

CONTRACTS

- 300. Breach of Contract—Introduction
- 301. Third-Party Beneficiary
- 302. Contract Formation—Essential Factual Elements
- 303. Breach of Contract—Essential Factual Elements
- 304. Oral or Written Contract Terms
- 305. Implied-in-Fact Contract
- 306. Unformalized Agreement
- 307. Contract Formation—Offer
- 308. Contract Formation—Revocation of Offer
- 309. Contract Formation—Acceptance
- 310. Contract Formation—Acceptance by Silence
- 311. Contract Formation—Rejection of Offer
- 312. Substantial Performance
- 313. Modification
- 314. Interpretation—Disputed Words
- 315. Interpretation—Meaning of Ordinary Words
- 316. Interpretation—Meaning of Technical Words
- 317. Interpretation—Construction of Contract as a Whole
- 318. Interpretation—Construction by Conduct
- 319. Interpretation—Reasonable Time
- 320. Interpretation—Construction Against Drafter
- 321. Existence of Condition Precedent Disputed
- 322. Occurrence of Agreed Condition Precedent
- 323. Waiver of Condition Precedent
- 324. Anticipatory Breach
- 325. Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements
- 326. Assignment Contested
- 327. Assignment Not Contested
- 328. Breach of Implied Duty to Perform With Reasonable Care—Essential Factual Elements
- 329. Reserved for Future Use
- 330. Affirmative Defense—Unilateral Mistake of Fact
- 331. Affirmative Defense—Bilateral Mistake
- 332. Affirmative Defense—Duress
- 333. Affirmative Defense—Economic Duress

CONTRACTS

- 334. Affirmative Defense—Undue Influence
- 335. Affirmative Defense—Fraud
- 336. Affirmative Defense—Waiver
- 337. Affirmative Defense—Novation
- 338. Affirmative Defense—Statute of Limitations
- 339–349. Reserved for Future Use
- 350. Introduction to Contract Damages
- 351. Special Damages
- 352. Loss of Profits—No Profits Earned
- 353. Loss of Profits—Some Profits Earned
- 354. Owner’s/Lessee’s Damages for Breach of Contract to Construct Improvements on Real Property
- 355. Obligation to Pay Money Only
- 356. Buyer’s Damages for Breach of Contract for Sale of Real Property (Civ. Code, § 3306)
- 357. Seller’s Damages for Breach of Contract to Purchase Real Property
- 358. Mitigation of Damages
- 359. Present Cash Value of Future Damages
- 360. Nominal Damages
- 361. Reliance Damages
- 362–369. Reserved for Future Use
- 370. Common Count: Money Had and Received
- 371. Common Count: Goods and Services Rendered
- 372. Common Count: Open Book Account
- 373. Common Count: Account Stated
- 374. Common Count: Mistaken Receipt
- 375. Restitution From Transferee Based on Quasi-Contract or Unjust Enrichment
- 376–379. Reserved for Future Use
- 380. Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.)
- 381–399. Reserved for Future Use
- VF-300. Breach of Contract
- VF-301. Breach of Contract—Affirmative Defense—Unilateral Mistake of Fact
- VF-302. Breach of Contract—Affirmative Defense—Duress
- VF-303. Breach of Contract—Contract Formation at Issue
- VF-304. Breach of Implied Covenant of Good Faith and Fair Dealing
- VF-305–VF-399. Reserved for Future Use

300. Breach of Contract—Introduction

[Name of plaintiff] **claims that [he/she/nonbinary pronoun/it] and [name of defendant] entered into a contract for [insert brief summary of alleged contract].**

[Name of plaintiff] **claims that [name of defendant] breached this contract by [briefly state the alleged breach].**

[Name of plaintiff] **also claims that [name of defendant]’s breach of this contract caused harm to [name of plaintiff] for which [name of defendant] should pay.**

[Name of defendant] **denies [insert denial of any of the above claims]. [Name of defendant] also claims [insert affirmative defense].**

New September 2003; Revised December 2007

Directions for Use

This instruction is designed to introduce the jury to the issues involved in the case. It should be read before the instructions on the substantive law.

Sources and Authority

- The Supreme Court has observed that “[c]ontract and tort are different branches of law. Contract law exists to enforce legally binding agreements between parties; tort law is designed to vindicate social policy.” (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 514 [28 Cal.Rptr.2d 475, 869 P.2d 454].)
- “The differences between contract and tort give rise to distinctions in assessing damages and in evaluating underlying motives for particular courses of conduct. Contract damages seek to approximate the agreed-upon performance . . . and are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable.” (*Applied Equipment Corp.*, *supra*, 7 Cal.4th at p. 515, internal citations omitted.)
- Certain defenses are decided as questions of law, not as questions of fact. These defenses include frustration of purpose, impossibility, and impracticability. (*Oosten v. Hay Haulers Dairy Employees and Helpers Union* (1955) 45 Cal.2d 784, 788 [291 P.2d 17]; *Mitchell v. Ceazan Tires, Ltd.* (1944) 25 Cal.2d 45, 48 [153 P.2d 53]; *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 157 [180 P.2d 888]; *Glen Falls Indemnity Co. v. Perscallo* (1950) 96 Cal.App.2d 799, 802 [216 P.2d 567].)
- “Defendant contends that frustration is a question of fact resolved in its favor by

the trial court. The excuse of frustration, however, *like that of impossibility*, is a conclusion of law drawn by the court from the facts of a given case” (*Mitchell, supra*, 25 Cal.2d at p. 48, italics added.)

- Estoppel is a “nonjury fact question to be determined by the trial court in accordance with applicable law.” (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61 [35 Cal.Rptr.2d 515].)
- “A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts.” (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 789 [249 Cal.Rptr.3d 295, 444 P.3d 97].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 872–892

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.50 (Matthew Bender)

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

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.03–13.17

301. Third-Party Beneficiary

[Name of plaintiff] is not a party to the contract. However, *[name of plaintiff]* may be entitled to damages for breach of contract if *[he/she/nonbinary pronoun/it]* proves that a motivating purpose of *[names of the contracting parties]* was for *[name of plaintiff]* to benefit from their contract.

You should consider all of the circumstances under which the contract was made. It is not necessary for *[name of plaintiff]* to have been named in the contract.

New September 2003; Revised November 2019

Directions for Use

The right of a third-party beneficiary to enforce a contract might not be a question for the jury to decide. Third-party beneficiary status may be determined as a question of law if there is no conflicting extrinsic evidence. (See, e.g., *Kalmanovitz v. Bitting* (1996) 43 Cal.App.4th 311, 315 [50 Cal.Rptr.2d 332].)

Among the elements that the court must consider in deciding whether to allow a case to go forward is whether the third party would in fact benefit from the contract. (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 829–830 [243 Cal.Rptr.3d 299, 434 P.3d 124].) If the court decides that this determination depends on resolution of a question of fact, add this element as a second element that the plaintiff must prove in addition to motivating purpose.

Sources and Authority

- Contract for Benefit of Third Person. Civil Code section 1559.
- “While it is not necessary that a third party be specifically named, the contracting parties must clearly manifest their intent to benefit the third party. ‘The fact that [a third party] is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of *the parties* to secure to him personally the benefit of its provisions.’ ” (*Kalmanovitz, supra*, 43 Cal.App.4th at p. 314, original italics, internal citation omitted.)
- “ ‘It is sufficient if the claimant belongs to a class of persons for whose benefit it was made. [Citation.] A third party may qualify as a contract beneficiary where the contracting parties must have intended to benefit that individual, an intent which must appear in the terms of the agreement. [Citation.]’ ” (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558 [90 Cal.Rptr.2d 469].)
- “Insofar as intent to benefit a third person is important in determining his right

to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent. No specific manifestation by the promisor of an intent to benefit the third person is required.” (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [15 Cal.Rptr. 821, 364 P.2d 685].)

- “[A] review of this court’s third party beneficiary decisions reveals that our court has carefully examined the express provisions of the contract at issue, as well as all of the relevant circumstances under which the contract was agreed to, in order to determine not only (1) whether the third party would in fact benefit from the contract, but also (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party, and (3) whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. All three elements must be satisfied to permit the third party action to go forward.” (*Goonewardene, supra*, 6 Cal.5th at pp. 829–830.)
- “Because of the ambiguous and potentially confusing nature of the term ‘intent’, this opinion uses the term ‘motivating purpose’ in its iteration of this element to clarify that the contracting parties must have a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract.” (*Goonewardene, supra*, 6 Cal.5th at p. 830, internal citation omitted.)
- “[The third] element calls for a judgment regarding the potential effect that permitting third party enforcement would have on the parties’ contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time the contract was entered into.” (*Goonewardene, supra*, 6 Cal.5th at p. 831.)
- “Section 1559 of the Civil Code, which provides for enforcement by a third person of a contract made ‘expressly’ for his benefit, does not preclude this result. The effect of the section is to exclude enforcement by persons who are only incidentally or remotely benefited.” (*Lucas, supra*, 56 Cal.2d at p. 590.)
- “Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties’ intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. [Citation.]” (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1725 [33 Cal.Rptr.2d 291].)
- “[A] third party’s rights under the third party beneficiary doctrine may arise under an oral as well as a written contract” (*Goonewardene, supra*, 6 Cal.5th at p. 833.)
- “In place of former section 133, the Second Restatement inserted section 302: ‘(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either [para.] (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or [para.] (b) the circumstances

indicate that the promisee intends to give the beneficiary the benefit of the promised performance. [para.] (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.’ ” (*Outdoor Servs. v. Pabagold* (1986) 185 Cal.App.3d 676, 684 [230 Cal.Rptr. 73].)

- “[T]he burden is upon [plaintiff] to prove that the performance he seeks was actually promised. This is largely a question of interpretation of the written contract.” (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436 [204 Cal.Rptr. 435, 682 P.2d 1100].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 705–726

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.83, 140.103, 140.131 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.132 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.11 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 19, *Seeking or Opposing Recovery As Third Party Beneficiary of Contract*, 19.03–19.06

302. Contract Formation—Essential Factual Elements

[*Name of plaintiff*] claims that the parties entered into a contract. To prove that a contract was created, [*name of plaintiff*] must prove all of the following:

1. That the contract terms were clear enough that the parties could understand what each was required to do;
2. That the parties agreed to give each other something of value [a promise to do something or not to do something may have value]; and
3. That the parties agreed to the terms of the contract.

[When you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. You may not consider the parties' hidden intentions.]

If [*name of plaintiff*] did not prove all of the above, then a contract was not created.

