment to Civil Code section 3439.08, subdivision (a), provides that 'good faith,' within the meaning of the provision, 'means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee's knowledge of the transferor's fraudulent intent may, in combination with other facts, be relevant on the issue of the transferee's good faith … .' " (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], internal citations omitted.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:324. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-C, *Fraud--Fraudulent Transfers—Particular Defenses*, ¶ 5:580 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[2], 270.44[1], 270.47[2], [3] (Matthew Bender)

4208. Affirmative Defense—Statute of Limitations—Actual and Constructive Fraud (Civ. Code, § 3439.09)

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law.

[[With respect to [*name of plaintiff*]'s claim of actual intent to hinder, delay, or defraud,] [To/to] succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] ~~did not file~~filed [his/her/its] lawsuit ~~within~~ later than four years after the [transfer was made/obligation was incurred] [or, if later than four years, ~~within~~ no later than one year after the [transfer/obligation] was or could reasonably have been discovered by [*name of plaintiff*]]. But in any event, the lawsuit must have been filed within seven years after the [transfer was made/the obligation was incurred].]

[[With respect to [*name of plaintiff*]'s claim of constructive fraud,] [To/to] succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] ~~did not file~~filed [his/her/its] lawsuit ~~within~~ later than four years after the [transfer was made/obligation was incurred].]

New June 2006; Revised December 2007, June 2016

Directions for Use

This instruction provides an affirmative defense for failure to file within the statute of limitations. (See Civ. Code, § 3439.09.) Read the first bracketed paragraph regarding delayed discovery in cases involving actual ~~fraud~~intent to hinder, delay or defraud. (See Civ. Code, § 3439.04(a)(1); CACI No. 4200.) ~~,~~ ~~and~~Read the second in cases involving constructive fraud. (See Civ. Code, §§ 3439.04(a)(2), 3439.05; CACI Nos. 4202, 4203.) ~~Do not r~~Read the first bracketed phrases in those paragraphs ~~unless~~ if the plaintiff has brought both actual and constructive fraud claims. ~~This instruction applies only to claims brought under the UFTA.~~

Sources and Authority

- Statute of Limitations. Civil Code section 3439.09.

- "[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked. They may also be attacked by, as it were, a common law action. If and as such an action is brought, the applicable statute of limitations is section 338 (d) and, more importantly, the cause of action accrues not when the fraudulent transfer occurs but when the judgment against the debtor is secured (or maybe even later, depending upon the belated discovery issue)." (*Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1051 [104 Cal.Rptr.2d 1].)

- "In the context of the scheme of law of which section 3934.09 is a part, where an alleged fraudulent transfer occurs while an action seeking to establish the underlying liability is pending, and where a judgment establishing the liability later becomes final, we construe the four-year limitation period, i.e., the language, 'four years after the transfer was made or the obligation was incurred,' " to

accommodate a tolling until the underlying liability becomes fixed by a final judgment." (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 920 [60 Cal.Rptr.2d 841].)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:351 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.49, 270.50 (Matthew Bender)

VF-4200. Actual Intent to Hinder, Delay, or Defraud Creditor—Affirmative Defense—Good Faith

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] have a right to payment from [***name of debtor***]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of debtor***] [transfer property/incur an obligation] to [***name of defendant***]?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of debtor***] [transfer the property/incur the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors?**
   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of debtor***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**
   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [[***name of defendant***]/[***name of third party***]] receive the property from [***name of debtor***] in good faith?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. **Did [[***name of defendant***]/[***name of third party***]] receive the property for a reasonably equivalent value?**
   ____ Yes ____ No

   If your answer to question 6 is yes, stop here, answer no further questions, and have

the presiding juror sign and date this form. If you answered no, then answer question 7.

7. What are [*name of plaintiff*]'s damages?

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New December 2011; Revised June 2016

Directions for Use

This verdict form is based on CACI No. 4200, *Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements*, and CACI No. 4207, *Affirmative Defense—Good Faith*. The defendant is the transferee of the property. The transferee may have received the property in good faith even though the debtor had a fraudulent intent. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924].)

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~This verdict form is based on CACI No. 4200, *Actual Intent to Defraud a Creditor—Essential Factual Elements*, and CACI No. 4207, *Affirmative Defense—Good Faith*. The defendant is the transferee of the property. The transferee may have received the property in good faith even though the debtor had a fraudulent intent. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924].)~~

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VF-4201. Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] have a right to payment from [*name of debtor*]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of debtor*] [transfer property/incur an obligation] to [*name of defendant*]?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of debtor*] fail to receive a reasonably equivalent value in exchange for the [transfer/obligation]?**
   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **[[Was [*name of debtor*] [in business/about to start a business]/Did [*name of debtor*] enter into a transaction] when [his/her/its] remaining assets were unreasonably small for the [business/transaction]?]**

   [*or*]

   [Did [*name of debtor*] intend to incur debts beyond [his/her/its] ability to pay as they became due?]

   [*or*]

   [Did [*name of debtor*] believe or should [he/she/it] reasonably have believed that [he/she/it] would incur debts beyond [his/her/its] ability to pay as they became due?]
   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of debtor*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?**

____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New December 2011; Revised June 2016

Directions for Use

This verdict form is based on CACI No. 4202, *Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~This verdict form is based on CACI No. 4202, *Constructive Fraudulent Transfer—Essential Factual Elements.*~~

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VF-4202. Constructive Fraudulent Transfer—Insolvency

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] have a right to payment from [***name of debtor***]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of debtor***] [transfer property/incur an obligation] to [***name of defendant***]?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of debtor***] fail to receive a reasonably equivalent value in exchange for the [transfer/obligation]?**
   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of plaintiff***]'s right to payment from [***name of debtor***] arise before [***name of debtor***] [transferred property/incurred an obligation]?**
   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of debtor***] insolvent at that time or did [***name of debtor***] become insolvent as a result of the [transfer/ obligation]?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of debtor***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**
   ____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New December 2011; Revised June 2016

Directions for Use

This verdict form is based on CACI No. 4203, *Constructive Fraudulent Transfer—~~(Insolvency)—~~ Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~This verdict form is based on CACI No. 4203, *Constructive Fraudulent Transfer (Insolvency)—Essential Factual Elements.*~~

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

4560. Recovery of Payments to Unlicensed Contractor (Bus. & Prof. Code, § 7031(b))

[*Name of plaintiff***] claims that [***name of defendant***] did not have a valid contractor's license during all times when [***name of defendant***] was performing services for [***name of plaintiff***] under their contract. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That there was a contract between [***name of plaintiff***] and [***name of defendant***] under which [***name of defendant***] was required to perform services for [***name of plaintiff***];**

2. **That a valid contractor's license was required to perform these services; and**

3. **That [***name of plaintiff***] paid [***name of defendant***] for contractor services that [***name of defendant***] performed as required by the contract;**

[*Name of defendant***] must then prove that at all times while performing these services, [he/she/it] had a valid contractor's license as required by law.**

New June 2016

Directions for Use

Give this instruction in a case in which the plaintiff seeks to recover money paid to an unlicensed contractor for service performed for which a license is required. (Bus. & Prof. Code, § 7031(b).) It may be modified for use if an allegedly unlicensed contractor brings a claim for payment for services performed. (See Bus. & Prof. Code, § 7031(a).)

The burden of proof to establish licensure or proper licensure is on the licensee. Proof must be made by producing a verified certificate of licensure from the Contractors' State License Board. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).)

A corporation qualifies for a contractor's license through a responsible managing officer (RMO) or responsible managing employee (RME) who is qualified for the same license classification as the classification being applied for. (Bus & Prof. Code § 7068(b)(3).) The plaintiff may attack a contractor's license by going behind the face of the license and proving that a required RMO or RME is a sham. The burden of proof remains with the contractor to prove a bona fide RMO or RME. (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 385−387 [70 Cal. Rptr. 2d 427].) Whether an RMO or RME is a sham can be a question of fact. (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 518 [192 Cal.Rptr.3d 600].)

Sources and Authority

- Action to Recover Compensation Paid to Unlicensed Contractor. Business and Professions Code section 7031(b).

- Proof of Licensure. Business and Professions Code section 7031(d).

- "Contractor" Defined. Business and Professions Code section 7026.

- "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal. Rptr. 517, 803 P.2d 370], internal citations omitted.)

- "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. 'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .' " (*Hydrotech Systems, Ltd., supra*, 52 Cal.3d at p. 995, original italics.)

- "The current legislative requirement that a contractor plaintiff must, in addition to proving the traditional elements of a contract claim, also prove that it was duly licensed at all times during the performance of the contract does not change this historical right to a jury trial." (*Jeff Tracy, Inc., supra*, 240 Cal.App.4th at p. 518, fn. 2.)

- "[T]he courts may not resort to equitable considerations in defiance of section 7031." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)

- "In 2001, the Legislature complemented the shield created by subdivision (a) of section 7031 by adding a sword that allows persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. Section 7031(b) provides that 'a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract' unless the substantial compliance doctrine applies." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 519 [100 Cal.Rptr.3d 434], internal citation omitted.)

- "It appears section 7031(b) was designed to treat persons who have utilized unlicensed contractors consistently, regardless of whether they have paid the contractor for the unlicensed work. In short, those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered. Thus, unlicensed contractors are not able to avoid the full measure of the CSLL's civil penalties by (1) requiring prepayment before undertaking the next increment of unlicensed work or (2) retaining progress payments relating to completed phases of the construction." (*White, supra*, 178 Cal.App.4th at p. 520.)

- "In most cases, a contractor can establish valid licensure by simply producing 'a verified

certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action.' [Contractor] concedes that if this was the only evidence at issue, 'then—perhaps—the issue could be decided by the court without a jury.' But as [contractor] points out, the City was challenging [contractor]'s license by going behind the face of the license to prove that [license holder] was a sham RME or RMO. (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)

- "[T]he determination of whether [contractor] held a valid class A license involved questions of fact. '[W]here there is a conflict in the evidence from which either conclusion could be reached as to the status of the parties, the question must be submitted to the jury. [Citations.] This rule is clearly applicable to cases revolving around the disputed right of a party to bring suit under the provisions of Business and Professions Code section 7031.' " (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)

- "We conclude the authorization of recovery of '*all* compensation paid to the unlicensed contractor for performance of any act or contract' means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White, supra,* 178 Cal.App.4th at pp. 520−521, original italics, internal citation omitted.)

- "[A]n unlicensed contractor is subject to forfeiture even if the other contracting party was aware of the contractor's lack of a license, and the other party's bad faith or unjust enrichment cannot be asserted by the contractor as a defense to forfeiture." (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2010) Contracts, § 489 et seq.

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors,* § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts,* § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses,* § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors,* § 88.18 (Matthew Bender)

4561. Damages—All Payments Made to Unlicensed Contractor

A person who pays money under a contract to an unlicensed contractor may recover all compensation paid to the unlicensed contractor under the contract.

If you decide that [*name of plaintiff***] has proved that [he/she/it] paid money to [***name of defendant***] for services under the contract and that [***name of defendant***] has failed to prove that [he/she/it] was licensed at all times during performance, then [***name of plaintiff***] is entitled to the return of all amounts paid, not just the amounts paid while [***name of defendant***] was unlicensed. The fact that [***name of plaintiff***] may have received some or all of the benefits of [***name of defendant***]'s performance does not affect [his/her/its] right to the return of all amounts paid.**

New June 2016

Directions for Use

Give this instruction to clarify that the plaintiff is entitled to recover all compensation paid to the unlicensed defendant regardless of any seeming injustice to the contractor. (See *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal. Rptr. 517, 803 P.2d 370].) It may be modified for use if an allegedly unlicensed contractor brings a claim for payment for services performed. (See Bus. & Prof. Code, § 7031(a).)

Sources and Authority

- "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. 'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .' " (*Hydrotech Systems, Ltd., supra*, 52 Cal.3d at p. 995, original italics.)

- "[T]he courts may not resort to equitable considerations in defiance of section 7031." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)

- "[I]f a contractor is unlicensed for any period of time while delivering construction services, the contractor forfeits all compensation for the work, not merely compensation for the period when the contractor was unlicensed." (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)

- "We conclude the authorization of recovery of '*all* compensation paid to the unlicensed contractor for performance of any act or contract' means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 520−521 [100 Cal.Rptr.3d 434], original italics, internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2010) Contracts, § 489 et seq.

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors*, § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her] in retaliation for [his/her] [disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s employer;**

2. **[That [***name of defendant***] believed that [***name of plaintiff***] [had disclosed/might disclose] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***];]**

   [*or***]**

   [That [*name of plaintiff***] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;]**

   [*or***]**

   [That [*name of plaintiff***] refused to [***specify activity in which plaintiff refused to participate***];]**

3. **[That [***name of plaintiff***] had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***]'s participation in [***specify activity***] would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

4. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

5. **That [***name of plaintiff***]'s [disclosure of information/refusal to [***specify***]] was a contributing factor in [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

[The disclosure of policies that an employee believes to be merely unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff***] must have reasonably believed that [***name of defendant***]'s policies violated federal, state, or local statutes, rules, or regulations.]**

[It is not [*name of plaintiff***]'s motivation for [his/her] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]**

[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff***]'s job duties.]**

New December 2012; Revised June 2013, December 2013, Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No. 2730 and Revised June 2015; Revised June 2016

Directions for Use

The whistleblower protection statute of the Labor Code prohibits retaliation against an employee who, or whose family member, discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c), (h).) Liability may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)−(d).) Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant. Modifications will also be required if the retaliation is against an employee whose family member engaged in the protected activity.

Select the first option for elements 2 and 3 for disclosure of information; select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity. In the first option for element 2, choose "might disclose" if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648−649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].)

Select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case. It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has cast doubt on this limitation and held that protection is not limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(e).)

"Adverse employment action" is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements*.) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for

instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- Affirmative Defense: Same Decision. Labor Code section 1102.6.
- "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)
- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)
- "[T]he purpose of … section 1102.5(b) 'is to 'encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)
- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing

information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 847.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original italics.)

- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager, supra,* 228 Cal.App.4th at p. 1552.)

- "Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the [defendant]'s interpretation is a disincentive to report

unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict the purpose of the statute." (*Hager, supra*, 228 Cal.App.4th at p. 1550.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 349

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249~~50~~.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

4606. Whistleblower Protection—Unsafe Patient Care and Conditions ─Essential Factual Elements (Health & Saf. Code, § 1278.5)

[*Name of plaintiff***] claims that [***name of defendant***] discriminated against [him/her] in retaliation for [his/her] [***briefly specify protected conduct***] regarding unsafe patient care, services, or conditions at [***specify hospital or other health care facility***], [***name of defendant***]'s health care facility. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [a/an] [patient/employee/member of the medical staff/***specify other health care worker***] of [***name of defendant***];**

2. **[That [***name of plaintiff***] [***select one or both of the following options:***]**

   a. **[presented a grievance, complaint, or report to [[***name of defendant***]/an entity or agency responsible for accrediting or evaluating [***name of defendant***]/[***name of defendant***]'s medical staff/ [or] a governmental entity]] related to, the quality of care, services, or conditions at [***name of defendant***]'s health care facility;]**

   [or]

   b. **[initiated, participated, or cooperated in an [investigation [or] administrative proceeding] related to, the quality of care, services, or conditions at [***name of defendant***]'s health care facility that was carried out by [an entity or agency responsible for accrediting or evaluating the facility/its medical staff/a governmental entity];]**

3. **That [***name of defendant***] [mistreated/discharged/[***other adverse action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [***specify***] was a substantial motivating reason for [***name of defendant***]'s [mistreatment/discharge/[***other adverse action***]] of [***name of plaintiff***];**

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

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

New June 2016

Directions for Use

A patient, employee, member of the medical staff, or any other health care worker of a health facility is protected from discrimination or retaliation if he or she, or his or her family member, takes specified acts regarding suspected unsafe patient care and conditions at a health care facility. (Health & Saf. Code, § 1278.5.) A person alleging discrimination or retaliation by the facility has a private right of action against the facility. (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 676 [168 Cal.Rptr.3d 165,

318 P.3d 833].)

For elements 3 and 4, choose "mistreated" and "mistreatment" if the plaintiff was a patient. Choose "discharge" or specify another adverse action if the plaintiff is or was an employee, member of the medical staff, or other health care worker of the defendant's facility. Other adverse actions include, but are not limited to, demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of the plaintiff's contract, employment, or privileges, or the threat of any of these actions. (Health & Saf. Code, § 1278.5(d)(2).)

There are rebuttable presumptions of retaliation and discrimination if acts are taken within a certain time after the filing of a grievance. (See Health & Saf. Code § 1278.5(c), (d).) However, these presumptions affect only the burden of producing evidence. (Health & Saf. Code § 1278.5(e).) A presumption affecting only the burden of producing evidence drops out if evidence is introduced that would support a finding of its nonexistence. (Evid. Code § 604.) Therefore, unless there is no such evidence, the jury should not be instructed on the presumptions.

Sources and Authority

- Whistleblower Protection for Patients and Health Care Personnel. Health and Safety Code section 1278.5.

- "Section 1278.5 declares a policy of encouraging workers in a health care facility, including members of a hospital's medical staff, to report unsafe patient care. The statute implements this policy by forbidding a health care facility to retaliate or discriminate 'in any manner' against such a worker 'because' he or she engaged in such whistleblower action. It entitles the worker to prove a statutory violation, and to obtain appropriate relief, in a civil suit before a judicial fact finder." (*Fahlen, supra,* 58 Cal.4th at pp. 660−661; internal citation omitted.)

- "A medical staff member who has suffered retaliatory discrimination 'shall be entitled' to redress, including, as appropriate, reinstatement and reimbursement of resulting lost income. Section 1278.5 does not affirmatively state that these remedies may be pursued by means of a civil action, but it necessarily assumes as much when it explains certain procedures that may apply when 'the member of the medical staff … has filed *an action pursuant to this section … ' .*" (*Fahlen, supra,* 58 Cal.4th at p. 676, original italics, internal citation omitted.)

- "[Defendant] also appears to contend that it was entitled to judgment as a matter of law on [plaintiff]'s claim for violation of Health and Safety Code section 1278.5 because the undisputed evidence established that [defendant] terminated [plaintiff] for *refusing to perform* nurse-led stress testing, rather than for making complaints concerning [defendant]'s nurse-led stress testing. We are not persuaded. In light of the evidence of [plaintiff]'s complaints pertaining to the legality of nurse-led stress testing and the disciplinary actions discussed above, a jury could reasonably find that [defendant] retaliated against her for making these complaints. This is particularly so given that many of the complaints and disciplinary actions occurred within 120 days of each other, thereby triggering the rebuttable presumption of discrimination established in Health and Safety Code section 1278.5, subdivision (d)(1)." (*Nosal-Tabor v. Sharp Chula Vista Medical Center* (2015) 239 Cal.App.4th 1224, 1246 [191 Cal.Rptr.3d 651], original italics.)

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2014) Crimes Against Public Peace and Welfare, § 393

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13[14] (Matthew Bender)

5018. Audio or Video Recording and Transcription

A [sound/video] recording has been admitted into evidence, and a transcription of the recording has been provided to you. The recording itself, not the transcription, is the evidence. The transcription is not an official court reporter's transcript. The transcription was prepared by a party only for the purpose of assisting the jury in following the video-audio recording. The transcription may not be completely accurate. It may contain errors, omissions, or notations of inaudible portions of the recording. Therefore, you should use the transcription only as a guide to help you in following along with the recording. If there is a discrepancy between your understanding of the recording and the transcription, your understanding of the recording must prevail.

[[Portions of the recording have been deleted.] [The transcription [also] contains strikeouts or other deletions.] You must disregard any deleted portions of the recording or transcription and must not speculate as to why there are deletions or guess what might have been said or done.]

[For the video deposition(s) of [*name(s) of deponent(s)***], the transcript of the court reporter is the official record that you should consider as evidence.]**

New December 2010; Revised June 2016

Directions for Use

Give this instruction if an audio or a video recording was played at trial and accepted into evidence. A transcription is created by a party or parties in the case to assist the jury in following the video/audio recording. Include the second paragraph if only a portion of the recording was received into evidence or if parts of the transcription have been redacted. Give the last paragraph if a transcript of a deposition was provided to the jury. (See Code Civ. Proc., § 2025.510(g); see also CACI No. 208, *Deposition as Substantive Evidence*.)

