JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on December 11, 2015

Title
Jury Instructions: New, Revised, and Renumbered 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
December 11, 2015

Date of Report
December 8, 2015

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Executive Summary

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

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective December 11, 2015, 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 2016 edition of the *Judicial Council of California Civil Jury Instructions*.

A table of contents and the proposed new, revised, and renumbered civil jury instructions and verdict forms are attached at pages 48–192.

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 27th release of *CACI.* The council approved *CACI* release 26 at its June 2015 meeting.

Rationale for Recommendation

The committee recommends proposed revisions to the following 28 instructions and verdict forms: 426, 461, 1207B, 1621, VF-1902, 2021, 2330, 2331, 2332, 2336, 2337, 2520, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2523, 2525, 2526, 2527, VF-2505, VF-2515, 3704, 3706, 3903J, and 3961. The committee further recommends addition of 5 new instructions—361, 1810, 2022, 2351, 4605—and 11 new verdict forms—VF-405, VF-1720, VF-1721, VF-3023, VF-4400, VF-4500, VF-4510, VF-4520, VF-4600, VF-4601, VF-4602. Finally, the committee recommends renumbering current VF-405 to VF-411.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 50 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

A recent case, *Agam v. Gavra,* suggests a new instruction on contract damages for expenditures made in reliance on the defendant's performance.[3] The defendant then may attempt to prove that

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

[2] 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] *Agam v. Gavra* (2015) 236 Cal.App.4th 91.

the breach actually saved the plaintiff money. In response to this case, the committee proposes new instruction CACI No. 361, *Reliance Damages*.[4]

A new statute, Civil Code section 1708.85, creates a private cause of action for the distribution of material exposing private body parts or sexual acts of another without permission.[5] In response, the committee proposes new CACI No. 1810, *Distribution of Private Sexually Explicit Materials—Essential Factual Elements,* for use in claims under this statute.

In *Wilson v. Southern California Edison Co.,*[6] the court found CACI No. 2021, *Private Nuisance—Essential Factual Elements,* to be incomplete in that it provided no guidance to the jury as to what factors to consider in determining element 8, whether the seriousness of the harm to the plaintiff outweighs the public benefit of the defendant's conduct that is alleged to be a nuisance. The court set out very specific language for a supplemental instruction on these factors.[7] The committee now proposes new CACI No. 2022, *Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit*. The instruction closely tracks the instruction as drafted by the court in *Wilson*. The committee believes that because of the length of the instruction in *Wilson,* a new instruction if preferable to adding the language to CACI No. 2021.

An attorney proposed that CACI draft instructions to address the situation in which an insurer has a duty to defend with regard to some claims against its insured in an underlying action, but other claims are unambiguously excluded from coverage.[8] In this situation, the insurer may attempt to be reimbursed for the costs incurred solely in defending against the uncovered claims. The committee proposes new instruction CACI No. 2351, *Insurer's Claim for Reimbursement of Costs of Defense of Uncovered Claims*.

In the last release, the council approved a new series on Whistleblower Protection (CACI No. 4600 et seq.) Several whistleblower protection instructions were in the Wrongful Termination series (CACI No. 2400 et seq.) and in the Labor Code Action series (CACI No. 2700 et seq.). Because whistleblower cases are becoming more common under numerous statutory claims, the committee decided that a separate series was indicated.

For this release, the committee proposes expanding the series with an instruction under Labor Code section 6310, which creates a private right of action for an employee who was retaliated against for exercising enumerated rights with regard to workplace health and safety violations. In

[4] A previous CACI No. 361, *Plaintiff May Not Recover Duplicate Contract and Tort Damages,* was revoked in Release 22, June 2013. The committee sees no difficulty with reusing the number for a different instruction.

[5] See Assem. Bill 2643 (Stats 2014, ch. 859).

[6] *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123.

[7] *Id.* at p. 163, fn. 35.

[8] See *Buss v. Superior Court* (1997) 16 Cal.4th 35.

this release, the committee now proposes new CACI No. 4605, *Whistleblower Protection—Health or Safety Complaint—Essential Factual Elements*.

Previously revoked instruction: CACI No. 1808, *Stalking*

Last release, CACI No. 1808, *Stalking*, was revoked because the statute on which it was based, Civil Code section 1708.7, had been amended substantially, and the instruction no longer completely and accurately expressed the statutory elements.[9] The legislative amendments made the statute considerably more complex. Further, there was no evidence that any case had ever been brought under the statute or that CACI No. 1808 had ever been given.

Some committee members had not given up on drafting a usable replacement instruction, so a note on revocation was included that "the committee may consider revising this instruction in the next release." The committee did consider it, but there was little or no support for any further attempts to create a stalking instruction that complied with the statute. Therefore, the revocation of former CACI No. 1808 is now considered permanent.[10]

New Verdict Forms

Numerous new instructions have been added in recent releases for which verdict forms had not yet been drafted. In this release, the committee proposes adding 11 new verdict forms based on some of these new instructions:

1. CACI No. VF-405, *Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors*[11]
2. CACI No. VF-1720, *Slander of Title*
3. CACI No. VF-1721, *Trade Libel*
4. CACI No. VF-3023, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities*
5. CACI No. VF-4400, *Misappropriation of Trade Secrets*
6. CACI No. VF-4500, *Owner's Failure to Disclose Important Information Regarding Construction Project*
7. CACI No. VF-4510, *Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Affirmative Defense—Contractor Followed Plans and Specifications*
8. CACI No. VF-4520, *Contractor's Claim for Changed or Extra Work—Owner's Response That Contract Procedures Not Followed—Contractor's Claim of Waiver*
9. CACI No. VF-4600, *False Claims Act: Whistleblower Protection*

[9] See Assem. Bill 1356 (Stats 2014, ch 853).

[10] The deletion of the revocation note is among the 50 minor instruction changes approved by RUPRO.

[11] Current CACI No. VF-405, *Parental Liability (Nonstatutory)*, is proposed to be renumbered as VF-411 to keep the primary assumption of risk verdict forms together numerically.

10. CACI No. VF-4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Affirmative Defense—Same Decision*
11. CACI No. VF-4602, *Whistleblower Protection—Affirmative Defense of Same Decision*

Bad-Faith Insurance Instructions: "unreasonably" or "without proper cause"

For some time, the committee has struggled with how to express the proper standard for insurer liability for bad-faith insurance practices in a way that does not mislead the jury. The core of the problem is the clearly understood limitation that mere negligence is not bad faith.[12] Yet the most common expression of the standard in case law is that the insurer must have acted "unreasonably."[13] But in other legal contexts, a lack of due care could be considered to be both negligent and unreasonable. The challenge is how to express the proper standard for bad faith in a way that jurors will understand to require more than negligence.

In Release 11 (December 2007; published first in the 2008 edition), the committee added this language to CACI No. 2330, *Implied Obligation of Good Faith and Fair Dealing Explained:* "To breach the implied obligation of good faith and fair dealing, an insurance company must, *unreasonably or without proper cause,* act or fail to act in a manner that deprives the insured of the benefits of the policy" (italics added). This language has been used fairly often in the case law.[14] The phrase "unreasonably or without proper cause" was then added to the various bad-faith instructions (CACI Nos. 2331−2337).

The committee's intent in adding this language was to further explain "unreasonably" as something more than "negligently." It never intended for the phrase to be treated as two separate tests, either of which would suffice to prove bad faith. But at its July 2015 meeting, a member pointed out that the use of the disjunctive "or" created exactly that situation, at least linguistically.[15] While language in some cases is susceptible to this construction, no case has been found that clearly holds after analysis that there are two separate tests, and that one can prove bad faith by showing that the insurer acted either "unreasonably" or "without proper cause."

In contrast, in *Rappaport-Scott v. Interinsurance Exchange of the Automobile Club*[16] the court said:

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[12] *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949.

[13] See, e.g., *Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive].

[14] See, e.g., *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 881 [breach of duty to defend may violate the covenant of good faith and fair dealing if it involves unreasonable conduct or an action taken without proper cause].

[15] And comments received indicate that that is exactly how the plaintiff bar is treating this language. Several commentators argued that the law is that bad faith can be proved by showing that the insurer was either unreasonable or had no proper cause.

[16] *Rappaport-Scott v. Interinsurance Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831.

> 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 (italics added). [17]

In line with *Rappaport-Scott*, the committee now proposes revising CACI No. 2330 to state:

> To breach the implied obligation of good faith and fair dealing, an insurance company must unreasonably act or fail to act in a manner that deprives the insured of the benefits of the policy. To act unreasonably is not a mere failure to exercise reasonable care. It means that the insurer must act or fail to act without proper cause.

Other bad-faith instructions have been revised accordingly.[18]

The committee believes that this is the proper iteration of the standard for bad faith. It clarifies that it is a single test expressed in two ways. While the words "without proper cause" can be construed to cover many different kinds of insurer conduct, the language directs the jury to look for something more than negligence or a want of due care in assessing bad faith.

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

At its July 2015 meeting, the committee approved a proposed change to CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements*. The proposed change was to add an element that, in addition to the requirement that the policy-limits settlement demand be reasonable, required that the insurer's conduct in rejecting it also be unreasonable.

The immediate basis for this change was language in a recent case, *Graciano v. Mercury General Corp.,*[19] in which the court stated, albeit in dicta:

> 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.

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[17] *Id.*, at p. 837.

[18] Revised CACI No. 2331, *Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements*, says: "To act or fail to act 'unreasonably' means that the insurer had no proper cause for its conduct." CACI Nos. 2332, *Bad Faith (First Party)—Failure to Properly Investigate Claim,* 2336, *Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements,* and 2337, *Factors to Consider in Evaluating Insurer's Conduct,* have all have been revised to include the words "that is" instead of "or."

[19] *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425.

In actuality, this issue of whether in an excess-judgment bad-faith case there is one reasonableness inquiry only (the reasonableness of the demand) or two (also the reasonableness of the insurer's rejection) is one that the committee had been monitoring for some time. Authority from the California Supreme Court supports both positions.[20] The committee had been awaiting a definitive clarification from the courts. The committee's conclusion in July was that *Graciano* was the awaited case.

The proposed change was posted for public comment, and predictably, many comments were received both from attorneys who represent insureds, opposing the change, and those representing insurers, supporting the change. Some commentators also pointed out that the instruction is incomplete because it does not address the reasonableness of nonmonetary conditions included in a policy-limits demand. The committee had not previously considered this issue.

In reviewing the comments, some members of the committee were no longer convinced that *Graciano* definitively resolved the dispute. The committee began to consider the actual importance of the issue in the real world. The cases all seem to fall into three categories. There are denial-of-coverage cases, but these cases are clearly resolved in favor of insurer liability for the entire judgment if coverage is established.[21] There are cases involving unreasonable nonmonetary provisions of the offer, but these cases only require focus on the reasonableness of the offer, not on the reasonableness of the insurer's rejection of it. And finally, there are evaluation cases, in which the insurer rejects the demand because it believes either that there is no liability or that damages will not exceed the policy limits (or both). No cases were found in which the insurer put forth any other reasonable grounds for rejecting the demand.[22]

This result led some on the committee to the tentative conclusion that the only situation in which the disputed element might come into play is if the insurer argues that its (mis)evaluation of the case was reasonable. The committee chair, who makes all final decisions based on public comments, decided that the question needed more study before the committee is ready to make a recommendation. Therefore, CACI No. 2334 is being withdrawn from this release and will be reconsidered in the next cycle. In the interim, the committee will attempt to obtain empirical data

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[20] Compare *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 16 ["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.' "] with *Hamilton v. Maryland Cas. Co.* (2002) 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).

[21] *Johansen, supra*, 15 Cal.3d at pp. 15−16.

[22] In fact, language from *Johansen* could be construed to foreclose any other considerations. *Id* 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."] (italics added).

to learn whether there are any cases in which the insurer has defended on the ground that its rejection was reasonable for reasons other than its evaluation of liability and damages. The committee will also address the reasonableness of nonmonetary conditions in the demand.

CACI No. 3903J: *Damage to Personal Property (Economic Damage)*: Cost of repair plus diminution in value

An attorney who represents vehicle owners in property damage claims against insurers sent the committee the following complaint about CACI No. 3903J, *Damage to Personal Property (Economic Damage)*:

> This document… is to call to your attention what I consider to be a major tool used by the automobile insurance industry to defraud consumers and victims in California, and that is the California Judicial Counsel's [*sic*] CACI Jury Instruction 3903J, which deals with damage to personal property. Over the last seven years, I have repeatedly seen this jury instruction cited by the insurance company and/or their attorneys in the denial of claims as well as seeing the CACI Jury Instruction 3903J utilized in the litigation of cases by the Courts.

The basis of his objection was that insurance adjusters assert "that the claimant cannot recover both repair costs and diminished value based on CACI [No. 3903J]."

In addressing this complaint, the committee was considerably perplexed. In fact, CACI No. 3903J currently includes the following optional paragraph at the end:

> [If you find that [*name of plaintiff*]'s [*item of personal property*] cannot be completely repaired, the damages are the difference between its value before the harm and its value after the repairs have been made, plus the reasonable cost of making the repairs. The total amount awarded must not exceed the [*item of personal property*]'s value before the harm occurred.]

The committee could not understand how this language could possibly be construed to deny recovery of both cost of repair and diminution in value on appropriate facts. Nevertheless, the committee decided to propose a few changes to the instruction that it considered to be minor to make it clear that both recoveries could be possible.

First, the committee proposes moving this paragraph up to earlier in the instruction, to follow the introductory paragraph. Second, the committee proposes changing "cannot be completely repaired" to "can be repaired, but after repairs it will be worth less than it was before the harm." The thinking was that "completely repaired" was ambiguous in that property might be "completely" repaired in the sense of restoration to its prior state, without having its full prior

value restored.[23] In making these changes, the committee did not believe that it was changing the legal meaning of the instruction in any way.

But it appears that the "completely repaired" language is the source of the difficulty experienced with the instruction. The committee did receive comments from representatives of the insurance industry objecting to the change. The comments seem to indicate that the insurance industry assumes that property can always be repaired with no diminution of value. It appears that the "completely repaired" language in CACI No. 3903J was construed to support this position.

The committee now believes that its proposed revised language is not just a minor clarification, but an important revision. A motor vehicle that has been involved in an accident can often be "completely repaired" in the sense that it will be up and running with all of the same parts that it had before the accident. But it may not have the same value. For example, there may be a CARFAX report indicating that the car has been in an accident. This report may lower the market value of the vehicle. The insured-owner should be entitled to try to convince a jury that the repairs, though perhaps "complete" in some sense of the word, did not restore the property to its full prior value.

Uniform Fraudulent Conveyance Act Series (CACI No. 4200 et seq.)

Because of 2015 legislation,[24] the following NOTE must be added to the title page of the 4200 Series, Uniform Fraudulent Conveyance Act, and to the first page of each instruction and verdict form in the series:

> The Uniform Fraudulent Conveyance Act (Civ. Code section 3439 et seq.) has been renamed and revised effective January 1, 2016. (See S.B. 161, stats. 2015, ch. 44.) It is now the Uniform Voidable Transactions Act. The Advisory Committee will consider revisions to the instructions in this series required by S.B. 161 in a future release.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from July 20 to August 28, 2015. Comments were received from 30 different commentators. The majority of the comments addressed the last three issues discussed above. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 11–47.

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[23] The support for the possibility of dual recovery is *Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600. The court did use the term "completely repaired," but went on to state that "[t]his latter rule [cost of repairs only] presupposes that the damaged property can be restored to its former state with no depreciation in its former value." A holding of the case is that both cost of repair and diminution in value can be recovered if the repair does not restore the property to its former value.

[24] See S.B. 161, stats. 2015, ch. 44.

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, revised, and renumbered 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 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.

Attachments

1. Charts of comments, at pages 11–47
2. Full text of *CACI* instructions, at pages 48–192

Instruction	Commentator	Comment	Committee Response
426, *Negligent Hiring, Supervision, or Retention of Employee*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	Good revision because old instruction did not cover where employee was fit when hired but later became unfit.	No response is necessary.
	Hon. Yvette Palezuelos, Judge of the Superior Court, Los Angeles County	*So v. Shin* (2013) 212 Cal.App.4th 652 [cited in the Sources and Authority] does not apply to CACI 426. The *So* case was not a negligent hiring, retention or supervision case. It was a professional (malpractice) negligence case. Also, please note the language capitalized below, which was omitted from the excerpt in the Sources and Authority: ". . . plaintiff 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" "Therefore, assuming this case is addressing CACI 426, it would stand for the proposition that CACI 426is the wrong instruction to use because Plaintiff cannot pursue a direct negligence claim against the hospital (employer). Rather, Plaintiff can pursue a professional negligence claim and the professional negligence (medical malpractice) instructions must be used.	While *So v. Shin* is not the issue on which comments were requested, the committee agrees with the point. Without the capitalized language, which is the next sentence following the excerpt, the impression is left that *So* supports a negligent hiring type claim. The committee has added the last sentence to the excerpt. The additional sentence clarifies that one cannot claim both professional negligence and negligent staffing against a hospital.

Instruction	Commentator	Comment	Committee Response
		It should be made clear that CACI 426 must not be used but that the med mal instruction must be used instead. (Or, simply eliminate this case from the "Sources and Authority. However, it seems better to clarify this issue in order to avoid confusion). Otherwise, it appears that the committee is condoning the use of a "general negligence" instruction when there is a more "specific negligence" instruction that must be used. And that is not permitted. (See *Flowers v. Torrance Mem. Hosp. Med. Ctr.* (1994) 8 Cal.4th992, 1000.)	
461, *Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	Good revision because sometimes people who do not own wild animals keep or control them; old instruction did not provide for such cases.	No response is necessary.
VF-405, *Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	Good verdict form	No response is necessary.
1207B, *Strict Liability—Comparative Fault of*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	Revised comments seem appropriate.	No response is necessary.

Instruction	Commentator	Comment	Committee Response
Third Person	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that use of the word "negligence" in the second paragraph of the instruction would be inappropriate if the instruction were used to allocate liability between a negligent and a strictly liable defendant. We would select "fault" in those circumstances because the word "fault" encompasses both negligence and strict liability. So we would modify the second sentence in the second paragraph of the Directions for Use as follows: "In the former situation, choose negligence ~~throughout~~ in the opening paragraph and in elements 1 and 2, and fault in the first line of the second paragraph."	The committee agreed with the comment, but decided to remove the sentence from the Directions for Use instead of revise it as suggested. If comparison is between a negligent and a strictly liable defendant, one should not chose "negligent" throughout. But the suggested rewrite does not account for all possibilities either.
1621, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	Good comments for plaintiffs because leaves wide range of what observations qualify under the instruction.	No response is necessary.
	Louis Franecke, the Franecke Law Group, San Rafael	I am having difficulty determining if the Plaintiff must be a close relative or may be any bystander to claim damages for emotional distress as stated. I.e., are the 5 elements assuming a close relationship or not to establish the claim??	As stated in the Sources and Authority: •"Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra,* 48 Cal.
VF-1720, *Slander of Title*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We would modify the third paragraph in the Directions for Use as follows: "If the slander is by words, select the first option in questions 1 and 2 and include the optional language at the beginning of question 3. If the slander is by means other than words, specify the means in question 1 and how it became known to	The committee does not believe that the additional language is needed. It is obvious that the optional language ("statements") does not refer to means other than words.

Instruction	Commentator	Comment	Committee Response
		others in question 2, and omit the optional language at the beginning of question 3."	
		We suggest that consideration be given to making similar changes in the Directions for Use for CACI No. 1730, *Slander of Title—Essential Factual Elements*.	The suggestion has some merit, but not enough to justify including CACI No. 1730 in the release when there are no other changes proposed for 1730.
		We suggest that consideration be given to striking the words "[Was the statement untrue, and did]" in question 3 as unnecessary, to simplify the question if the plaintiff's ownership is all that must be proven whether the slander was by words or otherwise.	The committee agreed with the comment and has deleted the unnecessary language.
VF-1721, *Trade Libel*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest that language be added to the Directions for Use similar to that in the Directions for Use for CACI No. 1731, *Trade Libel—Essential Factual Elements*: "Include the optional language in question 1 if the plaintiff alleges that disparagement may be reasonably implied from the defendant's words."	CACI format does not require all of the "use" directions from the instruction be replicated in the verdict form.
VF-1902, *False Promise*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	Revised comments good clarification.	No response is necessary.
2021, *Private Nuisance—Essential Factual Elements*	Stanley Pedder, Attorney at Law, Lafayette	I am wondering about the wording of element 2 in the 2021 proposal. If someone has allowed a condition to exist that creates a serious fire hazard, I question whether element 2 is sufficient. I am wondering if "created or potentially created" might be more applicable. The reason I say this that if there has not yet been a fire, would the instruction as currently written provide for liability?	The comment is beyond the scope of the proposed changes to the instruction that were posted for comment. The comment will be considered in the next release cycle.
	State Bar of California, Litigation	We would modify the Directions for Use to state more clearly that CACI No. 2022, P*rivate Nuisance—Balancing Test Factors—Seriousness of*	The committee does not believe that this change would be useful.