New September 2003; Revised October 2004, June 2011, June 2014

Directions for Use

This instruction should only be given if the existence of a contract is contested. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. Read the bracketed paragraph only if element 3 is read.

The elements regarding legal capacity and legal purpose are omitted from this instruction because these issues are not likely to be before the jury. If legal capacity or legal purpose is factually disputed then this instruction should be amended to add that issue as an element. Regarding legal capacity, the element could be stated as follows: "That the parties were legally capable of entering into a contract." Regarding legal purpose, the element could be stated as follows: "That the contract had a legal purpose."

The final element of this instruction would be given before instructions on offer and acceptance. If neither offer nor acceptance is contested, then this element of the instruction will not need to be given to the jury.

Sources and Authority

- Essential Elements of Contract. Civil Code section 1550.
- Who May Contract. Civil Code section 1556.
- Consent. Civil Code section 1565.

- Mutual Consent. Civil Code section 1580.
- Good Consideration. Civil Code section 1605.
- Writing Is Presumption of Consideration. Civil Code section 1614.
- Burden of Proof on Consideration. Civil Code section 1615.
- “Whether parties have reached a contractual agreement and on what terms are questions for the fact finder when conflicting versions of the parties’ negotiations require a determination of credibility.” (*Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283 [159 Cal.Rptr.3d 869].)
- “Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case.” (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 349–350 [258 Cal.Rptr. 454].)
- “In order for acceptance of a proposal to result in the formation of a contract, the proposal ‘must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.’ [Citation.]” (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 [71 Cal.Rptr.2d 265].)
- “Whether a contract is sufficiently definite to be enforceable is a question of law for the court.” (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770, fn. 2 [23 Cal.Rptr.2d 810].)
- “Consideration is present when the promisee confers a benefit or suffers a prejudice. Although ‘either alone is sufficient to constitute consideration,’ the benefit or prejudice ‘must actually be bargained for as the exchange for the promise.’ ” ‘Put another way, the benefit or prejudice must have induced the promisor’s promise.’ It is established that ‘the compromise of disputes or claims asserted in good faith constitutes consideration for a new promise.’ ” (*Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th 1155, 1165 [236 Cal.Rptr.3d 500], internal citations omitted.)
- “[T]he presumption of consideration under [Civil Code] section 1614 affects the burden of producing evidence and not the burden of proof.” (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884 [268 Cal.Rptr. 505].)
- “Being an affirmative defense, lack of consideration must be alleged in answer to the complaint.” (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808 [194 Cal.Rptr. 617].)
- “ ‘It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.’ ” (*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719 [6 Cal.Rptr.2d 99], internal citation omitted.)
- “The failure to specify the amount or a formula for determining the amount of the bonus does not render the agreement too indefinite for enforcement. It is not essential that the contract specify the amount of the consideration or the means of ascertaining it.” (*Moncada v. West Coast Quartz Corp.* (2013) 221

Cal.App.4th 768, 778 [164 Cal.Rptr.3d 601].)

- “‘An essential element of any contract is “consent.” [Citations.] The “consent” must be “mutual.” [Citations.] “Consent is not mutual, unless the parties all agree upon the same thing in the same sense.” ’ ‘ “The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. [Citation.] Accordingly, the primary focus in determining the existence of mutual consent is upon the acts of the parties involved.” ’ ’ ” (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 789 [249 Cal.Rptr.3d 295, 444 P.3d 97], internal citations omitted.)
- “The manifestation of assent to a contractual provision may be ‘wholly or partly by written or spoken words or by other acts or by failure to act.’ ” (*Merced County Sheriff’s Employees’ Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 [233 Cal.Rptr. 519] (quoting Rest. 2d Contracts, § 19).)
- “A letter of intent can constitute a binding contract, depending on the expectations of the parties. These expectations may be inferred from the conduct of the parties and surrounding circumstances.” (*California Food Service Corp., Inc. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897 [182 Cal.Rptr. 67], internal citations omitted.)
- “If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract.” (*Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47 [303 P.2d 565].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 116 et seq.

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.10, 140.20–140.25 (Matthew Bender)

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

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, §§ 75.10, 75.11 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.03–13.17

303. Breach of Contract—Essential Factual Elements

To recover damages from [name of defendant] for breach of contract, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] and [name of defendant] entered into a contract;
2. That [name of plaintiff] did all, or substantially all, of the significant things that the contract required [him/her/nonbinary pronoun/it] to do;]
[or]
2. That [name of plaintiff] was excused from having to [specify things that plaintiff did not do, e.g., obtain a guarantor on the contract];]
3. That [specify occurrence of all conditions required by the contract for [name of defendant]’s performance, e.g., the property was rezoned for residential use];]
[or]
3. That [specify condition(s) that did not occur] [was/were] [waived/ excused];]
4. That [name of defendant] failed to do something that the contract required [him/her/nonbinary pronoun/it] to do;]
[or]
4. That [name of defendant] did something that the contract prohibited [him/her/nonbinary pronoun/it] from doing;]
5. That [name of plaintiff] was harmed; and
6. That [name of defendant]’s breach of contract was a substantial factor in causing [name of plaintiff]’s harm.

New September 2003; Revised April 2004, June 2006, December 2010, June 2011, June 2013, June 2015, December 2016, May 2020

Directions for Use

Read this instruction in conjunction with CACI No. 300, *Breach of Contract—Introduction*.

Optional elements 2 and 3 both involve conditions precedent. A “condition precedent” is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises. (*Stephens & Stephens XII, LLC v. Fireman’s Fund Ins. Co.* (2014) 231 Cal.App.4th

1131, 1147 [180 Cal.Rptr.3d 683].) Element 2 involves the first kind of condition precedent; an act that must be performed by one party before the other is required to perform. Include the second option if the plaintiff alleges that the plaintiff was excused from having to perform some or all of the contractual conditions.

Not every breach of contract by the plaintiff will relieve the defendant of the obligation to perform. The breach must be *material*; element 2 captures materiality by requiring that the plaintiff have done the significant things that the contract required. Also, the two obligations must be *dependent*, meaning that the parties specifically bargained that the failure to perform the one relieves the obligation to perform the other. While materiality is generally a question of fact, whether covenants are dependent or independent is a matter of construing the agreement. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) If there is no extrinsic evidence in aid of construction, the question is one of law for the court. (*Verdier v. Verdier* (1955) 133 Cal.App.2d 325, 333 [284 P.2d 94].) Therefore, element 2 should not be given unless the court has determined that dependent obligations are involved. If parol evidence is required and a dispute of facts is presented, additional instructions on the disputed facts will be necessary. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Element 3 involves the second kind of condition precedent; an uncertain event that must happen before contractual duties are triggered. Include the second option if the plaintiff alleges that the defendant agreed to perform even though a condition did not occur. For reasons that the occurrence of a condition may have been excused, see the Restatement Second of Contracts, section 225, Comment b. See also CACI No. 321, *Existence of Condition Precedent Disputed*, CACI No. 322, *Occurrence of Agreed Condition Precedent*, and CACI No. 323, *Waiver of Condition Precedent*.

Element 6 states the test for causation in a breach of contract action: whether the breach was a substantial factor in causing the damages. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 909 [28 Cal.Rptr.3d 894].) In the context of breach of contract, it has been said that the term “substantial factor” has no precise definition, but is something that is more than a slight, trivial, negligible, or theoretical factor in producing a particular result. (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 871–872 [63 Cal.Rptr.3d 514]; see CACI No. 430, *Causation—Substantial Factor*, applicable to negligence actions.)

Equitable remedies are also available for breach. “As a general proposition, ‘[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]’” (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8 [151 Cal.Rptr. 323, 587 P.2d 1136]; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 524 [154 Cal.Rptr. 164].) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671 [111 Cal.Rptr. 693, 517 P.2d 1157].)

Sources and Authority

- Contract Defined. Civil Code section 1549.

- “A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing.” (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)
- “To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff’s performance of the contract or excuse for nonperformance, (3) the defendant’s breach, and (4) the resulting damage to the plaintiff.” (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186 [169 Cal.Rptr.3d 475].)
- “Implicit in the element of damage is that the defendant’s breach *caused* the plaintiff’s damage.” (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352 [90 Cal.Rptr.3d 589], original italics.)
- “It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant’s duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired.” (*Consolidated World Investments, Inc., v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524], internal citation omitted.)
- “When a party’s failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract. Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. Whether a partial breach of a contract is material depends on ‘the importance or seriousness thereof and the probability of the injured party getting substantial performance.’ ‘A material breach of one aspect of a contract generally constitutes a material breach of the whole contract.’ ” (*Brown, supra*, 192 Cal.App.4th at pp. 277–278, internal citations omitted.)
- “The obligations of the parties to a contract are either dependent or independent. The parties’ obligations are dependent when the performance by one party is a condition precedent to the other party’s performance. In that event, one party is excused from its obligation to perform if the other party fails to perform. If the parties’ obligations are independent, the breach by one party does not excuse the other party’s performance. Instead, the nonbreaching party still must perform and its remedy is to seek damages from the other party based on its breach of the contract.” (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1182–1183 [236 Cal.Rptr.3d 542], internal citations omitted.)
- “Whether specific contractual obligations are independent or dependent is a matter of contract interpretation based on the contract’s plain language and the parties’ intent. Dependent covenants or ‘[c]onditions precedent are not favored in the law [citations], and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect.’ ” (*Colaco, supra*, 25 Cal.App.5th at p. 1183, internal citations omitted.)
- “The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is

a *breach*. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach.” (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847, original italics, internal citations omitted.) “Ordinarily, a breach is the result of an intentional act, but *negligent performance* may also constitute a breach, giving rise to alternative contract and tort actions.” (*Ibid.*, original italics.)