Sources and Authority

- Electronic Recordings of Deposition. Cal. Rules of Court, Rule 2.1040.
- "Defendant contends the trial court erred in permitting the prosecution to provide the jury with a written transcript of the tape recording, because the transcript was not properly authenticated as an accurate rendition of the tape recording. [¶] Following the testimony of [witness] during the prosecution's case-in-chief, the prosecutor proposed to play the tape recording to the jury. Defense counsel suggested the jury should be informed that portions of the tape recording were unintelligible. When the trial court observed that a transcript of the tape recording would be submitted to the jury, defense counsel voiced concern that the jury would follow the transcript rather than independently consider the tape recording. The trial court indicated it would listen to the tape recording and, in the event the court determined that the transcript would assist the jury in its understanding of the interview, a copy of the transcript would be provided to the jury at the

time of its deliberations. … The trial court instructed the jury that in the event there was any discrepancy between the jury's understanding of the tape recording and the typed transcript, the jury's understanding of the recording should control." (*People v. Sims* (1993) 5 Cal.4th 405, 448 [20 Cal.Rptr.2d 537, 853 P.2d 992], internal citation omitted.)

- " 'To be admissible, tape recordings need not be completely intelligible for the entire conversation as long as enough is intelligible to be relevant without creating an inference of speculation or unfairness.' [¶] Thus, partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete the tape's relevance is destroyed. The fact a tape recording 'may not be clear in its entirety does not of itself require its exclusion from evidence since a witness may testify to part of a conversation if that is all he heard and it appears to be intelligible.' " (*People v. Polk* (1996) 47 Cal.App.4th 944, 952–953 [54 Cal.Rptr.2d 921], internal citations omitted.)

- "[T]ranscripts of admissible tape recordings are only prejudicial if it is shown they are so inaccurate that the jury might be misled into convicting an innocent man." (*Polk, supra,* 47 Cal.App.4th at p. 955.)

- "During closing arguments all counsel cautioned the jury the transcript was only a guide and to just listen to the tape. Before the jury left to deliberate, the court again instructed it to disregard the transcript and sent that instruction into the jury room. We presume the jurors followed the court's instructions regarding the tape and the use of the transcript." (*People v. Brown* (1990) 225 Cal.App.3d 585, 598 [275 Cal.Rptr. 268].)

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 162

5 California Trial Guide, Unit 100, *The Oral Deposition*, § 100.27 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions*, §§ 193.70 et seq., 193.172 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 7.23 (Cal CJER 2010)

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: June 24, 2016

Title
Jury Instructions: Revised Civil Jury Instruction No. 2334—Supplemental Report

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
June 24, 2016

Date of Report
May 5, 2016

Contact
Bruce Greenlee, 415-865-7698
bruce.greenlee@jud.ca.gov

Executive Summary

This is a supplementary report covering only the Advisory Committee on Civil Jury Instructions' proposed revisions to CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements*. Because of the extensive controversy generated by the committee's proposed changes to this instruction, the committee believes that it is appropriate to set forth its decision and decisionmaking process about this instruction in a separate report.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective June 24, 2016, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court revisions to CACI No. 2334. The proposed revised instruction is attached at pages 15–20. It is also included in the complete file of instructions proposed for adoption in this release that is attached to the committee's report to the council for this release.

Rationale for Recommendation

At its January 2016 meeting, the committee approved for posting a revised version of CACI No. 2334, which addresses a claim for bad-faith insurance practice if the insurer has rejected a policy-limits settlement demand, and there is a subsequent judgment against the insured in excess of the policy limits. The proposed revisions involved four significant changes to the instruction.

First, an additional element was proposed to be added:

> [3. That [*name of defendant*]'s failure to accept this settlement demand was unreasonable;][1]

Second, the following sentence was proposed to be added after the elements:

> To act or fail to act "unreasonably" means that the insurer had no proper cause for its conduct.

Third, the current last paragraph would be revised as follows:

> A settlement demand <u>for an amount within policy limits</u> is reasonable<u>, and [*name of defendant*]'s rejection of the demand is unreasonable,</u> if [*name of defendant*] knew or should have known at the time the ~~settlement~~ demand was rejected that the potential judgment was likely to exceed the amount of the ~~settlement~~ demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probable liability.

Fourth, the following sentence would be added to the end of the instruction:

> However, the demand may be unreasonable for reasons other than the amount demanded.

The committee majority[2] approved these changes in response to a 2015 case, *Graciano v. Mercury General Corp.*[3] *Graciano,* as discussed in more detail below, contained language directly supporting the first two proposed changes. The committee decided, however, that the "unreasonable failure" inquiry was limited to the insurer's evaluation of the case; i.e., liability

[1] The element was made optional because it would not apply if the insurer denied that there was coverage for the loss. See *Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 15−16.

[2] The vote was 13 to 8.

[3] *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414.

and damages.[4] The fourth proposed change, which proved to be noncontroversial, was to direct the jury's attention to any nonmonetary conditions in the settlement demand that may have been unreasonable.

As noted below under Comments, Alternatives, and Policy Considerations, the proposed revisions produced a barrage of comments from attorneys who represent plaintiffs in suits against insurers, all objecting to the proposed revisions to the instruction.

The opposition focused around two main arguments. First, no court has specifically stated that 2334 is wrong or incomplete, so there is no reason to change it. Second, it was claimed that the language from *Graciano* is dicta, is not the law, and should be ignored.

History: 2003−2014

The original 2003 version of CACI No. 2334, as drafted by the CACI task force and approved by the Judicial Council, included the following element:

> 2. That [*name of defendant*] unreasonably failed to accept a reasonable settlement demand for an amount within policy limits.

This element requires two separate inquiries. First, the settlement demand must be reasonable; second, the insurer's failure to accept the demand must be unreasonable.

The cases originally excerpted in the Sources and Authority perhaps did not provide solid support for this element. The closest is the following:

> An insurer's decision to contest or settle a claim " 'should be an honest and intelligent one. It must be honest and intelligent if it be a good-faith conclusion. In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained.' "[5]

If one substitutes "reasonable" for "honest and intelligent," then there is arguably support for element 2 as originally written by the task force.

[4] See *Johansen, supra,* 15 Cal.3d at p. 16. "[[T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer."

[5] *Brown v. Guarantee Insurance Co.* (1957) 155 Cal.App.2d 679, 685−686.

In contrast, there is this 1975 language from the California Supreme Court in *Johansen v. California State Auto. Assn. Inter-Insurance Bureau*: [6]

> [W]henever it is likely that the judgment against the insured will exceed policy limits "so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest *requires the insurer to settle* the claim." (Italics added.)

Johansen was a denial-of-coverage case. The court's holding was that if the insurer denied coverage, it did so "at its peril." If coverage is later established, then the insurer must pay the entire judgment, not just the policy limits.

The language "requires the insurer to settle" would seem to impose the same "peril" on the insurer even if there is no coverage dispute. If the insurer refuses to accept a reasonable demand for the policy limits, it is automatically on the hook for the entire judgment if its insured is found liable for a judgment in excess of the policy limits. This is the position of the authors of the many letters received in opposition to the proposed changes.

In December 2006, Justice H. Walter Croskey,[7] then the committee chair, proposed that all of the insurance bad-faith instructions be revised to clarify what it meant that the insurer's decision was "unreasonable." Justice Croskey was concerned that without any qualification, juries would construe "unreasonable" as indicating a lack of due care; that is, negligence. The law is clear that mere negligence is not bad faith.[8]

For 2334, he proposed deleting "unreasonable" from element 2, but adding explanatory words so that the element would read:

> 2. That [*name of defendant*] ~~unreasonably~~ failed to accept a reasonable settlement demand for an amount within policy limits <u>without proper cause or with no reasonable basis for such action</u>.

The committee majority, however, rejected Justice Croskey's proposal for 2334. Instead, it agreed to remove "unreasonably" from element 2, but did not add his proposed replacement language. The result was the current instruction, which extends the "at its peril" holding of *Johansen* to all cases, not just to denial of coverage. It focuses solely on the reasonableness of the demand. If the demand is reasonable, the insurer pays the entire judgment if it guessed wrong in refusing to pay the policy limits. This result may be seen as a version of "strict liability."

[6] *Johansen, supra,* 15 Cal.3d at p. 16.

[7] The late Justice Croskey was the lead-named author of The Rutter Group treatise on insurance law, *California Practice Guide: Insurance Litigation*.

[8] See, e.g., *Brown, supra,* 155 Cal.App.2d at p. 689. "Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable."

It should be noted that this 2007 change was not done in response to any holding in any particular case finding CACI No. 2334 as originally drafted to be an incorrect statement of the law. Instead, the committee reevaluated the instruction and came to a different conclusion about the state of the law in 2007 than the one made by the original CACI task force in 2003.

Like its predecessor, the instruction as revised in 2007 has not been directly addressed by the courts since then, as noted by numerous commentators. Nevertheless, it did not escape criticism. In 2014, the committee received a proposal from an insurance defense attorney asking the committee to restore 2334 to its original language by returning "unreasonably failed" to element 2. The attorney argued as follows, citing authority from the California Supreme Court:

> Breach of the implied covenant of good faith and fair dealing is dubbed "bad faith" for a reason. In order for an insurer to be liable for a judgment above its policy limits, its failure to accept a settlement demand within the limits must be unreasonable—i.e., in bad faith. *Kransco v. International Ins. Co.*, 23 Cal. 4th 390, 401, 97 Cal. Rptr. 2d 151 (2000) ("An insurer that breaches its implied duty of good faith and fair dealing by *unreasonably refusing* to accept a settlement offer within policy limits may be held liable for the full amount of the judgment against the insured in excess of its policy limits") (italics added); *Commercial Union Assurance Companies v. Safeway Stores, Inc.*, 26 Cal. 3d 912, 916-17, 610 P.2d 1038 (1980) ("an insurer may be held liable for a judgment against the insured in excess of its policy limits where it has breached its implied covenant of good faith and fair dealing by *unreasonably refusing* to accept a settlement offer within the policy limits") (italics added).

But the Supreme Court cases cited did not turn on the reasonableness of the insurer's rejection of the policy limits demand, and there is no analysis of the issue in any of them.[9]

In resolving this proposal, a working group recommended deferring any changes while closely monitoring the issue. One factor was the lack of any clear Supreme Court authority rejecting the strict liability position seemingly adopted in *Johansen*. Still, the cases cited in support of the defense position caused many members to postulate that 2334 element 2 might indeed be insufficient by not including a requirement that the insurer's rejection of the offer be unreasonable. Nevertheless, the recommendation was to wait for a clearer signal from the courts.

At its July 2014 meeting, the full committee agreed with the Working Group recommendation to defer action.

[9] See also *Hamilton v. Maryland Cas. Co.* (2012) 27 Cal.4th 718, 724–725. ("An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits.") (italics added)

2015: *Graciano v. Mercury General*

The committee did not have long to wait. On October 17, 2014, the Fourth Appellate District, Division One, published *Graciano v. Mercury General*, in which the court stated:[10]

> An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. … ¶ A claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably* failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance. (*Critz, supra*, 230 Cal.App.2d at p. 798.) (italics added)

At its July 2015 meeting, the committee agreed that *Graciano* now compelled restoring the "unreasonably rejected" language to 2334. A revised 2334 was drafted containing a new element requiring:

> [3. That [*name of defendant*]'s failure to accept this settlement demand was unreasonable or without proper cause;][11]

The proposed revised instruction was posted for public comment. Many comments were received, both opposing and supporting the proposed change. After reviewing the comments, the chair decided to pull the instruction from the release for further deliberation, based on three concerns.

First, the instruction did not address nonmonetary aspects of the policy-limits demand. As written, the instruction suggested to the jury that its only task was to evaluate the financial aspects of the offer. In fact, an offer may be unreasonable for any number of nonmonetary reasons, such as an unduly short window in which to accept it.[12]

Second, commentators opposed to the change claimed that the language from *Graciano* was dicta. The committee had not considered this possibility in its discussions of the case and the instruction.

Third, there was concern with the lack of any discussion about possible parameters of what insurer conduct the jury could evaluate for reasonableness. While cases say that the insurer's rejection of the offer must be "unreasonable" or "unwarranted," the committee had not looked at any cases that addressed whether there are limitations on the scope of insurer conduct that are

[10] *Graciano, supra*, 231 Cal.App.4th at p. 426.

[11] The element was bracketed to make it optional because it should not be given in denial-of-coverage cases.

[12] See, e.g., *Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 992–993. Failure to include provisions for relief by the workers' compensation carrier made the settlement offer ineffective.

subject to this reasonableness inquiry. The chair was uncomfortable with leaving this inquiry open-ended without further consideration by the committee.

2016: the current proposal

On reconsideration for the current release cycle, the committee focused on the three issues above that had caused it not to proceed to recommend the revised instruction in 2015. The nonmonetary issue was noncontroversial and easily addressed. Language was added to the instruction: "However, the demand may be unreasonable for reasons other than the amount demanded." The other two issues remain without any clear resolution after another round of deliberations.

For the reasons set forth below, the committee now proposes that only the above substantive change to the instruction itself, regarding nonmonetary conditions in the demand, be made. [13] But the committee believes that bench and bar should be informed that there is a highly controversial potential additional element for the instruction. Therefore, the committee proposes adding substantial discussion of the issue in the Directions for Use.

Reasons for current proposal: no case clearly holds that the additional element is required.
The many commentators opposed to adding the element would ignore *Graciano* entirely. They claim that all of the language that supports adding the additional element is dicta, and that it is wrong anyway.

The issue of whether the crucial language in *Graciano* is or is not dicta is not so easily answered. There are several ways of identifying the actual holding of *Graciano*. The facts of the case involved a mix-up over policies covering two different insureds. The plaintiff made the demand on the wrong policy and never corrected the error. The insurer rejected the demand on the wrong policy, but eventually discovered another policy that did provide coverage. On this discovery, the insurer offered the policy limits, but the plaintiff rejected the offer as untimely.

The position of those opposed to adding the element is that the holding of *Graciano* was that there was never a valid settlement offer. Therefore, the plaintiff's bad-faith claim fails on the lack of a reasonable demand; everything that follows is dicta.

But another possible holding is in this sentence:[14]

> [A]lthough there was some delay by CAIC in locating and connecting Graciano's claim with Saul's policy, resulting in a mistaken "withholding" of policy benefits

[13] The committee proposes several nonsubstantive language changes to the last paragraph as follows: "A settlement demand <u>for an amount within policy limits</u> is reasonable if [*name of defendant*] knew or should have known at the time the ~~settlement~~ demand was rejected that the potential judgment was likely to exceed the amount of the ~~settlement~~ demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probable liability."

[14] *Graciano, supra,* 231 Cal.App.4th at p. 433.

> for a 24-hour period, such mistake was "contributed to by the very party claiming those policy benefits" and "supplies the 'proper cause'" (*ibid.*), fatal to Graciano's bad faith claim.

One may argue that "supplies the proper cause" is a holding that "proper cause" negates bad faith. But whether the *Graciano* language is a holding or dicta is not dispositive of the correct rule.[15] Whether or not the language in *Graciano* is dicta, it has its origins in language from the California Supreme Court.

As noted in the proposed addition to the Directions for Use, none of these cases—neither those seemingly creating strict liability nor those seemingly providing an opportunity for the insurer to assert that its rejection was reasonable—actually discuss, analyze, and apply this standard to reach a result. All are determined on other issues.

Reasons for current proposal: it is not clear that the reasonable-rejection inquiry can be limited to evaluation of liability and damages. The third reason that 2334 was returned for further consideration in 2015 is what has ultimately led us to the revisions now proposed for this release. Does the law place any limitations on the scope of insurer conduct that the jury must evaluate for reasonableness?

In *Johansen*, the California Supreme Court stated:[16]

> [T]he *only* permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer.

Application of this language would limit the scope of the reasonable-rejection inquiry. Apart from denial of coverage cases and nonmonetary provisions in the demand, there would be only one ground on which an insurer may assert that its rejection of the demand was reasonable, and that is reasonable misevaluation of liability and damages. At the January meeting, the committee majority voted in favor of this position.

Those committee members asserting the minority position argued that misevaluation is encompassed within the first step, the evaluation of whether the demand was reasonable. But the majority countered that it is possible for the demand to be reasonable, and for the insurer's rejection of the demand to also be reasonable. One member gave the example of an accident

[15] It should be noted that the language from *Johansen* quoted above—for the proposition that failure to accept a reasonable policy limits demand creates strict liability for an excess judgment—was also dicta. *Johansen* was a denial-of-coverage case. Any language that might be applied to a case in which coverage was conceded was therefore dicta.

[16] *Johansen, supra*, 15 Cal.3d at p. 16, italics added.

causing catastrophic injuries, but after a full and fair investigation, the insurer's counsel puts the likelihood of liability at less than 5 percent. The likely damage award will indisputably greatly exceed the policy limits. In such a case, one could hardly say that a policy-limits demand would be unreasonable. But can it be said that given the doubts as to liability, it was unreasonable for the insurer to reject paying the policy limits? That is exactly the issue that the jury must determine with the help of CACI No. 2334.

Thus, the committee's proposed revisions to the last paragraph would provide:

> A settlement demand for an amount within policy limits is reasonable, and [*name of defendant*]'s rejection of the demand is unreasonable, if [*name of defendant*] knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probable liability.

The intent of the instruction as revised was to create a two-step reasonableness evaluation, but to tie both to the evaluation of liability and damages. First the jury looks at the plaintiff's evaluation in making the demand. Then the jury is to look at the insurer's evaluation in rejecting it. The intent was to significantly narrow the scope of the grounds that the insurer can allege to constitute a reasonable rejection.

But after considering some analysis from former chair Justice Croskey in a December 27, 2006 memorandum to a working group, and one comment in particular, the committee majority is no longer convinced that the reasonableness inquiry can be narrowed to evaluation of liability and damages.

A commentator presented the following:

> I am unaware of any cases where a jury relying upon CACI 2334 has found an insurer liable for bad faith because its adjuster was hit by a bus while in the process of mailing a letter accepting a settlement demand.

Under the originally proposed revisions, the insurer must pay in the example noted above because the reason for failing to accept was not related to its evaluation of liability and damages. Strict liability remains for bus accidents (and everything else that is not related to evaluation). But are there reasonable failures to accept that don't involve evaluation? A bus accident would seem to be one.

Justice Croskey in a 2006 memo to the committee presented the following factors that should guide the jury's determination in the prudent-insurer inquiry:[17]

> [The prudent-insurer inquiry] will always raise a jury question and will depend on the consideration of a number of factors, for example:
>
> (1) the strength of the injured claimant's case on the issues of liability and damages;
>
> (2) the nature and extent of the claimant's injuries;
>
> (3) the extent of the financial risk to which the insured would be exposed in the event of a refusal to settle;
>
> (4) whether the insurer has properly investigated the circumstances so as to ascertain the evidence against the insured as well as the evidence of the claimant's injuries;
>
> (5) whether the insurer followed advice received from its own lawyer or claims investigator;
>
> (6) whether the insurer fairly and objectively evaluated the claim;
>
> (7) whether the insurer kept the insured fully informed of any settlement offers, to enable the insured to consider adding to the "pot" to effect settlement;
>
> (8) any attempt by the insurer to induce or coerce the insured to contribute to the settlement (e.g., "if you want to avoid excess liability, you'll have to pay for it");
>
> (9) the fault of the insured, if any, in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and
>
> (10) any other facts tending to show bad faith (i.e., action without a reasonable basis or proper cause) on the part of the insurer.

[17] This list is a slight variation on a list of eight factors in *Brown, supra*, 155 Cal.App.2d at p. 689. Justice Croskey added: (2) the nature and extent of the claimant's injuries; and (6) whether the insurer fairly and objectively evaluated the claim. His factor (2) is really subsumed within factor (1). His factor (6) would be the only relevant factor under the committee's original proposed revision.

Some of these factors are clearly relevant only to case evaluation. But others, particularly (9), suggest that the prudent-insurer inquiry is not limited to evaluation.

Another scenario that caused the committee hesitation about limiting the inquiry to evaluation issues is as follows: Assume that the adjuster was supposed to contact the claimant's counsel to accept or refuse the demand. The insurer decides to accept on the last day before the offer to settle expires. But the adjuster gets called away from the office for a family emergency and neglects to accept the demand. The demand expires. This situation sounds like negligence at most, and negligence is not bad faith.[18] So should the insurer be liable for the entire judgment under "unreasonably failed?" Yes, if the reasonableness inquiry is limited to evaluation issues.