Instruction	Commentator	Comment	Committee Response
	Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	*Harm and Public Benefit* must be given with this instruction: "~~Element 8~~ This instruction must be ~~supplemented~~ given with CACI No. 2022, *Private Nuisance—Balancing Test Factors—Seriousness of Harm and Public Benefit.*"	
2022, *Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit*	Orange County Bar Association, by Ashleigh E. Aitken, President	The only authority cited for the text of the proposed Instruction is the Restatement Second of Torts, sections 827 and 828. Accordingly, the language of the proposed instruction should closely pattern, and most certainly be consistent with, the language of the Restatement. As to each factor, in what is likely an attempt at explanation and guidance, the proposed Instruction amplifies the simple, clear statements of the Restatement. The result, however, is that the factors become muddled and, perhaps, even altered. If there is authority for these amplifying passages added to the language of the Restatement, then it should be provided. If there is none, it is believed these additional passages should largely be omitted. Additionally, as this Instruction is expressly to be given with No. 2021, phrases, concepts and considerations used in it should be used in No. 2022 with no deviation so as to avoid confusion.	*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App. 4th 123, 160−165, cited in the Directions for Use, not only holds that this instruction is required, but actually provides the language for it. (See text of instruction to be given on retrial immediately following footnote 35.)
		Harm factor (a) is problematic beyond "[t]he extent of the harm;" use of the phrase "how much" may imply a monetary measure, which is not meant; the word "caused" should be replaced with the relevant phrase "created or permitted" as used on No. 2021; the phrase "how long that interference lasted" may prove confusing where the condition/interference continues through trial.	The committee believes that the safer course is to use the language offered by the court in *Wilson*.
		Harm factor (b) is problematic beyond "[t]he	See response above.

Instruction	Commentator	Comment	Committee Response
		character of the harm;" use of the phrase "a loss" may imply a monetary measure, which not meant; the balance of the phrase from "the destruction or impairment …." is, in general, limiting to the possible detriment of the plaintiff; in particular, tying the use of land to the use of "physical things," is neither consistent with the essence of nuisance (see Element 3 of No. 2021) nor found among the adverse impacts listed in Element 2 of No. 2021.	
		Harm factor (c): The second sentence is problematic; it uses the term "seriousness" and instructs the jury to engage in a balancing test within the factor; this would seem to make this factor paramount and undercut the balancing of all factors set forth in the Instruction to then determine the "seriousness" of harm; arguably, as to this particular factor, it is more appropriately balanced not internally, but as against the value society places on the primary purpose of the challenged conduct.	See response above.
		Harm factor (d): The term "nature" should be replaced with "character" as used in the Restatement, as it is more appropriate and accurate when assessing a locality, that is, the "characteristics" of a neighborhood are considered, hence, its "character" determined; second sentence is problematic as it uses the phrase "primary kind of activity;" there may be no discernible foremost characteristic of a neighborhood and may not involve something that can be seen as an "activity;" the locality may be of equally mixed uses or in transition so that no one use is chief, but the alleged nuisance condition still may not belong; this sentence addresses what is "locality" while	While here the language of the instruction does deviate from that used in *Wilson,* the committee believes that people have character; places have a nature.

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		ignoring "suitability" of use/enjoyment; "benefit" factor b. below addresses suitability of conduct but ignores locality; each of these factors should address, and so act to focus the jury's attention, on both suitability and locality, or neither.	
		Benefit factor (a): The third sentence is problematic, as use of "achievement" would seem inappropriate as the term suggests there is value to be ascribed to the condition's purpose; the phrase "advancing or protecting the public good" may also be limiting to the concept of "public benefit."	The committee believes that the safer course is to use the language offered by the court in *Wilson*.
		Benefit factor (b): See "harm" factor d. above; use of the plural of "activity" here does not lessen concerns expressed above as to its use either alone or in connection with the term "primary;" use of the plural here versus the singular above, may only lead to speculation by the jury as to whether or what distinction is being made.	See response above.
		Benefit factor (c): Adding the term "practicability" provides no guidance and may create confusion as to the factor to be considered.	See response above.
2330, *Implied Obligation of Good Faith and Fair Dealing Explained*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	I think this is a bad instruction and makes the cause of action even more unclear than under the existing language. As now stated, plaintiff must prove that the insurer acted "unreasonably or without proper cause" and that either equates to more than a mere failure to exercise reasonable care" Under this proposed language it appears that acting unreasonably and acting without probable cause are two separate requirements and that acting without probable cause does not automatically mean that the conduct was unreasonable. I think that this confusion will hurt plaintiffs in bad faith cases.	The committee agreed with the comment with regard to a possible reading that "unreasonable" and "without proper cause" are two separate requirements. A small change has been made to the instruction to clarify that it is a single requirement expressed in two different ways.

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	Mitchell C. Tillner, Horvitz and Levy, Encino	As revised, CACI No. 2330 would instruct the jury that an insurer can be liable for bad faith only if it acted "unreasonably" and that "[t]o act unreasonably is not a mere failure to exercise reasonable care. The insurer must act or fail to act without proper cause." Our concern is that a jury might understand the last sentence to support a finding of bad faith liability when the insurer withheld benefits due under the insurance policy based on an honest mistake. It is important to note that existing case law establishes that an insurer's honest mistake alone cannot support liability for bad faith. (*Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205 ["It is now clear under California law that an insurer's *erroneous* failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages" (emphasis added) Indeed, included in the Sources and Authority listed after CACI No. 2230 is a citation to and quotation from *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949, to the same effect—an honest mistake cannot support liability for bad faith. (Sources and Authority to CACI No. 2330.) We suggest that one sentence be added to CACI No. 2330 following the sentences quoted in the second paragraph above. The additional sentence should read: "An honest mistake constitutes proper cause."	"Honest mistakes" are covered in the existing language by "To act unreasonably is not a mere failure to exercise reasonable care." An honest mistake is just failure to exercise reasonable care.
2331, *Breach*	Matthew B.F.	This is a good improvement. In fact the same	The change made to CACI No. 2330, noted

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of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements	Biren, The Biren Law Group, Los Angeles	language -- "To act or fail to act 'unreasonably' means that the insurer had no proper cause for its conduct" -- should be used in 2330 as it clarifies the obligation, rather than confusing it.	above, should suffice to remove any confusion.
	Mitchell C. Tillner, Horvitz and Levy, Encino	We also suggest that the sentence "An honest mistake constitutes proper cause." be added at the end of the final paragraph in CACI No. 2331.	The committee does not believe that this language should be added.
2332, *Bad Faith (First Party)—Failure to Properly Investigate Claim*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	OK modification, but would be better and more consistent if the 2331 proposed language was used in this instruction as well.	The 2331 language works well in 2331 because it is an elements instruction. "Unreasonably" can be used in the element and then defined later. CACI No. 2332 is not an instruction that sets forth a list of elements; it is a simple statement of how failure to investigate can be bad faith. The 2331 language does not work well in 2332.
2330, 2331, 2332, 2336, 2337, Clarifying that "unreasonable" means "without proper cause"	United Policy Holders, by David B. Goodwin	The reference to conduct that is *either* "unreasonable *or* without proper cause" as sufficient to establish liability for insurance bad faith was not a mere slip of the pen. In fact, *more than two dozen published California decisions* distinguish between insurer conduct that is "unreasonable" or "without proper cause," as do an even larger number of federal court decisions applying California law. These cases set out the rule that a plaintiff can establish bad faith liability in one of two alternative ways, i.e., showing that, in denying or delaying benefits, the insurer acted unreasonably or that the insurer acted without proper cause. In contrast, United Policyholders	*See also discussion in the committee's report to the Judicial Council.* A review of the cases cited by the commentator fuond none that clearly holds or states that there are two separate tests, and that one can prove bad faith by showing either "unreasonable" or "without proper cause." The instruction does not require that the insurer act both unreasonably and without proper cause. They are two ways to say the same thing, so as not to suggest that the standard is mere negligence. The comment does not

Instruction	Commentator	Comment	Committee Response
		has not located a single California appellate decision holding that an insurer must act both "unreasonably and without proper cause" to face liability.	address R*appaport-Scott v. Interinsurance Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831, 837, in which the court used the phrase "unreasonable, that is, without proper cause."
		California courts do not treat "unreasonable" conduct as if it were identical to conduct undertaken without "proper cause." (See *George F. Hillenbrand, Inc. v. Ins. Co. of N. Am.* (2002) 104 Cal.App.4th 784, 808 ["The jury could have found that benefits were not unreasonably delayed though the insurer acted without proper cause."].)	On the surface the language from *George Fl Hillenbrand, Inc.* would appear to support the commentator's position. But on closer examination, it does not. First, this is one sentence in a very long opinion, mostly about other things. The committee believes that the court means that if there was no unreasonable delay, then element 3 of CACI No. 2331 is not met, even if the insurer's handing of the claim was deficient. Further, if this sentence is the law, then the commentator's point above concerning two separate tests is disproved. A finding of no proper cause would constitute bad faith if the law is that either of the two tests suffices.
		Whether a person or entity has acted unreasonably is, of course, a "bread and butter" jury issue, as reasonableness is an element of dozens of causes of actions, both within and outside of insurance disputes. A juror would understand "unreasonable" as "not acting according to reason," "exceeding the bounds of reason or moderation." (Webster's Third New Int'l Dict. (1968) 2507.) In insurance bad faith cases, factors (a) through (p) of CACI No. 2337 would help inform the jury's finding on "reasonableness."	"Unreasonable" in bad-faith insurance law does not mean "negligent" or lack of due care as it does in the other dozens of causes of action outside of insurance disputes.
		In contrast, "proper" means "[a]ppropriate, suitable, right, fit, or correct; according to the	If there is a linguistic distinction here, the confusion arises only if the two terms mean

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		rules." Black's Law Dictionary (10th ed. 2014). Thus, a lay juror would likely understand "proper cause" to mean an appropriate, suitable, right, or correct cause, i.e., a cause for action or inaction that was "according to the rules." Jurors may reasonably interpret this to consider the terms of the insurance policy, or insurance industry custom and practice, the state of the law, or the purpose of the implied covenant.	different things. If the instruction tells the jury that the two terms mean the same thing, then the jury doesn't have to try to figure out what the difference is.
		Determining whether an insurer acted "without proper cause" would likely require an expert. This is because the jury would need to consider the cause the insurer had for its refusal to pay the insurance claim and whether the insurer acted properly in basing its denial of coverage on that cause. For example, an insurer might have a bright-line rule that it never pays a certain type of claim, because processing the claim would be expensive and the vast majority of claims, after investigation, would not be covered. The insurer might argue that it has proper cause for its blanket denial of coverage – lowering costs and thereby reducing insurance premiums – but a jury, without expert assistance, might not be able to assess whether such conduct is proper.	The comment appears to the legal issue of policy coverage. Juries do not decide coverage disputes.
		The Council's proposed draft of instruction 2337 sets out examples that a jury may consider to determine whether the defendant acted "unreasonably, *that is* without proper cause." Proposed Amendment to CACI No. 2337 (emphasis added). If the jury's decision is limited to determining whether the defendant acted "without proper cause" – as the proposed draft implies – some of the factors listed in the instruction would not assist the jury's analysis and,	The committee disagrees with the premise that "unreasonable" and "without proper cause" mean different things. The supposed conflicts raised from CACI No. 2337 all start from that premise. But as stated in R*appaport-Scott, supra,* "without proper cause" is explanatory of when something is "unreasonable" in the insurance bad-faith context.

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		indeed, may cause confusion. For instance, the fact that the defendant "[f]ailed to acknowledge and act reasonably promptly after receiving communications about [the plaintiff's] claim arising under the insurance policy," (CACI No. 2337(b)), fails to illuminate the inquiry as to whether the insurer acted or failed to act "without proper cause" in denying the plaintiff the benefits of the policy. That is because a belated response does not mean that someone acted "without proper cause" but it may mean that the person acted unreasonably. (See the discussion of *Major* in the Section C below for an example.) Likewise, "[f]ail[ing], after payment of a claim, to inform [the plaintiff] at [his/her/its] request, of the coverage under which payment was made," (CACI No. 2337(i), as amended, fourth alteration in original), does not mean the insurer denied the plaintiff benefits "without proper cause," but it may mean that the insurer acted unreasonably. This confusion could be a pervasive problem under the proposed amended instructions because these factors, rightly, depend upon a distinction between "unreasonable" and "without proper cause."	
	AgnewBrusavich, Torrence, by Bruce M. Brusavich	I urge the Advisory Committee on Civil Jury Instructions to reject this proposed amendment to CACI 2334 [see below]. For the same reasons, I would urge the Committee to reject the similar changes to CACI 2330, 2331, 2332, 2336 and 2337.	The committee cannot really address this comment because the commentator only addresses the double "unreasonable" elements of CACI No. 2334. He does not address the language that No. 2334 shares with the other instructions.
	Consumer Attorneys of California, by Jacqueline S. Anguiano,	We particularly do not see the basis for the addition [to 2334] of "which means without proper cause." This revision would go against more than two dozen published California appellate decisions holding that an insurer may be liable for a "bad	See response to comment of Jacobs and Jacobs, below

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	Legislative Counsel	faith" claim if it acts "unreasonably," irrespective of whether it has "proper cause" for failing to pay out benefits owed. For these same reasons, we would urge the committee to refrain from making any changes to CACI 2330, 2331, 2332, 2336 and 2337.	
	Jacobs and Jacobs, Los Angeles, by Stanley K. Jacobs and John F. Gerard	These instructions all have the reasonableness element stated in the *disjunctive*, i.e. "unreasonably or without proper cause." This disjunctive treatment is consistent with case law on the breach of the covenant in the first party context, and the unreasonable failure to defend third party context. (See, e.g., *Major v. Western Home Ins. Co.* (2009) 169 Cal.App. 4th 1197, 1209; *Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1237, fn 20 (a Justice Croskey opinion citing his earlier opinion in *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App. 4th 1062, 1072); *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App. 4th 335, 347; *Love v. Fire Insurance Exchange* (1990) 221 Cal.App. 3d 1136, 1151; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal. App.4th 847, 881 [breach of duty to defend may violate the covenant of good faith and fair dealing if it involves unreasonable conduct or an action taken without proper cause].	Cases cited in the comment, including *Jordan,* that don't specifically say "which means" do not mean that there are two disjunctive tests. No case discusses any possible difference between the two phrases, suggesting that one need only prove one or the other. In *Major,* the court used quotation marks around each of the two terms, but not the "or." In *Jordan, Bosetti,*and *Chateau Chamberay,* the court put both terms but not the "or," in italics. With quotation marks or italics, the more likely meaning is that the two terms mean the same thing. In *Rappaport Scott, supra,* The court makes it clear that they are two ways to say the same thing. Only *Shade Foods* might linguistically suggest that they are two different tests, and there is no analysis of the point.
		In first party cases, the Supreme Court has held that "[t]he genuine dispute rule does not relieve an insurer from its obligation to thoroughly investigate, process and evaluate the insured's claim. A genuine dispute exists only if the insurer's position is maintained in good faith and on reasonable grounds." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723.) However, the	It is not clear from the comment what revisions are proposed. The committee does not believe that *Wilson* and the genuine dispute doctrine address whether "unreasonable or without proper cause" is one standard or two.

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		court went on to note that "[i]n this connection, we find potentially misleading the statements in some decisions to the effect that under the genuine dispute rule bad faith cannot be established where the insurer's withholding of benefits 'is reasonable or is based on a legitimate dispute as to the insurer's liability.' [Criticized citations omitted]. **In the insurance bad faith context, a dispute is not 'legitimate' unless it is founded on a basis that is reasonable under all the circumstances.**" (*Wilson supra,* 42 Cal. 4th at p. 724, fn 7, emphasis added.). "Proper" is also a synonym for "legitimate." [See, www.thesaurus.com]. Accordingly, attempts by insurers to assert "proper cause" based on "a legitimate dispute" as an excuse (for their withholding of benefits , failure to properly investigate or unreasonable failure to defend), run afoul of the same concerns expressed by the *Wilson* court, "unless it is founded on a basis that is reasonable under all the circumstances." (United Policy Holders makes a similar argument based on *Wilson*.)	
		Rather than the proposed changes in these CACI instructions pertaining to first party bad faith, the phrase "unreasonably, that is, *without any reasonable basis*," is a better statement of the law and more consistent with the holding in *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal. 4th 713, 723 and was used by Justice Croskey in *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073.	The committee considered using this language from *Jordan,* but decided that it had to address the many cases that use "unreasonably" or "without proper cause."
	Guy O. Kornblum,	Upon review of Mr. Goodwin's [United Policy Holders'] letter, I find his points entirely accurate	What is proposed is completely consistent with case law. The committee is completely

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	Kornblum, Cochran, Erickson, & Harbison, San Francisco	as to the state of the law and the need to preserve the current instructions on the standard for determining a breach of the covenant of good faith and fair dealing. What is proposed, as Mr. Goodwin notes, is completely contrary to the case law and decisions on this area. Obviously this has been engineered by those representing insurance company interests.	independent of any outside interests. There has been no "engineering" by insurance company interests.
	Lari-Joni & Bassell, Los Angeles, by Torsten M. Bassell and Nicole Lori-Jones	In their published form, each of these instructions incorporates the phrase "unreasonably or without proper cause". The language the instructions use is verbatim from 50+ cases dealing with first-party issues. In each case, the language uses a disjunctive form and specifies either "unreasonably or without proper cause." However, the proposed changes seek to equate "unreasonable" and "without proper cause". While there may be circumstances in which an insurer's "unreasonable" actions are "without proper cause", there is no reason to stray from the language presently used in the CACI instructions. In fact, the current instructions more accurately recite the language of the cases on the subject. Moreover, given the multitude of factors and scenarios giving rise to liability, it is preferable to maintain broader language to minimize the modifications to the instructions by the trial courts. Since it is a question of fact for the jury, it makes sense to avoid being unduly restrictive in the instruction.	Addressed in response to comment of United Policy Holders, above
	Orange County Bar Association, by Ashleigh E. Aitken, President	It appears case law is using "without proper cause" and "unreasonable" interchangeably but due to lack of guidance from our courts we can't say for certain. *Major v. Western Home Insurance Co.* (2009) 169 Cal.App.4th 1197, 1209 states	The committee believes that the use of quotation marks as done by the court in *Major* means that the two terms are synonymous.

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		"unreasonable" or "without proper cause."	
	Mitchell C. Tillner, Horvitz and Levy, Encino	We appreciate this opportunity to comment on the proposed revisions to the CACI instructions concerning insurance litigation, CACI No. 2330 et seq. We believe the proposed revisions to these instructions are sensible and help clarify the law.	No response is necessary.
2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements*	Many comments were received from counsel representing both the interests of insureds and those of insurers.		*See also discussion in the committee's report to the Judicial Council.* Based on the comments, the committee has decided to withdraw this instruction at this time for further consideration in the next release cycle.
2336, *Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	Good change given the fact that "without proper cause" was already in the instruction. Makes it clear that unreasonable and without proper cause are the same requirement -- not two different elements that must be met.	No response is necessary.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that the word "unreasonably" is superfluous and unnecessary and that "without proper cause" alone better states the requirement. (*Rappaport-Scott v. Interinsurance Exchange of Auto. Club* (2007) 146 Cal.App.4th 831, 837.) We therefore would modify element 4 as follows: "That [*name of defendant*] ~~unreasonably, that is~~ without proper cause failed to defend [*name of plaintiff*] against the lawsuit;	The committee believes that just as "unreasonably" alone is insufficient, "without proper cause" alone is also insufficient. All of the cases use "unreasonable." It cannot be read it out of the instruction.

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2337, *Factors to Consider in Evaluating Insurer's Conduct*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	Good change; same comments as 2336.	No response is necessary.
	Orange County Bar Association, by Ashleigh E. Aitken, President	If there were to be a change to 2337, it should be made at last paragraph to be consistent with earlier language such that the phrase should be "unreasonable, that is without proper cause".	The committee agreed and has made this change.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that the word "unreasonably" is superfluous and unnecessary and that "without proper cause" alone better states the requirement. (*Rappaport-Scott v. Interinsurance Exchange of Auto. Club* (2007) 146 Cal.App.4th 831, 837.) We therefore would modify element 4 as follows: "That [*name of defendant*] ~~unreasonably, that is~~ without proper cause failed to defend [*name of plaintiff*] against the lawsuit;	See response above to similar comment on CACI No. 2336.
2351, *Insurer's Claim for Reimbursement of Costs of Defense of Uncovered Claims*	Matthew B.F. Biren, The Biren Law Group, Los Angeles	good instruction	No response is necessary.
	Guy O. Kornblum, Kornblum, Cochran, Erickson, & Harbison, San Francisco	I also agree with each Mr. Goodwin's [United Policyholders] points on the revision to new instruction CACI 2351.	See response to United Policy Holders comment, below.
	Orange County Bar Association, by Ashleigh E. Aitken, President	This instruction is designed to address the situation when the insurer is seeking reimbursement from the insured for noncovered claims. An insurer may do this, albeit usually with great difficulty, only if the claims are not even potentially covered and has a preponderance of the evidence standard.	The committee does not understand this comment and is unable to respond.

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		Here, the court has determined that there are such uncovered claims, presumably by applying that standard, though it is not stated in the instruction. Also, by not informing the jury of the standard used, it potentially gives less weight to the fact that the court used such a high standard thereby lessening the jury's attention to the costs.	
		Furthermore, by having the jury decide the costs as opposed to the tasks that are solely applicable to these claims, there would seem to be no ability to address whether these costs are reasonable. The presumption is that fees are reasonable absent any evidence to the contrary but any uncertainty is resolved against the insurer. (*O'Morrow v. Borad* (1946) 27 Cal.2d 794.) On the other hand, since the insured was the beneficiary of those efforts, perhaps there is no need to consider this aspect.	If work was done on a clearly uncovered claim, all costs, reasonable or unreasonable, allocated solely to that claim are reimbursable.
		This instruction does not state that the jury should look at related costs as well as the attorney fees. The jury may need more guidance than what is in the instruction itself as currently proposed.	What is reimbursable is the insurer's "costs of defense." The committee does not believe that this language can be construed to be limited to court costs and not to cover attorney fees.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Some committee members are concerned that the language "can be allocated solely to claims that are not even potentially covered" and "costs of defense that were attributable only to these claims" may be unclear to jurors who are unfamiliar with these concepts, and suggest that "were incurred solely to defend claims that were not even potentially covered" would be clearer. Some other committee members do not share these concerns.	The committee does not share these concerns.
	United Policy Holders, by David B. Goodwin	United Policyholders also suggests revisions to proposed CACI No. 2351. This new instruction provides welcome guidance in the important and often-litigated situation where an insurer defends	The burden of proof is stated in the opening paragraph. There is no need to state if again.