- “ ‘ “Where a party’s breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.” [Citation.]’ ” (*Stephens & Stephens XII, LLC, supra*, 231 Cal. App. 4th at p. 1144.)
- “ ‘Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant’s breach, and that their causal occurrence be at least reasonably certain.’ A proximate cause of loss or damage is something that is a substantial factor in bringing about that loss or damage.” (*U.S. Ecology, Inc., supra*, 129 Cal.App.4th at p. 909, internal citations omitted.)
- “An essential element of [breach of contract] claims is that a defendant’s alleged misconduct was the cause in fact of the plaintiff’s damage. [¶] The causation analysis involves two elements. ‘ “One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event.” [Citation.]’ The second element is proximate cause. ‘ “[P]roximate cause ‘is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor’s responsibility for the consequences of his conduct.’ ” ’ ” (*Tibeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102–1103 [192 Cal.Rptr.3d 354], footnote and internal citation omitted.)
- “Determining whether a defendant’s misconduct was the cause in fact of a plaintiff’s injury involves essentially the same inquiry in both contract and tort cases.” (*Tibeca Companies, LLC, supra*, 239 Cal.App.4th at p. 1103.)
- “b. *Excuse*. The non-occurrence of a condition of a duty is said to be ‘excused’ when the condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds. It may be excused by a subsequent promise, even without consideration, to perform the duty in spite of the non-occurrence of the condition. See the treatment of ‘waiver’ in § 84, and the treatment of discharge in §§ 273–85. It may be excused by acceptance of performance in spite of the non-occurrence of the condition, or by rejection following its non-occurrence accompanied by an inadequate statement of reasons. See §§ 246–48. It may be excused by a repudiation of the conditional duty or by a manifestation of an inability to perform it. See § 255; §§ 250–51. It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing (§ 205). See § 239. And it may be excused by impracticability. See § 271. These and other grounds for excuse are dealt with in other chapters of this Restatement. This Chapter deals only with one general ground, excuse to avoid forfeiture. See § 229.” (Rest.2d of Contracts, § 225, comment b.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 872

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.50
(Matthew Bender)

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

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or
Defending Action for Breach of Contract*, 22.03–22.50

304. Oral or Written Contract Terms

[Contracts may be written or oral.]

[Contracts may be partly written and partly oral.]

Oral contracts are just as valid as written contracts.

New September 2003; Revised December 2013

Directions for Use

Give the bracketed alternative that is most applicable to the facts of the case.

If the written agreement is fully integrated, the second option may not be appropriate. Parol evidence is inadmissible if the judge finds that the written agreement is fully integrated. (Code Civ. Proc., § 1856(d).) The parol evidence rule generally prohibits the introduction of extrinsic evidence—oral or written—to vary or contradict the terms of an integrated written instrument. (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175 [15 Cal.Rptr.2d 209]; see Civ. Code, § 1625; Code Civ. Proc., § 1856(a).)

There are, however, exceptions to the parol evidence rule. (See, e.g., *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174–1175 [151 Cal.Rptr.3d 93, 291 P.3d 316] [fraud exception]; see also Code Civ. Proc., § 1856.) If an exception has been found as a matter of law, the second option may be given. If there are questions of fact regarding the applicability of an exception, additional instructions on the exception will be necessary.

Sources and Authority

- Oral Contracts. Civil Code section 1622.
- Statute of Frauds. Civil Code section 1624.
- “This question posed by defendant [may a contract be partly written and partly oral] must be answered in the affirmative in this sense: that a contract or agreement in legal contemplation is neither written nor oral, but oral or written evidence may be received to establish the terms of the contract or agreement between the parties. . . . A so-called partly written and partly oral contract is in legal effect a contract, the terms of which may be proven by both written and oral evidence.” (*Lande v. Southern California Freight Lines* (1948) 85 Cal.App.2d 416, 420–421 [193 P.2d 144].)
- “When the parties to a written contract have agreed to it as an ‘integration’—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms . . . [However,] ‘[w]hen only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing.’ ” (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225 [65 Cal.Rptr. 545, 436 P.2d 561].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts § 117

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8E-G, *Parol Evidence Rule*, ¶ 8:3145 (The Rutter Group)

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.83 (Matthew Bender)

27 California Legal Forms Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.12 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.03–13.17

305. Implied-in-Fact Contract

In deciding whether a contract was created, you should consider the conduct and relationship of the parties as well as all the circumstances of the case.

Contracts can be created by the conduct of the parties, without spoken or written words. Contracts created by conduct are just as valid as contracts formed with words.

Conduct will create a contract if the conduct of both parties is intentional and each knows, or has reason to know, that the other party will interpret the conduct as an agreement to enter into a contract.

New September 2003

Sources and Authority

- Contract May Be Express or Implied. Civil Code sections 1619.
- Express Contract. Civil Code section 1620.
- Implied Contract. Civil Code section 1621.
- “Unlike the ‘quasi-contractual’ quantum meruit theory which operates without an actual agreement of the parties, an implied-in-fact contract entails an actual contract, but one manifested in conduct rather than expressed in words.” (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 455 [78 Cal.Rptr.2d 101].)
- “An implied-in-fact contract is based on the conduct of the parties. Like an express contract, an implied-in-fact contract requires an ascertained agreement of the parties.” (*Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 636 [198 Cal.Rptr.3d 211], internal citation omitted.)
- Express and implied-in-fact contracts have the same legal effect, but differ in how they are proved at trial: “ ‘Contracts may be express or implied. These terms, however, do not denote different kinds of contracts, but have reference to the evidence by which the agreement between the parties is shown. If the agreement is shown by the direct words of the parties, spoken or written, the contract is said to be an express one. But if such agreement can only be shown by the acts and conduct of the parties, interpreted in the light of the subject-matter and of the surrounding circumstances, then the contract is an implied one.’ ” (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 678, fn. 16 [134 Cal.Rptr. 815, 557 P.2d 106], internal citation omitted.)
- “As to the basic elements [of a contract cause of action], there is no difference between an express and implied contract. . . . While an implied in fact contract may be inferred from the conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise.” (*Division of Labor*

Law Enforcement v. Transpacific Transportation Co. (1977) 69 Cal.App.3d 268, 275 [137 Cal.Rptr. 855]; see also *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 888 [24 Cal.Rptr.2d 892].)

- The formation of an implied contract can become an issue for the jury to decide: “Whether or not an implied contract has been created is determined by the acts and conduct of the parties and all the surrounding circumstances involved and is a question of fact.” (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611 [176 Cal.Rptr. 824], internal citation omitted.)
- “Whether an implied contract exists ‘ “ ‘is usually a question of fact for the trial court. Where evidence is conflicting, or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, a question of fact is presented for decision of the trial court. . . . ’ [Citation.]” ’ ” (*Unilab Corp*, *supra*, 244 Cal.App.4th at p. 636.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 102

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.10, 140.110 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.07

306. Unformalized Agreement

[Name of defendant] contends that the parties did not enter into a contract because they had not signed a final written agreement. To prove that a contract was created, *[name of plaintiff]* must prove both of the following:

1. That the parties understood and agreed to the terms of the agreement; and
2. That the parties agreed to be bound before a written agreement was completed and signed.

New September 2003; Revised December 2012, May 2020

Directions for Use

Give this instruction if the parties agreed to contract terms with the intention of reducing their agreement to a written and signed contract, but an alleged breach occurred before the written contract was completed and signed. For other situations involving the lack of a final written contract, see CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention.

Sources and Authority

- “Where the writing at issue shows ‘no more than an intent to further reduce the informal writing to a more formal one’ the failure to follow it with a more formal writing does not negate the existence of the prior contract. However, where the writing shows it was not intended to be binding until a formal written contract is executed, there is no contract.” (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 [87 Cal.Rptr.2d 822], internal citations omitted.)
- The execution of a formalized written agreement is not necessarily essential to the formation of a contract that is made orally: “[I]f the respective parties orally agreed upon all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement. [Citation.]” (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 [72 Cal.Rptr.2d 598].)
- If the parties have agreed not to be bound until the agreement is reduced to writing and signed by the parties, then the contract will not be effective until the formal agreement is signed. (*Beck v. American Health Group International, Inc.* (1989) 211 Cal.App.3d 1555, 1562 [260 Cal.Rptr. 237].)
- “Whether it was the parties’ mutual intention that their oral agreement to the

terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court.” (*Banner Entertainment, Inc.*, *supra*, 62 Cal.App.4th at p. 358.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 133, 134

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22
(Matthew Bender)

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

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.07[3]

307. Contract Formation—Offer

Both an offer and an acceptance are required to create a contract. [Name of defendant] contends that a contract was not created because there was never any offer. To overcome this contention, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] communicated to [name of defendant] that [he/she/nonbinary pronoun/it] was willing to enter into a contract with [name of defendant];**
- 2. That the communication contained specific terms; and**
- 3. That, based on the communication, [name of defendant] could have reasonably concluded that a contract with these terms would result if [he/she/nonbinary pronoun/it] accepted the offer.**

If [name of plaintiff] did not prove all of the above, then a contract was not created.

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention there was never any offer.

This instruction assumes that the defendant is claiming the plaintiff never made an offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror). If the existence of an offer is not contested, then this instruction is unnecessary.

Sources and Authority

- Courts have adopted the definition of “offer” found at Restatement Second of Contracts, section 24: “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” (*City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930 [1 Cal.Rptr.2d 896, 819 P.2d 854].)
- Under basic contract law “ ‘[a]n offer must be sufficiently definite, or must call for such definite terms in the acceptance that the performance promised is reasonably certain.’ ” (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770 [23 Cal.Rptr.2d 810].)
- “The trier of fact must determine ‘whether a reasonable person would necessarily assume . . . a willingness to enter into contract.’ [Citation.]” (*In re*

First Capital Life Insurance Co. (1995) 34 Cal.App.4th 1283, 1287 [40 Cal.Rptr.2d 816].)

- Offers should be contrasted with preliminary negotiations: “Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement.” (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59 [248 Cal.Rptr. 217].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 116, 117, 125–137

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.210 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.18–13.24

308. Contract Formation—Revocation of Offer

Both an offer and an acceptance are required to create a contract. [Name of defendant] contends that the offer was withdrawn before it was accepted. To overcome this contention, [name of plaintiff] must prove one of the following:

- 1. That [name of defendant] did not withdraw the offer; or**
- 2. That [name of plaintiff] accepted the offer before [name of defendant] withdrew it; or**
- 3. That [name of defendant]’s withdrawal of the offer was never communicated to [name of plaintiff].**

If [name of plaintiff] did not prove any of the above, then a contract was not created.

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention.

This instruction assumes that the defendant is claiming to have revoked the defendant’s offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

Sources and Authority

- Revocation Before Acceptance. Civil Code section 1586.
- Methods for Revocation. Civil Code section 1587.
- “It is a well-established principle of contract law that an offer may be revoked by the offeror any time prior to acceptance.” (*T. M. Cobb Co., Inc. v. Superior Court* (1984) 36 Cal.3d 273, 278 [204 Cal.Rptr. 143, 682 P.2d 338].)
- “‘Under familiar contract law, a revocation of an offer must be directed to the offeree.’ [Citation.]” (*Moffett v. Barclay* (1995) 32 Cal.App.4th 980, 983 [38 Cal.Rptr.2d 546].)