Reasons for current proposal: subjective v. objective standards and the "prudent insurer" test. Numerous commentators allege that "the posted proposed change requiring the aggrieved party to show that the insurer's conduct was unreasonable, is a subjective standard that is much harder to meet and for which no true measure even exists." The committee does not agree that the proposed new element 3 is a subjective standard. A subjective standard would allow the defendant to avoid liability as long as it actually believed that it had a good reason to reject the demand. That is not what the element said. The jury is to determine whether the insurer's rejection was justified or not justified. The jury is to put itself in the insurer's shoes and decide what the insurer should have done. This is an objective standard based on a "reasonable insurer."

Still, there is possibly a different way to phrase the element to make it totally clear that it is an objective standard. According to Justice Croskey in his 2006 memo to the committee:

> When an insurer refuses to settle on some other ground (e.g., a disagreement over the nature and extent of the claimant's injuries or the insured's liability—"damage refusal"), then it will be judged by a different standard: the so called "*prudent insurer*" standard. Here, the test is whether a prudent insurer would have settled if there were no policy limits and the insurer alone was on the risk: "The governing standard is whether a prudent insurer would have accepted the settlement offer if it alone were liable for the entire judgment." (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 706; *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 430 436), original italics.

It could be argued that the proposed new element 3 is just a different way of expressing the prudent-insurer standard. That is perhaps true, but element 3 might also be expressed as:

> 3. That a prudent insurer would have accepted the settlement offer if it alone were liable for the entire judgment.

[18] *Brown, supra,* 155 Cal.App.2d at p. 689.

The possibility that element 3 might be better expressed differently is another factor counseling caution in making a change to the instruction itself at this time.

Reasons for current proposal: the explanation of "unreasonable" as meaning "without proper cause" is not firmly established in the third-party context. Numerous commentators point out that "without proper cause" is vague and undefined.

Two cases support defining "unreasonable" as meaning "without proper cause." One is Justice Croskey's opinion *Rappaport-Scott v. The Interinsurance Exchange of the Automobile Club*, in which he wrote: [19]

> The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause.

But *Rappaport-Scott* was a first-party case over uninsured motorist coverage. So this language arguably (as numerous commentators did argue) does not apply in a third-party excess judgment case.

The other case is *Graciano,* in which the court said:[20]

> A bad faith claim requires "something beyond breach of the contractual duty itself" (*California Shoppers, Inc. v. Royal Globe Ins. Co., supra,* 175 Cal.App.3d at p. 54 (*California Shoppers*)), and that something more is "'refusing, *without proper cause,* to compensate its insured for a loss covered by the policy … .' [Citation.] Of course, the converse of 'without proper cause' is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant." (*Ibid.,* italics added by *California Shoppers.*) The *California Shoppers* court then noted that "[t]o refine further the nature and extent of the duty here under analysis, in terms of a particular application of 'with proper cause,' it is our view that a *mistaken withholding* of policy benefits, at least where, as here, such mistake (as to the insured's identity and not as to the matter of coverage) has been contributed to by the very party claiming those policy benefits, is consistent with observance of the implied covenant of good faith and fair dealing because the mistake supplies the 'proper cause.'" (*Id.* at p. 55.) Applying *California Shoppers* here, although there was some delay by CAIC in locating and connecting Graciano's claim with Saul's policy, resulting in a mistaken "withholding" of policy benefits for a 24-hour period, such mistake was

[19] *Rappaport-Scott v. The Interinsurance Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831, 837.

[20] *Graciano, supra,* 231 Cal.App.4th at pp. 433−434.

> "contributed to by the very party claiming those policy benefits" and "supplies the 'proper cause'" (*ibid.*), fatal to Graciano's bad faith claim. (original italics)

Graciano is a third-party case, so if it is authority, then the definition is supported. But, as pointed out extensively above, it may not be authority.

For all of the above reasons, the committee decided that some restraint would be best in actually revising the words of the instruction at this time. But the committee believes that it owes it to bench and bar to point out that CACI No. 2334 could be insufficient as currently written. The need for an additional element requiring the insurer's rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 25 to March 4, 2016. Comments were received from 171 different commentators. Of these, 168 expressed opposition to the proposed changes to CACI No. 2334. Of these 168, 97 letters were identical except for the identity of the commentator;[21] A list of the attorneys submitting this letter is attached as Appendix A. 21 were almost identical, but contained slight variations. A list of the attorneys submitting these letters is attached as Appendix B. 50 of the comments were different letters drafted by the commentators. A list of the attorneys submitting these comments is attached as Appendix C. There were three comments generally supporting the changes to CACI No. 2334.

The comments received on CACI No. 2334 resulted in the committee's change in recommendation as outlined above.

A document summarizing all comments received on CACI No. 2334 and the committee's responses is attached at pages 21–58.

The committee considered and voted on three options:

1. Leave the instruction unchanged in any way, which was the position of the many commentators who opposed the proposed changes; this option received only one vote;

2. Proceed with the revision approved in January and posted for comment, which included the additional element in the instruction itself; this option received only six votes;

3. Add language on the nonmonetary aspects of the offer, but defer adding the new element and the language in the last paragraph that tries to restrict the scope of that element; but address the possible existence of the additional element in the Directions for Use. This

[21] This is a template letter that the Consumer Attorneys of California sent to their members with a request to forward it on to the committee.

option received a unanimous 23-0 vote, including the votes of the seven members who had voted for one of the first two options.

Attachments

1. CACI No. 2334 as proposed to be revised at page 15.
2. Document of comments on CACI No. 2334, at pages 21−58
3. Attorney List Appendix A at pages 59-65
4. Attorney List Appendix B at pages 66-67
5. Attorney List Appendix C at pages 68-70

2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of the obligation of good faith and fair dealing because [***name of defendant***] failed to accept a reasonable settlement demand in a lawsuit against [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff in underlying case***] brought a lawsuit against [***name of plaintiff***] for a claim that was covered by [***name of defendant***]'s insurance policy;**

2. **That [***name of defendant***] failed to accept a reasonable settlement demand for an amount within policy limits; and**

3. **That a monetary judgment was entered against [***name of plaintiff***] for a sum greater than the policy limits.**

"Policy limits" means the highest amount available under the policy for the claim against [*name of plaintiff***].**

A settlement demand for an amount within policy limits is reasonable if [*name of defendant***] knew or should have known at the time the ~~settlement~~ demand was rejected that the potential judgment was likely to exceed the amount of the ~~settlement~~ demand based on [***name of plaintiff in underlying case***]'s injuries or loss and [***name of plaintiff***]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded.**

New September 2003; Revised December 2007, June 2012, December 2012, June 2016

Directions for Use

This instruction is for use in an "excess judgment" case; that is one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits.

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

~~This instruction is intended for use if the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. It may also be used if the insurer rejects the defense, but did in fact owe its insured a duty to indemnify (i.e., coverage can be established). (See *Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705].)~~ For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should

have contributed the policy limits, then this instruction will need to be modified.

This instruction should also be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other claimants.

Under this instruction, if the jury finds that the policy-limits demand was reasonable, then the insurer is automatically liable for the entire excess judgment. Language from the California Supreme Court supports this view of what might be called insurer "strict liability" if the demand is reasonable. (See *Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744] ["[W]henever it is likely that the judgment against the insured will exceed policy limits 'so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest *requires the insurer to settle* the claim,' " italics added].)

However, there is language in numerous cases, including several from the California Supreme Court, that would require the plaintiff to also prove that the insurer's rejection of the demand was "unreasonable." (See, e.g., *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724-725 [117 Cal.Rptr.2d 318, 41 P.3d 128] ["An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits," italics added]; *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717] [claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably* failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance, italics added].) Under this view, even if the policy-limits demand was reasonable, the insurer may assert that it had a legitimate reason for rejecting it. However, this option, if it exists, is not available in a denial of coverage case. (*Johansen*, *supra*, 15 Cal.3d at pp. 15−16.)

None of these cases, however, neither those seemingly creating strict liability nor those seemingly providing an opportunity for the insurer to assert that its rejection was reasonable, actually discuss, analyze, and apply this standard to reach a result. All are determined on other issues, leaving the pertinent language as arguably dicta.

For this reason, the committee has elected not to change the elements of the instruction at this time. Hopefully, some day there will be a definitive resolution from the courts. Until then, the need for an additional element requiring the insurer's rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement. For a thorough analysis of the issue, see the committee's report to the Judicial Council for its June 2016 meeting, found at (link).

Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires

the insurer to settle the claim." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra*, 66 Cal.2d at p. 429.)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen*, *supra*, ~~*v. California State Auto. Asso. Inter-Insurance Bureau* (1975)~~ 15 Cal.3d ~~9,~~ at p. 16 ~~[123 Cal.Rptr. 288, 538 P.2d 744]~~, internal citation omitted.)

- "[A]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." (*Hamilton*, *supra*, 27 Cal.4th at pp. 724–725.)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra*, 66 Cal.2d at p. 431.)

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an

enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure." (*Graciano, supra, ~~v. Mercury General Corp.~~ (2014)* 231 Cal.App.4th ~~414,~~ at p. 425 ~~[179 Cal.Rptr.3d 717]~~, internal citations omitted.)

- "A bad faith claim requires 'something beyond breach of the contractual duty itself, and that something more is ' "refusing, *without proper cause*, to compensate its insured for a loss covered by the policy … ." [Citation.] Of course, the converse of "without proper cause" is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant.' " (*Graciano, supra*, 231 Cal.App.4th at p. 433, original italics.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

- ~~"A claim for bad faith based on an alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance." (*Graciano, supra*, 231 Cal.App.4th at p. 425.)~~

- "The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal … ." (*Graciano, supra,* 231 Cal.App.4th at p. 434.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)

- "An insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)

- " 'An insurer who denies coverage *does so at its own risk and although its position may not have been entirely groundless*, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract.' Accordingly, contrary to the defendant's suggestion, an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen, supra,* 15 Cal.3d at pp. 15−16, original italics, footnotes and internal citation omitted.)

- "~~[A]n insurer who refused a reasonable settlement offer, on the ground of no coverage, does so at its own risk, so that the insurer has no defense that its refusal was in good faith if coverage is, in fact, found. However, w~~[W]here the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because 'The insurer does not … insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.…' " (*Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705]~~*DeWitt, supra,* 204 Cal.App.4th at p. 244~~, original italics.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton, supra, ~~v. Maryland Casualty Co.~~* (2002) 27 Cal.4th at p.~~718,~~ 725~~ [117 Cal.Rptr.2d 318, 41 P.3d 128]~~, internal citations omitted.)

- "[I]nsurers do have a 'selfish' interest (that is, one that is peculiar to themselves) in imposing a blanket rule which effectively precludes disclosure of policy limits, and that interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request." (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1398−1399 [93 Cal.Rptr.3d 763].)

- "For bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no "opportunity to settle" that an insurer may be taxed with ignoring." (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)

- **"(4) [12:245] Insurer culpability required? A number of cases suggest that some degree of insurer 'culpability' is required before an insurer's refusal to settle a third party claim can be found to constitute 'bad faith.' [*Howard v. American Nat'l Fire Ins. Co.* (2010) 187 CA4th 498, 529, 115 CR3d 42, 69 (quoting text)]**

  (a) [12:246] **Good faith or mistake as excuse:** 'If the insurer has exercised good faith in all of its dealings … and if the settlement which it has rejected has been fully and fairly considered and has been based upon an *honest belief* that the insurer could defeat the action or keep any possible

judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment.' [See *Brown v. Guarantee Ins. Co.* (1957) 155 CA2d 679, 684, 319 P2d 69, 72 (emphasis added); *Howard v. American Nat'l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69—'an insurer may reasonably underestimate the value of a case, and thus refuse settlement' on this basis (acknowledging but not applying rule)]

'In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake.' [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 CA4th 1445, 1460, 7 CR2d 513, 521]

1) [12:246.1] **Comment: These cases are difficult to reconcile with the 'only permissible consideration' standard of a 'reasonable settlement demand' set out in *Johansen* and CACI 2334 (see ¶12:235.1). A possible explanation is that these cases address the 'reasonableness' of the insurer's refusal to settle based on a dispute as to the value of the case (or other matters unrelated to coverage), whereas *Johansen* addressed 'reasonableness' in the context of a coverage dispute (see ¶12:235). [See *Howard v. American Nat'l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69 (quoting text)]" (**Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:245–12:246.1 (The Rutter Group), bold in original.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 257–258

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-A, *Implied Covenant Liability—Introduction*, ¶¶ 12:202–12:224 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:226–12:548 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-C, *Bad Faith Liability Despite Settlement Of Third Party Claims*, ¶¶ 12:575–12:581.12 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Refusal To Defend Cases*, ¶¶ 12:582–12:686, (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1–26.35

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.07[1]–[3] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.195, 120.199, 120.205, 120.207 (Matthew Bender)

Comments Generally Supporting Proposed Revisions

Civil Justice Association, by Hal Dasinger, Legislative Director
In general we support the proposed changes as an improved reflection of the current state of the law. The instruction that the plaintiff must prove that the defendant's failure to accept a settlement demand was unreasonable, in particular, represents an important element of bad faith litigation.

Committee Response:
No response is necessary. However, this element will not be added at this time, but will be suggested in the Directions for Use.

We remain concerned with the included definition of "unreasonably." The standard for unreasonableness—"no proper cause"—is itself not clearly defined, and may cause a jury to struggle with what constitutes unreasonableness. We suggest instead "the insurer's conduct was not justified" or something similar. We recognize that "unreasonable" and "without proper cause" have been used interchangeably in cases including *Dalrymple v. United Services Auto Assn.*, 40 Cal.App.4th 497, *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.*, 90 Cal.App.4th 335, and *Rappaport-Scott v. Interinsurance Exchange of Auto. Club*, 146 Cal.App.4th 831; however, whether conduct is proper appears at least conceptually to be more imprecise to establish than whether it is justified.

Committee Response:
The committee believes that it is best to use language from the cases unless it is absolutely clear that there is a better plan-language alternative. That is not the case here.

We are troubled by wording that says that a settlement demand within policy demands is reasonable. We think the instruction would be clearer if the last sentence were reworded to read "However, [*name of defendant*] does not act unreasonably in refusing to accept a settlement demand that may be unreasonable for reasons other than the amount demanded.

Committee Response:
The committee believes that these are more words than are needed to make the point that there can be nonmonetary provisions that make a demand unreasonable.

The jury should evaluate the defendant's conduct according to the information the defendant possessed at the time. We suggest adding the following sentence at the end:

> The reasonableness of the demand is based on the information the defendant has at the time of the offer and should not include information (or treatment) that is provided to the defendant after the demand.

Committee Response:
The committee assumes that the comment actually is meant to address the reasonableness of the insurer's rejection of the demand, not the reasonableness of the demand, which would be based on information known to the plaintiff, not the defendant. As stated in the instruction, the reasonableness of the rejection (should such an element be included) is based on what the insurer knew or should have known.

Interinsurance Exchange of the Automobile Club, by Mitchell C. Tilner, Horvitz & Levy
The Exchange commends the Committee for its work and supports the proposed revisions to CACI No. 2334, particularly the addition of the third numbered element.

Committee Response:
No response is necessary. However, this element will not be added at this time, but will be suggested in the Directions for Use.

The instruction should use the terms “refusal” and “refused,” rather than “failure” and “failed.” “Refusal” and “refusing” are the words the Supreme Court has consistently used to describe the conduct that can support tort liability. (citing cases.)

The committee has previously recognized “the clearly understood limitation that mere negligence is not bad faith” and that instructions on bad faith should communicate to jurors that “more than negligence” is required. (Judicial Council of Cal., Advisory Com. on Civil Jury Instructions, Rep. to the Judicial Council (Dec. 11, 2015) p. 5.) The words “failure” and “failed,” however, connote mere negligence. An insurer might “fail” to accept a reasonable settlement offer because its mail clerk failed to deliver the offer to the responsible adjuster; or because the adjuster overlooked or misinterpreted a condition of the demand; or because the adjuster erroneously calendared the deadline for responding to the offer. Indeed, as in Grayson, an insurer might “fail” to accept the offer despite repeated efforts to accept it.

The problem is not ameliorated by requiring proof that the insurer’s failure was “unreasonable,” the language used in the Committee’s proposed third numbered element in CACI No. 2334. That language would still leave the jury free to find, for example, that it was “unreasonable” for the adjuster to misinterpret the demand or to erroneously calendar the deadline for responding, or for an insurer to request that the policyholder sign a release. The insurer’s liability would rest on “mere negligence,” not on the required “refusal” to accept a settlement offer.

If the committee decides not to accept this change of language, then the Exchange supports adoption of the proposed revisions in their current form.

Committee Response:
The committee has decided not to change the title at this time.

We agree with the committee’s proposal to add the following sentence to the instruction to explain that, in the bad faith context, “unreasonably” means having “no proper cause”: “To act or fail to act ‘unreasonably’ means that the insurer had no proper cause for its conduct.”

Committee Response:
No response is necessary. However, this language will not be added at this time.

Neil Selman, Attorney at Law, Los Angeles
I am fully in support of these proposed changes as they are in line with current California law on the subject and would reduce the need to supplement jury instructions during trial to make up for the failure of the current language to properly focus on the need for the carrier to have acted unreasonably in order to be found liable for bad faith.

The current language only uses the term "reasonable" to describe the offer made by the plaintiff but it does not appear to use the standard of "reasonable" or "unreasonable" in reference to the carrier's conduct. This omission needs correction because a carrier's refusal to accept a reasonable demand, if such refusal was reasonable, allows the carrier to fully defend a claim of bad faith. Even if the decision to not accept a reasonable offer is found to be wrong, if the jury finds the carrier acted reasonably, the carrier can be found liable for breach of the contract, but not for the breach of the covenant of good faith and fair dealing.

There really cannot be any dispute on this legal standard and the CACI instructions in this area should, indeed, better reflect the law now governing this area.

Committee Response:
While no response is necessary, the committee does not concur that "[t]here really cannot be any dispute on this legal standard."

Comments Raised in Consumer Attorneys of California Standard Letter
(97 letters were received with the only difference being information on the commentator)
See Appendix 1 for names of those submitting this letter.

The proposed revision would improperly add an additional element-· that in addition to failing to accept a reasonable settlement offer within policy limits, the defendant insurer's conduct must be otherwise "unreasonable" which means vvithout "proper cause." The proposed revision puts the focus on the insurance company's conduct and would constitute a major departure from the existing established standard of liability.

Committee Response:
The committee does not believe that it is proposing a major departure. There is authority, including language from the California Supreme Court, supporting both the current version of CACI No. 2334 and the proposed revision adding that an insurer's rejection of a policy-limits offer must be "unreasonable" before the insurer is liable for the entire judgment. See report.

Nevertheless, the committee has decided not to proceed with adding the disputed element at this time. Instead, the case supporting the additional element will be summarized in the Directions for Use.

If the instruction is truly incorrect, an appellate court should issue a decision saying it is wrong. The current CACI 2334 instruction has been in use since 2007 without the additional "unreasonable" requirement. It has been used in countless trials over the past nine years giving defendants multiple opportunities to challenge the instruction as currently approved and take their complaint to a court of appeal. By not seeking an appellate court review of the actual instruction, and instead arguing for its change before the CACI committee, defendants, have demonstrated an inability or fear of judicial review. They are choosing to do an end run around the jury instruction approval process. This revision sets a dangerous precedent and sends the message that future legal changes should be made at the CACI committee level, rather than at the Legislature or the courts.

Committee Response:
There is no evidentiary support for the view that the insurance industry is "arguing for … change before the CACI committee" rather than seeking judicial review. The impetus for the committee's proposed changes is *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425, not advocacy by the insurance industry. The unresolved issue is whether *Graciano,* and the authority that supports it, is sufficient to change the instruction. See report.