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		under a reservation of rights and the insured retains independent counsel but, when the case is over, the insurer wishes to seek partial reimbursement for costs that it claims are not even potentially covered by the relevant insurance policy. The proposed jury instruction's wording is likely to confuse a lay juror. Thus, we propose the following changes to the second paragraph of the proposed instruction. First, instead of simply saying the jury should determine the "costs of defense that were attributable only to [non-covered] claims," the instruction should refer to the "costs of defense that [*name of insurer*] has proven were attributable only to [non-covered] claims" to clarify that the insurer bears the burden of proof.	
		Second, instead of stating that defense costs benefiting potentially covered claims "should not be included" in this determination, the jury instruction should state simply that such costs "are covered and [the jury] should award them."	There is no claim in a reimbursement action to award costs to the lawyers. The claim is by the insurer to recover money that it spent on the lawyers.
2520, VF-2505: *Quid Pro Quo Sexual Harassment*	Santa Clara County Counsel, by Karl A. Sandoval and Aimee N. Logan	We disagree with additions to the third element: "That **terms of employment,** job benefits, or **favorable working conditions** were made contingent, by words or conduct, on [*name of plaintiff*]'s acceptance of the [*name of alleged harasser*]'s sexual advances or conduct." (Emphasis added). The proposed addition of the phrases "terms of employment" and "favorable working conditions" to the third element of this claim unnecessarily conflates quid pro quo harassment with hostile	The committee sees no issue of conflating quid pro quo and hostile environment. "Made contingent" indicates quid pro quo. Nothing about hostile environment involves any contingency. The committee does not see how "contingent on" can be confused with "severe or pervasive" (not "severe *and* pervasive). Nor does the committee believe that a word like "concrete" is needed. Case law offers little direction with regard to the scope of retaliatory conduct that is actionable. The

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		working environment harassment. The law has generally recognized a distinction between the two. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App. 3d 590, 607.) For example, the phrase "favorable working conditions" could include a harmonious work environment, which is already analyzed under hostile working environment harassment. Moreover, under the definition of quid pro quo harassment, *Fisher* required that submission to sexual conduct be conditioned upon the receipt of "*concrete* employment benefits." *!d.* (emphasis added). Adding the vague phrases "terms of employment" and "favorable working conditions" does away with the current meaningful legal distinction between the two forms of sexual harassment. To the extent this distinction is eliminated, this new standard for quid pro quo sexual harassment conflicts with the "severe and pervasive" standard for hostile work environment harassment, as discussed by the California Supreme Court in *Lyle v. Warner Bros. Television Prods.* (2006), 38 Cal.4th 264. In *Lyle*, the California Supreme Court expressly noted that "when a plaintiff cannot point to a loss of tangible job benefits, [he or] she must make a "commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment." *Id.* at p. 284 (emphasis added), quoting *Fisher*, 214 Cal.App.3d at p. 610.)	committee fears that a word like "concrete" might imply a limitation that should not be implied."
		We agree with deletion of the second portion of the third element, which stated: "[or] [That employment decisions affecting [name of plaintiff] were made based on [his/her] acceptance or	No response is necessary.

Instruction	Commentator	Comment	Committee Response
		rejection of[name of alleged harasser]'s sexual advances or conduct."	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that there is a danger that the jury will understand element 3 in the current instruction to require the loss of tangible job benefits in order to establish liability for harassment, contrary to Government Code section 12940, subdivision (j)(1). We are concerned, however, that "favorable working conditions" may be too broad and ill-defined and lacks solid authority as an appropriate standard. We believe that the language used to describe an adverse employment action in CACI No. 2509, *"Adverse Employment Action" Explained* would be appropriate in this instruction: "That ~~terms of employment, job benefits, or favorable working conditions~~ material changes in the terms, conditions, or privileges of [*name of plaintiff*]'s employment were made contingent, by words or conduct, on [*name of plaintiff*]'s acceptance of [*name of alleged harasser*]'s sexual advances or conduct;"	The committee sees no significant difference between the language that it has proposed and the language suggested by the commentator.
		We believe that the language "made contingent" may be unclear to some jurors and suggest that other language such as "conditioned on" or "depended on" be considered	Including "by words or conduct," requires "made contingent on." To say "depended on, by words or conduct" does not convey the meaning.
	Wilson Turner Kosmo, Attorneys at Law, San Diego	Eliminate "favorable working conditions from element 3 because it is (1) vague, and (2) not mentioned in any case law discussing harassment.	The committee believes that only including "terms of employment" and "job benefits" is insufficient. There are many ways to retaliate against someone that do not really fall within terms of employment and job benefits. Since there is no case law placing any limitations on the scope of the retaliatory conduct, the committee believes that the instruction should suggest expansive coverage, not limitations on

Instruction	Commentator	Comment	Committee Response
			coverage.
2521A, 2521B, 2521C, 2522A, 2522B, 2522C: *Hostile Work Environment Harassment*	Santa Clara County Counsel, by Karl A. Sandoval and Aimee N. Logan	We disagree with all of these Instructions to the extent they add "volunteers" as individuals who have standing to bring a claim of harassment under California Government Code section 12940(j). The California Fair Employment and Housing Act ("FEHA") proscribes unlawful harassment by an employer against "an employee, an applicant, or a person providing services pursuant to a contract." Cal. Gov't Code§ 12940(j)(l) Volunteers are not "employees," "applicants" or independent contractors. They are not providing services in exchange for any job benefits.	Government Code section 12940(j)(1) was amended in 2014 to protect unpaid interns and volunteers from sexual harassment. (Stats 2014, ch. 302).
2523, *"Harassing Conduct" Explained*	Santa Clara County Counsel, by Karl A. Sandoval and Aimee N. Logan	We disagree with the change to factor "e," which includes examples of other forms of harassment "*e.g., photographs, text messages, Internet postings*." The inclusion of these examples is unnecessarily vague, and expansive. Absent this revision, the instruction more closely tracks the governing regulation for the definition of "harassment." (See Cal. Code Regs., tit. 2, § 11019(b)(l).) If these examples remain, they should be prefaced with the terms "derogatory, unwanted and/or offensive," as used in the governing regulations, and in factors "b" and "c" of the instruction.	The committee believes that some reference to electronic forms of harassment is helpful. The did, however, agree with the suggestion that the words "derogatory, unwanted, or offensive" should be added and has made this change.
2525, *Harassment — "Supervisor" Defined*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Absent any cited authority that an employer can be strictly liable for harassment by a person having the responsibility to direct other employees only if that person is the plaintiff's direct supervisor (i.e., has the responsibility to direct the plaintiff's daily work activities), we believe that option c in the instruction should refer to the responsibility to direct "other employees," just as options a and b,	There is some authority that the harassing supervisor must be the victim's supervisor. See response to commentator Wilson Turner Kosmo below.

Instruction	Commentator	Comment	Committee Response
		and Government Code section 12926(t), on which this instruction is based, refer to "other employees."	
		We would insert the word "must" in the optional sentence at the end of the instruction to clarify the point: "[*Name of alleged harasser*]'s exercise of this authority or responsibility must not be merely routine or clerical, but must require the use of independent judgment."	The committee agreed and has made this change.
	Wilson Turner Kosmo, Attorneys at Law, San Diego	We would change "other employees" in options (a) and (b) to "[*name of plaintiff*]." (the opposite of the State Bar committee's comment above about option c) The way this instruction is currently worded, it makes it seem like harassment by any individual who has the authority to make or recommend personnel actions can make the employer vicariously liable, regardless of the individual's relationship vis a vis the plaintiff. This is not supported by any case law. As explained by the California Supreme Court, "[t]he FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040-1041[emphasis added]; see also *Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 605-606 ["Unlike discrimination in hiring, the ultimate responsibility for which rests with the employer, sexual or other harassment perpetrated by a supervisor with the power to hire,	The committee found no clear authority for either side of the issue as to whether the harassing supervisor has to be the victim's supervisor. *State Dept of Health Services* and *Matthews*, cited in the comment, do say that it is the *victim's* supervisor who makes the company strictly liable. But no case was found in which the issue was raised, analyzed, and decided in a holding. Therefore, the committee considers the issue to be unresolved. But based on the language in *State Dept of Health Services* and *Matthews*, the committee believes that the preferred course at this time is to base employer strict liability on the conduct of the victim's supervisor. The conduct of the victim's supervisor is clearly covered; while the conduct of other supervisors is speculative. Therefore, the committee has elected to make the changes proposed by this comment and not the change proposed by the State Bar committee.

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		fire and control the victimized employee's working conditions is a particularly personal form of the type of discrimination which the Legislature sought to proscribe when it enacted the FEHA."][emphasis added.) Thus, the relevant inquiry is the alleged harasser's authority and responsibility with respect to the plaintiff. His/her authority or responsibility over other employees is irrelevant.	
2526, *Affirmative Defense—Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)*	California Employment Law Attorneys, by David deRobertis	While CELA understands the need to note potential issues in the "Directions for Use," and we acknowledge that one decision (*Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 Cal.App.4th 886) appears to have allowed some form or variant of this defense in a nonharassment, discrimination case, we submit that in this instance the "Directions for Use" should not be changed to suggest that the defense applies outside of environmental harassment claims relating to conduct by a supervisor because there is a very real possibility that the *Rosenfeld* decision is wrong in applying the defense to a discrimination claim. There are many reasons to believe that *Rosenfeld* misstates the law to the extent that it suggests that this defense applies to a discrimination versus a harassment case, including, among others, the following. First, the defense was created by our Supreme Court in *State Department of Health Services v. Superior Court* (2003) 31 Cal. 4th 1026, 1045. There, the Supreme Court repeatedly made clear its holding applied to cases involving harassment by a supervisor.	The commentator misstates or misreads *Rosenfeld*. It was not a termination case; it was a constructive discharge case alleging intolerable conditions. In that context, it is reasonable to expect that the employee will avail herself of available dispute resolution procedures before quitting. There was no post-termination requirement imposed. Nothing in *State Dept of Health Services* indicates that the defense only applies to cases involving harassment by a supervisor. That was the case the Supreme Court was deciding. It did not have any reason to consider any other contexts. The committee sees minimal relevance of *Schifando*. It was an exhaustion of remedies case, not a mitigation of damages case. The doctrines may be related in that both involve some available process. But the policies are entirely different. One says that you have no right to sue. The other merely says that you could have lost less.

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		Second, *Rosenfeld* applied the defense to require the employee post-termination to resort to an internal grievance process to try to reverse the termination. (*Rosenfeld*, 226 Cal.App.4th at pp. 900-901.) It is one thing to hold an employee responsible during employment for taking steps to avail him or herself of the internal processes and procedures put in place to prevent harassment. It is quite another to say that after an employee is illegally discriminated against and the discrimination results in termination, the employee must nonetheless beg and plead for his or her job back by subjecting him or herself to the grievance process of the employer that chose to discriminate in the first place. Third, *Rosenfeld* appears to be inconsistent with another Supreme Court decision *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074. The Supreme Court rejected the employer's contention that in a FEHA action a government employee must exhaust the government employer's intenal administrative remedies as a condition to filing suit. (31 Cal.4th at p. 1092 ("We hold that municipal employees who claim they have suffered employment-related discrimination need not exhaust City Charter internal remedies prior to filing a complaint with the Department."). *Schifando's* core holding - that internal administrative remedies need not be exhausted in FEHA cases - appears inconsistent with *Rosenfeld's* application of the avoidable consequences rule to require internal exhaustion of the employer's grievance procedures post-	All that is proposed to say about *Rosenfeld* is that it allowed the defense in an age discrimination case. This is true. The committee has added that it is a constructive discharge case.

Instruction	Commentator	Comment	Committee Response
		termination.	
		The citation to *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832 is misleading and should be removed. It is not correct (or at least highly ambiguous) to cite *Mize-Kurzman* for the proposition that "[i]t has also been suggested in dicta that the defense may apply whenever mitigation might reduce damages." The reason this is not correct or at least highly ambiguous is that the phrase "the defense" in this sentence is ambiguous. What defense? The general tort law duty to mitigate or duty to avoid harm? Or, the unique, specific variant of the avoidable consequences doctrine created by *Department of Health Services*? To say that they are the same thing is fundamentally incorrect, and that's why the citation to *Mize-Kurzman* is inaccurate here. The avoidable consequence defense endorsed in *Department of Health Services* is fundamentally different in material ways than the typical general tort law duty to mitigate or duty to avoid otherwise avoidable harm. It is a unique variant of an avoidable consequences defense -one that focuses both on the employee's conduct and the employer's conduct. The defense requires an analysis of whether the employer took reasonable steps to prevent harassment and whether the employer, in fact, would have taken corrective action in response to the employee's pursuing the internal complaint procedure. (*Department of Health Services,* 31 Cal. 4th at 1044.) In contrast, the general tort law duty to mitigate or duty to avoid harm focuses solely on the victim plaintiff's conduct by looking at whether the plaintiff victim	The committee agreed with the comment and has removed the sentence supported by *Mize-Kurzman*. The committee has also revised the paragraph somewhat to make it clear that the scope of the defense with regard to other claims is not resolved.

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		acted reasonably under the circumstances regardless of what the defendant tortfeasor did or did not do.	
	Wilson Turner Kosmo, Attorneys at Law, San Diego	The proposed additions to the Directions for Use are consistent with case law. We agree with them.	No response is necessary.
2527, *Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant*	Wilson Turner Kosmo, Attorneys at Law, San Diego	This minor addition is consistent with the FEHA and case law. We agree with this modification.	No response is necessary.
VF-2515, *Limitation on Remedies—Same Decision*	California Employment Law Attorneys, by David deRobertis	CELA submits that the order in which the questions are posed on this proposed Verdict Form is inconsistent with the Supreme Court's decision in *Harris v. City ofSanta Monica* (2013) 56 Cal.4th 203. *Harris* held that a same-decision defense applies to FEHA claims and that, if the defense is proven, the employer has still committed an unlawful employment practice but that the effect of the defense is that the employee cannot recover damages or reinstatement. *Harris,* 56 Cal. 4th at 211. Because the defense is an affirmative defense, we submit that the verdict form should treat it as an affirmative defense by ensuring that: (1) the jury only considers the defense after it has made all predicate liability findings; and (2) the verdict form question makes it clear that, because it is an	The comment is beyond the scope of the proposed change, which is merely to add "at that time" to question 6. The structure of the verdict form is unchanged. However, "same decision" is not an affirmative defense because it is not a defense to liability. The defense does have the burden of proof, so the proposed change in order of questions would not be wrong. But the committee does not think the current order is wrong either.

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		affirmative defense, the burden of proof on the defense questions is placed on the employer. The current proposed instruction instead mixes affirmative defense questions into the threshold liability questions. The order of questions should be changed so that questions 5 and 6 on "same decision" follow question 7 on substantial factor.	
		Proposed questions 5 and 6 (regardless of where they are placed in the order of questions) should be revised to make clear that the burden of proof has switched. Failing to do so creates too great of a risk that the burden shift will be overlooked or ignored by the jury - particularly where the verdict form does not otherwise state that the question relates to an affirmative defense. This can easily be accomplished by just adding before each of these questions "Has [*name of defendant*] proven that ... "	The proposed change does not meet with CACI format rules. Burdens of proof are stated in instructions, but not in verdict forms.
VF-3023, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities*	Orange County Bar Association, by Ashleigh E. Aitken, President	This verdict form is based on CACI No. 3043. The verdict form findings follow the corresponding jury instruction elements number by number until element 7, which requires the jury to find, "That [*name of plaintiff*] was harmed…" The proposed verdict form omits asking for this finding but instead asks whether defendant's conduct was a substantial factor in causing harm. There seems to be no reason for this omission. For the sake of conformity with CACI No. 3043, question 7 should be changed to "Was [*name of plaintiff*] harmed?" with the appropriate instruction for the question. Consequently, the remaining two questions should be renumbered accordingly.	This comment is applicable to every verdict form that has a substantial-factor question. The committee has been asked to reexamine the combining of harm and substantial factor into a single verdict-form question on several occasions. It continues to believe that the jury does not need to make separate findings. If the jury finds that there was either no harm or no causation, it answers "no" and there is no liability.
3903J,	Association of	The primary authority cited in support of these	*See also discussion in the committee's report*

Instruction	Commentator	Comment	Committee Response
Damage to Personal Property (Economic Damage)	California Insurance Companies, by Armand Feliciano, Vice President	proposed changes is the case of *Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600. That case is inapposite and involved a brand new, unique and specialized piece of equipment that was damaged on its initial delivery to the buyer. Specifically, in that case, the court held that diminution could only be recovered "if the damaged property cannot be completely repaired, the measure of damages is the difference between the value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs." (*Id.* at p. 600.) Based on feedback we received on the proposed changes, the financial impact on the property and casualty industry will be significant. It is important to note that there is a cottage industry of appraisers who, even when repairs are completely effected, calculate diminution in many thousands of dollars for even average vehicles such as family sedans. In our view, this change is completely wrong, in that it adds a component of diminution when repairs can be effected. Thus, we respectfully request that the current language remains unchanged.	*to the Judicial Council.* The committee is somewhat surprised by the comments on this instruction as the intent was not to change the legal effect of the instruction in any way, but only to address some aspects of the instruction that possibly were creating some uncertainty. One of the proposed changes is to replace "completely repaired" with "can be repaired, but after repairs it will be worth less than it was before the harm." This comment does seem to indicate that the insurance industry assumes that property can always be repaired with no diminution of value. It appears that the "completely repaired" language was construed to support this position. The committee believes that the revised language is correct. *Merchant Shippers* is not inapposite; the facts are exactly what is at issue. Whether the property is brand new and unique or old and common is beside the point. True the court used "completely repaired" in the sentence quoted. But the court also said: "This latter rule [cost of repairs only] presupposes that the damaged property can be restored to its former state with no depreciation in its former value." So the court clearly endorses both recoveries if the property cannot be restored to its prior value.
	Civil Justice Association, by Katherine	We would respectfully disagree with the proposed changes to CACI 3903J, *Damage to Personal Property (Economic Damage),* which adds a	See response to Association of California Insurance Companies, above.

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	Pettibone	component of diminution in value if, after repair, the vehicle has a value that is lower than immediately prior to the loss. The sole authority cited in support of this case, *Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946), 28 Cal. 2d 594, 600 is inapposite and involved a brand new, unique and specialized piece of equipment that was damaged upon its initial delivery to the buyer. The court held that diminution could only be recovered "if the damaged property cannot be completely repaired, the measure of damages is the difference between the value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs." (Id. at 600.) Accordingly, this change is incorrect in our opinion, in that it adds a component of diminution when repairs can be effected. We believe the current language, now deleted, is the correct statement of the law.	
	Montie S. Day, Attorney at Law, Henderson, Nevada	I commend you on the work and the proposed changes to this material jury instruction."	No response is necessary.
	Arnold Hernandez, Penney and Associates, Irvine	My firm and I support a change that would permit for recovery for the loss in the fair market of a property after it has been repaired. I have had numerous clients who have experienced significant loss in the fair market value of their vehicles particularly after a "Carfax" check is done, which indentifies the fact that the vehicles have been involved in a previous car accident. The trade in value and the fair market value is always less than comparable vehicles.	No response is necessary.

Instruction	Commentator	Comment	Committee Response
	Russell Kerr, Kerr and Sheldon, Fountain Valley	The current version of CACI Jury Instruction 3903J is confusing and inadequate because it only addresses diminished value if an item of property "cannot be completely repaired." It thus incorrectly focuses jurors' attention on the adequacy of repairs rather than on the correct legal issue of whether an item of property is worth less due to the stigma of its accident history. The proposed revision remedies this shortcoming by also addressing diminished value for property that "can be repaired, but after repairs will be worth less." The proposed revision provides a more easily understood instruction on damages for diminished value when property can be restored to its former state, but still sustains depreciation in its former value. (*Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600.) The proposed revision remedies the main shortcoming of CACI Instruction 3903J by addressing damage to property which can be repaired, *but after repairs it will be worth less;* whereas the current Instruction 3903J only addresses damages for depreciation when property *cannot be completely repaired*.	See response to Association of California Insurance Companies, above. No further response is necessary.
	Frank Nicholas, Attorney at Law, Irvine	I have been practicing personal injury since 1977 and most of my cases involved automobile accidents. I support the change to CACI 3903J since the current wording does not adequately compensate a plaintiff for the loss in value of his/her vehicle if it has been repaired adequately but, due to the fact that it was in an accident, is worth less than it was before the accident.	No response is necessary.