Secondary Sources

- 1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 159–165
- 13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.22, 140.61 (Matthew Bender)
- 5 California Points and Authorities, Ch. 50, *Contracts*, § 50.351 (Matthew Bender)
- 27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard*

Contractual Provisions, § 75.211 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.23–13.24

309. Contract Formation—Acceptance

Both an offer and an acceptance are required to create a contract. [Name of defendant] contends that a contract was not created because the offer was never accepted. To overcome this contention, [name of plaintiff] must prove both of the following:

- 1. That [name of defendant] agreed to be bound by the terms of the offer. [If [name of defendant] agreed to be bound only on certain conditions, or if [he/she/nonbinary pronoun/it] introduced a new term into the bargain, then there was no acceptance]; and**
- 2. That [name of defendant] communicated [his/her/nonbinary pronoun/its] agreement to [name of plaintiff].**

If [name of plaintiff] did not prove both of the above, then a contract was not created.

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention.

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

Sources and Authority

- Acceptance. Civil Code section 1585.
- “[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer.” (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855–856 [70 Cal.Rptr.2d 595].)
- “[I]t is not necessarily true that any communication other than an unequivocal acceptance is a rejection. Thus, an acceptance is not invalidated by the fact that it is ‘grumbling,’ or that the offeree makes some simultaneous ‘request.’ Nevertheless, it must appear that the ‘grumble’ does not go so far as to make it doubtful that the expression is really one of assent. Similarly, the ‘request’ must not add additional or different terms from those offered. Otherwise, the ‘acceptance’ becomes a counteroffer.” (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376 [84 Cal.Rptr.2d 581].)
- “The interpretation of the purported acceptance or rejection of an offer is a

question of fact. Further, based on the general rule that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, the test of the true meaning of an acceptance or rejection is not what the party making it thought it meant or intended it to mean. Rather, the test is what a reasonable person in the position of the parties would have thought it meant.” (*Guzman, supra*, 71 Cal.App.4th at pp. 1376–1377.)

- “Acceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror.” (*Russell v. Union Oil Co.* (1970) 7 Cal.App.3d 110, 114 [86 Cal.Rptr. 424].)
- “The Restatement Second of Contracts, section 60 provides, ‘If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.’ Comment a to Restatement 2d, section 60 provides, ‘a. *Interpretation of offer.* If the offeror prescribes the only way in which his offer may be accepted, an acceptance in any other way is a counter-offer. But frequently in regard to the details of methods of acceptance, the offeror’s language, if fairly interpreted, amounts merely to a statement of a satisfactory method of acceptance, without positive requirement that this method shall be followed.’ [¶] Similarly, Restatement 2d, section 30 provides in relevant part, ‘Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.’ Comment b to Restatement 2d section 30 states: ‘*Invited form.* Insistence on a particular form of acceptance is unusual. Offers often make no express reference to the form of acceptance; sometimes ambiguous language is used. Language referring to a particular mode of acceptance is often intended and understood as suggestion rather than limitation; the suggested mode is then authorized, but other modes are not precluded. In other cases language which in terms refers to the mode of acceptance is intended and understood as referring to some more important aspect of the transaction, such as the time limit for acceptance.’ ” (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 311–312 [181 Cal.Rptr.3d 399], original italics, footnote omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 180–192
- 13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)
- 5 California Points and Authorities, Ch. 50, *Contracts*, § 50.352 (Matthew Bender)
- 27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.214 (Matthew Bender)
- 1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.25–13.31

310. Contract Formation—Acceptance by Silence

Ordinarily, if a person does not say or do anything in response to another party’s offer, then the person has not accepted the offer. However, if [name of plaintiff] proves that both [he/she/nonbinary pronoun/it] and [name of defendant] understood silence or inaction to mean that [name of defendant] had accepted [name of plaintiff]’s offer, then there was an acceptance.

New September 2003; Revised May 2020

Directions for Use

This instruction assumes that the defendant is claiming to have not accepted plaintiff’s offer. Change the identities of the parties in the last two sets of brackets if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

This instruction should be read in conjunction with and immediately after CACI No. 309, *Contract Formation—Acceptance*, if acceptance by silence is an issue.

Sources and Authority

- Consent by Acceptance of Benefits. Civil Code section 1589.
- Because acceptance must be communicated, “[s]ilence in the face of an offer is not an acceptance, unless there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance.” (*Southern California Acoustics Co., Inc. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 722 [79 Cal.Rptr. 319, 456 P.2d 975].)
- Acceptance may also be inferred from inaction where one has a duty to act, and from retention of the offered benefit. (*Golden Eagle Insurance Co. v. Foremost Insurance Co.* (1993) 20 Cal.App.4th 1372, 1386 [25 Cal.Rptr.2d 242].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 193–197

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.11 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.31

311. Contract Formation—Rejection of Offer

[Name of defendant] contends that the offer to enter into a contract terminated because [name of plaintiff] rejected it. To overcome this contention, [name of plaintiff] must prove both of the following:

1. That [name of plaintiff] did not reject [name of defendant]’s offer; and
2. That [name of plaintiff] did not make any additions or changes to the terms of [name of defendant]’s offer.

If [name of plaintiff] did not prove both of the above, then a contract was not created.

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention that the plaintiff rejected the offer.

Note that rejections of a contract offer, or proposed alterations to an offer, are effective only if they are communicated to the other party. (See *Beverly Way Associates v. Barham* (1990) 226 Cal.App.3d 49, 55 [276 Cal.Rptr. 240].) If it is necessary for the jury to make a finding regarding the issue of communication then this instruction may need to be modified.

This instruction assumes that the defendant is claiming plaintiff rejected defendant’s offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

Conceptually, this instruction dovetails with CACI No. 309, *Contract Formation—Acceptance*. This instruction is designed for the situation where a party has rejected an offer by not accepting it on its terms.

Sources and Authority

- Acceptance. Civil Code section 1585.
- Cases provide that “a qualified acceptance amounts to a new proposal or counter-offer putting an end to the original offer. . . . A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing.” (*Apablaza v. Merritt and Co.* (1959) 176 Cal.App.2d 719, 726 [1 Cal.Rptr. 500], internal citations omitted.) More succinctly: “The rejection of an offer kills the offer.” (*Stanley v. Robert S. Odell and Co.* (1950) 97 Cal.App.2d 521, 534 [218 P.2d 162].)
- “[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified

acceptance amounts to a new proposal or counteroffer putting an end to the original offer.” (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855–856 [70 Cal.Rptr.2d 595].)

- The original offer terminates as soon as the rejection is communicated to the offeror: “It is hornbook law that an unequivocal rejection by an offeree, communicated to the offeror, terminates the offer; even if the offeror does no further act, the offeree cannot later purport to accept the offer and thereby create enforceable contractual rights against the offeror.” (*Beverly Way Associates, supra*, 226 Cal.App.3d at p. 55.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 163

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.352 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, §§ 75.212–75.214 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.23–13.24

312. Substantial Performance

[Name of defendant] contends that [name of plaintiff] did not perform all of the things that [name of plaintiff] was required to do under the contract, and therefore [name of defendant] did not have to perform [his/her/nonbinary pronoun/its] obligations under the contract. To overcome this contention, [name of plaintiff] must prove both of the following:

- 1. That [name of plaintiff] made a good faith effort to comply with the contract; and**
- 2. That [name of defendant] received essentially what the contract called for because [name of plaintiff]’s failures, if any, were so trivial or unimportant that they could have been easily fixed or paid for.**

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention that the plaintiff did not perform all of the things required under the contract.

Sources and Authority

- “ ‘Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed.’ ” (*Connell v. Higgins* (1915) 170 Cal. 541, 556 [150 P. 769], citation omitted.)
- The Supreme Court has cited the following passage from Witkin with approval: “At common law, recovery under a contract for work done was dependent upon a complete performance, although hardship might be avoided by permitting recovery in quantum meruit. The prevailing doctrine today, which finds its application chiefly in building contracts, is that substantial performance is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there be no wilful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for.” (*Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 186–187 [14 Cal.Rptr. 297, 363 P.2d 313]; see also *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 101 [161 Cal.Rptr. 423].)

- “ ‘Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.’ ” (*Connell, supra*, 170 Cal. at pp. 556–557, internal citation omitted.)
- “The doctrine of substantial performance has been recognized in California since at least 1921, when the California Supreme Court decided the landmark case of *Thomas Haverty Co. v. Jones* [citation], in which the court stated: ‘The general rule on the subject of [contractual] performance is that “Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy.” [Citation.] [¶] . . . [I]t is settled, especially in the case of building contracts, where the owner has taken possession of the building and is enjoying the fruits of the contractor’s work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages, to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent, and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price less the amount allowed as damages for the failure in strict performance. [Citations.]’ ” (*Murray’s Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1291–1292 [71 Cal.Rptr.3d 317].)
- “We hold that a provision in the parties’ contract making time of the essence does not automatically make [the defendant’s] untimely performance a breach of contract because there are triable issues regarding the scope of that provision and whether its enforcement would result in a forfeiture to [the defendant] and a windfall to [the plaintiff].” (*Magic Carpet Ride LLC v. Rugger Investment Group, LLC* (2019) 41 Cal.App.5th 357, 360 [254 Cal.Rptr.3d 213].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 843–884

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.23 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.30, 50.31 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.08[2], 22.16[2], 22.37, 22.69

313. Modification

[Name of party claiming modification] **claims that the original contract was modified or changed. *[Name of party claiming modification]* must prove that the parties agreed to the modification. *[Name of other party]* denies that the contract was modified.**

The parties to a contract may agree to modify its terms. You must decide whether a reasonable person would conclude from the words and conduct of the parties that they agreed to modify the contract. You cannot consider the parties' hidden intentions.

[A contract in writing may be modified by a contract in writing.]

[A contract in writing may be modified by an oral agreement to the extent the oral agreement is carried out by the parties.]

[A contract in writing may be modified by an oral agreement if the parties agree to give each other something of value.]

[An oral contract may be modified by consent of the parties, in writing, without an agreement to give each other something of value.]

New September 2003; Revised December 2009

Sources and Authority

- Modification. Civil Code section 1698.
- The Law Revision Commission comment to this section observes: “The rules provided by subdivisions (b) and (c) merely describe cases where proof of an oral modification is permitted; these rules do not, however, affect in any way the burden of the party claiming that there was an oral modification to produce sufficient evidence to persuade the trier of fact that the parties actually did make an oral modification of the contract.”
- Modification of Oral Contract. Civil Code section 1697.
- “It is axiomatic that the parties to an agreement may modify it.” (*Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 519 [198 Cal.Rptr. 725].)
- “Another issue of fact appearing in the evidence is whether the written contract was modified by executed oral agreements. This can be a question of fact. An agreement to modify a written contract will be implied if the conduct of the parties is inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify it.” (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 158 [92 Cal.Rptr. 120], internal citation omitted.)
- “Modification is a change in the obligation by a modifying agreement which requires mutual assent.” (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457 [118 Cal.Rptr. 695].)