The basis for the committee decision to add this element is the *Graciano* case, which does not directly deal with whether CACI 2334 as written is incorrect. In *Graciano,* the court held that there was no substantial evidence that the insurer had *unreasonably* rejected an offer to settle because the evidence showed that the insurer was prejudiced by the third party's identification of the applicable policy. (231 Cal.App.4th at p. 418.) The court then concluded "there is no substantial evidence Graciano [plaintiff] ever offered to settle her claims against Saul [insured] for an amount within Saul's policy limits. (231 Cal.App.4th at p. 427.) The *Graciano* case did not hold that CACI 2334 was wrong. The decision held that there was no breach of the covenant where there was not a reasonable offer to settle for the policy limits with the actual insured. Id. at 427. This is the same result that would have been reached applying the existing CACI 2334 instruction. (color emphasis added by committee)

Committee Response:

The fact that no court has directly said that CACI 2334 is wrong is not dispositive. If a court holds that the elements of a claim are a, b, and c, the CACI instruction omits c, then the court has held that the instruction is wrong. It does not have to expressly state that the instruction is wrong.

The crucial language from *Graciano* is:

> A claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably failed* to accept an otherwise reasonable offer within the time specified by the third party for acceptance." (*Graciano, supra*, 231 Cal.App.4th at p. 425, italics added.)

The commentator is correct in noting that the court found that there had been no valid demand. Whether or not that makes the above language dicta, the committee does not believe that it can be ignored.

It is true that there is no analysis or development of the "unreasonably failed" element in the opinion. But as the comment itself notes in the language emphasized above, throughout the opinion, the court says that the insurer must have unreasonably rejected the offer. The court did not invent this element; there are several California Supreme Court cases that say that speak of the insurer's "unreasonable" or 'unwarranted" rejection of the demand. (See *Hamilton v. Maryland Cas. Co.* (2012) 27 Cal.4th 718, 724-725 ("An *unreasonable refusal* to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits.") *Kransco v. International Ins. Co.* (2009) 23 Cal.4th 390, 401 ("An insurer that breaches its implied duty of good faith and fair dealing by *unreasonably refusing* to accept a settlement offer within policy limits may be held liable for the full amount of the judgment against the insured in excess of its policy limits") *Commercial Union Assurance Companies v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 916-917 ("an insurer may be held liable for a judgment against the insured in excess of its policy limits where it has breached its implied covenant of good faith and fair dealing by *unreasonably refusing* to accept a settlement offer within the policy limits"), italics added

However, uncertainty over whether the critical language in *Graciano* is or is not dicta, is one of the reasons why the committee has elected not to add the element to the instruction at this time. See report.

Additional Comments Raised in Other Letters Objecting to Proposed Revisions
See Appendix 2 for names of those submitting additional comments.

Thomas G. Adams, Attorney at Law, Ventura
Nothing justifies this departure from present standards, which already reflect existing law placing responsibility upon carriers for their breaches of their duty of good faith and fair dealing, defined as rejection of reasonable offers, presumptively for their own benefit, to the detriment of their insured. The added language implies that rejecting a reasonable offer to settle a claim against their insured is not unreasonable enough to hold the carrier liable. This is contrary to law. Instead, the Committee should adhere to the longstanding notion that not accepting a reasonable offer is per se unreasonable—and leave the instruction alone.

Committee Response:
The added language does more than imply that rejecting a reasonable offer to settle a claim against their insured is not unreasonable enough to hold the carrier liable. That is in fact the purpose of the proposed change. It is not contrary to law; instead, the law is unsettled.

Indeed, the seminal cases, *Johansen v. California State Auto Assoc.* (1975) 15 Cal.3d. 9, *Crisci v. Security Insurance Co. of New Haven* (1967) 66 Cal.2d 425, and *Communale v. Traders & General Insurance Co.* (1958) 50 Cal.2d 654, clearly identify the requirements, which have been properly stated in the current jury instruction:

> Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci, supra,* 66 Cal.2d at 430)

Committee Response:
The committee agrees that this excerpt is a correct statement of the law.

> "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment… [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen, supra,* 15 Cal.3d at 16)

Committee Response:
The committee originally concluded that this language from *Johansen* supported the conclusion that there is a reasonable-rejection element, but that the inquiry is limited to evaluation ("the *only* permissible consideration"). The committee is no longer confident that *Johansen* so limits the inquiry. This is among the reasons that the committee has decided not to include language to this effect in the last paragraph at this time. See report.

> The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim. Its unwarranted refusal to do so constitutes a breach of the implied covenant of good faith and fair dealing." (*Comunale, supra,* 50 Cal.2d at 659) (color emphasis added by committee)

Committee Response:
The committee believes that this excerpt from *Communale* actually supports adding the additional element. The committee sees no difference between "unreasonable" and "unwarranted." If a refusal must be "unwarranted" to constitute a breach of the implied covenant, then by implication, if it is not unwarranted (i.e., "warranted"), then there is no breach. But, as with all the cases from the Supreme Court, this is only this single word that supports that result. There is no development of what is, and what is not "unwarranted."

> A breach which prevents the making of an advantageous settlement when there is a great risk of liability in excess of the policy limits will, in the ordinary course of things, result in a judgment against the insured in excess of those limits. (*Id.* at 660-661)

Committee Response:
The significance of this excerpt is not immediately clear. Yes, a breach, that is, compelling the insured to go to trial, will usually (in the ordinary course of things) result in a judgment against the insured. And if there in fact was a breach, then the insurer must pay the entire judgment. But nothing in this language addresses what constitutes a breach.

A review of the case law lays out 5 criteria to support a bad faith finding in rejecting a demand, none of which are that the insurer engaged in "unreasonable conduct" "without proper cause." Rather, the requirements are:

- The terms of the demand must be clear. (*Coe v. State Farm Mutual Automobile Insurance Co.* (1977) 66 Cal.App.3d 981, 991).

- All [bad faith] claimants must join in the settlement demand. (*Coe, supra,* 66 Cal.App.3d at 992-93).

- All insureds must be released. (*Strauss v. Farmers Insurance Exchange* (1994) 26 Cal.App.4th 1017, 1021).

- The settlement amount demanded must be both within policy limits and "reasonable". (*Heredia v. Farmers Insurance Exchange* (1991) 228 Cal.App.3d 1345, 1357; see also, *Comunale, supra,* 50 Cal.2d at 661.)

- The demand must be timed to afford the insurer adequate opportunity to investigate "whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Crisci v. Security Insurance Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 430);

Committee Response:
These are nonmonetary considerations in evaluating the reasonableness of the demand. But their existence proves nothing about whether or not there is also a reasonable-rejection element.

A reading of the above cases shows that those in favor of the plaintiff likely would have turned out differently if this additional requirement were placed on them. For example, in *Johanson, supra,* the insurance company did not believe that the injury fell within coverage. In *Crisci,* the insurance company's adjusters determined that the plaintiff in the underlying matter could not win on the mental suffering issue. Both of these cases would have resulted in verdicts for the insurance company under the new jury instruction. That alone should make it clear that this instruction is contrary to the law.

Committee Response:
The committee does not agree. In *Crisci*: "[insurer] was unwilling to pay one cent for the possibility of a plaintiff's verdict on the mental illness issue. This conclusion was based on the assumption that the jury would believe all of the defendant's psychiatric evidence and none of the plaintiff's." If the jury in the bad-faith action decides whether the insurer's stonewall position was or was not reasonable, the case could have come out either way under proposed revised 2334. *Johansen* could not have turned out differently because the court held that there is no reasonable-rejection inquiry in a denial-of-coverage case.

Adamson Ahdoot, Attorneys at Law, Los Angeles, by Christopher B. Adamson
Any reliance on the *Graziano* matter is misplaced and disingenuous. … Most importantly, the emphasis of the *Graziano* matter - and all relevant California case law - is on the reasonableness of the demand, not whether the insurer's failure to accept the demand was unreasonable.

Committee Response:
The comment misstates the emphasis of *Graciano*. There are eight different places in the opinion in which the court used "unreasonably" to qualify the insurer's rejection of a reasonable settlement offer.

Adleson Hess & Kelly, Attorneys at Law, Camp, by Randy M. Hess and Nicole S. Adams-Hess
Last summer we obtained a $2,280,000 jury verdict on behalf of our client against Navigators Specialty Insurance Company in the Northern District of California, in front of Judge Alsup, in a bad faith breach of the duty to settle case entitled Doublevision Entertainment LLC v. Navigators Specialty Insurance Company, Case No. 3:14-cv-02848-WHA. In this case, Judge Alsup required extensive argument and supplemental briefing on the proper standard to determine when an insurer has breached the duty to settle under California law. Judge Alsup was determined to get the law right in drafting his jury instructions. We urged the Court to utilize CACI 2334, asserting that it stated the essential elements of an insurer's duty to settle. Counsel for Navigators insisted on adding additional requirements, similar to the proposed changes at issue here. In fact, Navigators' counsel specifically requested that there should be an additional prong added to the test, requiring the jury to determine if the insurer had acted unreasonably in rejecting the settlement offer, and cited *Graciano* in support of their arguments. After hearing argument and reviewing our briefs, Judge Alsup agreed with us and refused to instruct the jury that they should look to the reasonableness of the insurer's conduct in evaluating a breach of the duty to settle.

Committee Response:
A trial judge's views are not dispositive of the law. If in fact Judge Alsup's decision was incorrect, that would be a strong argument to revise the instruction so that other judges are not led astray.

Agnew Brusavich, Attorneys at Law, Torrance, by Bruce M. Brusavich
Having been involved for many years in the political process in Sacramento on behalf of CAOC and as a member of the Civil Small Claims Advisory Committee where I worked through the deliberative process of drafting proposals to enact Rules of Court or propose changes in the law to deal with new court decisions or legislative enactments requiring such changes, I have a thorough understanding of the differences in the two processes. Given the fact that there has been no appellate decision critical of CACI 2334 which would justify the Committee's proposal to change the instruction, making such a proposal gives the appearance that the Committee is acquiescing to special-interest pressure for a change, something more common in the legislative process.

Committee Response:
The committee may recommend updates and revisions to a jury instruction without a case that expressly says that an instruction is wrong before there is a clear need to revise it. If the case says that the elements

of the claim are a, b, c, and d, and the instruction omits c, then c must be added, whether or not the court expressly says that the instruction is wrong.

Finally, I believe the proposed change to CACI 2334 would create jury confusion since essentially it asks them to answer the question as to whether or not the failure to accept the policy limit demand was unreasonable after already having to have made a determination as to whether or not the policy limit demand itself was reasonable. The proposed change is also likely to create years of appellate litigation which is not existing with the current instruction.

Committee Response:
Whether or not two different elements involving reasonableness are confusing, if it is the law, then the committee must present the elements in a way that attempts to lessen the confusion. Originally, the instruction read that the insurer "unreasonably failed to accept a reasonable [policy limits] settlement demand." Arguably, the elements would be less confusing if separated into two, as was proposed in the draft posted for public comment. What would be most useful would be one case from the California Supreme Court resolving the issue.

Aitken Aitken Cohn, Attorneys at Law, Santa Ana—Six identical letters from different attorneys
Thus, the dicta relied upon by the committee (as confirmed by its own reporting) comes from a case that 1) did not challenge the language of CACI 2334, and 2) did not involve a refusal to accept a settlement within the liability policy limits. Simply put, there is no legal holding that supports the change to CACI 2334 currently being considered by the committee.

Committee Response:
The question of whether the critical language in *Graziano* is or is not dicta is addressed in the committee's report.

Alpers Law Group, Aptos, by Thomas Aldrich
In my 15 years of practice, I have represented plaintiffs and defendants and insurance companies on both sides of cases. I have utilized the current version of CACI 2334 on a number of occasions to instruct insurance companies on the ramifications of accepting or denying a settlement proposal. I believe it provides the right incentive for insurance companies to resolve cases short of trial. Adding additional burdens to the plaintiff will likely only increase litigation costs for both sides due to insurance companies' perceived strength in negotiating position created by the new requirement.

Committee Response:
The committee does not consider legal policy, such as the importance of balancing bargain power, in drafting and revising instructions consistent with the law. The law should reflect best policies; jury instructions should then reflect the law.

Additionally, I have chaired 11 jury trials and participated in a number of others. It is my belief, based on this experience, that adding a second reasonableness requirement for the jury to consider in the same instruction will unnecessarily increase jury confusion on this issue.

Committee Response:
Addressed above

Alpers Law Group, Aptos, by Richard C. Alpers
When people purchase insurance, they are buying peace of mind that any inadvertent mistakes they may make will be protected against. They buy the insurance to help fix the problems they may have accidentally caused, and for the peace of mind that dealing with these problems will not overtake their

life. Including a reasonableness standard in this jury instruction will defeat this underlying purpose of insurance.

The bad-faith laws exist in order to keep insurance companies honest and deal in a fair manner with their insureds. The laws, as they exist today, even the playing field between the insured and their insurance company, allowing an insured to bring an action against their insurance company if the insurance company fails to live up to their obligations.

If the jury instructions, as they presently exist, are changed as proposed, these bad-faith cases will be more difficult to win, thereby un-leveling the playing field. It will be more difficult to keep the insurance companies honest, and therefore the potential for mistreatment of the insurance buying public will grow.

Committee Response:
These are all policy arguments and therefore not considered by the committee in revising the instruction consistent with the law.

Chet R. Bhavsar, Attorney at Law, Los Angeles
Maurizio A. Mangini, Attorney at Law, Oceanside
Russell & Lazerus, Attorneys at Law, Newport Beach, by Christopher E. Russell
(All three included this paragraph in their comments.)
It has become progressively more difficult to resolve claims for their fair value short of trial. The insurance industry has made the determination that if fair value is to be provided to a personal injury victim it must be by way of verdict or by way of an 11th hour offer after hundreds of hours and tens of thousands of dollars have been spent. The ONLY fear the insurance industry has is a verdict in excess of the insured's policy limits as a result of the unreasonable handling of a claim, which would then expose it to having to pay on a claim in excess of the limits purchased by the insured. (color emphasis added by committee)

The current CACI 2334 instruction properly puts the focus on the reasonableness of the settlement demand, and in doing so provides premium-paying policy holders with objectively verifiable rights that cannot be manipulated by an insurer, and the existing CACI 2334 is therefore the instruction that should remain in use.

Committee Response:
This is one of a number of comments that actually support adding a reasonable-rejection element. According to the commentator, the handling of the claim must have been *unreasonable*. If all that matters is if the demand is reasonable, it would make no difference whether the insurer's claims handling was reasonable or unreasonable; meticulous or outrageous. Everything that the insurer does would be irrelevant once the demand is determined to be reasonable.

Biren Law Group, Attorneys at Law, Los Angeles, by Sarina M. Jarchi and John A. Roberts
Existing law is that if the insurer makes a reasonable business decision to gamble and not accept a reasonable settlement offer within policy limits, it has got to gamble with its own money, not the insured's. In many cases, a jury could very well find that if there was a liability dispute and the insurer decided to take the case to trial rather than settling, that the decision to try the case was a reasonable business decision. Thus, under the proposed instruction, the jury could conclude that even though the insurer refused to accept a reasonable offer within policy limits, the refusal was nevertheless not unreasonable, because the decision to gamble at trial was a reasonable business decision.

Committee Response:

The committee agrees that under the proposed revisions posted for comment, this would be the result. If one replaces "business" decision in the last sentence of the comment with "evaluation" decision, then this comment says exactly what the proposed revised 2334 was trying to accomplish.

Campagnoli Abelson & Campagnoli, Attorneys at Law, San Francisco, by Mark B. Abelson
Unfortunately, special interest groups will devise new strategies to buy their desired result. CACI 2334 has been used by our trial courts for a decade and has been considered by appellate courts. It is not the job of this Advisory Committee to change jury instructions as requested by the insurance industry. Let the Insurance industry seek to have the courts of our state make the determination about the jury instructions. (color emphasis added by committee)

Committee Response:
CACI 2334 has not been considered by appellate courts. There are no published opinions that say that 2334 is correct or incorrect. The committee has received no requests from the insurance industry. It has received proposals from counsel who represent insurance companies to change the instruction. This is perfectly appropriate, as it also is appropriate for attorneys who represent insureds to make proposals for CACI instructions. The committee deeply resents any implication in the comment that it has taken money to aid special interest groups. Hopefully, "buy" is just a poor choice of words.

Central Coast Trial Lawyers Association (CCTLA) – Mission Law Center, San Luis Obispo, by Louis Koory, President
The proposed revision allows the defendant insurance company to simply argue that they had some "proper" basis to reject the demand and as such, there can be no bad faith. This revision not only misstates the law, but would result in substantially undercutting the consumer's ability to prove that the refusal to accept a reasonable settlement demand within the policy limits amounted to bad faith.

Committee Response:
The proposed revision posted for comment did allow the insurer to argue that it had a proper basis to reject the demand. And yes, it would make it more difficult to prove bad faith. But whether it misstates the law is not resolved.

Gordon Churchill, Attorney at Law (inactive), San Diego
The word which bounced off the page when I saw it was "proper". There is no precedent for using "proper" to define the duty of good faith and fairness owed by the insurance company. It leaves the juror with a defining a word, "proper" by using a word which itself needs to be defined. This, of course, makes things worse instead of better.

Committee Response:
The committee agrees that "without proper cause" is language without a clear meaning. But it is used in many cases. In *Rappaport-Scott v. Insurance Exchange*, a first-party case, the court said the following:

> The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause. (146 Cal.App.4th at p. 837.)

It is also used in *Graciano*. A third-party case.

But because there is no clear authority for defining "unreasonable" as meaning "without proper cause" in a third-party case, the committee has decided not to propose this language at this time. See Report.

Consider defining “unreasonable” with “1.) The failure to settle was done without clear evidence of a benefit to the insured person or 2) that the insurance company placed its own interests ahead of the financial interests of the insured person when declining the opportunity to settle.”

Committee Response:
Implicit in this suggestion is that the commentator agrees that the conduct of the insurer in rejecting the demand must be considered. The first suggested definition seems unhelpful. It will always be to the benefit of the insured to settle, and there are cases that point that out. The second could be helpful as many cases say that the insurer must place the insured’s interest equal to its own. That could be an added sentence on how to determine proper cause, but it is not a definition.

Stephen N. Cole, Attorney at Law, West Sacramento
Carolin K. Shining, Attorney at Law, Sherman Oaks
(Both included this paragraph in their comment letters.)
Instead of improving CACI 2334 by using "plain English", the proposed changes are nothing short of blasphemous to written clarity:

1. The proposed changes add the word "unreasonable" when key parts of the instruction already use the word "reasonable" in several different places. Strunk and White advise clear writing should omit needless words". Asking a juror to find certain conduct "reasonable", then asking him or her also to find that other similar or identical conduct was "unreasonable" frustrates and overcomplicates their task.
2. The English words "reasonable" and "unreasonable" are undisputedly opposites. Yet in the proposed instruction they are given definitions that are not opposite. Reasonable conduct is defined one way, but unreasonable conduct is defined as a something that had no "proper cause." Giving regular words different legal definitions is precisely the type of confusion that the Advisory Committee should be seeking to avoid.
3. Adding a completely new element (turning a 3-prong test into a 4-prong test) to an already confusing and complex instruction should only be done with clear instruction from the California Supreme Court or the Legislature.
4. Finally, a new jargonistic phrase "proper cause" is given no definition at all, leaving the jury at sea and without even common sense direction.

Committee Response:
The committee finds points 1 and 2 to be off point. The proposed revisions to the instruction did not use “reasonable conduct” anywhere. “Reasonable” was only used as an adjective to modify “settlement.” The committee sees no great confusion in requiring a reasonable demand and an unreasonable rejection of the demand. Points 3 and 4 are addressed in response to other comments
Robert D. Conaway, Attorney at Law, Victorville
Adding the subjective "unreasonableness" standard becomes a way to undermine a finder of fact's conclusion that the offer was unreasonable. How? It collateralizes the finder of fact's review in violation of Evidence Code 352 to consider as examples staffing and workload problems a carrier may have had at the time, personalities, changes in management teams and oversight philosophies. It could introduce a tier of "expert" testimony on something that is within the province of the jury and by that cause confusion, delays and additional expense.

Committee Response:
The committee is not sure what a collateralized review is. None of the postulated evidence would be relevant if the determination of whether the rejection was reasonable was limited to case evaluation, as was proposed in the draft posted for comment. Because the committee is no longer convinced that the determination is so limited, some of the postulated evidence could become relevant in distinguishing

between negligence and bad faith. The fact that the scope of the determination is unresolved is one of the reasons that the committee is no longer recommending the posted version. See report.