Instruction	Commentator	Comment	Committee Response
	State Bar Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with the revisions to the instruction, but we suggest that the verb tense in the second paragraph of the Directions for Use should match that in the instruction: "Give the optional second paragraph if the property ~~was~~ can be repaired, but the value after repair ~~was~~ would be less than before the harm occurred."	The committee has made the suggested revision.
VF-4400	State Bar Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*, on which this verdict form is based in part, states in element 1 "[*describe each item claimed to be a trade secret that is subject to the misappropriation claim*]." We believe that the same language should be used in question 1 of the verdict, in lieu of "[*insert general description of alleged trade secret[s] subject to the misappropriate claim*]," for the sake of consistency and to ensure that each item on which the claim is based is described.	The committee sees no need to set forth the often lengthy recitation of alleged trade secrets at issue. They will be in the instruction.
		This proposed new verdict form incorporates the elements of both CACI No. 4401 and CACI No. 4402, *"Trade Secret" Defined,* but does not include the requirement stated in CACI No. 4401, element 2, that the matter must have been a trade secret at the time of the misappropriation. We suggest that the words "at the time of [*name of defendant*]'s improper [acquisition/use/[or] disclosure]" be inserted in questions 2, 3, and 4 to impose this requirement.	The committee agreed that time should be stated. But found it sufficient to state it once in question 2, and to use "alleged misappropriation" instead of "[*name of defendant*]'s improper [acquisition/use/[or] disclosure]"
		CACI No. 4401 states that misappropriation of a trade secret involves improper acquisition, use, or disclosure of a trade secret. We believe that question 5 should ask whether the defendant "improperly" acquired, used, or disclosed the trade secret, rather than whether the defendant acquired,	The committee believes that "Improperly" alone is too broad. The misappropriation requires acquisition by "improper means." The way that the defendant got the alleged trade secrets has to be improper.

Instruction	Commentator	Comment	Committee Response
		used, or disclosed the trade secret by "improper means." This would be clearer and more consistent with both CACI No. 4401 and question 6 of this verdict form.	
		We suggest adding an optional question 8 for use if punitive damages are sought, stating, "[Did [*name of plaintiff*] prove [by clear and convincing evidence] that [*name of defendant*] acted willfully and maliciously in [acquiring/using [or] disclosing] the trade secret[s]?]" Language should also be added to the Directions for Use regarding this optional element together with references to CACI No. 4411, *Punitive Damages for Willful and Malicious Misappropriation,* and CACI No. 205, *More Likely True—Clear and Convincing Proof*.	A punitive damages question could be included in every tort verdict form. There is no need to do so here.
		We believe that establishing misappropriation by acquisition, disclosure, or use ordinarily is important and believe that the Directions for Use should more strongly encourage the use of additional questions on acquisition, disclosure, or use. We suggest the following modification to the Directions for Use: "Additional questions ~~may~~ <u>should</u> be added depending on whether misappropriation is claimed in question 5 by acquisition, disclosure, or use."	The committee did not think that there necessarily would always be more questions.
VF-4500	Orange County Bar Association, by Ashleigh E. Aitken, President	The numbering of this instruction should be changed to match that of the primary instruction found at CACI-4501 (the instruction at CACI-4500 relates to a different claim that the plans and specifications provided by the owner or contractor were incorrect).	Correlation between instruction numbers and verdict form numbers is not possible. There are too many verdict forms based on multiple instructions. And there are many instructions with no corresponding verdict forms. There would be large gaps in numbers among the verdict forms.
		We also recommend that the title be changed to add the word "Owner's" at the beginning in order	The committee has made this change to the title.

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		to match the title of CACI – 4501.	
VF-4510	Orange County Bar Association, by Ashleigh E. Aitken, President	The OCBA recommends that the numbering of this instruction be changed to VF-4510/4511 to match the two primary instructions upon which this verdict form is based.	The committee does not think that a CACI No. VF-4510/4511 is a good idea.
		We also recommend that Question #1 be modified to read: "Did [*name of plaintiff*] fail to competently perform the work or use the proper materials or complete the work in substantial conformity with the plans and specifications for this project?"	The committee believes that it is better that the element be left open to put in the specific failure rather than to present three of the more likely ones.
VF-4420	Orange County Bar Association, by Ashleigh E. Aitken, President	The OCBA recommends that the numbering of this verdict form be changed to VF-4520/4521/4522 to more accurately identify the various instructions on which it is based.	See response above.
		We also recommend that Question #3 be changed to read: "Was [*name of plaintiff*] harmed by not receiving extra compensation for the changed/extra work required by [*name of defendant*]?"	The committee does not believe that the extra words are necessary or helpful.
		We recommend that Question #4 be changed to read: "Did [*name of plaintiff*] follow, or was [he/she/it] excused from following, the change – order requirements included in the parties' contract?"	This language would present the possibility of waiver, but that is question 5.
4605, *Whistleblower Protection—Health or Safety Complaint—Essential Factual Elements*	Wilson Turner Kosmo, Attorneys at Law, San Diego	We recommend changing element no. 4 from "substantial motivating reason" to "but for": "That but for plaintiff's [*specify action*], defendant would not have [discharged/*other adverse action*] plaintiff." The comment to the proposed instruction borrows "substantial motivating reason" from the FEHA without any basis or explanation, and concedes there is no supporting case law. This is a Labor Code section 6310 issue and existing case law, *Touchstone Television Prod. v. Sup. Ct.* (2012) 208 Cal.App.4th 676, applies the "but for" standard to a	The commentator is correct that *Touchstone* does use "but for." But there is no discussion of causation in the opinion. The committee believes that the California Supreme Court's reasoning in *Harris v. City of Santa Monica* in rejecting "but for" language in for claims under the Fair Employment and Housing Act indicates that "substantial motivating reason" is the proper standard of causation unless there is some legislative indication to the contrary, such as including a

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		section 6310 claim.	specific "same decision" statute, as it has with Labor Code section 1102.6 and Government Code section 8547.8(e).
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Labor Code section 6310(b) provides for a recovery if the employee's complaint was "bona fide," and the Directions for Use note a split in authority concerning the meaning of that requirement. Yet element 2 includes no "bona fide" or "good faith" requirement, and the Directions for Use do not clearly state that the instruction should be modified to include such a requirement. We suggest that the words "in good faith" be inserted at the beginning of the first option in element 2 and that the Directions for Use be modified to state that this language can be modified if it is determined that some other standard is appropriate.	The committee does not agree with adding "good faith" to the instruction. It suggests that it is the better rule. The committee prefers to just flag the issue in the Directions for Use and leave the decision to the court. However, the Directions for Use now suggest modifying the instruction depending on the court's decision on "bona fide."
		The second and third options in element 2 refer to a proceeding "to address" workplace health or safety rights. We believe that "relating to" rather than "to address" would be clearer and more consistent with the language "under or relating to" in Labor Code section 6310(a)(2).	The committee agreed with the comment and has made the suggested change. "Address" is clearer language than "relating to." But the statute does not require that the proceeding "address" the complaint. It just has to relate to the complaint. A proceeding could relate to a complaint without necessarily addressing it.
VF-4600, *False Claims Act: Whistleblower Protection*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with the proposed new verdict form, except that in question 5 we would provide optional language referring to the plaintiff's "act" or "acts," so as to allow for the possibility that there was only a single act in furtherance of a false claims action or to stop a false claim.	The committee does not believe that this point, while technically valid, is important enough to address.
	Wilson Turner Kosmo, Attorneys at Law,	Change question no. 5 from "substantial motivating reason" to "but for." Government Code section 12653(a) uses a "but for" standard.	The statute uses "because of." See the response above to the comment of this commentator with regard to CACI No. 4605

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	San Diego		and Labor section Code 6310.
VF-4602, *Whistleblower Protection—Affirmative Defense of Same Decision*	Santa Clara County Counsel, by Karl A. Sandoval and Aimee N. Logan	We disagree with the causation standard, namely, that a plaintiff needs to show the protected activity was a "contributing factor" in the adverse employment action. It is unclear why this instruction does not track the instructions for other retaliation and discrimination claims under FEHA, which require that a plaintiff show the protected activity was a "substantial motiving reason." See, e.g., CACI 2507. The latter is also in line with the "causal link" requirement discussed in the case law. See, e.g., *Dowell v. Contra Costa County* (N.D. Cal. 2013) 928 F.Supp.2d 1137; *Turnerv. City and County of San Francisco* (N.D. Cal. 2012) 892 F.Supp.2d 1188; see also *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal. App. 4th 1378, 1390 (citing *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 615.)	This instruction uses the statutory language "contributing factor" because in Labor Code section 1102.6, the Legislature has provided a specific mixed-motive, same-decision defense. So since the Legislature has instructed on how to handle mixed causation, it would be ill advised to suggest that *Harris* may well control, as is done when the Legislature is silent. *Harris* specifically rejected grafting an 1102.6 style affirmative defense into the FEHA because the Legislature did not. *Patten* simply points out that there must be a "causal link."
Multiple	California Employment Law Attorneys, by David deRobertis	Proposed changes to CACI Nos. 2520, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2523, 2525, 2527, 4605 and Proposed VF Nos. VF-2505, VF-4600, VF-4601 and VF-4602. CELA supports the proposed changes to the above instructions and verdict forms, and the inclusion of verdict forms to match existing instructions for which a verdict form was not previously included.	No response is necessary.
Multiple	Orange County Bar Association, by Ashleigh E. Aitken, President	Approve of all except as noted above	No response is necessary.
Multiple	State Bar of California,	Approve of all except as noted above	No response is necessary.

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361. Reliance Damages

If you decide that [*name of defendant***] breached the contract, [***name of plaintiff***] may recover the reasonable amount of money that [he/she/it] spent in preparing for contract performance. These amounts are called "reliance damages." [***Name of plaintiff***] must prove the amount that [he/she/it] was induced to spend in reliance on the contract.**

If [*name of plaintiff***] proves reliance damages, [***name of defendant***] may avoid paying [some/ [or] all] of those damages by proving [***include one or both of the following***]:**

[1. That [some/ [or] all] of the money that [*name of plaintiff***] spent in reliance was unnecessary;]**

[or]

[2. That [*name of plaintiff***] would have suffered a loss even if [***name of defendant***] had fully performed [his/her/its] obligations under the contract].**

New December 2015

Sources and Authority

- "One proper 'measure of damages for breach of contract is the amount expended [by the nonbreaching party] on the faith of the contract.' " (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 105 [186 Cal.Rptr.3d 295].)

- "Where, without fault on his part, one party to a contract who is willing to perform it is prevented from doing so by the other party, the primary measure of damages is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance, and the anticipated profits which he would have derived from performance." (*Buxbom v. Smith* (1944) 23 Cal.2d 535, 541 [145 P.2d 305].)

- "This measure of damages often is referred to as 'reliance damages.' It has been held to apply where, as here, 'one party to an established business association fails and refuses to carry out the terms of the agreement, and thereby deprives the other party of the opportunity to make good in the business … .' " (*Agam, supra,* 236 Cal.App.4th at p. 105, internal citations omitted.)

- "[I]n the context of reliance damages, the plaintiff bears the burden to establish the amount he or she expended in reliance on the contract. The burden then shifts to the defendant to show (1) the amount of plaintiff's expenses that were unnecessary and/or (2) how much the plaintiff would have lost had the defendant fully performed (i.e., absent the breach). The plaintiff's recovery must be reduced by those amounts." (*Agam, supra,* 236 Cal.App.4th at p. 107, internal citation omitted.)

- "Concerning reliance damages, Restatement [Second of Contracts] section 349 provides as

follows: ‘As an alternative to the measure of damages stated in [Restatement section] 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, *less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed*.’ ” (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 907 [28 Cal.Rptr.3d 894], original italics.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2010) Contracts, § 869 et seq.

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.79 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.21 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.15

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***];]**

~~1.~~2. **That [***name of employee***] [was/became] [unfit/ [or] incompetent] to perform the work for which [he/she] was hired;**

~~2.~~3. **That [***name of employer defendant***] knew or should have known that [***name of employee***] [was/became] [unfit/ [or] incompetent] and that this [unfitness/ [or] incompetence] created a particular risk to others;**

~~3.~~4. **That [***name of employee***]'s [unfitness/ [or] incompetence] harmed [***name of plaintiff***]; and**

~~4.~~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

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 the employee'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.

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].)

- "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)

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

Sources and Authority

- ~~Lions, tigers, bears, elephants, wolves, monkeys, and sharks have been characterized as wild animals. (*Rosenbloom v. Hanour Corp.* (1998) 66 Cal.App.4th 1477, 1479, fn. 1 [78 Cal.Rptr.2d 686].)~~
- "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]~~An owner of a wild animal is strictly liable to persons who are injured by the animal: "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." (*Opelt v. Al G. Barnes Co.* (1919) 41 Cal.App. 776, 779 [183 P. 241]~~.)
- "[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 v. Beatty* (1949) 91 Cal.App.2d 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."~~A wild animal, of a type to be known to have a vicious nature, is presumed to be vicious.~~ (*Baugh, supra,* 91 Cal.App.2d at ~~p. 791.) Accordingly, an instruction on the owner's knowledge of its ferocity is unnecessary. (*Id.* at~~ pp. 791–792.)

- ~~"It is commonly said that scienter, or knowledge of such propensities, must be proved in the case of domestic animals, but is presumed in the case of wild animals." (6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1403.)~~

- "[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 ~~(Thomson West)~~ §§ 2:20–2:21 (Thomson Reuters)

VF-405. Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***]?**
   ____ 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 defendant***] do something or fail to do something that unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***sport or other recreational activity, e.g., snowboarding***]?**

   ____ 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. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ 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. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss
   [lost earnings $ _____]
   [lost profits $ _____]
   [medical expenses $ _____]
   [other past economic loss $ _____]
   Total Past Economic Damages: $ _____]

   [b. Future economic loss
   [lost earnings $ _____]
   [lost profits $ _____]
   [medical expenses $ _____]
   [other future economic loss $ _____]

Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

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 2015

Directions for Use

This verdict form is based on CACI No. 410, *Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors*.

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.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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 before judgment.

VF-~~405~~411. Parental Liability (Nonstatutory)

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] aware of habits or tendencies of [***name of minor***] that created an unreasonable risk of harm to other persons and led to [***name of plaintiff***]'s harm?**
   ____ 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 defendant***] have the opportunity and ability to control the conduct of [***name of minor***]?**
   ____ 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. **Was** [*name of defendant*] **negligent because [he/she] failed to exercise reasonable care to prevent [***name of minor***]'s conduct?**
   ____ 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 defendant***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ 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. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

   Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

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 September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-405 December 2015

Directions for Use

This verdict form is based on CACI No. 428, *Parental Liability (Nonstatutory).* Questions 1 and 3 can be altered to correspond to one or both of the alternative bracketed option in elements 1 and 3 of CACI No. 428.

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. 428, *Parental Liability (Nonstatutory).* Questions 1 and 3 can be~~

~~altered to correspond to one or both of the alternative bracketed option in elements 1 and 3 of CACI No. 428.~~

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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*.

1207B. Strict Liability—Comparative Fault of Third Person

[*Name of defendant***] claims that the [negligence/fault] of [***name(s) or description(s) of nonparty tortfeasor(s)***] [also] contributed to [***name of plaintiff***]'s harm. To succeed on this claim, [***name of defendant***] must prove both of the following:**

1. **[***Insert one or both of the following:***]**

   [That [*name(s) or description(s) of nonparty tortfeasor(s)***] negligently modified the [***product***];] [or]**

   [That [*name(s) or description(s) of nonparty tortfeasor(s)***] was [otherwise] [negligent/at fault];]**

   and

2. **That this [negligence/fault] was a substantial factor in causing [***name of plaintiff***]'s harm.**

If you find that the [negligence/ [or] fault] of more than one person, including [*name of defendant***][, [***name of plaintiff***],] and [***name(s) or description(s) of nonparty tortfeasor(s)***], was a substantial factor in causing [***name of plaintiff***]'s harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent.**

You will make a separate finding of [*name of plaintiff***]'s total damages, if any. In determining an amount of damages, you should not consider any person's assigned percentage of responsibility.**

["Person" can mean an individual or a business entity.]

Derived from former CACI No. 1207 April 2009; Revised December 2009, December 2015

Directions for Use

Give this instruction if the defendant has raised the issue of the comparative fault of a third person who is not also a defendant at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (See *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140]; see also CACI No. 406, *Apportionment of Responsibility*.) For an instruction on the comparative fault of the plaintiff, see CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*.

This instruction may also be used to allocate liability between a negligent and a strictly liable defendant (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 332 [146 Cal. Rptr. 550, 579 P.2d 441].) or between two strictly liable defendants if multiple products are involved. (*Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1198 [74 Cal.Rptr.2d 580].) However, there is no

comparative fault among entities in the distribution chain of the same product. Each remains fully liable for the plaintiff's economic and noneconomic damages. (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 623 [65 Cal.Rptr.2d 532].)

In the first sentence, include "also" if the defendant concedes some degree of liability or alleges the comparative fault of the plaintiff, and select "fault" unless the only basis for liability at issue is negligence. Include the last paragraph if any of the defendants or others alleged to have contributed to the plaintiff's harm are not individuals.

Subsequent misuse or modification may be considered in determining comparative fault if it was a substantial factor in causing the plaintiff's injury. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17 [56 Cal.Rptr.2d 455].) Unforeseeable misuse or modification can be a complete defense if it is the sole cause of the plaintiff's harm. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.

Sources and Authority

- "[T]he comparative indemnity doctrine may be utilized to allocate liability between a negligent and a strictly liable defendant." (*Safeway Stores, Inc., supra,* 21 Cal.3d at p. 332.)~~In *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 737 [144 Cal.Rptr. 380, 575 P.2d 1162], the California Supreme Court held that comparative fault applies to strict products liability actions. The court explained: "[W]e do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should, following *Li*, be borne by others."~~

- ~~"[A] petitioner's recovery may accordingly be reduced, but not barred, where his lack of reasonable care is shown to have contributed to his injury." (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172].)~~

- "The record does not support [defendant]'s assertion that modification of the bracket was the sole cause of the accident. The record does indicate that if the bracket had not been modified there would have been no need to remove it to reach the flange bolts, and thus the modification was one apparent cause of [plaintiff]'s death. However, a number of other causes, or potential causes, were established, including: [plaintiff]'s failure to wear protective clothing; [third party]'s failure to furnish the correct replacement bracket for the valve; [third party]'s failure to furnish [employer] with all of the literature it received from [defendant]; and negligence on the part of [employer] independent of its modification of the valve, including violations of various federal Occupational Safety and Health Administration regulations governing equipment and training in connection with the accident." (*Torres, supra,* 49 Cal.App.4th at p. 17.)

- 'We conclude Proposition 51 is inapplicable; a strictly liable defendant may not reduce or eliminate its responsibility to plaintiff for damages caused by a defective product by shifting blame to others in the product's chain of distribution." (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 623 [65 Cal.Rptr.2d 532].)

- "Proposition 51 is applicable in a strict liability asbestos exposure case where multiple products cause the plaintiff's injuries and the evidence provides a basis to allocate liability for noneconomic damages between the defective products. Where the evidence shows that a particular product is responsible for only a part of plaintiff's injury, Proposition 51 requires apportionment of the responsibility for that part of the injury to that particular product's chain of distribution." (*Arena, supra,* 63 Cal.App.4th at p. 1198.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 1542

California Products Liability Actions, Ch. 8, *Defenses*, §§ 8.03, 8.04 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.53, 460.182 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability,* § 190.253 (Matthew Bender)

1621. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] suffered serious emotional distress as a result of perceiving [an injury to/the death of] [***name of victim***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] negligently caused [injury to/the death of] [***name of victim***];**

2. **That when the [***describe event, e.g., traffic accident***] that caused [injury to/the death of] [***name of victim***] occurred, [***name of plaintiff***] was present at the scene;**

3. **That [***name of plaintiff***] was then aware that the [***e.g., traffic accident***] was causing [injury to/the death of] [***name of victim***];**

4. **That [***name of plaintiff***] suffered serious emotional distress; and**

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

[*Name of plaintiff***] need not have been then aware that [***name of defendant***] had caused the [***e.g., traffic accident***].**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003; Revised December 2013, June 2014, December 2014, December 2015

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

A "bystander" case is one in which a plaintiff seeks recovery for damages for emotional distress suffered as a percipient witness of an injury to another person. If the plaintiff is a direct victim of tortious conduct, use CACI No. 1620, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements.* For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements,* and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—*

Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements.

This instruction should be read in conjunction with instructions in the Negligence series (see CACI No. 400 et seq.) to further develop element 1.

Whether the plaintiff had a sufficiently close relationship with the victim should be determined as an issue of law because it is integral to the determination of whether a duty was owed to the plaintiff.

There is some uncertainty as to how the "event" should be defined in element 2 and then just exactly what the plaintiff must perceive in element 3. When the event is something dramatic and visible, such as a traffic accident or a fire, it would seem that the plaintiff need not know anything about why the event occurred. (See *Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].) And the California Supreme Court has stated that the bystander plaintiff need not contemporaneously understand the defendant's conduct as *negligent*, as opposed to *harmful*. (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324], original italics.)

But what constitutes perception of the event is less clear when the victim is clearly in observable distress, but the cause of that distress may not be observable. It has been held that the manufacture of a defective product is the event, which is not observable, despite the fact that the result was observable distress resulting in death. (See *Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 843−844 [151 Cal.Rptr.3d 320].) In another observable-distress case, medical negligence that led to distress resulting in death was found to be perceivable because the relatives who were present observed the decedent's acute respiratory distress and were aware that defendant's *inadequate* response caused her death. (See *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.4th 484, 489−490 [185 Cal.Rptr.3d 313], emphasis added.) It might be argued that observable distress is the event and that the bystanders need not perceive anything about the cause of the distress. However, these cases indicate that is not the standard. But if it is not necessary to comprehend that negligence is causing the distress, it is not clear what it is that the bystander must perceive in element 3. Because of this uncertainty, the Advisory Committee has elected not to try to express element 3 any more specifically.