- “A contract can, of course, be subsequently modified with the assent of the parties thereto, provided the same elements essential to the validity of the original contract are present.” (*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 223 [64 Cal.Rptr. 915], internal citations omitted.)
- “Generally speaking, a commitment to perform a preexisting contractual obligation has no value. In contractual parlance, for example, doing or promising to do something one is already legally bound to do cannot constitute the consideration needed to support a binding contract.” (*Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1185 [88 Cal.Rptr.2d 718].)
- Consideration is unnecessary if the modification is to correct errors and omissions. (*Texas Co. v. Todd* (1937) 19 Cal.App.2d 174, 185–186 [64 P.2d 1180].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 995–1002

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8E-G, *Parol Evidence Rule*, ¶¶ 8:3050–8:3202 (The Rutter Group)

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.112, 140.149–140.152 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.520–50.523 (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, §§ 77.21, 77.121, 77.320–77.323 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.58

314. Interpretation—Disputed Words

[Name of plaintiff] and [name of defendant] dispute the meaning of the following words in their contract: [insert disputed language].

[Name of plaintiff] claims that the words mean [insert plaintiff's interpretation]. [Name of defendant] claims that the words mean [insert defendant's interpretation]. [Name of plaintiff] must prove that [his/her/nonbinary pronoun/its] interpretation is correct.

In deciding what the words of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.

[The following instructions may also help you interpret the words of the contract:]

New September 2003; Revised December 2014

Directions for Use

Give this instruction if there is conflicting extrinsic evidence as to what the parties intended the language of their contract to mean. While interpretation of a contract can be a matter of law for the court (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839]), it is a question of fact for the jury if ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Read any of the instructions (as appropriate) on tools for interpretation (CACI Nos. 315 through 320) after reading the last bracketed sentence.

Sources and Authority

- Contract Interpretation: Intent. Civil Code section 1636.
- Contracts Explained by Circumstances. Civil Code section 1647.
- “Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury.” (*City of Hope National Medical Center, supra*, 43 Cal.4th

at p. 395, footnote and internal citations omitted.)

- “This rule—that the jury may interpret an agreement when construction turns on the credibility of extrinsic evidence—is well established in our case law. California’s jury instructions reflect this (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 314) . . . , as do authoritative secondary sources.” (*City of Hope National Medical Center, supra*, 43 Cal.4th at pp. 395–396, internal citations omitted.)
- “The trial court’s determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court’s resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court’s resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. Furthermore, ‘[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.’ ” (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 [50 Cal.Rptr.2d 323].)
- “In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made.” (*Lloyd’s Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197–1198 [32 Cal.Rptr.2d 144], internal citations omitted.)
- “Ordinarily, even in an integrated contract, extrinsic evidence can be admitted to explain the meaning of the contractual language at issue, although it cannot be used to contradict it or offer an inconsistent meaning. The language, in such a case, must be ‘ “reasonably susceptible” ’ to the proposed meaning.” (*Hot Rods, LLC v. Northrop Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1175–1176 [196 Cal.Rptr.3d 53].)
- “ ‘When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citation.] This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence [citations] or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. [Citations.] If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury. [Citations.]’ ” (*Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 433 [246 Cal.Rptr.3d 161].)
- “[I]t is indisputably the law that ‘when ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty.’ The agreement must still provide the essential terms, and it is ‘clear that extrinsic evidence cannot *supply* those required terms.’ ‘It can, however, be used to *explain* essential terms that were understood by the parties but would otherwise

be unintelligible to others.’ ” (*Jacobs v. Locatelli* (2017) 8 Cal.App.5th 317, 325 [213 Cal.Rptr.3d 514], original italics, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 764–766

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.04[2][b], 21.14[2]

315. Interpretation—Meaning of Ordinary Words

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Words to Be Understood in Usual Sense. Civil Code section 1644.
- “Generally speaking, words in a contract are to be construed according to their plain, ordinary, popular or legal meaning, as the case may be. However, particular expressions may, by trade usage, acquire a different meaning in reference to the subject matter of a contract. If both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage and parol evidence is admissible to establish the trade usage even though the words in their ordinary or legal meaning are entirely unambiguous. [Citation.]” (*Hayter Trucking Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15 [22 Cal.Rptr.2d 229].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 768

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.20

316. Interpretation—Meaning of Technical Words

You should assume that the parties intended technical words used in the contract to have the meaning that is usually given to them by people who work in that technical field, unless you decide that the parties clearly used the words in a different sense.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Technical Words. Civil Code section 1645.
- “The ‘clear and explicit’ meaning of these provisions, interpreted in their ‘ordinary and popular sense,’ unless ‘used by the parties in a technical sense or a special meaning is given to them by usage’ [citation], controls judicial interpretation.” (*Cooper Companies, Inc. v. Transcontinental Insurance Co.* (1995) 31 Cal.App.4th 1094, 1101 [37 Cal.Rptr.2d 508].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 768

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.22

317. Interpretation—Construction of Contract as a Whole

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Effect to Be Given to Every Part of Contract. Civil Code section 1641.
- “[T]he contract must be construed as a whole and the intention of the parties must be ascertained from the consideration of the entire contract, not some isolated portion.” (*County of Marin v. Assessment Appeals Bd. of Marin County* (1976) 64 Cal.App.3d 319, 324–325 [134 Cal.Rptr. 349].)
- “Any contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable.” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473 [80 Cal.Rptr.2d 329].)
- “[W]e should interpret contractual language in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory.” (*Titan Corp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473–474 [27 Cal.Rptr.2d 476].)
- “Nor are we persuaded by [defendant]’s related claim that it was improper for [plaintiff]’s counsel to tell the jurors, during closing argument, that in resolving witness credibility issues they should consider the ‘big picture’ and not get lost in the minutiae of the contractual language.” (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 394 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 769–770

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting*

a Particular Construction of Contract, 21.19

318. Interpretation—Construction by Conduct

In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- “In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties’ intent.” (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242 [88 Cal.Rptr.2d 777].)
- “This rule of practical construction is predicated on the common sense concept that ‘actions speak louder than words.’ Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent.” (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754 [8 Cal.Rptr. 427, 356 P.2d 171].)
- “The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties’ intentions.” (*Kennecott Corp. v. Union Oil Co. of California* (1987) 196 Cal.App.3d 1179, 1189 [242 Cal.Rptr. 403].)
- “[T]his rule is not limited to the joint conduct of the parties in the course of performance of the contract. As stated in Corbin on Contracts, ‘The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them. In the litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other party’s earlier words, and acts, can introduce them to support his contention.’ We emphasize the conduct of one party to the contract is by no means conclusive evidence as to the meaning of the contract. It is relevant, however, to show the contract is reasonably susceptible to the meaning evidenced by that party’s conduct.” (*Southern California Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851 [44 Cal.Rptr.2d 227], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 772

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32
(Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.51

319. Interpretation—Reasonable Time

If a contract does not state a specific time in which the parties are to meet the requirements of the contract, then the parties must meet them within a reasonable time. What is a reasonable time depends on the facts of each case, including the subject matter of the contract, the reasons each party entered into the contract, and the intentions of the parties at the time they entered the contract.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Time of Performance of Contract. Civil Code section 1657.
- “[A]s the contract was silent as to the time of delivery a reasonable time for performance must be implied.” (*Palmquist v. Palmquist* (1963) 212 Cal.App.2d 322, 331 [27 Cal.Rptr. 744].)
- “The question of what constituted a reasonable time was of course one of fact.” (*Lyon v. Goss* (1942) 19 Cal.2d 659, 673 [123 P.2d 11].)
- “[W]hat constitutes a reasonable time is a question of fact, depending upon the situation of the parties, the nature of the transaction, and the facts of the particular case.” (*Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836 [52 Cal.Rptr. 1, 415 P.2d 816].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 785–787

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.41 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.49

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.30

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.46

320. Interpretation—Construction Against Drafter

In determining the meaning of the words of the contract, you must first consider all of the other instructions that I have given you. If, after considering these instructions, you still cannot agree on the meaning of the words, then you should interpret the contract against [the party that drafted the disputed words/the party that caused the uncertainty].

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Language Interpreted Against Party Causing Uncertainty. Civil Code section 1654.
- “[T]his [Civil Code section 1654] canon applies only as a tie breaker, when other canons fail to dispel uncertainty.” *Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 596 [19 Cal.Rptr.2d 295], disapproved on other grounds in *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376–377 [36 Cal.Rptr.2d 581, 885 P.2d 994].)
- “The trial court’s instruction . . . embodies a general rule of contract interpretation that was applicable to the negotiated agreement between [the parties]. It may well be that in a particular situation the discussions and exchanges between the parties in the negotiation process may make it difficult or even impossible for the jury to determine which party caused a particular contractual ambiguity to exist, but this added complexity does not make the underlying rule irrelevant or inappropriate for a jury instruction. We conclude, accordingly, that the trial court here did not err in instructing the jury on Civil Code section 1654’s general rule of contract interpretation.” (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 398 [75 Cal.Rptr.3d 333, 181 P.3d 142].)
- “[I]f the uncertainty is not removed by application of the other rules of interpretation, a contract must be interpreted most strongly against the party who prepared it. This last rule is applied with particular force in the case of adhesion contracts.” (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 801 [79 Cal.Rptr.2d 273], internal citations omitted.)
- “[T]he doctrine of contra proferentem (construing ambiguous agreements against the drafter) applies with even greater force when the person who prepared the writing is a lawyer.” *Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1370

[62 Cal.Rptr.2d 27].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 780

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32
(Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard
Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting
a Particular Construction of Contract*, 21.15

321. Existence of Condition Precedent Disputed

[Name of defendant] **claims that the contract with [name of plaintiff] provides that [he/she/nonbinary pronoun/it] was not required to [insert duty] unless [insert condition precedent].**

[Name of defendant] **must prove that the parties agreed to this condition. If [name of defendant] proves this, then [name of plaintiff] must prove that [insert condition precedent].**

If [name of plaintiff] does not prove that [insert condition precedent], then [name of defendant] was not required to [insert duty].

New September 2003

Directions for Use

This instruction should only be given if both the existence and the occurrence of a condition precedent are contested. If only the occurrence of a condition precedent is contested, use CACI No. 322, *Occurrence of Agreed Condition Precedent*.