DeWitt Algorri & Algorri, Attorneys at Law, Pasadena, by Mark S. Algorri
Let's not forget or ignore the basics, especially in third party situations. The gravamen of the claim, to be brief, is when the carrier, with vastly superior power, puts their interest over that of their insured and consequently causes great harm to their insured. The insurer, generally after dragging the insured through a traumatic jury trial, forces the insured to assign their claims to the third party. Carriers now, subtly or not so subtly, have misframed the issues as a fight between them and a third party plaintiff, forgetting that it was their breach of contract, and their covenants that caused the problem. In short, the proposed instruction now provides an unacceptable excuse, not found in the law, to the carrier even if it just breached the contract and "botched" the claim. Something they are paid NOT to do. This ignore years of long standing law.

Committee Response:
The comment mostly presents policy arguments.

Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, by Robert B. Bale
The proposed revision injects a subjective element into the quantum of proof by focusing on the insurance company's conduct in light of what that company considered "unreasonable." This constitutes a major departure from the existing established standard of liability.

The additional element stands the meaning and impetus of the current instruction on its head. The current instruction is grounded in a failure of the insurer to accept a "reasonable" demand that is within the policy limits. The "reasonable person" standard is one of long standing and common usage. It is, in fact, a cornerstone of tort law. For generations it has been used to measure the standard of care that litigants must comply with, and serves as bedrock for hundreds of judicial interpretations of the law. Conversely, the proposed change requires the aggrieved party to show that the insurer's conduct was unreasonable, a subjective standard that is much harder to meet and for which no true measure even exists.

Committee Response:
The committee does not believe that the additional element included in the draft posted for comment presents a subjective standard. The element does not tell the jury that as long as the insurer thought that it had a good reason to reject the demand, that's all that is required. The reasonableness of the insurer's rejection would be evaluated according to a "reasonable insurer" standard, which the comment notes is one of long standing and common usage.

But this comment caused the committee to reconsider whether the element is presented in the clearest possible way. Cases state that the standard is the objective, whether a prudent insurer would have accepted the offer if there were no policy limits and the insurer alone was on the risk: (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 706]; *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 430 436). Whether or not the element should be phrased along these lines is among the reasons that the committee has elected not to recommend the posted version at this time.

There has been no showing that the current version of CACI 2334 creates an unfair burden for defendant insurance companies, or unfairly benefits plaintiffs seeking recourse.

Committee Response:
These are policy considerations.

Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, by Steven M. Campora

The correct statement of the law in California is that an insurer, who is aware that the plaintiff has expressed an interest in settling the case, within the policy limit, must take affirmative steps to settle the case.

> In summary, when a claimant offers to settle an excess claim within policy limits, an opportunity to settle exists and a conflict of interest arises, because a divergence exists between the insurer's interest in paying less than the policy limits and the insured's interest in avoiding liability beyond the policy limit. (*Merritt, supra*, 34 Cal.App.3d at p. 873.) And a conflict may also arise, without a formal settlement offer, when a claimant clearly conveys to the insurer an interest In discussing settlement but the insurer ignores the opportunity to explore settlement possibilities to the insured's detriment, or when an insurer has an arbitrary rule or engages in other conduct that prevents settlement opportunities from arising. (*Boicourt, supra,* 78 Cal.App.4th at p. 1399.) (*Reid v. Mercury Ins. Co.*, 220 Cal.App.4th 262, 278 (Cal.App.2d Dist. 2013).)

Committee Response:
Whether or not "expressed an interest" is the correct statement of the law is not relevant. This language is about what constitutes an offer that the insurer must respond to. It has nothing to do with whether the insurer may reject an offer and argue that its rejection was reasonable.

Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, by Andrew G. Minney
The proposed revision would add an element which is solely intended to create an unduly difficult burden at trial that would only embolden carriers to act unreasonably. The present language of CACI 2334 establishes a suitable burden which protects consumers and carriers alike and promotes timely settlement. As for plaintiffs, he or she must engage in a difficult, painstaking assessment before concluding that a demand for settlement within the policy limits is a reasonable course of action. This is often done with the full knowledge that the value of his or her damages far exceeds the demand. (color emphasis added by committee)

Committee Response:
The committee sees at least two contradictions in this comment. First, if the insurer has been emboldened to act unreasonably, then under proposed revised 2334 it is liable for the entire excess judgment. If there is any emboldening being encouraged, it is to act reasonably in order to avoid liability. But more significantly, if the law is as under current CACI 2334, how the insurer acts is completely irrelevant. There's a reasonable demand; there's a rejection; there's an excess judgment; there's insurer liability with no inquiry into how it acted.

If the victim of the policy holder's negligence is able to timely develop a measured and reasonable demand, there is no reason why a carrier should not be expected to perform a similar assessment and act accordingly. The existing language of CACI 2334 properly focusses upon the value of the damages. However, the proposed amendment will require the jury to shift its focus away from the key issue of damages and into an esoteric analysis of insurance industry standards and practices. The result of this distraction is the establishment of a shield to protect bad faith conduct.

Committee Response:
The committee agrees with the first sentence of the comment. The carrier should be expected to perform a measured and reasonable assessment of the case and to act accordingly. Whether it did or did not do that would be what the jury would determine if the proposed element is added to the instruction. The committee does not fear any esoteric analysis of insurance industry standards and practices. The sole issue would be whether this insurer in this case can advance a good reason for having rejected the demand.

Dunk Law Firm, Attorneys at Law, San Diego, by Andrew P. Dunk, III
There are plenty of cases addressing the issue of an insurer's duty to accept a reasonable settlement offer and none of them have the additional proposed burden of proof. For example, "determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793); "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994.) (color emphasis added by committee)

Committee Response:
Many cases have language stating the proposed additional burden of proof. The comment contradicts the commentator's position. Whether the insurer could "reasonably have acted otherwise" is what the proposed added element would ask the jury to find. If all that is required is a reasonable demand, what the insurer could have done, reasonable or unreasonable, would be irrelevant.

Scott Dunning, Attorney at Law, San Francisco
All failures to settle within policy limits are viewed as "reasonable" by insurance companies. Their bottom line is profits, not the interests of their insureds. The purpose of bad faith law is to compel insurance companies to additionally act from the vantage point of their insureds rather than their own personal interests. For the jury to focus on whether the insurance company acted with "proper cause" is simply too vague a standard.

Committee Response:
The comment mostly presents policy arguments. The vagueness of "proper cause" is addressed in response to prior comments.

Jeffrey I. Erlich
I am a co-author of the Rutter Insurance Litigation treatise, and was fortunate enough to work with the late Justice Walter Croskey on that treatise for several years. I know that Justice Croskey had a major role in the development of the CACI instructions on insurance bad faith, and that it was his view that the current version of CACI 2334 correctly stated the law. (color emphasis added by committee)

Committee Response:
The committee records contain documents from its former chair the late Justice Croskey indicating that the commentator is not correct about Justice Croskey's views, at least in 2006 and 2007. There is an undated memo from him in a file noted as last modified on December 7, 2006. In this memo, he says:

> The damage refusal cases [as opposed to coverage denial case], on the other hand, rely on a different standard. Whether an insurer's refusal to settle constitutes "bad faith" will be measured by the "prudent insurer" standard. This is obviously a jury issue and is the case to which No. 2334 clearly applies. This standard requires a showing that the insurer's refusal to settle was "unreasonable" under all the circumstances. (See *Comunale v. Traders & Gen. Ins. Co.* (1958) 50 Cal.2d 654, 659 [implied covenant requires insurer to settle "in an appropriate case"]; *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 430 [insurer must settle "where the most reasonable manner of disposing of the claim is by accepting settlement"].) The test of "good faith" under this standard is whether a prudent insurer would have settled if there were no policy limits and the insurer alone was at risk: "The governing standard is whether a prudent insurer would have accepted the settlement offer if it alone were liable for the entire judgment." (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 706 (italics added). By unreasonably refusing to settle within policy limits, the insurer assumes the full liability, even in excess of its

policy limits: "When defendant refused to pay the policy limits demand, it . . . in essence wrote a new policy without limits . . . " (*Hulett v. Farmers Ins. Exchange* (1992) 10 Cal.App.4th 1051, 1060.) Under this standard, however, an insurer that had a reasonable basis for rejecting a settlement offer would not be held liable in bad faith.

The result, with respect to exposing the insurer to full liability for any excess judgment, is the same in both the "coverage refusal" and the "damage refusal" cases. But the "bad faith" basis for such recovery in the coverage refusal cases seems questionable where the insurer has acted reasonably and with proper cause. If the insurer's actions were found to be reasonable and with proper cause in a damage refusal case, there would be no bad faith recovery, so why should there be one in a coverage refusal case. It would seem to be enough simply to expose the coverage refusal insurer to full liability regardless of policy limits, but do so on a non tort theory. The full liability result is justified on public policy grounds, but it need not and should not rest on the theory of a tortious breach of the implied covenant of good faith and fair dealing.

It is true that in 2014, when an insurance defense attorney asked the committee to restore the "unreasonable rejection" requirement, Justice Croskey was not in favor. But his view then, which was adopted by the committee, was to wait and see if a case came down.

The law in this area was accurately and comprehensively explained by Justice Croskey in his opinion in *Archdale v. American Intern. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 464. He explained that:

(1) "The implied covenant of good faith and fair dealing imposes a duty on an insurer to accept a reasonable offer to settle a claim against its insured." (*Id.*, citing *Crisci v. Security Ins. Co. of New Haven) Conn.* (1967) 66 Cal.2d 425, 430.)

(2) [W]hether a liability insurer's failure to accept a settlement offer constituted a breach of the implied covenant depends on whether that settlement offer was "reasonable." (*Archdale, supra,* 154 Cal.App.4th at p. 464.)

In other words, under the proposed change, a carrier could receive an offer that was within policy limits and represented a fair value for the case in light of the insured's potential liability and policy limits, was clearly phrased to release all insureds; and which contained no extraneous demands that made it "unreasonable," and yet the insurer could nevertheless still be found to have acted "reasonably" in declining to accept it.

Committee Response:
The committee agrees that the two sentences from *Archdale* correctly state the law. But they do not address the issue. Under the proposed additional element, the committee agrees that the result postulated in the comment is possible if the insurer properly investigated, and based on what it knew or should have known at the time, reasonably concluded that the insured had no potential liability.

Similarly, the *Johansen* opinion explains that, "We have held that whenever it is likely that the judgment against the insured will exceed policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (*Id.*, 15 Cal.3d at p. 16, emphasis added and internal quotation marks omitted for clarity.)

Johansen plainly states that if the insurer receives a reasonable settlement offer, that it is obligated to accept it. As the Court framed its holding, "we conclude the insurer breached its duty to its insured when

it failed to accept the reasonable settlement offer." (*Id.* at p. 19.) Note that the Court did not say, "we conclude the insurer breached its duty to its insured when it unreasonably failed to accept the reasonable settlement offer." Yet the proposed revision to CACI 2334 proceeds as if that is what the Court held.

Committee Response:
Yes, this language from *Johansen* is the source of the strict-liability rule set forth in current CACI No.2334. And if that were the only case in which the California Supreme Court had ever spoken about excess judgment cases, then the current instruction would clearly be correct. But there are a number of California Supreme Court cases that include the exact language that the comment notes was *not* stated in *Johansen.* Further, this language from *Johansen* is dicta with regard to cases in which the insurer has accepted coverage. *Johansen* was a denial of coverage case. See report.

The proposed change to the instruction is expressly at odds with the Court's opinion in *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 243. In *Samson,* three month after the insured had been held liable for an excess judgment, the plaintiffs offered the insurer a chance to settle the case within the policy limit. (*Id.*, 30 Cal.3d at p. 229.) The carrier declined. The Supreme Court held that the rejection was a breach of the implied covenant as a matter of law. (Id. at p. 243.)

Specifically, the Court rejected the insurer's argument that "the issue as to whether it wrongfully rejected a reasonable settlement offer must be decided by a jury." (Id. at pp. 242-243.) The Court noted that, ordinarily, the reasonableness of a rejected settlement offer presents a factual question for the jury. But the Court noted that "reasonableness in this context was narrowly defined by this court in *Johansen*. 'The only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer.'" (*Id.* at p. 243, citation omitted.) The Court held that, because the judgment against the insured had already been entered, and exceeded the amount of the offer, "as a matter of law, the settlement offer was reasonable and was wrongfully rejected by Transamerica. [fn 14.]" (*Id.*)

Committee Response:
Samson was a denial-of-coverage case. The issue was whether the policy covered the claim. All of the language cited in the comment was in recognition that if there was in fact coverage, *Johansen* dictated liability for the entire judgment.

The Supreme Court has also described bad-faith conduct as a refusal to pay policy benefits "without proper cause." But each time it has used that formulation, it has done so in the context of a first-party claim for policy benefits) not in a third-party failure to settle context. (See *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 574 [first-party claim for insurer's failure to pay fire-loss claim].) I have not located a Supreme Court decision that has framed the bad-faith inquiry in the third party failure-to-settle context in terms of the insurer refusing to accept a reasonable settlement offer "without proper cause." Accordingly, I question whether the proposed change to the instruction to put the inquiry in those terms is accurate.

Committee Response:
The committee found this to be a valid point. It is among the reasons why the committee has elected not to propose the draft of CACI No. 2334 at this time, but to instead, frame the unresolved issues in the Directions for Use.

The proposed change to CACI 2334 would tell juries that an insurer acts or fails to act "unreasonably" when it "had no proper cause for its conduct." But the instruction fails to provide any corresponding explanation of what "proper cause" might be. In addition, the instruction requires the jury to decide

whether a settlement demand is "reasonable," as well as whether the insurer's refusal to accept the offer was "unreasonable."

The proposed change is therefore likely to confuse juries in two ways. First, jurors are far more likely to have an understanding of what is "reasonable" or "unreasonable" than to have any conception of the legalism "proper cause." And second, if jurors are instructed that "unreasonable" means "without proper cause," they are likely to try to use the same formulation when deciding whether the [demand] is "reasonable." But that endeavor will be hopelessly confusing, because defining "reasonable" to mean "with proper cause" simply does not translate to the inquiry of whether a settlement offer is reasonable.

Committee Response:
These points have mostly been addressed in response to prior comments. The committee doubts that there will be an issue with the jury's attempting to apply "with proper cause" to the reasonableness of the demand. To do so would have the element come out "the demand was reasonable, which means with proper cause." Jurors will soon recognize that it doesn't work. "Without proper cause" as it applies to the reasonableness of the insurer's rejection modifies "acts or fails to act." Thus, it's used as an adverbial phrase. With regard to the demand, "reasonable" is used as an adjective.

Evans Law Firm, Attorneys at Law, San Francisco, by Michael Levy
A jury can readily evaluate whether a settlement demand was "reasonable." For a jury to evaluate whether the refusal to accept a settlement demand was "reasonable," that suggests it would be necessary to evaluate the insurer's internal process. Insurers are not known for openness or honesty about their internal processes. This change will increase the amount and scope of discovery that must be done in bad faith cases. It will invite insurance companies to "paper their file" to create a record to support that every denial was supposedly "reasonable" (instead of spending their time and effort to look out for the interests of the insured). It is contrary to binding Supreme Court precedent, which requires the jury to consider whether "a prudent insurer without limits" would make the decision, not whether this particular insurer was reasonable in making the decision. (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425.)

Committee Response:
The "paper their file" argument appears in several comments. The assumption of the comment is that the "papering" will involve falsification. But if the phrase is changed to "build their files" and the assumption of falsification is set aside, then isn't the building a good thing? Documenting the facts on which the rejection was based is actually what the insurer should be doing. So yes, inquiring into the reasonableness of the insurer's rejection gives the insurer the incentive to have a good file in support of its decision. But it also gives the insurer the incentive to open up its internal process to the light of day rather than hiding it. And it may increase the discovery needed as the plaintiff will have to attack the insurer's purported good reason to reject. But whether or not a legal rule makes discovery harder or easier is not a consideration in determining whether there is such an element to the claim.

The proposed new instruction is not only incorrect and unwieldy in practice, it will also promote a result that is bad and contrary to law. This change would incentivize insurance carriers to reject reasonable settlement demands, as long as the insurer believes it could get away, at a later date, with claiming that its decision-making process was "reasonable." This is exactly the type of behavior that the bad faith cause of action was created to dis-incent. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659.) Insurance carriers' rational willingness to "roll the dice" by rejecting reasonable settlement offers, at the expense of their policyholders, is exactly why California's Supreme Court recognized the bad faith cause of action in the first instance. (*Id.*) If this proposed new instruction significantly weakens the bad faith cause of action, it would bring about all of the negative outcomes that the bad faith cause of action was

intended to suppress: more individual and small business bankruptcies, more uncompensated victims, more litigation, and it would make litigation more protracted and expensive.

Committee Response:
These are essentially policy arguments.

Felahy Trial Lawyers, Los Angeles, by Andrew P. Menotti
Contrary to some comments the Committee has received, the current version of CACI 2334 does not impose "strict liability" on insurers. Rather, CACI 2334 states that the insurer must have "failed to accept a reasonable settlement demand for an amount within policy limits" and further defines a "reasonable" settlement demand. Therefore, as currently worded, the instruction properly focuses on the reasonableness of the settlement demand, which is the proper standard for a bad faith claim based on rejecting a third party's settlement offer. (See, e.g., *Johansen v. Cal. State Auto. Assn.Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 16 ("We have held that whenever it is likely that the judgment against the insured will exceed policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (quotation marks omitted.))

Committee Response:
The committee finds that the term "strict liability" is helpful to the debate, while recognizing that it may be technically inaccurate. According to the commentators, if the demand is reasonable, then the insurer is liable for the entire judgment. There is no evaluation of how the insurer arrived at the decision to reject the demand, valid or invalid. The committee finds that "strict liability" is a reasonable label even though there is the qualification that there first must be a reasonable demand.

I am unaware of any cases where a jury relying upon CACI 2334 has found an insurer liable for bad faith because its adjuster was hit by a bus while in the process of mailing a letter accepting a settlement demand.

Committee Response:
This simple point on the surface makes little or no sense. Under current CACI 2334, nothing else is relevant if the demand is reasonable. So no jury could find bad faith based on a bus accident. The more pertinent inquiry would be whether a jury could find the insurer NOT liable for bad faith based on a bus accident.

But this comment is one that has caused the committee to elect not to recommend adoption of the version of the instruction posted for public comment at this time. The premise of the posted draft with the additional element requiring an unreasonable insurer rejection is that the only consideration for the jury is the reasonableness of the insurer's evaluation of liability and damages. A bus accident would not be a reason for avoiding liability. The committee is not convinced that it should not be. See report.

Christopher J. Fry, Attorney at Law, Sacramento
Scott H.Z. Sumner, Attorney at Law, Walnut Creek
The proposed revision would improperly add a new element of proof that would effectively immunize insurers from bad faith liability to their insureds, and thereby leave Californians at the mercy of liability insurers when their insurer's failure to accept a reasonable offer of settlement within the limits of coverage ends up leaving the insured defendant left to deal with a judgment in excess of their policy limits. This situation will be financially catastrophic to policy holders who find themselves in such circumstances, and lead to bankruptcies and financial disruption to the lives of policyholders and their families despite their prudence in purchasing insurance coverage. As such, this proposed change is against public policy and I urge the committee to reject the proposed change.

Committee Response:
These are policy arguments. But the committee fails to see how scrutiny of insurers' basis for rejecting a policy limits offer would immunize them from liability. An unwarranted rejection would still be bad faith.

Garmo & Garmo, Attorneys at Law, El Cajon, by Bill Epstein
The comment adds these two sentences to the CAOC template letter: Plaintiffs already have a substantial burden in such cases, typically meeting this challenge with limited funds. Sufficient statutory and real-world limitations are already in place.

Committee Response:
These are policy arguments.

Greene, Broillet & Wheeler, Attorneys at Law, Santa Monica, by Mark T. Quigley
While the CACI committee has the benefit of many members of the judiciary and legal community, its review of instructions is necessarily limited and is not based on the full record that a court of appeal would have before it when reviewing whether instructional error has occurred. By revising the instruction in such a significant way, without a Court of Appeal decision finding that the current instruction is wrong, the CACI committee is conveying to the legal community that future legal changes to instructions should be made at the committee level, rather than before the trial and appellate courts or the legislature.

Committee Response:
This is a slight variation on the argument that the committee should not act until a court or the legislature expressly says that an instruction is wrong. As addressed in response to previous comments, the committee disagrees.