The explanation in the last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien, supra,* 27 Cal.3d at p. 928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747]; but see *Keys, supra*, 235 Cal.App.4th at p. 491 [finding last sentence of this instruction to be a correct description of the distress required].)

Sources and Authority

- "California's rule that plaintiff's fear for his own safety is compensable also presents a strong argument for the same rule as to fear for others; otherwise, some plaintiffs will falsely claim to have feared for themselves, and the honest parties unwilling to do so will be penalized. Moreover, it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 738 [69 Cal.Rptr. 72, 441 P.2d 912].)

- "As an introductory note, we observe that plaintiffs … framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, 'the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort … .' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)

- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)

- "[T]o satisfy the second *Thing* requirement the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm and the injuries suffered by the close relative." (*Fortman, supra, ~~v. Förvaltningsbolaget Insulan AB~~ (2013)* 212 Cal.App.4th at p.~~830,~~ 836 ~~[151 Cal.Rptr.3d 320]~~.)

- "[A] plaintiff need not contemporaneously understand the defendant's conduct as *negligent,* as opposed to *harmful.* But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim." (*Bird, supra, ~~v. Saenz~~ (2002)* 28 Cal.4th at p.~~910,~~ 920 ~~[123 Cal.Rptr.2d 465, 51 P.3d 324]~~.)

- "*Bird* does not categorically bar plaintiffs who witness acts of medical negligence from pursuing NIED claims. 'This is not to say that a layperson can never perceive medical negligence or that one who does perceive it cannot assert a valid claim for NIED.' Particularly, a NIED claim may arise when … caregivers fail 'to respond significantly to symptoms obviously requiring immediate medical attention.' " (*Keys, supra*, 235 Cal.App.4th at p. 489.)

- "The injury-producing event here was defendant's lack of acuity and response to [decedent]'s inability to breathe, a condition the plaintiffs observed and were aware was causing her injury." (*Keys, supra,* 235 Cal.App.4th at p. 490.)

- "*Thing* does not require that the plaintiff have an awareness of what caused the injury-producing event, but the plaintiff must have an understanding perception of the 'event as causing harm to the victim.' " (*Fortman, supra,* 212 Cal.App.4th at p. 841, fn. 4.)

- "[W]e also reject [plaintiff]'s attempt to expand bystander recovery to hold a product manufacturer strictly liable for emotional distress when the plaintiff observes injuries sustained by a close relative arising from an unobservable product failure. To do so would eviscerate the second *Thing* requirement." (*Fortman, supra,* 212 Cal.App.4th at pp. 843−844.)

- "Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra,* 48 Cal.3d at p. 668, fn. 10.)

- "[A]n unmarried cohabitant may not recover damages for emotional distress based on such injury." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr. 254, 758 P.2d 582].)

- "Although a plaintiff may establish presence at the scene through nonvisual sensory perception, 'someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.' " (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)

- "[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (*Wilks*, *supra*, ~~*v. Hom* (1992)~~ 2 Cal.App.4th at p.~~1264,~~ 1271 ~~[3 Cal.Rptr.2d 803]~~.)

- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien, supra,* 27 Cal.3d at pp. 927–928.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong, supra,* 189 Cal.App.4th at p. 1378.)

- "We have no reason to question the jury's conclusion that [plaintiffs] suffered serious emotional distress as a result of watching [decedent] 's struggle to breathe that led to her death. The jury was properly instructed, as explained in *Thing*, that '[s]erious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.' The instructions clarify that 'Emotional distress includes suffering, anguish, fright, … nervousness, grief, anxiety, worry, shock … .' Viewed through this lens there is no question that [plaintiffs'] testimony provides sufficient proof of serious emotional distress." (*Keys, supra*, 235 Cal.App.4th at p. 491, internal citation omitted.)

- "[W]here a participant in a sport has expressly assumed the risk of injury from a defendant's conduct, the defendant no longer owes a duty of care to bystanders with respect to the risk expressly assumed by the participant. The defendant can therefore assert the participant's express assumption of the risk against the bystanders' NIED claims." (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 731 [183 Cal.Rptr.3d 234].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1007–1021

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 11-F, *Negligent Infliction Of Emotional Distress*, ¶ 11:101 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.04 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, §§ 153.31 et seq., 153.45 et seq. (Matthew Bender)

VF-1720. Slander of Title

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [make a statement/[***specify other act, e.g., record a deed***] that cast doubts about [***name of plaintiff***]'s ownership of the property?**
   ____ 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. **[Was the statement made to a person other than [***name of plaintiff***]/[***Specify other publication, e.g., Did the deed become a public record***]]?**
   ____ 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 plaintiff***] in fact own the property?**
   ____ 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 defendant***] [know that/act with reckless disregard of the truth or falsity as to whether] [***name of plaintiff***] owned the property?**
   ____ 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***] know or should [he/she] have recognized that someone else might act in reliance on the [statement/***e.g., deed***], causing [***name of plaintiff***] financial loss?**
   ____ 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. **Did [***name of plaintiff***] in fact suffer immediate and direct financial harm because someone else acted in reliance on the [statement/***e.g., deed***]?**

____ 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. Was [*name of defendant***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss: $ _____]

[b. Future economic loss: $ _____]

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 2015

Directions for Use

This verdict form is based on CACI No. 1730, *Slander of Title─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.

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

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

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*.

VF-1721. Trade Libel

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make a statement that [would be clearly or necessarily understood to have] disparaged the quality of [***name of plaintiff***]'s [***product/service***]?**
   ____ 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. **Was the statement made to a person other than [***name of plaintiff***]?**
   ____ 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. **Was the statement untrue?**
   ____ 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 defendant***] [know that the statement was untrue/act with reckless disregard of the truth or falsity of the statement]?**
   ____ 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***] know or should [he/she] have recognized that someone else might act in reliance on the statement, causing [***name of plaintiff***] financial loss?**
   ____ 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. **Did [***name of plaintiff***] suffer direct financial harm because someone else acted in reliance on the statement?**
   ____ 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. Was [*name of defendant***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss $ _____]

[b. Future economic loss $ _____]

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 2015

Directions for Use

This verdict form is based on CACI No. 1731, *Trade Libel—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.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

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*.

1810. Distribution of Private Sexually Explicit Materials—Essential Factual Elements (Civ. Code, § 1708.85)

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

1. **That [***name of defendant***] intentionally distributed by [***specify means, e.g., posting online***] [a] [photograph(s)/film(s)/videotape(s)/recording(s)/[***specify other reproduction***]] of [***name of plaintiff***];**

2. **That [***name of plaintiff***] did not consent to the distribution of the [***specify, e.g., photographs***];**

3. **That [***name of defendant***] knew that [***name of plaintiff***] had a reasonable expectation that the [***e.g., photographs***] would remain private;**

4. **That the [***e.g., photographs***] [exposed an intimate body part of [***name of plaintiff***]/ [or] showed [***name of plaintiff***] engaging in an act of [intercourse/oral copulation/sodomy/ [or] [***specify other act of sexual penetration***]];**

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.**

[An "intimate body part" is any part of the genitals[, and, in the case of a female, also includes any portion of the breast below the top of the areola,] that is uncovered or visible through less than fully opaque clothing.]

New December 2015

Directions for Use

This instruction is for use for an invasion-of-privacy cause of action for the dissemination of sexually explicit materials. (See Civ. Code, § 1708.85(a).) It may not be necessary to include the last definitional paragraph as the court may rule as a matter of law that an intimate body part has been distributed. (See Civ. Code, § 1708.85(b).)

The plaintiff's harm (element 5) is general or special damages as defined in subdivision 4 of Civil Code section 48a. (Civ. Code, § 1708.85(a).) a) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings. (Civ. Code, § 48a4(a).) "Special damages" are essentially economic loss. (Civ. Code, § 48a4(b).)

Sources and Authority

- Right of Action Against Distributor of Private Sexually Explicit Material. Civil Code section

1708.85

- General and Special Damages. Civil Code section 48a4(a), (b)

Secondary Sources

4 California Torts, Ch. 46, *Invasion of Privacy*, § 46.07 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36A (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.25B (Matthew Bender)

VF-1902. False Promise

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make a promise to [***name of plaintiff***]?**
____ 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 defendant***] intend to perform this promise when [he/she] made it?**
____ Yes ____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] intend that [***name of plaintiff***] rely on this promise?**
____ 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***] reasonably rely on this promise?**
____ 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***] perform the promised act?**
____ Yes ____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff***]'s reliance on [***name of defendant***]'s promise a substantial factor in causing harm to [***name of plaintiff***]?**
____ 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?

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

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 September 2003; Revised April 2007, December 2010, June 2014, December 2015

Directions for Use

This verdict form is based on CACI No. 1902, *False Promise.*

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.

If multiple promises are at issue, question 1 should be repeated to specify each one; for example: "1. Did [*name of defendant*] promise [*name of plaintiff*] that [*specify promise*]?" The rest of the questions will need to be repeated for each promise.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

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 (or from different promises), 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.

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;]

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

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.)

- 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.

- ~~Restatement Second of Torts, section 827 provides:~~
  ~~In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:~~

  ~~(a) the extent of the harm involved;~~
  ~~(b) the character of the harm involved;~~
  ~~(c) the social value that the law attaches to the type of use or enjoyment invaded;~~
  ~~(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and~~
  ~~(e) the burden on the person harmed of avoiding the harm.~~

- ~~Restatement Second of Torts, section 828 provides:~~
  ~~In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:~~

  ~~(a) the social value that the law attaches to the primary purpose of the conduct;~~
  ~~(b) the suitability of the conduct to the character of the locality; and~~
  ~~(c) the impracticability of preventing or avoiding the invasion.~~

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)

2022. Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit

In determining whether the seriousness of the harm to [*name of plaintiff***] outweighs the public benefit of [***name of defendant***]'s conduct, you should consider a number of factors.**

To determine the seriousness of the harm [*name of plaintiff***] suffered, you should consider the following:**

a. **The extent of the harm, meaning how much the condition [***name of defendant***] caused interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] property, and how long that interference lasted.**

b. **The character of the harm, that is, whether the harm involved a loss from the destruction or impairment of physical things that [***name of plaintiff***] was using, or personal discomfort or annoyance.**

c. **The value that society places on the type of use or enjoyment invaded. The greater the social value of the particular type of use or enjoyment of land that is invaded, the greater is the seriousness of the harm from the invasion.**

d. **The suitability of the type of use or enjoyment invaded to the nature of the locality. The nature of a locality is based on the primary kind of activity at that location, such as residential, industrial, or other activity.**

e. **The extent of the burden (such as expense and inconvenience) placed on [***name of plaintiff***] to avoid the harm.**

To determine the public benefit of [*name of defendant***]'s conduct, you should consider:**

a. **The value that society places on the primary purpose of the conduct that caused the interference. The primary purpose of the conduct means [***name of defendant***]'s main objective for engaging in the conduct. How much social value a particular purpose has depends on how much its achievement generally advances or protects the public good.**

b. **The suitability of the conduct that caused the interference to the nature of the locality. The suitability of the conduct depends upon its compatibility to the primary activities carried on in the locality.**

c. **The practicability or impracticality of preventing or avoiding the invasion.**

New December 2015

Directions for Use

This instruction must be given with CACI No. 2021, *Private Nuisance—Essential Factual Elements*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 160−165 [184 Cal.Rptr.3d 26].) CACI No. 2021 has been found to be inadequate to express the requirement that the plaintiff must suffer *serious* harm without this additional guidance to the jury on how to determine whether the seriousness of the plaintiff's harm outweighs the public benefit of the defendant's conduct (CACI No. 2021, element 8). (See *Id.* at pp. 162−163.)

Sources and Authority

- "Had the jury been instructed on the proper factors to consider when weighing the gravity of the harm against the social utility of [defendant]'s conduct and found [defendant] liable, the statement of these elements would be sufficient because in finding in favor of [plaintiff] the jury necessarily would have concluded that the harm was substantial. Without such instruction, it is not." (*Wilson, supra,* 234 Cal.App.4th at p. 163.)

- Restatement Second of Torts, section 827 provides:
  In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
  (a) the extent of the harm involved;
  (b) the character of the harm involved;
  (c) the social value that the law attaches to the type of use or enjoyment invaded;
  (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
  (e) the burden on the person harmed of avoiding the harm.

- Restatement Second of Torts, section 828 provides:
  In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
  (a) the social value that the law attaches to the primary purpose of the conduct;
  (b) the suitability of the conduct to the character of the locality; and
  (c) the impracticability of preventing or avoiding the invasion.

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2010) Equity, § 169 et seq.

2 California Torts, Ch. 17 *Nuisance*, § 17.05 (Matthew Bender)

9 California Real Estate Law and Practice, Ch. 320, *The Law of Nuisance*, § 320.15 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.20 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.47 (Matthew Bender)

2330. Implied Obligation of Good Faith and Fair Dealing Explained

In every insurance policy there is an implied obligation of good faith and fair dealing that neither the insurance company nor the insured will do anything to injure the right of the other party to receive the benefits of the agreement.

To fulfill its implied obligation of good faith and fair dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.

To breach the implied obligation of good faith and fair dealing, an insurance company must~~,~~ unreasonably ~~or without proper cause,~~ act or fail to act in a manner that deprives the insured of the benefits of the policy. ~~It~~ To act unreasonably is not a mere failure to exercise reasonable care. It means that the insurer must act or fail to act without proper cause. However, it is not necessary for the insurer to intend to deprive the insured of the benefits of the policy.

New September 2003; Revised December 2007, December 2015

Directions for Use

This instruction may be used to introduce a "bad-faith" claim arising from an alleged breach of the implied covenant of good faith and fair dealing.

Sources and Authority

- "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198].)

- "For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it again must give at least as much consideration to the latter's interests as it does to its own." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 818–819 [169 Cal.Rptr. 691, 620 P.2d 141].)

- "[T]o establish the insurer's 'bad faith' liability, the insured must show that the insurer has (1) withheld benefits due under the policy, and (2) that such withholding was 'unreasonable' or 'without proper cause.' The actionable withholding of benefits may consist of the denial of benefits due; paying less than due; and/or unreasonably delaying payments due." (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1209 [87 Cal.Rptr.3d 556], internal citations omitted.)

- " '[T]he covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive.' … [A]n 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." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744], original italics, internal citations

omitted.)

- "Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable." *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689 [319 P.2d 69].)

- "Thus, a breach of the implied covenant of good faith and fair dealing involves something more than a breach of the contract or mistaken judgment. There must be proof the insurer failed or refused to discharge its contractual duties not because of an honest mistake, bad judgment, or negligence, 'but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.' " (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468], internal citations omitted.)

- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)

- "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." (*R. J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1602 [17 Cal.Rptr.2d 425].)

- "[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business." (*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30 [148 Cal.Rptr. 653], overruled on other grounds in *Egan, supra,* 24 Cal.3d at p. 824 fn. 7.)

- "Unique obligations are imposed upon true fiduciaries which are not found in the insurance relationship. For example, a true fiduciary must first consider and always act in the best interests of its trust and not allow self-interest to overpower its duty to act in the trust's best interests. An insurer, however, may give its own interests consideration equal to that it gives the interests of its insured; it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims; and it is not required to pay noncovered claims, even though payment would be in the best interests of its insured." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148–1149 [271 Cal.Rptr. 246], internal citations omitted.)

- "[I]n California, an insurer has the same duty to act in good faith in the uninsured motorist context as it does in any other insurance context." (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 636 [173 Cal.Rptr.3d 854].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 239

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 11-B, *Theories For Extracontractual Liability—In General*, ¶¶ 11:7–11:8.1 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-A, *Definition of Terms*, ¶¶ 12:1–12:10 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-B, *Capsule History Of Insurance "Bad Faith" Cases*, ¶¶ 12:13–12:23 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-C, *Theory Of Recovery—Breach Of Implied Covenant Of Good Faith And Fair Dealing ("Bad Faith")*, ¶¶ 12:27–12:54 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-D, *Who May Sue For Tortious Breach Of Implied Covenant (Proper Plaintiffs)*, ¶¶ 12:56–12:90.17 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-E, *Persons Who May Be Sued For Tortious Breach Of Implied Covenant (Proper Defendants)*, ¶¶ 12:92–12:118 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-F, *Compare—Breach Of Implied Covenant By Insured*, ¶¶ 12:119–12:121 (The Rutter Group)

1 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar), Overview of Rights and Obligations of Policy, §§ 2.9–2.15

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.03[1][a]–[c] (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24[1] (Matthew Bender)

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17[9] (Matthew Bender)

2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*] breached the obligation of good faith and fair dealing by [failing to pay/delaying payment of] benefits due under the insurance policy. 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 with [*name of defendant*];**

2. **That [*name of defendant*] was notified of the loss;**

3. **That [*name of defendant*], unreasonably ~~or without proper cause,~~ [failed to pay/delayed payment of] policy benefits;**

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

5. **That [*name of defendant*]'s [failure to pay/delay in payment of] policy benefits was a substantial factor in causing [*name of plaintiff*]'s harm.**

To act or fail to act "unreasonably" means that the insurer had no proper cause for its conduct. In determining whether [*name of defendant*] acted unreasonably ~~or without proper cause~~, you should consider only the information that [*name of defendant*] knew or reasonably should have known at the time when it [failed to pay/delayed payment of] policy benefits.

New September 2003; Revised December 2007, April 2008, December 2009, December 2015

Directions for Use

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.

If there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad-faith liability imposed on the insurer for advancing its side of that dispute. This is known as the "genuine dispute" doctrine. The genuine-dispute doctrine is subsumed within the test of reasonableness or proper cause (element 3). No specific instruction on the doctrine need be given. (See *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 792–794 [90 Cal.Rptr.3d 74].)

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

Sources and Authority

- If an insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause,

to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. ... [¶] ... [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574-575 [108 Cal.Rptr. 480, 510 P.2d 1032], original italics.)

- "An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage include a duty not to unreasonably withhold benefits due under the policy. An insurer that unreasonably delays, or fails to pay, benefits due under the policy may be held liable in tort for breach of the implied covenant. 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. In a first party case, as we have here, the withholding of benefits due under the policy is not unreasonable if there was a genuine dispute between the insurer and the insured as to coverage or the amount of payment due." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151 [271 Cal.Rptr. 246], internal citations omitted.)

- "The standard of good faith and fairness examines the reasonableness of the insurer's conduct, and mere errors by an insurer in discharging its obligations to its insured ' "does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*. [Citations.]" ' " (*Graciano v. Mercury General Corp*. (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717], original italics.)

- "[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal.Rptr.2d 776].)

- "The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. … 'The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. … On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics, internal citations omitted.)

- "We evaluate the reasonableness of the insurer's actions and decision to deny benefits as of the time

they were made rather than with the benefit of hindsight." (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468].)

- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)

- "While many, if not most, of the cases finding a genuine dispute over an insurer's coverage liability have involved *legal* rather than *factual* disputes, we see no reason why the genuine dispute doctrine should be limited to legal issues. That does not mean, however, that the genuine dispute doctrine may properly be applied in every case involving purely a factual dispute between an insurer and its insured. This is an issue which should be decided on a case-by-case basis." (*Chateau Chamberay Homeowners Assn., supra,* 90 Cal.App.4th at p. 348, original italics, footnote and internal citations omitted.)

- "[I]f the conduct of [the insurer] in defending this case was objectively reasonable, its subjective intent is irrelevant." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744]; cf. *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 [6 Cal.Rptr.2d 467, 826 P.2d 710] ["[I]t has been suggested the covenant has both a subjective and objective aspect—subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable."].)

- "[W]hile an insurer's subjective bad intentions are not a sufficient basis on which to establish a bad faith cause of action, an insurer's subjective mental state may nonetheless be a circumstance to be considered in the evaluation of the *objective* reasonableness of the insurer's actions." (*Bosetti, supra,* 175 Cal.App.4th at p. 1239, original italics.)

- "[A]n insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss. If the insurer's investigation—adequate or not—results in a correct conclusion of no coverage, no tort liability arises for breach of the implied convenant." (*Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 [39 Cal.Rptr.3d 650], internal citations omitted; cf. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1236 [83 Cal.Rptr.3d 410] ["[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing. … [E]ven an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured"].)

- " '[D]enial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. "A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim." ' " (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 634 [173 Cal.Rptr.3d 854].)

- "We conclude ... that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. ... [T]he nonperformance by one party of its contractual duties cannot

excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded." (*Gruenberg, supra,* 9 Cal.3d at p. 578.)

- "Thus, an insurer may be liable for bad faith in failing to attempt to effectuate a prompt and fair settlement (1) where it unreasonably demands arbitration, or (2) where it commits other wrongful conduct, such as failing to investigate a claim. An insurer's statutory duty to attempt to effectuate a prompt and fair settlement is not abrogated simply because the insured's damages do not plainly exceed the policy limits. Nor is the insurer's duty to investigate a claim excused by the arbitrator's finding that the amount of damages was lower than the insured's initial demand. Even where the amount of damages is lower than the policy limits, an insurer may act unreasonably by failing to pay damages that are certain and demanding arbitration on those damages." (*Maslo, supra,* 227 Cal.App.4th at pp. 638−639 [uninsured motorist coverage case].)

- "[T]he insurer's duty to process claims fairly and in good faith [is] a nondelegable duty." (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 848 [263 Cal.Rptr. 850].)