Sources and Authority

- Conditional Obligation. Civil Code section 1434.
- Condition Precedent. Civil Code section 1436.
- “Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event.” (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158].)
- “A conditional obligation is one in which ‘the rights or duties of any party thereto depend upon the occurrence of an uncertain event.’ ‘[P]arties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event.’ A condition in a contract may be a condition precedent, concurrent, or subsequent. ‘[A] condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.’ ” (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 593 [198 Cal.Rptr.3d 47].)
- “The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract.” (*Karpinski v. Smitty’s Bar, Inc.* (2016) 246 Cal.App.4th 456, 464 [201 Cal.Rptr.3d 148].)
- “Dependent covenants or ‘[c]onditions precedent are not favored in the law [citations], and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that

effect.’ ” (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1183 [236 Cal.Rptr.3d 542], internal citations omitted.)

- “[W]here defendant’s duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired.” (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)
- “When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test.” (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601], internal citations omitted.)
- “[T]he parol evidence rule does not apply to conditions precedent.” (*Karpinski, supra*, 246 Cal.App.4th at p. 464, fn 6.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 803–814

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.44, 140.101 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.20–50.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.19, 22.66

322. Occurrence of Agreed Condition Precedent

The parties agreed in their contract that [name of defendant] would not have to [insert duty] unless [insert condition precedent]. [Name of defendant] contends that this condition did not occur and that [he/she/ nonbinary pronoun/it] did not have to [insert duty]. To overcome this contention, [name of plaintiff] must prove that [insert condition precedent]. If [name of plaintiff] does not prove that [insert condition precedent], then [name of defendant] was not required to [insert duty].

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention a condition precedent did not occur.

If both the existence and the occurrence of a condition precedent are contested, use CACI No. 321, *Existence of Condition Precedent Disputed*.

Sources and Authority

- Conditional Obligation. Civil Code section 1434.
- Condition Precedent. Civil Code section 1436.
- “A conditional obligation is one in which ‘the rights or duties of any party thereto depend upon the occurrence of an uncertain event.’ ‘[P]arties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event.’ A condition in a contract may be a condition precedent, concurrent, or subsequent.” (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 593 [198 Cal.Rptr.3d 47].)
- “[A] ‘condition precedent’ is ‘either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.’ ” (*Stephens & Stephens XII, LLC v. Fireman’s Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1147 [180 Cal.Rptr.3d 683].)
- “Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event.” (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158].)
- “The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract.” (*Karpinski v. Smitty’s Bar, Inc.* (2016) 246 Cal.App.4th 456, 464 [201 Cal.Rptr.3d 148].)
- “ ‘[G]enerally, a party’s failure to perform a condition precedent will preclude an

action for breach of contract.’ ” (*Stephens & Stephens XII, LLC, supra*, 231 Cal.App.4th at p. 1147.)

- “[W]here defendant’s duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired.” (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)
- “When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test.” (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601], internal citations omitted.)
- “[T]he parol evidence rule does not apply to conditions precedent.” (*Karpinski, supra*, 246 Cal.App.4th at p. 464, fn 6.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 799–814

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.44, 140.101 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.20–50.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.19, 22.66

323. Waiver of Condition Precedent

[Name of plaintiff] and [name of defendant] agreed in their contract that [name of defendant] would not have to [insert duty] unless [insert condition precedent]. That condition did not occur. Therefore, [name of defendant] contends that [he/she/nonbinary pronoun/it] did not have to [insert duty].

To overcome this contention, [name of plaintiff] must prove by clear and convincing evidence that [name of defendant], by words or conduct, gave up [his/her/nonbinary pronoun/its] right to require [insert condition precedent] before having to [insert duty].

New September 2003; Revised December 2013

Directions for Use

For an instruction on waiver as an affirmative defense, see CACI No. 336, *Affirmative Defense—Waiver*.

Sources and Authority

- “Ordinarily, a plaintiff cannot recover on a contract without alleging and proving performance or prevention or waiver of performance of conditions precedent and willingness and ability to perform conditions concurrent.” (*Roseleaf Corp. v. Radis* (1953) 122 Cal.App.2d 196, 206 [264 P.2d 964].)
- “‘[C]ase law is clear that “‘[w]aiver is the intentional relinquishment of a known right after knowledge of the facts.’ [Citations.] The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and “doubtful cases will be decided against a waiver’ [citation].” [Citations.] The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right.” (*Stephens & Stephens XII, LLC v. Fireman’s Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1148 [180 Cal.Rptr.3d 683].)
- “All case law on the subject of waiver is unequivocal: ‘ “Waiver always rests upon intent.” ’ ” (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515] [plaintiff’s claim that defendant waived occurrence of conditions must be proved by clear and convincing evidence].)
- “A condition is waived when a promisor by his words or conduct justifies the promisee in believing that a conditional promise will be performed despite the failure to perform the condition, and the promisee relies upon the promisor’s manifestations to his substantial detriment.” (*Sosin v. Richardson* (1962) 210 Cal.App.2d 258, 264 [26 Cal.Rptr. 610].)
- “Waiver is ordinarily a question for the trier of fact; ‘[h]owever, where there are no disputed facts and only one reasonable inference may be drawn, the issue can

be determined as a matter of law.’ ” (*DuBeck v. California Physicians’ Service* (2015) 234 Cal.App.4th 1254, 1265 [184 Cal.Rptr.3d 743].)

- Section 84 of the Restatement Second of Contracts provides:
 - (1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless
 - (a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or
 - (b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.
 - (2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if
 - (a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and
 - (b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and
 - (c) the promise is not binding apart from the rule stated in Subsection (1).

Secondary Sources

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.48

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.44 (Matthew Bender)

27 California Legal Forms Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.231 (Matthew Bender)

324. Anticipatory Breach

A party can breach, or break, a contract before performance is required by clearly and positively indicating, by words or conduct, that the party will not or cannot meet the requirements of the contract.

If [name of plaintiff] proves that [he/she/nonbinary pronoun/it] would have been able to fulfill the terms of the contract and that [name of defendant] clearly and positively indicated, by words or conduct, that [he/she/nonbinary pronoun/it] would not or could not meet the contract requirements, then [name of defendant] breached the contract.

New September 2003; Revised May 2020

Sources and Authority

- Anticipatory Breach. Civil Code section 1440.
- “Repudiation of a contract, also known as “anticipatory breach,” occurs when a party announces an intention not to perform prior to the time due for performance.” (*Stephens & Stephens XII, LLC v. Fireman’s Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1150 [180 Cal.Rptr.3d 683].)
- Courts have defined anticipatory breach as follows: “An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible.” (*C. A. Crane v. East Side Canal & Irrigation Co.* (1935) 6 Cal.App.2d 361, 367 [44 P.2d 455].)
- Anticipatory breach can be express or implied: “An express repudiation is a clear, positive, unequivocal refusal to perform; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible.” (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 [123 Cal.Rptr. 641, 539 P.2d 425].)
- “In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies—he or she may ‘treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.’ ” (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)
- Anticipatory breach can be used as an excuse for plaintiff’s failure to

substantially perform. (*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29 [142 P.2d 22].)

- “Although it is true that an anticipatory breach or repudiation of a contract by one party permits the other party to sue for damages without performing or offering to perform its own obligations, this does not mean damages can be recovered without evidence that, but for the defendant’s breach, the plaintiff would have had the ability to perform.” (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 625 [2 Cal.Rptr.2d 288], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 886–893

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.54, 140.105 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.23 (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, §§ 77.15, 77.361 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.23

325. Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements

In every contract or agreement there is an implied promise of good faith and fair dealing. This implied promise means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation. However, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract.

[*Name of plaintiff*] claims that [*name of defendant*] violated the duty to act fairly and in good faith. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] and [*name of defendant*] entered into a contract;
2. That [*name of plaintiff*] did all, or substantially all of the significant things that the contract required [*him/her/nonbinary pronoun/it*] to do [or that [*he/she/nonbinary pronoun/it*] was excused from having to do those things;]
3. That all conditions required for [*name of defendant*]'s performance [had occurred/ [or] were excused];]
4. That [*name of defendant*] [*specify conduct that plaintiff claims prevented plaintiff from receiving the benefits under the contract*];
5. That by doing so, [*name of defendant*] did not act fairly and in good faith; and
6. That [*name of plaintiff*] was harmed by [*name of defendant*]'s conduct.

New April 2004; Revised June 2011, December 2012, June 2014, November 2019, May 2020

Directions for Use

This instruction should be given if the plaintiff has brought a separate count for breach of the covenant of good faith and fair dealing. It may be given in addition to CACI No. 303, *Breach of Contract—Essential Factual Elements*, if breach of contract on other grounds is also alleged.

Include element 2 if the plaintiff's substantial performance of contract requirements is at issue. Include element 3 if the contract contains conditions precedent that must

occur before the defendant is required to perform. For discussion of element 3, see the Directions for Use to CACI No. 303.

In element 4, insert an explanation of the defendant's conduct that violated the duty to act in good faith.

If a claim for breach of the implied covenant does nothing more than allege a mere contract breach and, relying on the same alleged acts, simply seeks the same damages or other relief already claimed in a contract cause of action, it may be disregarded as superfluous because no additional claim is actually stated. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].) The harm alleged in element 6 may produce contract damages that are different from those claimed for breach of the express contract provisions. (See *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 [123 Cal.Rptr.3d 736] [noting that gravamen of the two claims rests on different facts and different harm].)

It has been noted that one may bring a claim for breach of the implied covenant without also bringing a claim for breach of other contract terms. (See *Careau & Co.*, *supra*, 222 Cal.App.3d at p. 1395.) Thus it would seem that a jury should be able to find a breach of the implied covenant even if it finds for the defendant on all other breach of contract claims.

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], internal citation omitted.)
- “ ‘ “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” ’ [] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith.” (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371–372 [6 Cal.Rptr.2d 467, 826 P.2d 710], internal citations omitted.)
- “When one party to a contract retains the unilateral right to amend the agreement governing the parties’ relationship, its exercise of that right is constrained by the covenant of good faith and fair dealing which precludes amendments that operate retroactively to impair accrued rights.” (*Cobb v. Ironwood Country Club* (2015) 233 Cal.App.4th 960, 963 [183 Cal.Rptr.3d 282].)
- “The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party’s right to receive the *benefits of the agreement actually made*. The covenant thus cannot ‘ “be endowed with an existence independent of its contractual underpinnings.” ’ ” It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their

agreement.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349–350 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics, internal citations omitted.)