The new element is unnecessary since it is, in effect, asking the same question as the first element but using different words. This will undoubtedly create confusion and uncertainty in the minds of jurors.

Committee Response:
A committee member made this argument at the January 2016 full committee meeting. Another member responded with the following example, which the majority found persuasive.

Say there is an accident with catastrophic damages and questionable liability on the insured. On those facts, it would be hard to say that a policy-limits demand would be unreasonable. But the insurer properly investigates and has solid evidence pointing a 90 or 95 percent likelihood of a defense verdict. It rejects the demand. Whether that conclusion was reasonable is the different evaluation that the jury must undertake under the proposed new element.

Inner City Law Office – LA
ICLC supports the change in this instruction's title from "Refusal" to "Failure."

Committee Response:
The committee has elected to recommend a change to the title at this time. It proposes making only noncontroversial changes to the instruction itself.

ICLC disagrees with the proposed addition of a third element and subsequent statement indicating that settlement demands may be unreasonable for reasons other than the amount demanded. The added language is vague and is likely to confuse jurors.

Committee Response:
This is the only comment received that addresses the additional language on nonmonetary provisions of the demand. The committee does not really see it as vague and likely to confuse. The attorneys will argue the nonmonetary aspects of the offer that are not reasonable, usually an unduly short acceptance window.

In addition, the proposed definition of "unreasonably" does not make clear what would constitute a "proper" cause for an insurer's denial of coverage, and taken together, the additions tend to suggest that denial of coverage is broadly appropriate.

Committee Response:
This instruction does not apply in a denial-of-coverage case, as is made clear in the Directions for Use.

These concerns are particularly acute from the perspective of tenants facing off against landlords, when the landlords' theory of the case is often rooted in an overt or implied argument that tenants' requests for repairs to their homes are unreasonable. Landlords' defenses in habitability cases often revolve around a suggestion that low-income tenants, particularly those who have disabilities, do not speak English, and/or are undocumented immigrants, should simply lower their expectations for safety and dignity in their homes. Jury instructions that suggest settlement demands could be "unreasonable" for a range of unspecified reasons beyond the amount could significantly disadvantage tenants in this type of case.

Committee Response:
The comment does not address the proposed changes to the instruction.

Jacobs & Jacobs – Jacobs and Girard
The proposed instruction can misleadingly result in error in those cases where the failure to accept is due to the denial of coverage if the new nonbracketed definition clause is given in such cases. Although the new proposed use note indicates that the new element 3 is to be omitted if the insurer denied coverage, but coverage is in fact established, it says nothing about deleting the nonbracketed phrase "To act or fail to act 'unreasonably' means that the insurer has no proper cause for its conduct" in such cases, which would clearly violate the holding of the Supreme Court in *Johansen v. California State Auto. Asso. Inter-Insurance Bureau* (1975) 15 Cal. 3d 9, 15-16.

Committee Response:
The committee agrees with the comment. Were it to recommend going forward with the draft posted for public comment, the suggested bracketing would have to be added. But since that is no longer the recommendation, the point is moot.

Under current law, an insurance company *cannot avoid its duty to accept a reasonable policy limits demand based upon its "subjective intent or motivations"* (e.g. claiming that they intended to settle when their purported acceptance was in fact a counter-offer i.e. rejection of a reasonable offer that was capable of acceptance) *or based upon its so called "good faith belief" due to a "genuine dispute"* over coverage, liability, the amount of damages, or some claimed technical defect in the offer, *if a prudent insurance company* faced with such a demand under similar circumstances *would have accepted the offer* because the potential judgment was likely to exceed the demand and the terms of the offer provided reasonable protection against potential remaining exposure to any insured covered under the same limits.

Committee Response:
This is the principal argument in favor of keeping the current instruction as is based on *Johansen*. It is addressed in response to other comments above.

"**Clearly, the rules for determining an insurer's liability under the implied covenant based on the failure to pay a first party claim differ from the rules for determining the obligations of a liability insurer based on the rejection of a reasonable settlement offer by a third party**." (*Rappaport-Scott v. Interinsurance Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831, 836-837. (Underinsured motorist case) (bold added).

Committee Response:
The fact that first-party and third-party cases may have some different rules does not foreclose the possibility that the "without proper cause" definition of "unreasonable" applies to both. But the committee is concerned about making this leap with questionable authority (*Graciano*). As noted in response to a similar comment above, this is one of the reasons that the committee is not recommending the draft posted for public comment at this time.

The key inquiry is not necessarily how the insurer weighed the insured's interests, rather the governing standard is "whether a prudent insurer would have accepted the settlement offer if it alone were to be liable for the entire judgment." (*Egan, supra,* 24 Cal.3d at p. 818.) This is an objective standard. The test is not dependent upon the motivations or intent of the insurer.

Committee Response:
The committee agrees with the comment. But the fact that the test is not dependent on the motivations or intent of the insurer does not mean that it does not involve the conduct of the insurer.

"A key factual question put to the jury was: Were the repeated offers made by the Trotter firm reasonable in the light of all of the circumstances of this case? If reasonable, their rejection by Allstate became unreasonable, therefore imposing on Allstate responsibility for the excess judgment." (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 707.)

Committee Response:
The opinion in *Betts* also says: "There is more than substantial evidence to support the jury's conclusion Allstate *unreasonably* rejected the policy limits offer made on several occasions by Gallucci's attorney." (154 Cal.App.3d at p.708, italics added) *Betts* is a misevaluation case in which the insurer ignored the results of its investigation. It is a prime example of how both sides of the debate can find language to support their position.

The terms "rejection" and "refusal" in the third party context seem to be used synonymously in the reported cases. Moreover, "the failure to timely act while the reasonable offer remained open breaches the duty just as much as an express rejection of the offer that considered the insured's interests." (See, e.g., *McDaniel v. GEICO Gen. Ins. Co.* (E.D. Cal. 2014) 55 F. Supp. 3d 1244, 1264 (applying California law). Under existing law, failure to accept the demand may be shown by proof that the insurer either refused, rejected, counter-offered (which operates as a rejection as a matter of law) or ignored the offer before the expiration of its deadline.

Committee Response:
The committee found this comment helpful in considering the use of "failure," "refusal," and "rejection" in the title and elsewhere in the instruction. As noted in response to a similar comment above, the committee has elected not to propose any changes to this language at this time. The comment suggests that there is no real significance to which word is used.

While some cases may contain language indicating that a breach of the covenant "may be" based on an "unwarranted or unreasonable rejection or refusal" of a reasonable settlement demand, or "refusal to accept" a reasonable settlement demand, most of these same cases describe the duty as one to accept a

reasonable settlement demand within policy limits. What is clear is that the prevailing view of California law in this third party context, is that it is the failure to timely accept a reasonable settlement demand within policy limits that is objectively unreasonable and a breach of the covenant.

Committee Response:
The comment acknowledges that there is authority for adding the additional reasonable-rejection element, including cases from the California Supreme Court. But the commentator does not say why these cases should be ignored; only that the "prevailing view" is to ignore them. The committee does not believe that these cases should be ignored, even if they might not compel a change to the instruction at this time.

While it is true that there are issues of reasonableness involved in both third party failure to accept policy limits offer cases and in first party cases, the focus between the two is quite different. In the third party context at issue in the CACI 2334 instruction, the focus of the analysis is upon the "reasonableness of the offer". As explained previously, under the duty to accept a reasonable settlement offer within policy limits, there is no requirement to show "bad faith" conduct in order to breach the implied covenant. The insurer's conduct, subjective beliefs or motivations, however well intended or in good faith, are not dispositive of this type of third party cause of action. Rather, the critical issue is the reasonableness of the settlement demand within policy limits. Under California law as explained above, the jury must determine the reasonableness of the offer on an objective basis, determining whether the insurer knew or should have known at the time the offer was not accepted that the potential judgment was likely to exceed the amount of the offer based upon the claimant's injuries or loss and the insured's probable liability. (color emphasis added by committee)

Committee Response:
While the comment purports to involve evaluation of the reasonableness of the offer, it transitions in the language in red to the reasonableness of the insurer's *evaluation* of the offer. Did the insurer reasonably evaluate the offer? If it did based on what it knew or should have known at that time, then it met the prudent insurer standard. That was exactly the intent of the draft posted for public comment.

Kerr & Wagstaffe, Attorneys at Law, San Francisco, by Daniel J. Veroff
There is good reason for imposing bad faith liability on an insurance company that refuses a reasonable settlement offer within the policy limits. Namely, it discourages the insurance company from gambling with the insured's money. An insurance company may feel that although a settlement offer is reasonable, there is a possibility it will save money by taking the case to trial. And the insurance company doesn't have a lot to lose if the gamble goes awry. If the judgment or verdict exceeds the policy limits, the insured pays the rest, not the insurer.

Committee Response:
These are essentially policy arguments. But under the proposed additional element, the insurer must have a good reason for rejecting the demand. That requirement should discourage gambling.

But, when bad faith liability is imposed on the insurer for refusing to accept a reasonable settlement within the policy limits, the insurer is on the hook for the excess amount, not the insured. As it stands under the current version of CACI 2334 and California case law, such bad faith liability can only be imposed if the jury finds that the refused settlement offer was reasonable at the time it was refused. Events occurring after the offer is refused – such as an excess judgment in favor of the insured, or newly discovered evidence – does not play into the jury's reasonableness analysis. Neither does any other evidence the insurer did not consider when making its refusal, unless its failure to consider it was a result of its own wrongful conduct, such as an unreasonable failure to investigate. Clearly, the jury instructions are sufficient as they now exist. (color emphasis added by committee)

Committee Response:
The instruction, both as it currently reads and as proposed to be revised, states that the determination of reasonableness must be based on what the insurer knew or should have known *at the time the demand was rejected*. The language in red introduces improper insurer conduct, i.e., failure to properly investigate. Under the *Johansen* strict liability position of those supporting the current instruction, whether the insurer did or did not conduct a proper investigation would be irrelevant. If the jury finds the demand to be reasonable, the insurer is liable for the whole judgment.

Kenneth S. Klein, Professor, California Western School of Law, San Diego
These revisions read like the work of someone who has not ever tried a case to a jury, or defended a verdict on appeal.

The proposed language defines "unreasonable" conduct as being "without proper cause." But in California unreasonable conduct in claims handling and claims denial without proper cause are two distinct forms of bad faith. Consider, for example, a claim that has been denied - and has a possibly proper cause for the denial – but the insurer is not confident of the propriety of the cause and so acts entirely unreasonably in its denial.

Committee Response:
This argument was made and rejected in release 27 with regard to all bad-faith insurance instructions. "Without proper cause" qualifies "unreasonable" to clarify that it does not mean "negligent." They are not two separate tests. (See *Rappaport Scott*, *supra*.)

Most insurance companies handle most insurance claims fairly and ethically. Some insurance companies, however, handle some insurance claims in bad faith. This is because doing so increases profits. The profit motive to handle insurance claims in bad faith increases with every incremental step eliminating bad faith exposure or increasing the threshold for a successful assertion of bad faith. These proposed revisions incentivize more bad faith claims handling.

Committee Response:
These are policy arguments. But the committee doubts that giving the insurer the possibility of showing a good reason for rejecting the offer (which requires that the insurer be acting in good faith) will sanction bad faith.

Kornblum, Cochran, Erickson & Harbison, Attorneys at Law, San Francisco, by Guy O. Kornblum
This change is clearly orchestrated by insurance interests who are trying to change the basic legal principles which apply to their claims handling which have governed such for years. I urge the Committee to reject this effort.

Committee Response:
The proposed revisions to the instruction were not improperly "orchestrated" by anyone. They were proposed in response to *Graciano*. Anyone may advocate for changes in instructions based on reasonable interpretations of the law, including attorneys who represent insurance companies.

Peter M. Kunstler, Attorney at Law, Encino
Nothing justifies this departure from present standards, which already reflect existing law placing responsibility upon carriers for their breaches of their duty of good faith and fair dealing, defined as rejection of reasonable offers, presumptively for their own benefit, to the detriment of their insured. The added language implies that rejecting a reasonable offer to settle a claim against their insured is not unreasonable enough to hold the carrier liable. Instead, the committee should adhere to the longstanding notion that not accepting a reasonable offer is per se unreasonable-and leave the instruction alone.

Committee Response:
All points made in this comment have been addressed previously.

Alexander O. Lichtner, Attorney at Law, West Sacramento
The landscape was changed (and not for the better) by the *Moradi-Shalal* decision eliminating third-party liability exposure as an incentive for the insurers to comply with the provisions of the insurance code in dealing with third party claims. Insurers have increasingly changed their conduct so that what in "my day" would have clearly been considered to be in bad faith has now become the norm. Cases which should be evaluated and settled early, are not. Many are forced through trial. What in my day would have been bad faith has now become part of the business model. Recent limitations on punitive damages have aggravated this problem. In my view it would be against the public interest and bad public policy to further amplify this problem by use of the proposed revision without legislative or judicial action, or both, and I would respectfully request that the committee not do so.

Committee Response:
These are all policy arguments.

The "no proper cause" standard is confusing to me and would be confusing to jurors, something I think would be contrary to the committee's intent. Is the "no proper cause" standard one of substance or one of form? Does "no proper cause" mean did the insurer have "proper cause" to put its own interests ahead of that of its insured and to gamble with the insured's money and the insured's future rather than its own? Or, does "no proper cause" mean did the insurance company claims file "document" defenses which could be used in the underlying third-party claim (which they always do), whether valid or not? Or, does it mean something else?

Committee Response:
The committee agrees that the meaning of “without proper cause” is subject to further interpretation, which may need to be addressed by the courts in the future. But in light of the committee’s decision to not go forward with including this language in the instruction at this time, the comment is moot.

Losh & Khoshlesan, Attorneys at Law, Beverly Hills, author signature illegible
I do not have a dog in this fight as I do not bring these types of suits, but I have an intellectual interest in this issue. I began practicing in California in 1987 after practicing in Michigan for 23 years. I was intrigued by two things as I had been hired by Detroit area insurance companies to enforce California judgments in excess of policy limits primarily where the insured vehicle had $20,000 worth of damage and the third party only had $10,000 in coverage. These companies do not settle within policy limits. I immediately learned that the third party carrier would approach me and try to work out something on the overage. I also learned that in California the duty of an insurance company to defend its insured was greater than the duty to pay for a loss. The other issue to me was the amount of underinsurance that many people in California carry in respect to policy limits.

On these types of property damage cases, the third party's insurance carrier is not taking a big risk by its actions. Where this becomes a problem is in the very cases that have brought this issue to your attention. Who is in the best position to understand the value of a case? That is the insurance company that is defending the third party defendant. Who is at the greatest risk of loss if their insurance company deliberately makes the wrong decision when presented with a policy limits demand? That is the third party defendant. He or she is putting their future in the hands of their insurance company. The Plaintiff is willing to take the loss in damages by submitting an offer to settle within policy limits. The only party gambling is the insurance company and there is no valid reason to support its efforts in that regard. The current jury instruction is fine.

Committee Response:
These are essentially policy arguments.

Maurice Mandel II, Attorney at Law, Newport Beach
The recent case of *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, is also instructive, because the Court of Appeal invalidated an unduly burdensome and restrictive jury instruction that improperly prejudiced the Plaintiff by imposing additional burdens of proof. This issue is best left to the Legislature or Courts of Appeal to determine, not this committee.

Committee Response:
The committee sees no relevance between *Wallace*, a disability discrimination case, and CACI No. 2334.

Maurizio A. Mangini, Attorney at Law, Oceanside
Russell & Lazerus, Attorneys at Law, Newport Beach, by Christopher E. Russell

The ONLY fear the insurance industry has is if the verdict returned is a verdict in excess of the insured's policy limits as a result of the unreasonable handling of a claim, which would then expose it to having to pay on a claim in excess of the limits purchased by the insured. Without that, there is nothing that will prevent almost all claims from either being resolved for pennies on the dollar or those same claims having to be tried. (color emphasis added by committee)

Committee Response:
The "unreasonable handling of a claim" would constitute bad faith under the proposed revisions to 2334 as the insurer's rejection of the demand would be found to be unreasonable, that is, without proper cause.

How is having more cases tried in the best interests of the taxpayer? As it is, there should be a surtax on the insurance industry to pay for our court system since a significant majority of the cases that must be filed are as a result of no offer or low ball offers from an uncaring industry more interested in quarterly profits than doing right by California consumers. You are a consumer, as am I. Would you really want to be in a position of having to file bankruptcy because your insurance company refused to handle a claim in a reasonable manner and as a result, a large, excess of your limits, verdict was returned against you? Of course not, but that is exactly what will be taking place here in California if the bar was lowered as to what is and is not the unreasonable handling of a claim. (color emphasis added by committee)

Committee Response:
These policy arguments culminate with language that would support adding the additional element of "unreasonable rejection." Under current CACI No. 2334, whether the handling of the claim was reasonable or unreasonable is irrelevant.

What front line insurance adjuster desires to get fired for the mishandling of a claim when that firing can be stopped by manipulating what actually was done in the handling of a given personal injury claim? The pressure on that front line adjuster is already enormous and gone is the day when that same adjuster actually has authority to resolve a claim without having to use software that is set up to spit out a low ball offer.

Committee Response:
These are policy arguments.

Apparently, the basis for the committee decision to change CACI 2334 is the case of *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414. Mercury usually leads the carriers on an annual

basis for most complaints filed with the DOI, so it does not surprise me it is involved with the *Graciano* case.

Committee Response:
No response necessary.

Mannion & Lowe, Attorneys at Law, San Francisco, by Derrian Oksenendler
Submitted the template letter with this additional sentence:
"In other words, all the Court of Appeal did in *Graciano* was *apply second prong of CACI 2334 as written*. The court found that the defect was in the plaintiffs demand."

Committee Response:
This is one plausible construction of the holding of *Graciano*. See report.

Myers, Widders, Gibson, Jones & Feingold, Attorneys at Law, Ventura, by Dennis Neil Jones
"In each policy of liability insurance, California law implies a covenant of good faith and fair dealing. This implied covenant obligates the insurance company, among other things, to make reasonable efforts to settle a third party's lawsuit against the insured. If the insurer breaches the implied covenant by unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover damages proximately caused by the insurer's breach." (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 312, 84 Cal.Rptr.2d 455, 457.) (color emphasis added by committee)

Committee Response:
Like some others, this comment supports adding the proposed additional element.

Insured's reasonable expectations: A duty to accept reasonable settlement demands is implied in order to protect the insureds' reasonable expectations in purchasing the insurance: "(I)n light of the common knowledge that settlement is one of the usual methods by which an insured receives protection under a liability policy, it may not be unreasonable for an insured ... to believe that a sum of money equal to the limits is available and will be used so as to avoid liability on his part ... " (*Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 431 [58 Cal.Rptr. 13].)

Committee Response:
The committee agrees with the language from *Crisci;* it is reasonable for the insured to believe that the policy limits will be used to avoid personal liability. But this reality is not helpful in resolving the issues presented.

The duty to accept reasonable settlement demands is also implied in order to cope with the conflict of interests that inevitably arises when the injured party offers to settle within the policy limits.

Settlement within policy limits is almost always in the insureds' financial interest, because it costs the insureds nothing and eliminates the risk of unlimited personal liability.

By contrast, settlement is not always in the insurer's financial interest. An insurer's contract liability is subject to the policy limits. Therefore, it might have "nothing to lose" (except defense costs) in rejecting a policy limits demand and gambling on the outcome at trial. After all, a jury *might* return a defense verdict, and any plaintiff's verdict *might* be less than the settlement demand.

Committee Response:
The committee agrees with this language also but also finds it off point.

Nelson & Fraenkel, Attorneys at Law, Los Angeles, by Stuart R. Fraenkel
There is no California case which I am aware of which supports the language change proposition.

Committee Response:
There are many cases with language supporting this point, most recently *Graciano*. See report.