- "[I]n [a bad–faith action] 'damages for emotional distress are compensable as *incidental damages flowing from the initial breach,* not as a separate cause of action.' Such claims of emotional distress must be incidental to 'a substantial invasion of property interests.' " (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1214 [87 Cal.Rptr.3d 556], original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 240–242

Croskey et al., California Practice Guide: Insurance Litigation. Ch. 12C-C, *Bad Faith—Requirements for First Party Bad Faith Action,* ¶¶ 12:822–12:1016 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.25–24.45A

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, §§ 13.03[2][a]–[c], 13.06 (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.140 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.21, 82.50 (Matthew Bender)

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

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.208 (Matthew Bender)

2332. Bad Faith (First Party)—Failure to Properly Investigate Claim

[*Name of defendant***] acted unreasonably, that is, ~~or~~ 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

Directions for Use

This instruction 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 that the insurer acted unreasonably or without proper cause by failing to properly investigate the claim.

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].)

- "[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 (The Rutter Group) ¶¶ 12:848–12:904

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)

2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements

[*Name of plaintiff*] claims [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 defend [*name of plaintiff*] in a lawsuit that was brought against [him/her/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was insured under an insurance policy with [*name of defendant*];**

2. **That a lawsuit was brought against [*name of plaintiff*];**

3. **That [*name of plaintiff*] gave [*name of defendant*] timely notice that [he/she/it] had been sued;**

4. **That [*name of defendant*], unreasonably, that is ~~or~~ without proper cause, failed to defend [*name of plaintiff*] against the lawsuit;**

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 October 2004; Revised December 2007, December 2014, December 2015

Directions for Use

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

The court will decide the issue of whether the claim was potentially covered by the policy. (See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 52 [221 Cal.Rptr. 171].) If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute establishes a possibility of coverage and thus a duty to defend. (*North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902, 922 [169 Cal.Rptr.3d 726].) Therefore, the jury does not resolve factual disputes that determine coverage.

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

Sources and Authority

- "A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken

without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)

- "To prevail in an action seeking declaratory relief on the question of the duty to defend, 'the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' The duty to defend exists if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.' " (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 [97 Cal.Rptr.3d 298, 211 P.3d 1083], original italics, internal citation omitted.)

- " ' [A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. … This duty … is separate from and broader than the insurer's duty to indemnify. … ' ' "[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. … Hence, the duty 'may exist even where coverage is in doubt and ultimately does not develop.' … " … ' " (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323 [78 Cal.Rptr.3d 828], internal citations omitted.)

- "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506 [86 Cal.Rptr.3d 515].)

- "In determining its duty to defend, the insurer must consider facts from any source—the complaint, the insured, and other sources. An insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender. However, where the information available at the time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise." (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 26 [102 Cal.Rptr.3d 591], internal citations omitted.)

- "The duty does not depend on the labels given to the causes of action in the underlying claims against the insured; 'instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.' " (*Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969, 976 [144 Cal.Rptr.3d 12], original italics, disapproved on other grounds in *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

- "The obligation of the insurer to defend is of vital importance to the insured. 'In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the

presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.' " (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831–832 [61 Cal.Rptr.2d 909], internal citations omitted.)

- "An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend. ... This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend." (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319–1320 [52 Cal.Rptr.2d 385].)

- "[T]he mere existence of a legal dispute does not create a potential for coverage: 'However, we have made clear that where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. *Moreover, the law governing the insurer's duty to defend need not be settled at the time the insurer makes its decision*.' " (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 209 [97 Cal.Rptr.3d 568], original italics.)

- "The trial court erroneously thought that because the case law was 'unsettled' when the insurer first turned down the claim, that unsettledness created a potential for a covered claim. … [I]f an insurance company's denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by our state Supreme Court." (*Griffin Dewatering Corp., supra,* 176 Cal.App.4th at p. 179, original italics.)

- "Unresolved factual disputes impacting insurance coverage do not absolve the insurer of its duty to defend. 'If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.' " (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 520 [115 Cal.Rptr.3d 42].)

- " 'If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. . . . [T]he duty to defend must be assessed at the outset of the case.' It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty." (*Shade Foods, Inc., supra,* 78 Cal.App.4th at p. 881, internal citations omitted.)

- "When a complaint states multiple claims, some of which are potentially covered by the insurance policy and some of which are not, it is a mixed action. In these cases, 'the insurer has a duty to defend as to the claims that are at least potentially covered, having been paid premiums by the insured therefor, but does not have a duty to defend as to those that are not, not having been paid therefor.' However, in a ' "mixed" action, the insurer has a duty to defend the action in its entirety.' Thereafter, the insurance company is entitled to seek reimbursement for the cost of defending the claims that are not potentially covered by the policy." (*Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1231 [184 Cal.Rptr.3d 394], internal citations omitted.)

- "No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense." (Croskey et al., California Practice Guide: Insurance Litigation, ¶ 7:614 (The Rutter Group).)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 297

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, Third Party Cases—Refusal To Defend Cases, ¶¶ 12:598–12:650.5 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Defend, §§ 25.1–26.38

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.10–82.16 (Matthew Bender)

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

2337. Factors to Consider in Evaluating Insurer's Conduct

In determining whether [*name of defendant***] acted unreasonably, that is ~~or~~ without proper cause, you may consider whether the defendant did any of the following:**

[(a) Misrepresented to [*name of plaintiff***] relevant facts or insurance policy provisions relating to any coverage at issue.]**

[(b) Failed to acknowledge and act reasonably promptly after receiving communications about [*name of plaintiff***]'s claim arising under the insurance policy.]**

[(c) Failed to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies.]

[(d) Failed to accept or deny coverage of claims within a reasonable time after [*name of plaintiff***] completed and submitted proof-of-loss requirements.]**

[(e) Did not attempt in good faith to reach a prompt, fair, and equitable settlement of [*name of plaintiff***]'s claim after liability had become reasonably clear.]**

[(f) Required [*name of plaintiff***] to file a lawsuit to recover amounts due under the policy by offering substantially less than the amount that [he/she/it] ultimately recovered in the lawsuit, even though [***name of plaintiff***] had made a claim for an amount reasonably close to the amount ultimately recovered.]**

[(g) Attempted to settle [*name of plaintiff***]'s claim for less than the amount to which a reasonable person would have believed he or she was entitled by referring to written or printed advertising material accompanying or made part of the application.]**

[(h) Attempted to settle the claim on the basis of an application that was altered without notice to, or knowledge or consent of, [*name of plaintiff***], [his/her/its] representative, agent, or broker.]**

[(i) Failed, after payment of a claim, to inform [*name of plaintiff***] at [his/her/its] request, of the coverage under which payment was made.]**

[(j) Informed [*name of plaintiff***] of its practice of appealing from arbitration awards in favor of insureds or claimants for the purpose of forcing them to accept settlements or compromises less than the amount awarded in arbitration.]**

[(k) Delayed the investigation or payment of the claim by requiring [*name of plaintiff***], [or [his/her] physician], to submit a preliminary claim report, and then also required the submission of formal proof-of-loss forms, both of which contained substantially the same information.]**

[(*l*) Failed to settle a claim against [*name of plaintiff***] promptly once [his/her/its] liability had become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.]**

[(m) Failed to promptly provide a reasonable explanation of its reasons for denying the claim or offering a compromise settlement, based on the provisions of the insurance policy in relation to the facts or applicable law.]

[(n) Directly advised [*name of plaintiff***] not to hire an attorney.]**

[(o) Misled [*name of plaintiff***] as to the applicable statute of limitations, that is, the date by which an action against [***name of defendant***] on the claim had to be filed.]**

[(p) Delayed the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome (AIDS) or AIDS-related complex for more than 60 days after it had received [*name of plaintiff***]'s claim for those benefits, doing so in order to investigate whether [***name of plaintiff***] had the condition before obtaining the insurance coverage. However, the 60-day period does not include any time during which [***name of defendant***] was waiting for a response for relevant medical information from a healthcare provider.]**

The presence or absence of any of these factors alone is not enough to determine whether [*name of defendant***]'s conduct was or was not unreasonable, that is, ~~or~~ without proper cause. You must consider [***name of defendant***]'s conduct as a whole in making this determination.**

New April 2008; Revised December 2015

Directions for Use

Although there is no private cause of action under Insurance Code section 790.03(h) (see *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304–305 [250 Cal.Rptr. 116, 758 P.2d 58]), this instruction may be given in an insurance bad-faith action to assist the jury in determining whether the insurer's conduct was unreasonable or without proper cause. (See *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078 [56 Cal.Rptr.3d 312], internal citations omitted.)

Include only the factors that are relevant to the case.

Sources and Authority

- Bad-Faith Insurance Practices. Insurance Code section 790.03.
- "[Plaintiff] was not seeking to recover on a claim based on a violation of Insurance Code section 790.03, subdivision (h). Rather, her claim was based on a claim of common law bad faith arising from [defendant]'s breach of the implied covenant of good faith and fair dealing which she is entitled to pursue. [Plaintiff]'s reliance upon the [expert's] declaration was for the purpose of providing evidence supporting her contention that [defendant] had breached the implied covenant by its actions. This is a *proper* use of evidence of an insurer's violations of the statute and the corresponding regulations." (*Jordan, supra,* 148 Cal.App.4th at p. 1078, original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance §§ 252, 253, 255, 321

Croskey et al., California Practice Guide: Insurance Litigation, , Ch. 14-A, *Statutory and Administrative Regulation--The California Regulator*, ¶ 14:109 et seq. -(The Rutter Group) ~~¶ 14:109 et seq.~~

1 California Liability Insurance Practice: Claims and Litigation, Ch. 24, *General Principles of Contract and Bad Faith* (Cont.Ed.Bar) § 24.30 et seq.

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.25 (Matthew Bender)

1 Rushing et al., Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 2, *Unfair Competition*, 2.11 (Matthew Bender)

2351. Insurer's Claim for Reimbursement of Costs of Defense of Uncovered Claims

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[*Name of insurer***] claims that it is entitled to partial reimbursement from [***name of insured***] for the costs that it spent in defending [***name of insured***] in the lawsuit brought by [***name of plaintiff in underlying suit***] against [***name of insured***]. [***Name of insurer***] may obtain reimbursement only for those defense costs that it proves can be allocated solely to claims that are not even potentially covered by the insurance policy.**

I have determined that the following claims in [*name of plaintiff in underlying suit***]'s lawsuit were not even potentially covered by the policy: [***specify***]. You must determine the dollar amount of [***name of insurer***]'s costs of defense that were attributable only to these claims. Costs for work that also helped the defense of the other claims that were potentially covered should not be included.**

New December 2015

Directions for Use

This instruction is for use if the insurer has provided a defense under a reservation of rights to deny indemnity if coverage cannot be established. In such a case, the insurer can seek reimbursement of the cost of defense that can be allocated solely to claims for which there was no possible potential coverage. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 57−58 [65 Cal.Rptr.2d 366, 939 P.2d 766].)

If the insurer denies a defense, but the court finds that there is coverage for some but not all claims in the underlying case, it would appear that the insured can recover all costs of defense from the insurer. The insurer is not entitled to apportion the costs of defense (damages) between covered and uncovered claims if it denies a defense. (See *Hogan v. Midland Nat'l Ins. Co.* (1970) 3 Cal.3d 553, 563-564 [91 Cal.Rptr. 153, 476 P.2d 825].) Therefore, this instruction may not be modified for use in a denial-of-coverage case.

Sources and Authority

- "An insurer may obtain reimbursement *only* for defense costs that can be allocated *solely* to the claims that are not even potentially covered. To do that, it must carry the burden of proof as to these costs by a preponderance of the evidence. And to do that, … it must accomplish a task that, 'if ever feasible," may be "extremely difficult.' " (*Buss, supra,* 16 Cal.4th at pp. 57−58, original italics.)

- Whether [insurer] will be able to carry its burden of proof by a preponderance of the evidence that specific costs can be allocated solely to the causes of action that were not even potentially covered is far from plain. But there is at least a triable issue of material fact that it can. It must be allowed the attempt." (*Buss, supra,* 16 Cal.4th at p. 61.)

- "By law applied in hindsight, courts can determine that no potential for coverage, and thus no duty to defend, ever existed. If that conclusion is reached, the insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense which, under its contract

of insurance, it was never obliged to furnish." (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 658 [31 Cal.Rptr.3d 147, 115 P.3d 460].)

- " 'Under the policy, the insurer does not have a duty to defend the insured as to the claims that are not even potentially covered. With regard to defense costs for these claims, the insurer has not been paid premiums by the insured. It did not bargain to bear these costs. . . . The "enrichment" of the insured by the insurer through the insurer's bearing of unbargained-for defense costs is inconsistent with the insurer's freedom under the policy and therefore must be deemed 'unjust." ' If [insurer], after providing an entire defense, can prove that a claim was 'not even potentially covered because it did not even possibly embrace any triggering harm of the specified sort within its policy period or periods caused by an included occurrence,' it should have that opportunity. This task ' "if ever feasible," may be "extremely difficult." ' " (*State v. Pac. Indem. Co.* (1998) 63 Cal.App.4th 1535, 1550 [75 Cal.Rptr.2d 69], internal citations omitted.)

- "The cases which have considered apportionment of attorneys' fees upon the wrongful refusal of an insurer to defend an action against its insured generally have held that the insurer is liable for the total amount of the fees despite the fact that some of the damages recovered in the action against the insured were outside the coverage of the policy." (*Hogan, supra*, 3 Cal.3d at p. 564.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2010) Insurance, § 269

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Nuisance*, § 308.123 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.51 (Matthew Bender)

2520. Quid pro quo Sexual Harassment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to sexual harassment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of alleged harasser***] made unwanted sexual advances to [***name of plaintiff***] or engaged in other unwanted verbal or physical conduct of a sexual nature;**

3. **~~[~~That ~~job~~ terms of employment, job benefits, or favorable working conditions were ~~conditioned~~made contingent, by words or conduct, on [***name of plaintiff***]'s acceptance of [***name of alleged harasser***]'s sexual advances or conduct;~~]~~**

   ~~[or]~~

   ~~[That employment decisions affecting [*name of plaintiff***] were made based on [his/her] acceptance or rejection of [***name of alleged harasser***]'s sexual advances or conduct;]~~**

4. **That at the time of [his/her] conduct, [***name of alleged harasser***] was a supervisor or agent for [***name of defendant***];**

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

6. **That [***name of alleged harasser***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2015

Directions for Use

Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), ~~and~~ 12940(j)(1); *Reno v. Baird* (1998) 18 Cal.4th 640, 648 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning]).

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined: Harassment. Government Code section 12940(j)(4)(A).

- "Person Providing Services Under Contract: Harassment. Government Code section 12940(j)(5)

- Sexual Harassment. Cal. Code Regs., tit. 2, § 11034(f)(1).

- "Courts have generally recognized two distinct categories of sexual harassment claims: quid pro quo and hostile work environment. Quid pro quo harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607 [262 Cal.Rptr. 842], internal citation omitted.)

- "A cause of action for quid pro quo harassment involves the behavior most commonly regarded as sexual harassment, including, e.g., sexual propositions, unwarranted graphic discussion of sexual acts, and commentary on the employee's body and the sexual uses to which it could be put. To state a cause of action on this theory, it is sufficient to allege that a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [26 Cal.Rptr.2d 116], internal citations omitted.)

- "Cases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility ... [¶] We do not suggest the terms quid pro quo and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 751, 753–754 [118 S.Ct. 2257, 141 L.Ed.2d 633].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:150, 7:166, 7:168–7:169, 7:194 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment,* ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:50 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual Harassment, §§ 3.31–3.35

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.81[1][a], [6] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5][b] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:55 (Thomson Reuters)

2521A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to harassment based on [his/her] [***describe protected status, e.g., race, gender, or age***] at [***name of defendant***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] was [***protected status, e.g., a woman***];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524,

"Severe or Pervasive" Explained.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined*.

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556].)
- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.2d 464].)
- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- Under federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662].)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering

all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers. Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

- "Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

- "The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239 [166 Cal.Rptr.3d 676].)

- "A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: 'For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire*.' " (*Lewis, supra,* 224 Cal.App.4th at p. 1527 fn. 8, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment,* ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40,

10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of plaintiff***], although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive toward [***e.g., women***];**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [*or***]**

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual*

Defendant. For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C),
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)
- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been

sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment**.**' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment**.**' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041 [6 Cal.Rptr.3d 441, 79 P.3d 556], original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that widespread sexual favoritism at [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor [engaged in the conduct/created the widespread sexual favoritism];]

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the widespread sexual favoritism and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised December 2015

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or

sexual orientation, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)
- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently

pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- " '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' … [¶] California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1040-1041 [6 Cal.Rptr.3d 441, 79 P.3d 556], original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2522A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to harassment based on [***describe protected status, e.g., race, gender, or age***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] was [***protected status, e.g., a woman***];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from Former CACI No. 2522 December 2007; Revised June 2013, December 2015

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ' "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," ' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)
- "Under FEHA, an employee who harasses another employee may be held personally liable." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)
- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)
- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ' " 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " ' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact

did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

- "Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis, supra,* 224 Cal.App.4th at p. 1525, original italics.)

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

- "The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1229 [166 Cal.Rptr.3d 676].) .)

- "A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: 'For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire*.' " (*Lewis, supra,* 224 Cal.App.4th at p. 1527, fn. 8, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56–2:56.1 (Thomson Reuters)

2522B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of employer***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of plaintiff***] although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive toward [***e.g., women***];**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe*

or Pervasive" Explained.

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)
- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2522C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that widespread sexual favoritism by [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the sexual favoritism;**

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

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

Derived from former CACI No. 2522 December 2007; Revised December 2015

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)
- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2523. "Harassing Conduct" Explained

Harassing conduct may include, but is not limited to, [any of the following:]

[a. Verbal harassment, such as obscene language, demeaning comments, slurs, [or] threats [or] [*describe other form of verbal harassment***];] [or]**

[b. Physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement;] [or]

[c. Visual harassment, such as offensive posters, objects, cartoons, or drawings;] [or]

[d. Unwanted sexual advances;] [or]

[e. [*Describe other form of harassment if appropriate, e.g., derogatory, unwanted, or offensive photographs, text messages, Internet postings***].]**

New September 2003; Revised December 2007, December 2015

Directions for Use

Read this instruction with CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant;* CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant;* CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant;* or CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. Read also CACI No. 2524, *"Severe or Pervasive" Explained*, if appropriate.

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Harassment" Defined. Cal. Code Regs., tit. 2, § ~~7287.6~~11019(b)(1).
- "Harassment is distinguishable from discrimination under the FEHA. '[D]iscrimination refers to bias in the exercise of official actions on behalf of the employer, and harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869 [172 Cal.Rptr.3d 732].)
- "[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other

personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." (*Reno v. Baird* (1998) 18 Cal.4th 640, 645–646 [76 Cal.Rptr.2d 499, 957 P.2d 1333], internal citations omitted.)

- "No supervisory employee needs to use slurs or derogatory drawings, to physically interfere with freedom of movement, to engage in unwanted sexual advances, etc., in order to carry out the legitimate objectives of personnel management. Every supervisory employee can insulate himself or herself from claims of harassment by refraining from such conduct." (*Serri, supra,* 226 Cal.App.4th at p. 869.)

- "We conclude, therefore, that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management. This significant distinction underlies the differential treatment of harassment and discrimination in the FEHA." (*Reno, supra,* 18 Cal.4th at pp. 646-647, internal citation omitted.)

- "[W]e can discern no reason why an employee who is the victim of discrimination based on some official action of the employer cannot also be the victim of harassment by a supervisor for abusive messages that create a hostile working environment, and under the FEHA the employee would have two separate claims of injury." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707 [101 Cal.Rptr.3d 773, 219 P.3d 749].)

- "Here, [plaintiff]'s *discrimination* claim sought compensation for official employment actions that were motivated by improper bias. These discriminatory actions included not only the termination itself but also official employment actions that preceded the termination, such as the progressive disciplinary warnings and the decision to assign [plaintiff] to answer the office telephones during office parties. [Plaintiff]'s *harassment* claim, by contrast, sought compensation for hostile social interactions in the workplace that affected the workplace environment because of the offensive message they conveyed to [plaintiff]. These harassing actions included [supervisor]'s demeaning comments to [plaintiff] about her body odor and arm sores, [supervisor]'s refusal to respond to [plaintiff]'s greetings, [supervisor]'s demeaning facial expressions and gestures toward [plaintiff], and [supervisor]'s disparate treatment of [plaintiff] in handing out small gifts. None of these events can fairly be characterized as an official employment action. None involved [supervisor]'s exercising the authority that [employer] had delegated to her so as to cause [employer], in its corporate capacity, to take some action with respect to [plaintiff]. Rather, these were events that were unrelated to [supervisor]'s managerial role, engaged in for her own purposes." (*Roby, supra,* 47 Cal.4th at pp. 708–709, original italics, footnote omitted.)

- "[S]ome official employment actions done in furtherance of a supervisor's managerial role can

also have a secondary effect of communicating a hostile message. This occurs when the actions establish a widespread pattern of bias. Here, some actions that [supervisor] took with respect to [plaintiff] are best characterized as official employment actions rather than hostile social interactions in the workplace, but they may have contributed to the hostile message that [supervisor] was expressing to [plaintiff] in other, more explicit ways. These would include [supervisor]'s shunning of [plaintiff] during staff meetings, [supervisor]'s belittling of [plaintiff]'s job, and [supervisor]'s reprimands of [plaintiff] in front of [plaintiff]'s coworkers. Moreover, acts of discrimination can provide evidentiary support for a harassment claim by establishing discriminatory animus on the part of the manager responsible for the discrimination, thereby permitting the inference that rude comments or behavior by that same manager were similarly motivated by discriminatory animus." (*Roby, supra,* 47 Cal.4th at p. 709.)