- “The implied covenant of good faith and fair dealing cannot be read to require defendants to take a particular action that is discretionary under the contract when the contract also expressly grants them the discretion to take a different action. To apply the covenant to *require* a party to take one of two alternative actions expressly allowed by the contract and forgo the other would contravene the rule that the implied covenant of good faith and fair dealing may not be ‘read to prohibit a party from doing that which is expressly permitted by an agreement.’ ” (*Bevis v. Terrace View Partners, LP* (2019) 33 Cal.App.5th 230, 256 [244 Cal.Rptr.3d 797], original italics.)
- “The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. ‘The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract’s purpose.’ . . . ‘In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.’ ” (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032 [14 Cal.Rptr.2d 335], internal citations omitted.)
- “There is no obligation to deal fairly or in good faith absent an existing contract. If there exists a contractual relationship between the parties . . . the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract.” (*Racine & Laramie, Ltd., supra*, 11 Cal.App.4th at p. 1032, internal citations omitted.)
- “Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract.” (*Digerati Holdings, LLC, supra*, 194 Cal.App.4th at p. 885.)
- “ ‘[B]reach of a specific provision of the contract is not . . . necessary’ to a claim for breach of the implied covenant of good faith and fair dealing.” (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244 [160 Cal.Rptr.3d 718].)
- “The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily ‘a question of fact unless only one inference [can] be drawn from the evidence.’ ” (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509 [108 Cal.Rptr.2d 10], internal citation omitted.)
- “If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. Thus, absent those limited cases where a breach of a consensual contract term is not claimed

or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery.” (*Careau & Co., supra*, 222 Cal.App.3d at p. 1395.)

- “[W]e believe that the gravamen of the two counts differs. The gravamen of the breach of contract count is [cross defendants’] alleged failure to comply with their express contractual obligations specified in paragraph 37 of the cross-complaint, while the gravamen of the count for breach of the implied covenant of good faith and fair dealing is their alleged efforts to undermine or prevent the potential sale and distribution of the film, both by informing distributors that the film was unauthorized and could be subject to future litigation and by seeking an injunction. (*Digerati Holdings, LLC, supra*, 194 Cal. App. 4th at p. 885.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 822, 824–826

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.12, 140.50 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 23, *Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing*, 23.05

326. Assignment Contested

[Name of plaintiff] was not a party to the original contract. However, [name of plaintiff] may bring a claim for breach of the contract if [he/she/nonbinary pronoun/it] proves that [name of assignor] transferred [his/her/nonbinary pronoun/its] rights under the contract to [name of plaintiff]. This transfer is referred to as an “assignment.”

[Name of plaintiff] must prove that [name of assignor] intended to transfer [his/her/nonbinary pronoun/its] contract rights to [name of plaintiff]. In deciding [name of assignor]’s intent, you should consider the entire transaction and the conduct of the parties to the assignment.

[A transfer of contract rights does not necessarily have to be made in writing. It may be oral or implied by the conduct of the parties to the assignment.]

New February 2005

Directions for Use

The bracketed third paragraph should be used only in cases involving a transfer that may be made without a writing.

Sources and Authority

- Oral Assignments. Civil Code section 1052.
- “While no particular form of assignment is required, it is essential to the assignment of a right that the assignor manifest an intention to transfer the right.” (*Sunburst Bank v. Executive Life Insurance Co.* (1994) 24 Cal.App.4th 1156, 1164 [29 Cal.Rptr.2d 734], internal citations omitted.)
- “The burden of proving an assignment falls upon the party asserting rights thereunder. In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when that fact is in issue, but the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee.” (*Cockerell v. Title Insurance & Trust Co.* (1954) 42 Cal.2d 284, 292 [267 P.2d 16], internal citations omitted.)
- “The accrued right to collect the proceeds of the fire insurance policy is a chose in action, and an effective assignment thereof may be expressed orally as well as in writing; may be the product of inference; and where the parties to a transaction involving such a policy by their conduct indicate an intention to transfer such proceeds, the courts will imply an assignment thereof. In making such a determination, substance and not form controls.” (*Greco v. Oregon Mutual Fire Insurance Co.* (1961) 191 Cal.App.2d 674, 683 [12 Cal.Rptr. 802], internal citations omitted.)

- “An assignor may not maintain an action upon a claim after making an absolute assignment of it to another; his right to demand performance is extinguished, the assignee acquiring such right. To ‘assign’ ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. It is the substance and not the form of a transaction which determines whether an assignment was intended. If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.” (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225 [87 Cal.Rptr. 213], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 727–739

6 California Forms of Pleading and Practice, Ch. 60, *Assignments*, § 60.20 (Matthew Bender)

27 California Legal Forms, Ch. 76, *Assignments of Rights and Obligations*, § 76.201 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.51–22.56, 22.58, 22.59

327. Assignment Not Contested

[Name of plaintiff] was not a party to the original contract. However, [he/she/nonbinary pronoun/it] may bring a claim for breach of contract because [name of assignor] transferred the rights under the contract to [name of plaintiff]. This transfer is referred to as an “assignment.”

New February 2005

Directions for Use

This instruction is intended to explain to the jury why a party not named in the original contract is nevertheless a party to the case.

Sources and Authority

- Oral Assignment. Civil Code section 1052.
- “To ‘assign’ ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. It is the substance and not the form of a transaction which determines whether an assignment was intended. If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.” (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225 [87 Cal.Rptr. 213], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 727–739
- 6 California Forms of Pleading and Practice, Ch. 60, *Assignments*, § 60.20 (Matthew Bender)
- 27 California Legal Forms, Ch. 76, *Assignments of Rights and Obligations*, § 76.201 (Matthew Bender)
- 2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.51–22.56, 22.58, 22.59

328. Breach of Implied Duty to Perform With Reasonable Care—Essential Factual Elements

The parties’ contract requires that *[name of defendant]* *[specify performance alleged to have been done negligently, e.g., install cable television service]*. **It is implied in the contract that this performance will be done competently and with reasonable care.** *[Name of plaintiff]* **claims that** *[name of defendant]* **breached this implied condition. To establish this claim,** *[name of plaintiff]* **must prove all of the following:**

1. That *[name of plaintiff]* **and** *[name of defendant]* **entered into a contract;**

[2. That *[name of plaintiff]* **did all, or substantially all of the significant things that the contract required** *[him/her/nonbinary pronoun/it]* **to do;]**

[or]

[2. That *[name of plaintiff]* **was excused from having to** *[specify things that plaintiff did not do, e.g., obtain a guarantor on the contract];]*

[3. That *[specify occurrence of all conditions required by the contract for* *[name of defendant]* *’s performance, e.g., the property was rezoned for residential use];]*

[or]

[3. That *[specify condition(s) that did not occur]* **[was/were]** **[waived/ excused];]**

4. That *[name of defendant]* **failed to use reasonable care in** *[specify performance]; and*

5. That *[name of plaintiff]* **was harmed by** *[name of defendant]* **’s conduct.**

New June 2015

Directions for Use

Give this instruction if the plaintiff alleges harm from the defendant’s failure to perform a contractual obligation with reasonable care. Every contract includes an implied duty to perform required acts competently. (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1324 [178 Cal.Rptr.3d 100].) If negligent performance is alleged, the jury should be instructed that the contract contains this implied duty. The jury must then decide whether the duty has been breached. It must also find all of the other elements required for breach of contract. (See CACI No. 303, *Breach of Contract—Essential Factual Elements*.)

This instruction may be adapted for use as an affirmative defense if the defendant asserts that the plaintiff is not entitled to recover on the contract because of the plaintiff's failure to perform its duties competently. (See *Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369, 376–378 [130 P.2d 477].)

For discussion of issues with the options for elements 2 and 3, see the Directions for Use to CACI No. 303, *Breach of Contract—Essential Factual Elements*.

Sources and Authority

- “[E]xpress contractual terms give rise to implied duties, violations of which may themselves constitute breaches of contract. ‘“Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.” The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement [citation].’ ” (*Holguin, supra*, 229 Cal.App.4th at p. 1324.)
- “A contract to perform services gives rise to a duty of care which requires that such services be performed in a competent and reasonable manner.” (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 774 [69 Cal.Rptr.2d 466].)
- “[T]he statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed ‘shall be fit and proper for its said intended use,’ as stated by the trial court.” (*Kuitema v. Covell* (1951) 104 Cal.App.2d 482, 485 [231 P.2d 552].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 822, 824

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.12 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Crompton et al., Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.79

329. Reserved for Future Use

330. Affirmative Defense—Unilateral Mistake of Fact

[Name of defendant] **claims that there was no contract because [he/she/nonbinary pronoun/it] was mistaken about [insert description of mistake]. To succeed, [name of defendant] must prove all of the following:**

1. **That [name of defendant] was mistaken about [insert description of mistake];**
2. **That [name of plaintiff] knew [name of defendant] was mistaken and used that mistake to take advantage of [him/her/nonbinary pronoun/it];**
3. **That [name of defendant]’s mistake was not caused by [his/her/nonbinary pronoun/its] excessive carelessness; and**
4. **That [name of defendant] would not have agreed to enter into the contract if [he/she/nonbinary pronoun/it] had known about the mistake.**

If you decide that [name of defendant] has proved all of the above, then no contract was created.

New September 2003; Revised April 2004

Directions for Use

If the mistake is one of law, this may not be a jury issue.

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772 [284 Cal.Rptr. 680].) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.
- Mistake. Civil Code section 1576.
- Mistake of Fact. Civil Code section 1577.
- “It is settled that to warrant a unilateral rescission of a contract because of mutual mistake, the mistake must relate to basic or material fact, not a collateral matter.” (*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 932 [114 Cal.Rptr. 673].)
- “A mistake need not be mutual. Unilateral mistake is ground for relief where the mistake is due to the fault of the other party or the other party knows or has reason to know of the mistake. . . . To rely on a unilateral mistake of fact, [the party] must demonstrate his mistake was not caused by his ‘neglect of a legal

duty.’ Ordinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577.” (*Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007–1008 [211 Cal.Rptr. 45], internal citations omitted.)