The duty to settle is an implied promise to settle a case, in certain situations, within policy limits. "The implied covenant of good faith and fair dealing requires the insured to settle in an appropriate case although the express terms of the policy do not impose such a duty." (*Comunale v. Traders Gen. Ins.* (1958) 50 Cal.2d 654, 659.) Triggering the duty to settle requires: (1) a clear and unequivocal opportunity to settle within policy limits, (2) reasonably clear liability, and (3) a substantial likelihood of a recovery in excess of the policy limits. A settlement offer must be construed as reasonable and whether it exposes the insurer to an excess policy limits exposure will depend upon the information the insurer knows, or should have known, at the time of the demand. (See *KPFF, Inc. v. California Union Ins. Co.* (1997) 56 Cal.App.4th 963, 973; *Isaacson v. Cal. Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793.) "Liability is imposed not for bad faith breach of the contract, but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 430.) An insurer has an obligation to accept a settlement demand within policy limits where there is "a substantial likelihood of a recovery in excess of those limits." (*Johansen v. California State Auto Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 14. "[T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (Emphasis added) (*Id.* at 16.)

Committee Response:
If the duty to settle requires reasonably clear liability and substantial likelihood of damages greater than the policy limits, then the committee believes that the insurer must evaluate whether those two conditions exist. The insurer should be able to conclude that either there is no reasonably clear liability or that there is no substantial likelihood of an excess judgment (or both). Under the proposed draft posted for comment, the jury would decide whether the insurer's conclusion is "reasonable" in light of what it knew or should have known at the time.

Minh T. Nguyen, Attorney at Law, Long Beach
(Added this sentence to the CAOC template letter)
The law in this area is settled and should not be disturbed. The principle of *stare decisis* is critical to the administration of justice.

Committee Response:
The committee agrees that *stare decisis* is critical to the administration of justice. But it finds the law far from settled.

Orange County Bar Association, by Todd G. Friedland, President
The change from "Refusal" to "Failure" is unnecessary. Further, case law regularly refers to an insurers' duty to accept a reasonable settlement offer within policy limits by using the word "refusal." (See *Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 (Bad Faith Refusal to Settle); *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718 (Until judgment is actually entered following trial, the mere possibility or even probability of an excess judgment does not render the insurer's refusal to settle actionable); *Johansen v. California State Auto. Asso. Inter-Insurance Bureau* (1975) 15 Cal.3d 9; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654; etc.)

Committee Response:

As noted in responses to previous comments, the committee has decided not to propose this change.

The inclusion of Element 3 would cause the litigant confusion as to which facts apply to each element. As it stands, Element 2 has adequately addressed all factors that might apply in this context.

The general factors to be considered in determining whether or not an insurer has breached its duty of good faith and fair dealing in failing to settle a third-party action are well established in California. The court of appeal has listed the following as the factors to be considered: (1) the strength of the injured claimant's case on the issues of liability and damages; (2) attempts by the insurer to induce the insured to contribute to a settlement (or lack of such attempts); (3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; (4) the insurer's rejection of advice of its own attorney or agent; (5) failure of the insurer to inform the insured of a compromise offer; (6) the amount of financial risk to which each party is exposed in the event of a refusal to settle; (7) the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and (8) any other factors tending to establish or negate bad faith on the part of the insurer. (*Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689, 319 P.2d 69. The factors cited above are under the umbrella of factors used to determine the reasonableness of settlement offers, not whether the defendant's failure was unreasonable.

Committee Response:
Except for factor (1) (liability and damages), the other factors do not evaluate the demand, they evaluate the insurer's conduct. If all that is required is a reasonable demand, then none of these factors would have any relevance. What the insurer did or did not do in the course of deciding to reject the demand would be of no import.

The final paragraph of the instruction should also remain unchanged.

Committee Response:
The only substantive change proposed to the final paragraph was to narrow the inquiry on the proposed new element of reasonable rejection to the insurer's evaluation of the case. The committee has elected not to propose the new element at this time; therefore, it will not propose this language either.

No objection to the additional case law and authorities.

Committee Response:
No response is necessary.

An insurer may reject the demand if there are non-monetary conditions in the demand or if the carrier has not had an adequate opportunity to thoroughly investigate the claim before the demand expires. Again, there should be some requirement that the plaintiff timely notified the insurer of the lawsuit in accord with the terms of the policy.

Committee Response:
Notice will not be an issue because the injured party will have given the insurer notice via the demand.

The word "settlement" should remain in the last paragraph.

Committee Response:
The committee disagrees. Once "settlement demand" is used in the first sentence, "settlement" is just an unneeded extra word in the rest of the paragraph.

The last sentence "However, the demand may be unreasonable for reasons other than the amount demanded," could be explained such as an unreasonable time given for the carrier to investigate and respond to the demand.

Committee Response:
The committee considered this suggestion. But it decided that an example might be misleading if the provision in the demand was something other than the example.

Bruce Palumbo, Attorney at Law, Pasadena
Clearly, the very damages caused by an insurer's failure to accept a reasonable settlement offer within policy limits when the insured is facing liability for damages above those limits are those very damages above the policy themselves. The insurer retains by its terms the exclusive right and duty to make all settlement decisions regarding payment of policy limits. Requiring a new and additional element for an insurer's breach would be unfair and unwarranted and would violate basic contract damages under Civil Code 3300.

Committee Response:
The committee does not understand this comment. The committee agrees that the damages in a policy limits case are the amount of a judgment against the insured in excess of the policy limits. But the instruction does not address what damages are recoverable. The committee does not see how the proposed additional element could possibly violate basic contract damages under Civil Code section 3300.

R. Rex Parris Law Firm, Attorneys at Law, Lancaster, by Daniel Eli
The *Graciano* court's dicta confuses these two aspects of the Covenant. Because the insurer's failure to accept a "reasonable" settlement demand is a violation of an implied "contractual" term, it is irrelevant whether the insurer acted reasonably or with proper cause. The reasonableness of the insurer's conduct is only relevant where the insured seeks enhanced "tort" damages. However, where the only damages at issue are "contract" damages for failure to accept a "reasonable" settlement demand, no further showing of "unreasonable" conduct by the insurer is necessary.

The California Supreme Court made this clear in *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 430:

> As we have seen, the duty of the insurer to consider the insured's interest in settlement offers within the policy limits arises from an implied covenant in the contract, and ordinarily contract duties are strictly enforced and not subject to a standard of reasonableness.

Committee Response:
The previous paragraph from *Crisci* to the one excerpted says:

> Obviously a showing that the insurer has been guilty of actual dishonesty, fraud, or concealment is relevant to the determination whether it has given consideration to the insured's interest in considering a settlement offer within the policy limits. The language used in the cases, however, should not be understood as meaning that in the absence of evidence establishing actual dishonesty, fraud, or concealment no recovery may be had for a judgment in excess of the policy limits. *Comunale v. Traders & General Ins. Co., supra,* 50 Cal.2d 654, 658-659, makes it clear that liability based on an implied covenant exists whenever the insurer refuses to settle in an appropriate case and that liability may exist when the insurer unwarrantedly refuses an offered settlement where the most reasonable manner of disposing of the claim is by accepting the settlement. Liability is imposed not for a bad faith breach of the contract but for failure to meet

> the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing. Moreover, examination of the balance of the *Palmer*, *Critz*, and *Davy* opinions makes it abundantly clear that recovery may be based on unwarranted rejection of a reasonable settlement offer and that the absence of evidence, circumstantial or direct, showing actual dishonesty, fraud, or concealment is not fatal to the cause of action.

Crisci demonstrates that there is often language supporting either position in the same case.

Law Offices of Frank D. Penney, Roseville, by James R. Lewis
The *Graciano* case did not create the proposed new element of "without proper cause" and factually does not support the creation of the new burden to be placed upon plaintiffs.

Committee Response:
Graciano says:

> A bad faith claim requires "something beyond breach of the contractual duty itself" (*California Shoppers, Inc. v. Royal Globe Ins. Co.*, *supra*, 175 Cal.App.3d at p. 54 (*California Shoppers*)), and that something more is "'refusing, *without proper cause*, to compensate its insured for a loss covered by the policy … .' [Citation.] Of course, the converse of 'without proper cause' is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant." (231 Cal.App.4th at p. 433, original italics.)

So if *Graciano* is authority, then there is authority for "without proper cause." As to whether *Graciano* is authority, see report.

Existing case law, contained within the citations to CACI 2334, sufficiently address the burden of proof of bad faith against an insurer. The authorities specifically require that a plaintiff must prove that the terms were clear, all claimants were including the policy limit demand, all insureds would be released if the policy limit was tendered, the demand was within the policy limits, the demand was reasonable (in light of the victim's injuries and the probable liability of the insured that ultimate judgment is likely to exceed the amount of the settlement offer), and that the policy limit demand afforded the insured adequate time to investigate the demand.

Committee Response:
These are the factors for the jury to consider in determining whether the demand was reasonable. But the fact that there are factors to evaluate the reasonableness of the demand does not mean that there are not factors to evaluate the reasonableness of the insurer's rejection of the demand.

Reiner & Slaughter, Attorneys at Law, Redding, by April K. Gesberg and Todd E. Slaughter
The change in the law that you are proposing will remove any pressure on the insurance carriers to make reasonable settlement offers and settle the cases for the limits when there is danger that the case could exceed the policy limits. Adjustors will simply document reasons in their file why they feel that their refusal to accept the demand is justified, in hopes that a later jury will conclude that they "seemed to be acting reasonably." Adjustors are already doing this now, as we are receiving an increasing number of letters from adjustors stating that the demands cannot be "accepted or rejected" at this time, citing some reason or claimed need for documentation, no matter how specious. In essence, you are providing a wall for the insurance industry to hide behind, removing them from their good faith obligation to protect the insured's financial wellbeing on a parity with their own. The inevitable net result of your proposed changes is that insureds are going to have their own assets put in peril when clever adjustors and carriers start justifying why they "just didn't think it was a good idea" to accept the demand at the time.

Committee Response:
These are essentially policy arguments. But the committee does not believe that a jury will accept "just didn't think that it was a good idea" as a reasonable rejection.

Rice & Bloomfield, Attorneys at Law, Encino, and Consumer Attorneys Association of Los Angeles, by Linda Fermoyle Rice
(Added this paragraph to the CAOC template letter)
Plaintiffs face significant obstacles to attaining justice in our civil justice system. Many of those obstacles have been designed and "sold" by the insurance industry to "fix" problems that do not exist - witness MICRA, now more than 40 years old. The "unintended consequences" of changing established law at the behest of insurers and their attorneys must be carefully considered and should mitigate heavily against not making this change to CACI 2334.

Committee Response:
These are policy arguments

Ara Saroian, Attorney at Law, Sherman Oaks
Although the term "unreasonable" has been defined, how does the committee intend to provide a definition to jurors as to what "proper cause" means. In essence, the definition the committee has provided to an ambiguous term itself requires further defining. Furthermore, what "conduct" is the committee discussing in the definition? Shouldn't the conduct that the insurer engaged in be absolutely clear (i.e. " failing to accept this settlement demand was unreasonable")?

Committee Response:
This point has been addressed in the committee's response to previous comments.

Alex B. Scheingross, Attorney at Law, San Diego
As our society is currently constituted, the insurance industry has tremendous advantage in any dispute with its policy holders. They have the time, money and resources to fight any thing they don't like, regardless of what the law is. Very few of my clients have ever had the resources to fight back on the scale the insurance industry has. The insurance industry has the ability (which they frequently exercise through their lobbying efforts) to influence legislation and give the table even more tilt in their favor. Therefore I cannot begin to comprehend how the committee arrived at its decision to change CACI 2334 without the holding of an appellate decision critical of the instruction. If allowed to stand, this revision to the instruction will work a grave injustice on the public.

Committee Response:
These are policy arguments

Shernoff Bidart Echeverria Bentley, Attorneys at Law, Claremont, by William M. Shernoff, Michael J. Bidart, Ricardo Echeverria, and Gregory L. Bentley
Graciano has not been cited by a reported decision for the proposition embodied in the proposed change to CACI 2334. Instead, the current CACI 2334 has repeatedly been cited as a correct statement of the law. (See, e.g., *Bosetti v. U.S. Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1236 ("In other words, an insured plaintiff need only show, for example, that the insurer ... failed to accept a reasonable settlement offer") (citing the current CACI 2334); *Yan Fang Du v. Allstate Ins. Co.* (9th Cir. 2012) 697 F.3d 753, 757 ("At trial, the district court gave modified forms of CACI 2334 and 2337. Both of these instructions made clear that breach of the covenant of good faith and fair dealing could be found only if Deerbrook had failed to accept a reasonable settlement demand"); *McDaniel v. GEICO General Ins. Co.* (E.D. Cal. 2014) 55 F.Supp.3d 1244, 1263 ("CACI 2334, *Hamilton, Johansen, Egan,* and *Crisci* recognize that there is a particular duty imposed on an insurance company to accept reasonable settlement

offers within policy limits. When the insurance company fails to accept a reasonable offer, the duty has been violated"); and *RSUI Indem. Co. v. Discover P & C Ins. Co.* (E.D. Cal., Apr. 16, 2014, 2:13-CV-00960-TLN-EF) 2014 WL 1513973, at *4 (citing the current CACI 2334 as a correct statement of the law) (color emphasis on the ellipsis in the *Bosetti* quote added by committee).

Committee Response:
The only case cited in this comment that might be controlling authority is *Bosetti*; the rest are federal court cases. *Bosetti* was a first-party case. Here is the full paragraph, including the text within the ellipsis above:

> Subsequent case law has confirmed that "the covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc., supra,* 2 Cal.4th at p. 373.) Indeed, "'[t]he ultimate test of [bad faith] liability in … first party [insurance] cases is whether the refusal to pay policy benefits was unreasonable.'" (*Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205 [10 Cal. Rptr. 2d 352], original italics.) In other words, an insured plaintiff need only show, for example, that the insurer unreasonably refused to pay benefits or failed to accept a reasonable settlement offer; there is no requirement to establish subjective bad faith. (See CACI No. 2331 [first party bad faith]; CACI No. 2334 [third party bad faith]; see also *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 794 [90 Cal. Rptr. 3d 74].)

The language is dicta. Further, the word "unreasonably" could be read above to modify both "refused to pay benefits" and also "failed to accept a reasonable settlement offer." Thus *Bosetti* adds nothing but additional uncertainty to the discussion.

State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair
We believe that an insurer's failure to accept a settlement demand that is reasonable in all respects, including amount, is necessarily unreasonable. A reasonable settlement demand and an unreasonable refusal are different sides of the same coin. To instruct the jury on both the reasonableness of the demand and the unreasonableness of the refusal may suggest that there is some distinction, which the authorities do not support. Accordingly, we would delete proposed new element 3 and the proposed new penultimate paragraph in the instruction defining "unreasonably."

Committee Response:
This committee's rejection of this argument is set forth in a response to a previous comment.

We would simplify and clarify the final paragraph in the instruction by limiting it to cases in which the insurer claims the demand was unreasonable because of the amount, which we believe are the great majority of cases. We suggest the following:

> "A settlement demand for an amount within policy limits is reasonable~~, and [name of defendant]'s rejection of the demand is unreasonable,~~ if [*name of defendant*] knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probably liability.~~ However, the demand may be unreasonable for reasons other than the amount demanded.~~"

We would modify the Directions for Use to state that the instruction should be modified if the insurer claims that the demand was unreasonable for a reason other than the amount, and delete the proposed new language explaining when to give element 3.

Committee Response:
The first deletion is a reiteration of the point above, that there is no difference in the analysis of reasonable demand and reasonable rejection. Assuming arguendo that it is true that in the "great majority of cases" the only issue is the monetary amount, the committee does not think that the instruction should ignore the need to look at the nonmonetary aspects, particularly the amount of time given to investigate.

Jonathan G. Stein, Attorney at Law, Elk Grove
He submitted the CAOC template letter with an expansion of the discussion of *Graciano* as shown in red. Second, the apparent basis changing CACI 2334 add this element is the *Graciano* case, but that decision does not say that CACI 2334 is incorrect or anything else that might require a change in the instruction. In *Graciano*, the court of Appeal actually applied the same law that underlies the existing CACI 2334. It held was that there was no bad faith because the insurer did not have a reasonable opportunity to settle the claim. When the third party claimant made a demand, she identified the wrong insurance policy number and the wrong insured, so the insurer could not accept the claim. 231 Cal.App.4th at 418-19. The court concluded "there is no substantial evidence Graciano [plaintiff] ever offered to settle her claims against Saul [insured] for an amount within Saul's policy limits." 231 Cal.App.4th at 427. The decision held that there was no breach of the covenant where there was not a reasonable offer to settle for the policy limits with the actual insured. Id. at 427. In other words, all the Court of Appeal did in *Graciano* was apply the second prong of CACI 2334 as written. The court found that the defect was in the plaintiff's demand. The *Graciano* court did not hold that CACI 2334 is wrong or that there is any problem with the instruction. Indeed, the words "instruct", "instructed", and "instruction" do not even appear in the opinion.

Committee Response:
This language expands on the view that the pertinent language in *Graciano* that would support the proposed additional element of unreasonable rejection is dicta. See report.

Robert H. Tourtelot, Attorney at Law, Santa Monica
He submitted the CAOC template letter with the additional language shown in red.
The current CACI 2334 instruction properly focuses on the reasonableness of the settlement demand and acknowledges that rejection of a reasonable demand, in and of itself, causes harm to an insured faced thereafter with an excess judgment. There is no reason to add consideration of extraneous conduct by insurers to the instruction.

Committee Response:
It cannot be denied that an excess judgment causes harm to the insured. But that does not foreclose the possibility that there are other elements other than a reasonable demand.

United Policyholders, by David B. Goodwin, Covington and Burling, Attorneys at Law, San Francisco
Draft amended instruction No. 2334 incorrectly describes the essential factual elements of an insurer's refusal to accept a reasonable settlement within policy limits. Liability for that tort arises from one of two distinct claims. Although the draft amended instruction attempts to reconcile the two situations in its "Directions for Use" section by removing certain elements when not applicable, crafting one instruction for two different categories of tortious behavior risks needless confusion.

First, an insurer can breach the implied covenant of good faith and fair dealing when it fails to accept a settlement of a covered claim within policy limits and (a) the likelihood of liability (b) multiplied by the likely damages if the insured is found liable is (c) greater than the settlement offer. (See *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 16.) In such cases, other factors such as policy limits or concerns about future settlements are irrelevant – so long as the likely liability exceeds

the settlement offer, the offer is a reasonable one and the insurer's failure to accept it can support a finding of bad faith. (See *id.*; see also *Howard v. American Nat'l Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 524-25. The standard is, moreover, closer to strict liability than it is to negligence. (See, e.g., *Johansen*, 15 Cal.3d at 16; *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 429.)

Committee Response:
The comment points (a), (b), and (c) would seem to indicate that the insurer is to evaluate the demand in light of its conclusion on liability and damages. The proposed draft posted for public comment would have the jury evaluate the insurer's conclusion and decide it was reasonable for it to have been wrong. If there is to be no consideration as to whether the insurer's conclusion was a reasonable one, then its evaluation would be irrelevant. Only the third party's evaluation as expressed in the demand would be relevant.

Second and distinctly, an insurer's failure to accept a settlement offer can constitute bad faith when it failed to adequately and objectively consider the offer. Under *Davy v. Public Nat'l Ins. Co.* (1960) 181 Cal.App.2d 387 and its progeny, "[t]he exercise of good faith … requires that the consideration given to an offer of settlement should be an intelligent one; and should be based on a reasonable investigation; and should be made by persons reasonably qualified to make a decision respecting the risks involved." Id. at 396. A wide variety of different actions by the insurer can suggest insufficient consideration of the offer, including the following:

- failing to make an "honest, intelligent and knowledgeable" evaluation of the offer on the merits, (see *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.2d 858, 875-76);

- improperly delegating its duty to evaluate the claim, (see *Garner v. American Mut. Liab. Ins. Co.* (1973) 31 Cal.App.3d 843, 850-51);

- unreasonably relying on an insured's statements when evidence undermined that perspective, (see *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 707);

- failing to seek competent legal advice, (see *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 906);

- disregarding competent legal advice, (see *Kinder v. Western Pioneer Ins. Co.* (1965) 231 Cal.App.2d 894, 901);

- concealing an unwillingness to settle for an unreasonable period of time, (see *Shade Foods*, 78 Cal.App.4th at 906);

- failing to properly inform the insured of settlement negotiations, (see *Martin v. Hartford Acc. & Indem. Co.* (1964) 228 Cal.App.2d 178, 184, see also *Anguiano v. Allstate Ins. Co.* (9th Cir. 2000) 209 F.2d 1167, 1169); and

- failing to ask an insured to contribute to a settlement offer above policy limits (see *Merritt, supra,* 34 Cal.App.2d 875-876).