- "[A]busive conduct that is not facially sex specific can be grounds for a hostile environment sexual harassment claim *if it is inflicted because of gender,* i.e., if men and women are treated differently and the conduct is motivated by gender bias." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 130 [129 Cal.Rptr.3d 384], original italics.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:125–10:155 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and Other Harassment, §§ 3.13, 3.36

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.80[1][a][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2525. Harassment—"Supervisor" Defined (Gov. Code, § 12926(t))

[*Name of alleged harasser***] was a supervisor of [***name of defendant***] if [he/she] had any of the followingthe discretion and authority:**

[a. The authority to hire, transfer, promote, assign, reward, discipline, [or] discharge [or] [*insert other employment action***] [***name of plaintiff***]other employees [or effectively to recommend any of these actions];]**

[b. The responsibility to act on [*name of plaintiff***]'s the grievances of other employees [or effectively to recommend action on grievances];] [or]**

[c. The responsibility to direct [*name of plaintiff***]'s daily work activities.]**

[*Name of alleged harasser***]'s exercise of this authority or responsibility must not be merely routine or clerical, but must require the use of independent judgment.**

New September 2003; Revised June 2006, December 2015

Directions for Use

The FEHA's definition of "supervisor" refers to the "authority" for factor (a) and the "responsibility" for factors (b) and (c). The difference, if any, between "authority" and "responsibility" as used in the statute is not clear. The statute further requires that "the exercise of that *authority* is not of a merely routine or clerical nature, but requires the use of independent judgment." (See Gov. Code, § 12926(t) [emphasis added].) However, at least one court has found the independent-judgment requirement to be applicable to the *responsibility* for factor (c). If using this instruction, consider(See *Chapman v. Enos* (2004) 116 Cal.App.4th 920, 930−931 [10 Cal.Rptr.3d 852] [emphasis added].) Therefore, the last sentence of the instruction refers to "authority or responsibility."

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Supervisor" Defined. Government Code section 12926(t).
- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor' by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State*

Dept. of Health Services v. Superior Court (2003) 31 Cal. 4th 1026, 1040−1041 [6 Cal. Rptr. 3d 441, 79 P.3d 556], internal citations omitted.)

- "Unlike discrimination in hiring, the ultimate responsibility for which rests with the employer, sexual or other harassment perpetrated by a supervisor with the power to hire, fire and control the victimized employee's working conditions is a particularly personal form of the type of discrimination which the Legislature sought to proscribe when it enacted the FEHA." (*Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 605−606 [40 Cal.Rptr.2d 350].)

- "This section has been interpreted to mean that the employer is strictly liable for the harassing actions of its supervisors and agents, but that the employer is only liable for harassment by a coworker if the employer knew or should have known of the conduct and failed to take immediate corrective action. Thus, characterizing the employment status of the harasser is very significant." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046 [58 Cal.Rptr.2d 122], internal citations omitted.)

- "The case and statutory authority set forth three clear rules. First, . . . a supervisor who personally engages in sexually harassing conduct is personally liable under the FEHA. Second, . . . if the supervisor participates in the sexual harassment or substantially assists or encourages continued harassment, the supervisor is personally liable under the FEHA as an aider and abettor of the harasser. Third, under the FEHA, the employer is vicariously and strictly liable for sexual harassment by a supervisor." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1327 [58 Cal.Rptr.2d 308].)

- "[W]hile an employer's liability under the [FEHA] for an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior, respondeat superior principles are nonetheless relevant in determining liability when, as here, the sexual harassment occurred away from the workplace and not during work hours." (*Doe, supra,* 50 Cal.App.4th at pp. 1048–1049.)

- "The FEHA does not define 'agent.' Therefore, it is appropriate to consider general principles of agency law. An agent is one who represents a principal in dealings with third persons. An agent is a person authorized by the principal to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. A supervising employee is an agent of the employer." (*Fiol, supra,* 50 Cal.App.4th at p. 1328, internal citations omitted.)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol, supra,* 50 Cal.App.4th at p. 1331.)

- "[W]hile full accountability and responsibility are certainly indicia of supervisory power, they are not *required* elements of … the FEHA definition of supervisor. Indeed, many supervisors with responsibility to direct others using their independent judgment, and whose supervision of employees is not merely routine or clerical, would not meet these additional criteria though they would otherwise be within the ambit of the FEHA supervisor definition." (*Chapman, supra,* 116 Cal.App.4th at p. 930, footnote omitted.)

- "Defendants take the position that the court's modified instruction is, nonetheless, accurate because the phrase 'responsibility to direct' is the functional equivalent of being 'fully accountable and responsible for the performance and work product of the employees. …' In this, they rely on the dictionary definition of 'responsible' as 'marked by accountability.' But as it relates to the issue before us, this definition is unhelpful for two reasons. First, one can be accountable for one's own actions without being accountable for those of others. Second, the argument appears to ignore the plain language of the statute which *itself* defines the circumstances under which the exercise of the responsibility to direct will be considered supervisory, i.e., 'if … [it] is not of a merely routine or clerical nature, but requires the use of independent judgment.' " (*Chapman, supra,* 116 Cal.App.4th at pp. 930−931.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment,* ¶ 10:17 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-D, *Employer Liability For Workplace Harassment,* ¶¶ 10:308, 10:310, 10:315–10:317, 10:320.5, 10:320.6 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-E, *Harasser's Individual Liability,* ¶ 10:499 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and other Harassment, § 3.21

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.81 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.20, 115.36, 115.54 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56.50 (Thomson Reuters)

2526. Affirmative Defense—Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)

If [*name of plaintiff*] proves that [*name of supervisor*] sexually harassed [him/her], [*name of employer defendant*] is responsible for [*name of plaintiff*]'s harm caused by the harassment. However, [*name of employer defendant*] claims that [*name of plaintiff*] could have avoided some or all of the harm with reasonable effort. To succeed, [*name of employer defendant*] must prove all of the following:

1. **That [*name of employer defendant*] took reasonable steps to prevent and correct workplace sexual harassment;**

2. **That [*name of plaintiff*] unreasonably failed to use the preventive and corrective measures for sexual harassment that [*name of employer defendant*] provided; and**

3. **That the reasonable use of [*name of employer defendant*]'s procedures would have prevented some or all of [*name of plaintiff*]'s harm.**

You should consider the reasonableness of [*name of plaintiff*]'s actions in light of the circumstances facing [him/her] at the time, including [his/her] ability to report the conduct without facing undue risk, expense, or humiliation.

If you decide that [*name of employer defendant*] has proved this claim, you should not include in your award of damages the amount of damages that [*name of plaintiff*] could have reasonably avoided.

New April 2004; Revised December 2011, December 2015

Directions for Use

Give this instruction if the employer asserts the affirmative defense of "avoidable consequences." The essence of the defense is that the employee could have avoided part or most of the harm had he or she taken advantage of procedures that the employer had in place to address sexual harassment in the workplace. The avoidable-consequences doctrine is a defense only to damages, not to liability. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1045 [6 Cal.Rptr.3d 441, 79 P.3d 556].) For ~~an~~ other instructions that may also be given on failure to mitigate damages generally, see CACI No. 2407, *Affirmative Defense—Employee's Duty to Mitigate Damages,* and CACI No. 3930, *Mitigation of Damages (Personal Injury).*

Whether this defense may apply to claims other than for supervisor sexual harassment has not been clearly addressed by the courts. It has been allowed against a claim for age discrimination in a constructive discharge case. (See *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 Cal.App.4th 886, 900−901 [172 Cal.Rptr.3d 465].)

Sources and Authority

- "[W]e conclude that under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. But strict liability is not absolute liability in the sense that it precludes all defenses. Even under a strict liability standard, a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely." (*State Dept. of Health Services, supra, ~~v. Superior Court~~* ~~(2003)~~ 31 Cal.4th at p.~~1026,~~ 1042 ~~[6 Cal.Rptr.3d 441, 79 P.3d 556]~~, internal citations omitted.)

- "We emphasize that the defense affects damages, not liability. An employer that has exercised reasonable care nonetheless remains strictly liable for harm a sexually harassed employee could not have avoided through reasonable care. The avoidable consequences doctrine is part of the law of damages; thus, it affects only the remedy available. If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1045, internal citation omitted.)

- "Under the avoidable consequences doctrine as recognized in California, a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure. The reasonableness of the injured party's efforts must be judged in light of the situation existing at the time and not with the benefit of hindsight. 'The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law.' The defendant bears the burden of pleading and proving a defense based on the avoidable consequences doctrine." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1043, internal citations omitted.)

- "Although courts explaining the avoidable consequences doctrine have sometimes written that a party has a 'duty' to mitigate damages, commentators have criticized the use of the term 'duty' in this context, arguing that it is more accurate to state simply that a plaintiff may not recover damages that the plaintiff could easily have avoided." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1043, internal citations omitted.)

- "We hold ... that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1044.)

- "This defense will allow the employer to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1044, internal citations omitted.)

- "If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1045, internal citations omitted.)

- "We stress also that the holding we adopt does not demand or expect that employees victimized by a supervisor's sexual harassment must always report such conduct immediately to the employer through internal grievance mechanisms. The employer may lack an adequate antiharassment policy or adequate procedures to enforce it, the employer may not have communicated the policy or procedures to the victimized employee, or the employee may reasonably fear reprisal by the harassing supervisor or other employees. Moreover, in some cases an employee's natural feelings of embarrassment, humiliation, and shame may provide a sufficient excuse for delay in reporting acts of sexual harassment by a supervisor." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1045.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2010) Torts, § 1624

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-D, *Employer Liability For Workplace Harassment*, ¶¶ 10:360, 10:361, 10:365–10:367, 10:371, 10:375 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.81[7][c], 41.92A (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.36[2][a], 115.54[3] (Matthew Bender)

2527. Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(k))

[*Name of plaintiff***] claims that [***name of defendant***] failed to take all reasonable steps to prevent [harassment/discrimination/retaliation] [based on [***describe protected status—e.g., race, gender, or age***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of plaintiff***] was subjected to [harassment/discrimination/retaliation] in the course of employment;**

3. **That [***name of defendant***] failed to take all reasonable steps to prevent the [harassment/discrimination/retaliation];**

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

5. **That [***name of defendant***]'s failure to take all reasonable steps to prevent [harassment/discrimination/retaliation] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2006; *Revised April 2007, June 2013, December 2015*

Directions for Use

Give this instruction after the appropriate instructions in this series on the underlying claim for discrimination, retaliation, or harassment if the employee also claims that the employer failed to prevent the conduct. (See Gov. Code, § 12940(k).) Read the bracketed language in the opening paragraph beginning with "based on" if the claim is for failure to prevent harassment or discrimination.

For guidance for a further instruction on what constitutes "reasonable steps," see section 11019(b)(3) of Title 2 of the California Code of Regulations.

Sources and Authority

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

- "The employer's duty to prevent harassment and discrimination is affirmative and mandatory." (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035 [127 Cal. Rptr. 2d 285].)

- "This section creates a tort that is made actionable by statute. ' " '[T]he word "tort" means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an

action for damages.' 'It is well settled the Legislature possesses a broad authority ... to establish ... tort causes of action.' Examples of statutory torts are plentiful in California law." ' Section 12960 et seq. provides procedures for the prevention and elimination of unlawful employment practices. In particular, section 12965, subdivision (a) authorizes the Department of Fair Employment and Housing (DFEH) to bring an accusation of an unlawful employment practice if conciliation efforts are unsuccessful, and section 12965, subdivision (b) creates a private right of action for damages for a complainant whose complaint is not pursued by the DFEH." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286 [73 Cal.Rptr.2d 596], internal citations omitted.)

- "With these rules in mind, we examine the section 12940 claim and finding with regard to whether the usual elements of a tort, enforceable by private plaintiffs, have been established: Defendants' legal duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff." (*Trujillo, supra,* 63 Cal.App.4th at pp. 286–287, internal citation omitted.)

- "[C]ourts have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section 12940, subdivision (k)." (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1314 [184 Cal.Rptr.3d 774].)

- "~~Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented. Plaintiffs have not shown this duty was owed to them, under these circumstances.~~ Also, there is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent actionable harassment or discrimination, which, however, did not occur." (*Trujillo, supra,* 63 Cal.App.4th at p. 289.)

- "[T]he "Directions for Use" to CACI No. 2527 (2015), … states that the failure to prevent instruction should be given 'after the appropriate instructions in this series on the underlying claim for . . . harassment if the employee also claims that the employer failed to prevent the conduct.' An instruction on the elements of an underlying sexual harassment claim would be unnecessary if the failure to take reasonable steps necessary to prevent a claim for harassment could be based on harassing conduct that was not actionable harassment." (*Dickson*, *supra*, 234 Cal.App.4th at p. 1317.)

- "In accordance with … the fundamental public policy of eliminating discrimination in the workplace under the FEHA, we conclude that retaliation is a form of discrimination actionable under [Gov. Code] section 12940, subdivision (k)." (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240 [51 Cal.Rptr.3d 206], disapproved on other grounds in *Jones v. The Lodge at Torrey Pines Partnership* (2008), 42 Cal. 4th 1158 [72 Cal. Rptr. 3d 624, 177 P.3d 232].)

- "[Defendant] suggests that a separate element in CACI No. 2527 requiring [plaintiff] to prove that the failure to prevent discrimination or retaliation was 'a substantial factor in causing her harm' is equivalent to the disputed element in the other CACI instructions requiring [plaintiff] to prove that her pregnancy-related leave was 'a motivating reason' for her discharge. However, the 'substantial factor in causing harm' element in CACI No. 2527 does not concern the causal relationship between the adverse employment action and the plaintiff's protected status or activity. Rather, it concerns the causal relationship between the discriminatory or retaliatory conduct, if proven, and the plaintiff's

injury." (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 480 [161 Cal.Rptr.3d 758].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 921

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, Title VII And The California Fair Employment and Housing Act, ¶¶ 7:670–7:672 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.02[6], 41.80[1], 41.81[7] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g] (Matthew Bender)

VF-2505. Quid pro quo Sexual Harassment

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] an employee of [***name of defendant***]?**
   ____ 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 alleged harasser***] make unwanted sexual advances to [***name of plaintiff***] or engage in other unwanted verbal or physical conduct of a sexual nature?**
   ____ 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. **Were terms of employment, job benefits, or favorable working conditions made contingent ~~conditioned~~ on [***name of plaintiff***]'s acceptance of [***name of alleged harasser***]'s sexual advances or conduct?**
   ____ 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. **At the time of [his/her] conduct, was [***name of alleged harasser***] a supervisor or agent for [***name of defendant***]?**
   ____ 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 alleged harasser***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ 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?**

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

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 September 2003; Revised April 2007, December 2010, December 2015

Directions for Use

This verdict form is based on CACI No. 2520, *Quid pro quo Sexual Harassment—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. 2520, *Quid pro quo Sexual Harassment—Essential Factual Elements.*~~

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in CACI No. 2520.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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-2515. Limitation on Remedies—Same Decision

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**
____ 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. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to 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 defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**
____ 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 plaintiff***]'s [***protected status or activity***] a substantial motivating reason for [***name of defendant***]'s [discharge of/refusal to hire/[***other adverse employment action***]] [***name of plaintiff***]?**
____ 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 [***specify employer's stated legitimate reason, e.g., plaintiff's poor job performance***] also a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**
____ 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. **Would [***name of defendant***] have [discharged/refused to hire/[***other adverse employment*

action]] [*name of plaintiff*] **anyway at that time based on [***e.g., plaintiff's poor job performance***] had [***name of defendant***] not also been substantially motivated by [discrimination/retaliation]?**
____ Yes ____ No

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

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 2013; Revised December 2015

Directions for Use

This verdict form is based on CACI No. 2512, *Limitation of Damages—Same Decision.* It incorporates questions from VF-2500, *Disparate Treatment,* and VF-2504, *Retaliation,* to guide the jury through the evaluation of the employer's purported legitimate reason for the adverse employment action.

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.

Question 5 asks the jury to determine whether the employer's stated legitimate reason actually was a motivating reason for the adverse action. In this way, the jury evaluates the employer's reason once. If it finds that it was an actual motivating reason, it then proceeds to question 6 to consider whether the employer has proved "same decision," that is, that it would have taken the adverse employment action anyway for the legitimate reason, even though it may have also had a discriminatory or retaliatory motivation. If the jury answers "no" to question 5 it then proceeds to consider substantial-factor causation of harm and damages in questions 7 and 8.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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-3023. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities

We answer the questions submitted to us as follows:

1. **While imprisoned, was [***name of plaintiff*] **deprived of [***describe deprivation, e.g., clothing***]?**
   ____ 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. **Was this deprivation sufficiently serious in that it denied [***name of plaintiff***] a minimal necessity of life?**
   ____ 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 defendant***]'s conduct create a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**
   ____ 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 defendant***] know that [his/her] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**
   ____ 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 there a reasonable justification for [***name of defendant***]'s conduct?**
   ____ Yes ____ No

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of defendant***] acting or purporting to act in the performance of [his/her] official duties?**

____ 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. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

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 2015

Directions for Use

This verdict form is based on CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities.*

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.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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.*

3704. Existence of "Employee" Status Disputed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Directions for Use

This instruction is primarily intended for employer-employee relationships. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

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

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.

- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra,* 59 Cal.4th at p. 528.)

- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 350, internal citations omitted.)

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

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

- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G.*

Borello & Sons, Inc., supra, 48 Cal.3d at p. 354.)

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

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

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

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

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

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

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

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

- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394~~When the principal controls only the results~~

~~of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298]~~.)

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

- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra*, 233 Cal.App.4th at p. 1184, original italics, internal citations omitted~~Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. ... One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*City of Los Angeles v. Meyers Brothers Parking System* (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545], internal citations omitted; accord *Mottola v. R. L. Kautz & Co.* (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737~~].)

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

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

- Restatement Second of Agency, section 220, provides:

  (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

  (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

  (b) whether or not the one employed is engaged in a distinct occupation or business;

  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

3706. Special Employment—General Employer and/or Special Employer Denies Responsibility

[*Name of plaintiff***] claims that [***name of worker***] was the employee of [***name of defendant first employer***] when the incident occurred, and that [***name of defendant first employer***] is therefore responsible for [***name of worker***]'s conduct. [***Name of defendant first employer***] claims that [***name of worker***] was the temporary employee of [***name of defendant second employer***] when the incident occurred, and therefore [***name of defendant second employer***] is solely responsible for [***name of worker***]'s conduct.**

In deciding whether [*name of worker***] was [***name of defendant second employer***]'s temporary employee when the incident occurred, the most important factor is whether [***name of defendant second employer***] had the right to fully control the activities of [***name of worker***], rather than just the right to specify the result. It does not matter whether [***name of defendant second employer***] exercised the right to control.**

In addition to the right of control, you must consider all the circumstances in deciding whether [*name of worker***] was [***name of defendant second employer***]'s temporary employee when the incident occurred. The following factors, if true, may tend to show that [***name of worker***] was the temporary employee of [***name of defendant second employer***].~~:~~ No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

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

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

(c) **The work being done by [***name of worker***] was part of the regular business of [***name of defendant second employer***];**

(d) **[***Name of defendant second employer***] had the right to terminate~~an unlimited right to end the relationship with~~ [***name of worker***]'s employment, not just the right to have [him/her] removed from the job site;**

(e) **[***Name of worker***] was not engaged in a distinct occupation or business~~The work being done by~~ [~~*name of worker*~~] ~~was the only occupation or business of [*name of worker*]~~;**

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

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

(h) **The services performed by [***name of worker***] were to be performed over a long period**

of time;

(i) **[***Name of first employer***] and [***name of defendant second employer***] were not jointly engaged in a project of mutual interest~~[*Name of worker*]'s duties to [*name of defendant second employer*] were only for the benefit of [*name of defendant second employer*]~~;**

(j) **[***Name of worker***], expressly or by implication, consented to the temporary employment with [***name of defendant second employer***]; [and]**

(k) **[***Name of worker***] and [***name of defendant second employer***] ~~acted as if~~believed that they had a temporary employment relationship[./; [and]**

(l) **[***Specify any other relevant factors.***]**

New September 2003; Revised June 2013, December 2015

Directions for Use

This instruction is for use if the worker's regular (general) employer claims that at the time of injury, the worker was actually working for a different (special) employer. It may be adapted for use if the plaintiff's claim is against the special employer. The terms "first and second employer" have been substituted for "special and general employer" to make the concept more straightforward. Also, the term "temporary employee" has been substituted for the term "special employee" for the same reason.

In addition to the alleged special employer's control over the employee, there are a number of relevant secondary factors to use in deciding whether a special employment relationship existed. They are similar, but not identical, to the factors from the Restatement Second of Agency, section 220 to be used in an independent contractor analysis. (See *State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1013−1014 [184 Cal.Rptr.3d 354, 343 P.3d 415]; CACI No. 3704, *Existence of "Employee" Status Disputed*~~.);~~ ~~S~~see also *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320, 606 P.2d 355], ~~and~~ *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176−177 [151 Cal.Rptr. 671, 588 P.2d 811].) ~~for additional factors.~~ In the employee-contractor context, it has been held to be error not to give the secondary factors. (See *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303−304 [111 Cal.Rptr.3d 787].)

Sources and Authority

- "[W]here the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other." (*Marsh, supra,* 26 Cal.3d at p. 493.)

- "When an employer -- the 'general' employer -- lends an employee to another employer and relinquishes to a borrowing employer all right of control over the employee's activities, a 'special employment' relationship arises between the borrowing employer and the employee. During this period of transferred control, the special employer becomes solely liable under the doctrine of

respondeat superior for the employee's job-related torts." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- "The law of agency has long recognized that a person generally the servant of one master can become the borrowed servant of another. If the borrowed servant commits a tort while carrying out the bidding of the borrower, vicarious liability attaches to the borrower and not to the general master." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 455-456 [183 Cal.Rptr. 51, 645 P.2d 102], internal citations omitted.)