These cases present distinct factual situations in which an insurer may be found to have refused a settlement offer in bad faith, all of which are distinct from a simple valuation of the offer against likely liability, as in *Johansen* and its progeny.

Committee Response:

All of these factors point to the insurer's bad conduct in how it investigates and determines whether to pay the policy limits. If the only question to be decided is whether the demand was reasonable, then none of these factors would be relevant.

While *Hamilton v. Maryland Cas. Co* (2002) 27 Cal.4th 718, 724-25 does describe such a situation as an "unreasonable refusal" to settle, it does so by way of direct citation to *Comunale*, and says only that an unreasonable refusal to settle "may subject the insurer to liability," not that it is the only way by which an insurer may face such liability. (*Id.*)

Committee Response:
The committee does not understand this comment. It acknowledges that *Hamilton*, a California Supreme Court case, includes language supporting an additional "unreasonable rejection" element. But the comment fails to explain why the instruction need not reflect this language.

Scott H.Z. Sumner, Attorney at Law, Walnut Creek
Sent the CAOC template letter with this addition.
The proposed change would encourage liability insurers to build their files to immunize themselves against bad faith liability, as opposed to the current instruction, which looks to the externally-verifiable objective reasonableness of the settlement offer.

Committee Response:
An insurer can "immunize" itself against bad-faith liability by properly investigating the claim and reaching a reasonable decision to accept or reject the demand. Hopefully, the files would show that they met this obligation.

William Swearinger, Attorney at Law, West Hollywood
Sent the CAOC template letter with this addition.
If the committee feels that its job is to make it easier for insurers to triumph over the ordinary person, then, y'all will have done someone's bidding in changing the instruction. If the committee wishes to remain apparently neutral, as it should be, then, leave interpretation of the law to the appellate court.

Committee Response:
The committee will leave interpretation of the law to the appellate courts.

Valentine Law Group, Attorneys at Law, Irvine, by Kimberly A. Valentine
There is no persuasive reasoning for this change to CACI 2334. CACI 2334 already provides that the settlement offer by the Plaintiff has to be reasonable and within the policy limits and this requirement of "reasonableness" already takes into consideration the circumstances surrounding the offer. There is no need to now provide the Defendant insurer with the ability to refuse an otherwise reasonable offers merely because Defendant believed they had a "proper cause" to do so.

Committee Response:
Under the proposed reasonable-rejection element, whether the insurer believed that it had proper cause would be irrelevant. It would be whether the jury concluded that the insurer had proper cause.

This revision would take the focus off the reasonableness of the settlement demand and instead focus it on defendant insurer's conduct. Given the vagueness of the revision, Defendants will have the ability to assert various and irrelevant factors to avoid a finding of bad faith on behalf of the Defendants.

Committee Response:

The proposed draft posted for public comment would put the focus on both the demand and the insurer's conduct.

Young & Nichols, Attorneys at Law, Bakersfield, by Steve W. Nichols
First, insurance companies get away with failing to pay claims within policy limits. On most all the claims made, insurance companies can deny a legitimate claim and the monetary differences make it impossible to sue over a claim, since economically, it is not enough to fight over. Those cases make up the vast majority of claims. The insurance company wins simply because it is not worth the effort to go after a few thousand dollars. For the insurance companies, you add up all those little wins and it becomes billions.

Second, when an insurance company is presented with a claim that is legitimate and deserves to be paid, the carrier refuses to pay it as well. Now the industry wants citizens to prove those actions were "unreasonable". This is just another way to defeat claims by people who have been hurt physically and financially. The insurance companies want our state to take away more rights by putting up road blocks.

The request to require proving something that can easily be fabricated only protects an industry that has already been over protected.

Committee Response:
These are policy arguments

The current jury instruction is adequate and simply tells jurors, judges and attorneys that when an insurance company fails to pay claims [that] are already deemed legitimate, they have violated the law.

Committee Response:
The committee agrees that is what the current instruction does. The question is whether it really is adequate or whether it needs to require more.

Innocent people are the victims if any further requirements are put up as road blocks to justice. The current law protects insurance companies if those requirements are not met. If those requirements are not met, insurance companies must be held accountable for their failure to act in good faith.

Remember, insurance companies already win 95% of all cases that they have failed to pay, simply because injured parties cannot afford to fight. Now, insurers want protection on the other 5% when these acts cause considerable damage and an attorney has decided to take the case and pursue the rights allowed by law.

Committee Response:
These are also policy arguments

Young & Nichols, Attorneys at Law, Bakersfield, by Thomas Sheets, Office Administrator
As a civil and criminal investigator, retired deputy sheriff, and law office administrator for 46 years, I must comment on CACI 2334 and its chilling effect on the ability to prove bad faith judgments in civil cases.

I know you will receive many emails and correspondence on this issue which will brief the fine legal points. I write this as a worker in the system who, in my investigations, sees almost daily abuses and incidents of bad faith.

Insurance companies in California have controlled and directed legislation for some time and this proposed revision to CACI 2334 is simply a further attempt to insulate insurance companies from paying claims when a reasonable offer for settlement has been made.

Committee Response:
The proposed revisions to CACI No. 2334 are an attempt to correctly express the law.

The law has worked well after changes were made to CACl 2334 in 2007. Now the insurance lobby is seeking the addition of vague and ambiguous language in the jury instruction to allow more loopholes and argument.

Committee Response:
The committee is not sure what language is challenged as “vague and ambiguous.” “Without proper cause” is addressed in responses to prior comments.

Appendix A Attorneys Submitting Identical Letter

1. Agnew Brusavich, Attorneys at Law, Torrance, by Terry S. Schneier
2. Law Offices of Joseph R. Baer, Attorney at Law, Pollock Pines, by Joseph R. Baer
3. Kelly Balamuth, Attorney at Law, Moraga
4. Larry L. Baumbach, Attorney at Law, Chico, by Larry L. Baumbach
5. Garland O. Bell, Attorney at Law, Sacramento
6. Arthur Paul Berg, Attorney at Law, Dillsboro, Indiana
7. Bennett & Johnson, Attorneys at Law, Oakland, by Richard C. Bennett
8. Bohn & Fletcher, Attorneys at Law, San Jose, by Robert H. Bohn, Jr.
9. John Christian Bohren, Attonrey at Law, San Diego
10. Robert A. Brenner, Attorney at Law, Woodland Hills
11. Steven M. Bronson, Attorney at Law, San Diego
12. James Matthew Brown, Attorney at Law, San Diego
13. Bruno | Nalu, Attorneys at Law, Newport Beach, by Keith J. Bruno
14. Boucher LLP, Attorneys at Law, Woodland Hills, by Shehnaz M. Bhujwala
15. Brent W. Caldwell, Attorney at Law, Huntington Beach
16. Richard P. Caputo, Attorney at Law, San Jose
17. Choulos, Choulos & Wyle, Attorneys at Law, San Francisco, by Claude A. Wyle
18. Corrales Law Group, Attorneys at Law, Orange, by Peter Corrales
19. Costanzo Law Firm, Attorneys at Law, San Jose, by Lori J. Costanzo
20. Frank J. Crum, Attorney at Law, Woodland
21. Seth Davidson, Attorney at Law, Torrance

22. Demián Oksenendler, Mannion & Lowe, Attorneys at Law, San Francisco

23. Thomas M. Dempsey, Attorney at Law, Beverly Hills

24. The Dolan Law Firm, Attorneys at Law, San Francisco, separate letters from
    Aimee E. Kirby
    Megan Irish

25. Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, separate letters from
    Robert A. Buccola
    Ryan L. Dostart
    Joshua T. Edlow
    Kelsey J. Fischer
    Justin M. Gingery
    Thomas J. Gray
    Hank G. Greenblatt
    Jonathan R. Hayes
    Larry Q. Phan
    Catia G. Saraiva
    Daniel G. Schneiderman
    Craig C. Sheffer
    Jason J. Siegel
    Sean D. Wisman
    Joseph R. Yates

26. Brent Duque, Attorney at Law, Newport Beach

27. Richard L. Duquette, Attorney at Law, Oceanside

28. Scott Bradley Dormer, Attorney at Law, Los Angeles

29. Emison Hullverson, Attorneys at Law, San Francisco, by Miles B. Cooper

30. Britany M. Engelman, Attorney at Law, Beverly Hills

31. Ernst Law Group, Attorneys at Law, San Luis Obispo, separate letters from
    Don Ernst
    Taylor Ernst
    Terry Kilpatrick
    Nigel Whitehead

32. Ingrid Evans, Attorney at Law, San Francisco

33. Mayra M. Fornos, Attorney at Law, Los Angeles

34. Freeman & Freeman, Attorneys at Law, Woodland Hills, separate letters from
    Stan Freeman
    Steven M. Freeman

35. Garmo & Garmo, Attorneys at Law, El Cajon, by Bill Epstein

36. Richard H. Geringer, Attorney at Law, Aliso Viejo
37. Michael F. Ghozland, Attorney at Law, Los Angeles

38. Gibson & Hughes, Attorneys at Law, Santa Ana, by Robert B. Gibson, Jeffrey S. Hughes, and Cynthia A. Craig

39. Goldstein, Gellman, Melbostad, Harris & McSparran, Attorneys at Law, San Francisco, by Lee S. Harris

40. Gwilliam, Ivary Chiosso, Cavalli & Brewer, Attorneys at Law, Oakland, by Jayme L. Walker

41. Loren B. Halpern, Attorney at Law, Calabasas

42. Genie Harrison, Attorney at Law, Los Angeles

43. Hassell Law Group, Attorneys at Law, San Francisco, separate letters from
    Dawn L. Hassell
    Sophia Cohn
    Sean Crandall
    Andrew Haling
    Christina Sun
    Lisa Villasenor

44. Rolando Hidalgo, Attorney at Law, Sonoma

45. Sanford I. Horowitz, Attorney at Law, Sonoma

46. Vincent D. Howard, Attorney at Law, Anaheim

47. Jachimowicz, Pointer & Emanuel, Attorneys at Law, San Jose, by Braid Pezzaglia

48. Jackson & Parkinson, Attorneys at Law, Fallbrook, by Brett R. Parkinson

49. Johnson Attorneys Group, Attorneys at Law, Newport Beach , by James Johnson

50. Robin Johnson, Attorney at Law, Folsom

51. Aghavni Kasparian, Attorney at Law, Los Angeles

52. Susan Cameron Kelley, Attorney at Law, Huntington Beach

53. Alain Kinaly, Attorney at Law, Irvine

54. James W. Kirby, Attorneys at Law, Redondo Beach

55. Lawrence Knapp, Attorney at Law, Stockton

56. Kornblum, Cochran, Erickson & Harbison, Attorneys at Law, San Francisco |Santa Rosa, separate letters from
    Charles D. Cochran
    Nicholas J. Peterson
    Amy Winters

57. Koshkaryan Law Group, Attorneys at Law, Sherman Oaks, by Vahagn Koshkaryan

58. Kottler & Kottler, Attorneys at Law, Los Angeles, separate letters from
    Shari S. Daneshrad
    Douglas E. Kottler
    Rochelle Rodriguez

59. M. Lawrence Lallande, Attorney at Law, Long Beach

60. Jeffrey R. Lamb, Attorney at Law, Los Angeles

61. Lamb & Frischer, Attorneys at Law, San Francisco, by Richard L. Frischer

62. Lavelle Law Group, Attorneys at Law, San Diego, by Joseph C. Lavelle

63. Timothy V. Magill, Attorney at Law, Fresno

64. Mancini & Associates, Attorneys at Law, Sherman Oaks, by Marcus A. Mancini

65. Jerod A. Marsalli, Attorney at Law, Pleasant Hill

66. McTernan, Stender & Weingus, Attorneys at Law, San Francisco, by Cliff Weingus

67. Mark Millen, Attorney at Law, Los Gatos

68. Mulligan, Banham & Findley, Attorneys at Law, San Diego, by Elizabeth A. Banham

69. Newmeyer & Dillion, Attorneys at Law, Newport Beach, by Robert K. Scott,

70. R. Rex Parris, Attorney at Law, Lancaster

71. Nikolaus W. Reed, Attorney at Law, San Francisco

72. Shawn Steel Law Firm, Attorneys at Law, Seal Beach, by Arun Dayalan

73. Kenneth M. Sigelman, Attorney at Law, San Diego

74. Edward A. Smith, Attorney at Law, Sacramento

75. Swanson O'Dell, Attorneys at Law, Bakersfield, separate letters from
    Peggy Vargas
    Seth N. O'Dell
    Jeremy D. Swanson

76. Jonathan G. Stein, Attorney at Law, Elk Grove

77. Stoll, Nussbaum & Polakov, Attorneys at Law, Los Angeles, by Mark J. Bringardner

78. Robert W. Thompson, Attorney at Law, Burlingame

79. Thorsnes Bartolotta McGuire, Attorneys at Law, San Diego, by Brett J. Schreiber

80. Joseph E. Tomasik, Attorney at Law, Berkeley

81. Kathryn M. Trepinski, Attorney at Law, Beverly Hills

82. Treyzon & Associates, Attorneys at Law, Los Angeles, by Boris Treyzon

83. The Veen Firm, Attorneys at Law, San Francisco, separate letters from
    Alexandra A. Hamilton
    Elinor Leary
    Andje M. Medina
    Kimberly Wong

84. Michael D. Waks, Attorney at Law, Long Beach

85. Walker, Hamilton & Koenig, Attorneys at Law San Francisco, by
    Walter H. Walker, III
    Timothy M. Hamilton
    Peter J. Koenig
    Beau R. Burbidge

86. Walkup, Melodia, Kelly & Schoenberger, Attorneys at Law, San Francisco, separate letters from
    Matthew D. Davis
    Conor M. Kelly

87. Bradley S. Wallace, Attorney at Law, Encino

88. Ward & Hagen, Attorneys at Law, Solana Beach, by Steven M. Nuñez

89. Wickman & Wickman, Attorneys at Law, Escondido, by Christina E. Wickman

90. Wilcoxen Callaham, Attorneys at Law, Sacramento, separate letters from
    Brian W. Plummer
    Daniel E. Wilcoxen
    William C. Callaham

91. Andrew L. Wright, Attorney at Law, Los Angeles

92. Alaa A. Yasin, Attorney at Law, Santa Ana

93. Yuhl Carr, Attorneys at Law, Marina del Rey, by Tyler J. Barnett

Appemdix B. Attorneys Submitting Almost Identical Letter, But With Slight Variations

1. Aitken * Aitken * Cohn, Attorneys at Law, Santa Ana, separate letters from
   Ashleigh E. Aitken
   Christopher R. Aitken
   Darren O. Aitken
   Megan Demshki
   Casey R. Johnson
   Michael A. Penn

2. Baradat & Paboojian, Attorneys at Law, Fresno, by
   Daniel R. Baradat
   Warren R. Paboojian
   Jason S. Bell
   Adam B. Stirrup
   Kevin B. Kalajian
   Lynne Thaxter Brown

3. Chet R. Bhavsar, Attorney at Law, Los Angeles

4. Campagnoli Abelson & Campagnoli, Attorneys at Law, San Francisco, by Mark B. Abelson

5. Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, by Roger A. Dreyer

6. Garmo & Garmo, Attorneys at Law, El Cajon, by Bill Epstein

7. Howarth & Smith, Attorneys at Law, Los Angeles, by Suzelle Smith

8. Maurice Mandel II, Attorney at Law, Newport Beach

9. Manion & Lowe, Attorneys at Law, San Francisco, by Derrian Oksenendler

10. Minh T. Nguyen, Attorney at Law, Long Beach

11. Law Offices of Frank D. Penney, Roseville , by James R. Lewis

12. Reiner & Slaughter, Attorneys at Law, Redding, by April K. Gesberg
    Todd E. Slaughter

13. Rice & Bloomfield, Attorneys at Law, Encino, and Consumer Attorneys Association of Los Angeles, by Linda Fermoyle Rice

14. Rizio & Nelson, Attorneys at Law, Santa Ana, by Eric Ryanen

15. William Swearinger, Attorney at Law, West Hollywood

16. Robert H. Tourtelot, Attorney at law, Santa Monica

17. Valentine Law Group, Attorneys at Law, Irvine, by Kimberly A. Valentine

Appendix C. Attorneys Submitting Other Letters

1. Thomas G. Adams, Attorney at Law, Ventura

2. Adamson Ahdoot, Attorneys at Law, Los Angeles, by Christopher B. Adamson

3. Adleson Hess & Kelly, Attorneys at Law, Campbell, by Randy M. Hess and Nicole S. Adams-Hess

4. Agnew Brusavich, Attorneys at Law, Torrance, by Bruce M. Brusavich

5. Alpers Law Group, Aptos, by J. Thomas Aldrich and Richard C. Alpers

6. Biren Law Group, Los Angeles, by
   Sarina M. Jarchi
   John A. Roberts

7. Central Coast Trial Lawyers Association (CCTLA) – Mission Law Center, San Luis Obispo, by Louis Koory, President

8. Gordon Churchill, Attorney at Law (inactive), San Diego

9. Stephen N. Cole, Attorney at Law, West Sacramento

10. Robert D. Conaway, Attorney at Law, Victorville SLaw Office of Robert D. Conaway, Victorville

11. Danko Meredith, Attorneys at Law, Redwood Shores, by Kristine K. Meredith

12. DeWitt Algorri & Algorri, Attorneys at Law, Pasadena, by Mark S. Algorri

13. Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, by
    Robert B. Bale
    Steven M. Campora
    Andrew G. Minney

14. Dunk Law Firm, Attorneys at Law, San Diego, by Andrew P.P. Dunk III

15. Scott Dunning, Attorney at Law, San Francisco

16. Jeffrey I. Ehrlich, Attorney at Law, Encino

17. Evans Law Firm, Attorneys at Law, San Francisco, by Michael Levy

18. Christopher J. Fry, Attorney at Law, Sacramento

19. Greene, Broillet & Wheeler, Attorneys at Law, Santa Monica, by Mark T. Quigley

20. Heiting & Irwin, Attorneys at Law, Riverside, by
    James O. Heiting

Dennis R. Stout
Jean-Simon Serrano
Sara B. Morgan

21. Inner City Law Center (ICLC), Los Angeles

22. Jacobs & Jacobs, Attorneys at Law, Los Angeles, by
Stanley K. Jacobs
John F. Gerard

23. Kerr & Wagstaffe, Attorneys at Law, San Francisco, by Daniel J. Veroff

24. Kenneth S. Klein, Professor, California Western School of Law, San Diego

25. Kornblum, Cochran, Erickson & Harbison, Attorneys at Law, San Francisco, by Guy O. Kornblum

26. Peter M. Kunstler, Attorney at Law, Encino

27. Alexander O. Lichtner, Attorney at Law, West Sacramento

28. Losh & Khoshlesan, Attorneys at Law, Beverly Hills, author signature illegible

29. Maurizio A. Mangini, Attorney at Law, Oceanside

30. Felahy Trial Lawyers, Los Angeles, by Andrew P. Menotti

31. Myers, Widders, Gibson, Jones & Feingold, Attorneys at Law, Ventura, by Dennis Neil Jones

32. Nelson & Fraenkel, Attorneys at Law, Los Angeles, by Stuart R. Fraenkel,

33. Orange County Bar Association, by Todd G. Friedland, President

34. Bruce Palumbo, Attorney at Law, Pasadena

35. R. Rex Parris Law Firm, Lancaster, by Daniel Eli

36. Reiner & Slaughter, Attorneys at Law, Redding, by Todd E. Slaughter

37. Russell & Lazerus, Attorneys at Law, Newport Beach, by Christopher E. Russell

38. Ara Saroian, Attorney at Law, Sherman Oaks

39. Alex B. Scheingross, Attorney at Law, San Diego

40. Shernoff Bidart Echeverria Bentley, Attorneys at Law, Claremont, by
William M. Shernoff
Michael J. Bidart
Ricardo Echeverria

Gregory L. Bentley

41. Carolin K. Shining, Attorney at Law, Sherman Oaks

42. State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair

43. Jonathan G. Stein, Attorney at Law, Elk Grove

44. Scott H.Z. Sumner, Attorney at Law, Walnut Creek

45. United Policyholders, by David B. Goodwin, Covington & Burling, Attorneys at Law, San Francisco

46. Young & Nichols, Attorneys at Law, Bakersfield, separate letters from'
    Steve W. Nichols
    Thomas Sheets, Office Administrator