- "Liability in borrowed servant cases involves the exact public policy considerations found in sole employer cases. Liability should be on the persons or firms which can best insure against the risk, which can best guard against the risk, which can most accurately predict the cost of the risk and allocate the cost directly to the consumers, thus reflecting in its prices the enterprise's true cost of doing business." (*Strait v. Hale Construction Co.* (1972) 26 Cal.App.3d 941, 949 [103 Cal.Rptr. 487].)

- "In determining whether a special employment relationship exists, the primary consideration is whether the special employer has " '[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not. ...' " However, '[whether] the right to control existed or was exercised is generally a question of fact to be resolved from the reasonable inferences to be drawn from the circumstances shown.' " (*Kowalski, supra,* 23 Cal.3d at p. 175, internal citations omitted.)

- "[S]pecial employment is most often resolved on the basis of 'reasonable *inferences* to be drawn from the circumstances shown.' Where the evidence, though not in conflict, permits conflicting inferences, ... ' "the existence or nonexistence of the special employment relationship barring the injured employee's action at law is generally a question reserved for the trier of fact." ' " (*Marsh, supra,* 26 Cal.3d at p. 493.)

- "[I]f neither the evidence nor inferences are in conflict, then the question of whether an employment relationship exists becomes a question of law which may be resolved by summary judgment." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1248-1249 [250 Cal.Rptr. 718], internal citations omitted.)

- "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- "The contract cannot affect the true relationship of the parties to it. Nor can it place an employee in a different position from that which he actually held." (*Kowalski, supra,* 23 Cal.3d at p. 176.)

- "California courts have held that evidence of the following circumstances tends to negate the existence of a special employment: The employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- "The common law also recognizes factors secondary to the right of control. We have looked to other considerations discussed in the Restatement of Agency to assess whether an employer-employee relationship exists. The comments to section 227 of the Restatement Second of Agency, which covers servants lent by one master to another, note that '[m]any of the factors stated in Section 220 which determine that a person is a servant are also useful in determining whether the lent servant has become the servant of the borrowing employer.' The secondary Restatement factors that we have adopted are: ' "(a) [W]hether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." [Citations.]' " (*State ex rel. Dept. of California Highway Patrol*, *supra*, ~~*v. Superior Court* (2015)~~ 60 Cal.4th at pp.~~1002,~~ 1013−1014 ~~[184 Cal.Rptr.3d 354, 343 P.3d 415]~~, internal citations omitted.)

- "Evidence that the alleged special employer has the power to discharge a worker 'is strong evidence of the existence of a special employment relationship. … The payment of wages is not, however, determinative.' Other factors to be taken into consideration are 'the nature of the services, whether skilled or unskilled, whether the work is part of the employer's regular business, the duration of the employment period, . . . and who supplies the work tools.' Evidence that (1) the employee provides unskilled labor, (2) the work he performs is part of the employer's regular business, (3) the employment period is lengthy, and (4) the employer provides the tools and equipment used, tends to indicate the existence of special employment. Conversely, evidence to the contrary negates existence of a special employment relationship. [¶¶] In addition, consideration must be given to whether the worker consented to the employment relationship, either expressly or impliedly, and to whether the parties believed they were creating the employer-employee relationship." (*Kowalski, supra,* 23 Cal.3d at pp. 176-178, footnotes and internal citations omitted.)

- "Moreover, that an alleged special employer can have an employee removed from the job site does not necessarily indicate the existence of a special employment relationship. Anyone who has the employees of an independent contractor working on his premises could, if dissatisfied with an employee, have the employee removed. Yet, the ability to do so would not make the employees of the independent contractor the special employees of the party receiving the services." (*Kowalski*, *supra*, 23 Cal.3d at p. 177 fn. 9.)

- [T]he jury need not find that [the worker] remained exclusively defendant's employee in order to impose liability on defendant. Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer. Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Marsh, supra,* 26 Cal.3d at pp. 494−495.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 169–172

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

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.22 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*, § 239.28 (Matthew Bender)

1 California Civil Practice: Torts §§ 3:26–3:27 (Thomson Reuters)

3903J. Damage to Personal Property (Economic Damage)

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

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

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

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

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

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

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

~~[If you find that [*name of plaintiff*]'s [*item of personal property*] cannot be completely repaired, the damages are the difference between its value before the harm and its value after the repairs have been made, plus the reasonable cost of making the repairs. The total amount awarded must not exceed the [*item of personal property*]'s value before the harm occurred.]~~

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

Directions for Use

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

Give the optional second paragraph if the property ~~was~~can be repaired, but the value after repair ~~was~~may be less than before the harm occurred. (See *Merchant Shippers Association v. Kellogg Express and*

Draying Co. (1946) 28 Cal.2d 594, 600 [170 P.2d 923].)

Sources and Authority

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

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

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

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

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

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

- "[I]t is said ... that 'if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs. The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof

being made up of the cost of repairs and the depreciation notwithstanding such repairs.' The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases in which the injured property 'can be entirely repaired.' This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value." (*Merchant Shippers Association, supra, ~~v. Kellogg Express and Draying Co. (1946)~~* 28 Cal.2d at p.~~594,~~ 600 ~~[170 P.2d 923]~~, internal citations omitted.)

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

Secondary Sources

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

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

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

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

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

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

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

3961. Duty to Mitigate Damages for Past Lost Earnings

[*Name of plaintiff*] is not entitled to recover damages for economic losses that [*name of defendant*] proves [*name of plaintiff*] could have avoided by returning to gainful employment as soon as it was reasonable for [him/her] to do so.

To calculate the amount of damages you must:

1. **Determine the amount [*name of plaintiff*] would have earned from the job [he/she] held at the time [he/she] was injured; and**

2. **Subtract the amount [*name of plaintiff*] earned or could have earned by returning to gainful employment.**

The resulting amount is [*name of plaintiff*]'s damages for past lost earnings.

New September 2003; Revised December 2015

Directions for Use

For an instruction on mitigation of damages involving personal injury, see CACI No. 3930, *Mitigation of Damages (Personal Injury).*

Sources and Authority

- "A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568 [54 Cal.Rptr.2d 468].)

- "The doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.' A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable. 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.' " (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329], internal citations omitted.)

- "Whether a plaintiff acted reasonably to mitigate damages, however, is a factual matter to be determined by the trier of fact, and is reviewed under the substantial evidence test. The burden of proving a plaintiff failed to mitigate damages, however, is on the defendant, not the other way around." (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 884 [164 Cal.Rptr.3d 811].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 915 et seq.

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1624.

4 Levy et al., California Torts, Ch. 53, *Mitigation of Damages (Avoidable Consequences) and the Collateral Source Rule,* § 53.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.48 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.170 et seq. (Matthew Bender)

VF-4400. Misappropriation of Trade Secrets

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [the owner/a licensee] of** [*insert general description of alleged trade secret[s] subject to the misappropriation claim***]?**
____ 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. **[Was this/Were these] [***select short term to describe, e.g., information***] secret at the time of the alleged misappropriation?**
____ 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 [this/these] [***e.g., information***] have actual or potential independent economic value because [it was/they were] secret?**
____ 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***] make reasonable efforts under the circumstances to keep the [***e.g., information***] secret?**
____ 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***] [acquire/use [or] disclose] the trade secret[s] by improper means?**
____ 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 defendant***]'s improper [acquisition/use/ [or] disclosure] of the [***e.g., information***] a substantial factor in causing [[***name of plaintiff***] harm/ [or] [***name of***

defendant] to be unjustly enriched]?
____ 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?

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[other future economic loss $ _____]
Total Future Economic 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 2015

Directions for Use

This verdict form is based on CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements,* CACI No. 4402, *"Trade Secret" Defined,* CACI No. 4403, *Secrecy Requirement,* CACI No. 4404, *Reasonable Efforts to Protect Secrecy,* and CACI No. 4412, *"Independent Economic Value" Explained*.

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.

In question 1, briefly describe the material alleged to be a trade secret that is set forth in detail in element1 of CACI No. 4401. Then in question 2, select a short term to describe the material.

Additional questions may be added depending on whether misappropriation is claimed in question 5 by acquisition, disclosure, or use. See CACI No. 4405, *Misappropriation by Acquisition,* CACI No. 4406, *Misappropriation by Disclosure,* and CACI No. 4407, *Misappropriation by Use,* for additional elements that the jury should find in each kind of case.

Modify the claimed damages in question 7 as appropriate depending on the circumstances. (See CACI No. 4409, *Remedies for Misappropriation of Trade Secret*.) If unjust enrichment is alleged, additional questions on the value of the benefit to the defendant and the defendant's reasonable expenses should be included. (See CACI No. 4410, *Unjust Enrichment*.)

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*.

VF-4500. Owner's Failure to Disclose Important Information Regarding Construction Project

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] submit [his/her/its] bid or agree to perform without information regardin7g [***e.g., tidal conditions***] that materially affected performance costs?**
   ____ 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 defendant***] have this information?**
   ____ 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. **Was [***name of defendant***] aware that [***name of plaintiff***] did not know this information and had no reason to obtain it?**
   ____ 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 defendant***] fail to provide this information to [***name of plaintiff***]?**
   ____ 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 the contract plans and specifications or other information furnished by [***name of defendant***] to [***name of plaintiff***] either mislead [him/her/it] or fail to put [him/her/it] on notice to investigate further?**
   ____ 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 plaintiff***] harmed because of [***name of defendant***]'s failure to disclose the information?**

____ 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? $ _____

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 2015

Directions for Use

This verdict form is based on CACI No. 4501, *Owner's Liability for Failing to Disclose Important Information Regarding a Construction Project—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.

If different categories or items of damages are claimed, expand question 7 so that the jury can state a separate amount for each category. (See CACI Nos. 4540−4544, Contractor's Damages.) In this way, should a reviewing court determine that a particular item of damages is not recoverable, it can reduce the judgment by the amount awarded for that item rather than have to send the case back for a retrial of damages.

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*.

VF-4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Affirmative Defense—Contractor Followed Plans and Specifications

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to [***specify alleged defect in the work and/or deficiency in performance***]?**
____ 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. **Was [***name of plaintiff***] harmed by [***name of defendant***]'s failure?**
____ 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 plaintiff***] provide [***name of defendant***] with the plans and specifications for the project?**
____ Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4, 5, and 6 and answer question 7.

4. **Did [***name of plaintiff***] require [***name of defendant***] to follow the plans and specifications in constructing the project?**
____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, skip questions 5 and 6 and answer question 7.

5. **Did [***name of defendant***] substantially comply with the plans and specifications?**
____ 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. **Was [***specify alleged defect in the work and/or deficiency in performance***] because of [***name of defendant***]'s use of the plans and specifications?**
____ 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, answer question 7.

7. What are [*name of plaintiff*]'s damages? $ _____

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 2015

Directions for Use

This verdict form is based on CACI No. 4510, *Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements,* and CACI No. 4511, *Affirmative Defense—Contractor Followed Plans and Specifications*. Questions 3−6 address the affirmative defense.

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.

If different categories or items of damages are claimed, expand question 7 so that the jury can state a separate amount for each category. (See CACI Nos. 4530−4532, Owner's Damages.) In this way, should a reviewing court determine that a particular item of damages is not recoverable, it can reduce the judgment by the amount awarded for that item rather than have to send the case back for a retrial of damages.

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*.

VF-4520. Contractor's Claim for Changed or Extra Work─ Owner's Response That Contract Procedures Not Followed─Contractor's Claim of Waiver

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] perform [changed/ [or] extra] work that was [not included in/ [or] in addition to that required under] the original contract?**
____ 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 defendant***] direct [***name of plaintiff***] to perform this [changed/ [or] extra] work?**
____ 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. Was [*name of plaintiff***] harmed because [***name of defendant***] required this [changed/ [or] extra] work?**
____ 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***] follow the change-order requirements included in the parties' contract?**
____ Yes ____ No

If your answer to question 4 is yes, skip question 5 and answer question 6. If you answered no, then answer question 5.

5. Did [*name of defendant***] freely and knowingly give up [his/her/its] right to require [***name of plaintiff***] to follow the contract's change-order requirements?**
____ 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? $ _____**

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 2015

Directions for Use

This verdict form is based on CACI No. 4520, *Contractor's Claim for Changed or Extra Work,* CACI No. 4521, *Owner's Claim That Contract Procedures Regarding Change Orders Were Not Followed,* and CACI No. 4522, *Waiver of Written Approval or Notice Requirements for Changed or Additional Work*. Question 4 addresses the owner's claim that contract requirements were not followed; question 5 addresses the contractor's response that the owner waived compliance. Waiver may only be asserted in a private contract case. (See *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1344 [119 Cal.Rptr.3d 253] [public contract change-order requirements not subject to oral modification or modification by conduct].)

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.

If different categories or items of damages are claimed, expand question 6 so that the jury can state a separate amount for each category. (See CACI Nos. 4540−4544, Contractor's Damages.) In this way, should a reviewing court determine that a particular item of damages is not recoverable, it can reduce the judgment by the amount awarded for that item rather than have to send the case back for a retrial of damages.

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*.

4605. Whistleblower Protection—Health or Safety Complaint−Essential Factual Elements (Lab. Code, § 6310)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her] in retaliation for [his/her] [***specify, e.g., complaint to the Division of Occupational Safety and Health regarding unsafe working conditions***]. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**

2. **[That [***name of plaintiff***] [***select one or both of the following options:***]**

   [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;]**

   [*or***]**

   [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].]**

   [*or***]**

   [[testified/was about to testify] in a proceeding related to [his/her [or] another person's]rights to workplace health or safety;]

   [*or***]**

   [exercised [his/her [or] another person's] rights to workplace health or safety;]

   [*or***]**

   [participated in a workplace health and safety committee;]

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

4. **That [***name of plaintiff***]'s [***specify***] was a substantial motivating reason for [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***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 December 2015

Directions for Use

Use this instruction for a whistleblower claim under Labor Code section 6310 for employer retaliation for an employee's complaint or other protected activity about health or safety conditions. Select the appropriate statutorily protected activity in element 2 and summarize it in the introductory paragraph. (See Lab. Code, § 6310(a).)

With regard to the first option in element 2, the complaint must have been made to (1) the Division of Occupational Safety and Health, (2) to another governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, (3) to the employer, or (4) to the employee's representative. (Lab. Code, § 6310(a)(1).

The statute requires that the employee's complaint be "bona fide." (See Lab. Code, 6310(b).) There appears to be a split of authority as to whether "bona fide" means that there must be an actual health or safety violation or only that the employee have a good-faith belief that there are violations. (See *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682, fn. 5 [145 Cal.Rptr.3d 766].) The instruction should be modified if the court decides to instruct one way or the other on the meaning of "bona fide."

Note that element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's protected conduct and the defendant's adverse action. "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 Labor Code section 6310 has not been addressed by the courts. There is authority for a "but for" causation standard instead of "substantial motivating reason." (See *Touchstone Television Productions, supra,* 208 Cal.App.4th at pp. 681−682.)

Sources and Authority

- Whistleblower Protection for Report of Health or Safety Violation. Labor Code section 6310.
- "Division" Defined. Labor Code section 6302(d).
- "[T]he plaintiff did not lack a remedy: she could sue under section 6310, subdivision (b) which permits 'an action for damages if the employee is discharged, threatened with discharge, or discriminated against by his or her employer because of the employee's complaints about unsafe work conditions. Here, it is alleged that [the defendant] discriminated against [the plaintiff] by not renewing her employment contract. *To prevail on the claim, she must prove that, but for her complaints about unsafe work conditions, [the defendant] would have renewed the employment contract. Damages, however, are limited to "lost wages and work benefits caused by the acts of*

the employer." ' " (*Touchstone Television Productions, supra,* 208 Cal.App.4th at pp. 681−682, original italics.)

- "The voicing of a fear about one's safety in the workplace does not necessarily constitute a complaint about unsafe working conditions under Labor Code section 6310. [Plaintiff]'s declaration shows only that she became frightened for her safety as a result of her unfortunate experience … and expressed her fear to [defendant]; it is not evidence that the … office where she worked was actually unsafe within the meaning of Labor Code sections 6310 and 6402. Hence, [plaintiff]'s declaration fails to raise a triable issue of fact as to whether she was terminated for complaining to [defendant] about unsafe working conditions in violation of Labor Code section 6310." (*Muller v. Auto. Club of So. Cal.* (1998) 61 Cal.App.4th 431, 452 [71 Cal.Rptr.2d 573], disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6 [130 Cal.Rptr.2d 662, 63 P.3d 220].)

- "Citing *Muller v. Automobile Club of So. California* (1998) 61 Cal. App. 4th 431, 452 [71 Cal. Rptr. 2d 573], defendants assert plaintiff's causes of action based on section 6310 must fail because an essential element of a section 6310 violation is that the workplace must actually be unsafe. We first note that the *Muller* court cites no authority for this assertion. It appears to contradict Justice Grodin's pronouncement that '. . . an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices which he reasonably believes to be unsafe, whether or not there exists at the time of the complaint an OSHA standard or order which is being violated.' We agree that an employee must be protected against discharge for a good faith complaint about working conditions which he believes to be unsafe." (*Cabesuela v. Browning-Ferris Indus.* (1998) 68 Cal.App.4th 101, 109 [80 Cal.Rptr.2d 60], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2010) Agency, § 370

2 Wilcox, California Employment Law, Ch. 21, *Occupational Health and Safety Regulation*, § 21.20 (Matthew Bender)

3 California Torts, Ch. 40A, *Wrongful Termination*, § 40A.30 (Matthew Bender)

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 et seq. (Matthew Bender)

VF-4600. False Claims Act: Whistleblower Protection (Gov. Code, § 12653)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] an employee of [***name of defendant***]?**
____ 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 plaintiff***] [***specify acts done in furthering the false claims action or to stop a false claim***]?**
____ 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 plaintiff***] act [in furtherance of a false claims action/to stop a false claim]?**
____ 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 defendant***] [discharge/***specify other adverse action***] [***name of plaintiff***]?**
____ 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. **Were [***name of plaintiff***]'s acts [in furtherance of a false claims action/to stop a false claim] a substantial motivating reason for [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her]?**
____ 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 defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
____ 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?

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

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 2015

Directions for Use

This verdict form is based on CACI No. 4600, *False Claims Act: Whistleblower Protection—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.

Questions 4 and 5 may be modified to allege constructive discharge. Questions 2 through 5 of CACI No. VF-2408, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy,* should be adapted and included in such a case.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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.

VF-4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Affirmative Defense—Same Decision (Gov. Code, § 8547.8(c))

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [***specify protected disclosure, e.g., report waste, fraud, abuse of authority, violation of law, threats to public health, bribery, misuse of government property***]?**
   ____ 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 plaintiff***]'s communication [disclose/ [or] demonstrate an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public]?**
   ____ 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 plaintiff***] make this communication in good faith [for the purpose of remediating the health or safety condition]?**
   ____ 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 defendant***] [discharge/***specify other adverse action***] [***name of plaintiff***]?**
   ____ 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 plaintiff***]'s communication a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her]?**
   ____ 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 defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
____ 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. Would [*name of defendant***] have [discharged/***specify other adverse action***] [***name of plaintiff***] anyway at that time, for legitimate, independent reasons?**
____ Yes ____ No

If your answer to question 7 is no, then answer question 8. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

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 2015

Directions for Use

This verdict form is based on CACI No. 4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements,* and CACI No. 4602, *Affirmative Defense—Same Decision*.

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.

If a health or safety violation is presented in element 2, include the bracketed language at the end of question 3.

Questions 4 and 5 may be modified to allege constructive discharge. Questions 2 through 5 of CACI No. VF-2408, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy,* should be adapted and included in such a case.

Question 7 presents the employer's affirmative defense that it would have made the same decision anyway for legitimate reasons even though the jury finds that retaliation for whistleblowing was also a contributing factor for the adverse action. Question 7 must be proved by clear and convincing evidence. (See Gov. Code, § 8547.8(e).)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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.

VF-4602. Whistleblower Protection—Affirmative Defense of Same Decision (Lab. Code, §§ 1102.5, 1102.6)

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [***name of plaintiff***]'s employer?**
____ 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 defendant***] believe 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***]?**
____ 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 plaintiff***] have 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]?**
____ 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 defendant***] [discharge/***specify other adverse action***] [***name of plaintiff***]?**
____ 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 plaintiff***]'s disclosure of information a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her]?**
____ 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 defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
____ 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. Would [*name of defendant***] have [discharged/***specify other adverse action***] [***name of plaintiff***] anyway at that time, for legitimate, independent reasons?**
____ Yes ____ No

If your answer to question 7 is no, then answer question 8. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

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 2015

Directions for Use

This verdict form is based on CACI No. 4603, *Whistleblower Protection—Essential Factual Elements,* and CACI No. 4604, *Affirmative Defense—Same Decision*.

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.

Elements 2 and 3 may be replaced with one of the other options for elements 2 and 3 in CACI No. 4603. If the third options are used, replace "disclosure of information" in question 5 with "refusal to (*specify*)."

Questions 4 and 5 may be modified to allege constructive discharge. Questions 2 through 5 of CACI No. VF-2408, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy,* should be adapted and included in such a case.

Question 7 presents the employer's affirmative defense that it would have made the same decision anyway for legitimate reasons even though the jury finds that retaliation for whistleblowing was also a contributing factor for the adverse action. Question 7 must be proved by clear and convincing evidence. (See Lab. Code, § 1102.6.)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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.