- To prevail on a unilateral mistake claim, the defendant must prove that the plaintiff knew that the defendant was mistaken and that plaintiff used that mistake to take advantage of the defendant: “Defendants contend that a material mistake of fact—namely, the defendants’ belief that they would not be obligated to install a new roof upon the residence—prevented contract formation. A unilateral mistake of fact may be the basis of relief. However, such a unilateral mistake may not invalidate a contract without a showing that the other party to the contract was aware of the mistaken belief and unfairly utilized that mistaken belief in a manner enabling him to take advantage of the other party.” (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 944 [127 Cal.Rptr. 846], internal citations omitted.)
- “Failure to make reasonable inquiry to ascertain or effort to understand the meaning and content of the contract upon which one relies constitutes neglect of a legal duty such as will preclude recovery for unilateral mistake of fact.” (*Wal-Noon Corporation v. Hill* (1975) 45 Cal.App.3d 605, 615 [119 Cal.Rptr. 646].) However, “[o]rdinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577.” (*Architects & Contractors Estimating Service, Inc. v. Smith, supra*, 164 Cal.App.3d at p. 1008.)
- Neglect of legal duty has been equated with “gross negligence,” which is defined as “the want of even scant care or an extreme departure from the ordinary standard of conduct.” (*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 257–276

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.50–215.57, 215.141 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.90 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, § 77.350 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.24

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 16, *Attacking or Defending Existence of Contract—Mistake*, 16.08[2], 16.13–16.16, 16.18

331. Affirmative Defense—Bilateral Mistake

[*Name of defendant*] claims that there was no contract because both parties were mistaken about [*insert description of mistake*]. To succeed, [*name of defendant*] must prove both of the following:

1. That both parties were mistaken about [*insert description of mistake*]; and
2. That [*name of defendant*] would not have agreed to enter into this contract if [*he/she/nonbinary pronoun/it*] had known about the mistake.

If you decide that [*name of defendant*] has proved both of the above, then no contract was created.

New September 2003

Directions for Use

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772 [284 Cal.Rptr. 680].) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

If the mistake is one of law, this may not be a jury issue.

Sources and Authority

- When Consent Not Free. Civil Code section 1567.
- Consent Obtained by Fraud. Civil Code section 1568.
- Mistake. Civil Code section 1576.
- Mistake of Fact. Civil Code section 1577.
- Mistake of Law. Civil Code section 1578.
- Rescission of Contract. Civil Code section 1689.
- “A mistake of fact may be urged as a defense to an action upon a contract only if the mistake is material to the contract.” (*Edwards v. Lang* (1961) 198 Cal.App.2d 5, 12 [18 Cal.Rptr. 60].)
- “A ‘mistake’ within the meaning of subdivision (b)(1) of section 1689 of the Civil Code can be either one of fact or of law. ‘Generally a mistake of fact occurs when a person understands the facts to be other than they are . . .’ When both parties understand the facts other than they are, the mistake necessarily is mutual and thus becomes a basis for rescission.” (*Crocker-Anglo*

Nat'l Bank v. Kuchman (1964) 224 Cal.App.2d 490, 496 [36 Cal.Rptr. 806], internal citations omitted.)

- “[T]o warrant a unilateral rescission of a contract because of mutual mistake, the mistake must relate to basic or material fact, not a collateral matter.” (*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 932 [114 Cal.Rptr. 673].)
- “Where, as here, the extrinsic evidence is not in conflict, the determination of whether a mutual mistake occurred is a question of law.” (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527 [117 Cal. Rptr. 2d 220, 41 P.3d 46].)
- “Ordinary negligence does not bar a claim for mutual mistake because ‘[t]here is an element of carelessness in nearly every case of mistake . . .’” ‘Only gross negligence or ‘preposterous or irrational’ conduct will [bar] mutual mistake.’” (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1243 [160 Cal.Rptr.3d 718], internal citation omitted.)
- “Where parties are aware at the time the contract is entered into that a doubt exists in regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain.” (*Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 885 [124 Cal.Rptr. 577].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 257–276

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.50–215.57, 215.140 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.90 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, § 77.350 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.24

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 16, *Attacking or Defending Existence of Contract—Mistake*, 16.08[1], 16.09, 16.11, 16.18

332. Affirmative Defense—Duress

[Name of defendant] claims that there was no contract because [his/her/nonbinary pronoun] consent was given under duress. To succeed, [name of defendant] must prove all of the following:

1. That [name of plaintiff] used a wrongful act or wrongful threat to pressure [name of defendant] into consenting to the contract;
2. That [name of defendant] was so afraid or intimidated by the wrongful act or wrongful threat that [he/she/nonbinary pronoun] did not have the free will to refuse to consent to the contract; and
3. That [name of defendant] would not have consented to the contract without the wrongful act or wrongful threat.

An act or a threat is wrongful if [insert relevant rule—e.g., “a criminal act is threatened”].

If you decide that [name of defendant] has proved all of the above, then no contract was created.

New September 2003; Revised December 2005

Directions for Use

Use CACI No. 333, *Affirmative Defense—Economic Duress*, in cases involving economic duress.

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.
- Duress. Civil Code section 1569.
- Menace. Civil Code section 1570.
- “Menace” is considered to be duress: “Under the modern rule, ‘[d]uress, which includes whatever destroys one’s free agency and constrains [her] to do what is against [her] will, may be exercised by threats, importunity or any species of mental coercion. It is shown where a party ‘intentionally used threats or pressure to induce action or nonaction to the other party’s detriment.’ ” The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing.” (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 84 [260 Cal.Rptr. 403], internal citations omitted.)
- “Duress envisions some unlawful action by a party by which one’s consent is obtained through fear or threats.” (*Keithley v. Civil Service Bd. of The City of Oakland* (1970) 11 Cal.App.3d 443, 450 [89 Cal.Rptr. 809], internal citations omitted.)
- Duress is found only where fear is intentionally used as a means of procuring

consent: “[A]n action for duress and menace cannot be sustained when the voluntary action of the apprehensive party is induced by his speculation upon or anticipation of a future event suggested to him by the defendant but not threatened to induce his conduct. The issue in each instance is whether the defendant intentionally exerted an unlawful pressure on the injured party to deprive him of contractual volition and induce him to act to his own detriment.” (*Goldstein v. Enoch* (1967) 248 Cal.App.2d 891, 894–895 [57 Cal.Rptr. 19].)

- It is wrongful to use the threat of criminal prosecution to obtain a consent: “California law is clear that an agreement obtained by threat of criminal prosecution constitutes menace and is unenforceable as against public policy.” (*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 127 [18 Cal.Rptr.2d 626].) However, a threat of legitimate civil action is not considered wrongful: “[T]he action or threat in duress or menace must be unlawful, and a threat to take legal action is not unlawful unless the party making the threat knows the falsity of his claim.” (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128 [54 Cal.Rptr. 533].)
- Standard duress is evaluated under a subjective standard: “The question in each case [is], Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim.” (*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 744 [129 Cal.Rptr. 566].)
- The wrongful acts of a third party may constitute duress sufficient to allow rescission of a contract with a party, who, although not participating in those wrongful acts, had knowledge of the innocent party’s position. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 205–206 [1 Cal.Rptr. 12, 347 P.2d 12].)
- “[Defendant has] the burden of proving by a preponderance of the evidence the affirmative of the issues of duress and plaintiff’s default.” (*Fio Rito v. Fio Rito* (1961) 194 Cal.App.2d 311, 322 [14 Cal.Rptr. 845]; cf. *Stevenson v. Stevenson* (1940) 36 Cal.App.2d 494, 500 [97 P.2d 982].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 310–316

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.20–215.21, 215.23–215.28, 215.120–215.121 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.20 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, § 77.351 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.07

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.03–17.06, 17.20–17.24[1]

333. Affirmative Defense—Economic Duress

[Name of defendant] claims that there was no contract because [his/her/nonbinary pronoun/its] consent was given under duress. To succeed, [name of defendant] must prove all of the following:

1. That [name of plaintiff] used a wrongful act or wrongful threat to pressure [name of defendant] into consenting to the contract;
2. That a reasonable person in [name of defendant]’s position would have believed that there was no reasonable alternative except to consent to the contract; and
3. That [name of defendant] would not have consented to the contract without the wrongful act or wrongful threat.

An act or a threat is wrongful if [insert relevant rule, e.g., “a bad-faith breach of contract is threatened”].

If you decide that [name of defendant] has proved all of the above, then no contract was created.

New September 2003; Revised December 2005, June 2011, December 2011, May 2020

Directions for Use

Different elements may apply if economic duress is alleged to avoid an agreement to settle a debt. (See *Perez v. Uline, Inc.* (2007) 157 Cal.App.4th 953, 959–960 [68 Cal.Rptr.3d 872].)

Element 2 requires that the defendant have had “no reasonable alternative” other than to consent. Economic duress to avoid a settlement agreement may require that the creditor be placed in danger of imminent bankruptcy or financial ruin. (See *Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1156–1157, 204 Cal.Rptr. 86].) At least one court has stated this standard in a case not involving a settlement (see *Uniwill v. City of Los Angeles* (2004) 124 Cal.App.4th 537, 545 [21 Cal.Rptr.3d 464]), though most cases do not require that the only alternative be bankruptcy or financial ruin. (See, e.g., *Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1173–1174 [116 Cal.Rptr.3d 122].)

In the next-to-last paragraph, state the rule that makes the alleged conduct wrongful. (See Restatement 2d of Contracts, § 176, When a Threat is Improper.) The conduct must be something more than the breach or threatened breach of the contract itself. An act for which a party has an adequate legal remedy is not duress. (*River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1425 [45 Cal.Rptr.2d 790].)

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.

- “The doctrine of ‘economic duress’ can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead ‘economic duress’ to avoid the contract.” (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644 [76 Cal.Rptr.2d 615], internal citation omitted.)
- The nonexistence of a “reasonable alternative” is a question of fact. (*CrossTalk Productions, Inc., supra*, 65 Cal.App.4th at p. 644.)
- “‘At the outset it is helpful to acknowledge the various policy considerations which are involved in cases involving economic duress. Typically, those claiming such coercion are attempting to avoid the consequences of a modification of an original contract or of a settlement and release agreement. On the one hand, courts are reluctant to set aside agreements because of the notion of freedom of contract and because of the desirability of having private dispute resolutions be final. On the other hand, there is an increasing recognition of the law’s role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.’” (*Rich & Whillock, Inc., supra*, 157 Cal.App.3d at p. 1158.)
- “‘As it has evolved to the present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. . . . Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator’s pressure. . . . The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine. . . . Further, a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin. . . .’” (*Chan, supra*, 188 Cal.App.4th at pp. 1173–1174.)
- “‘It is not duress . . . to take a different view of contract rights, even though mistaken, from that of the other contracting party, and it is not duress to refuse, in good faith, to proceed with a contract, even though such refusal might later be found to be wrong. [¶] . . . “A mere threat to withhold a legal right for the enforcement of which a person has an adequate [legal] remedy is not duress.” ’” (*River Bank America, supra*, 38 Cal.App.4th at p. 1425.)
- “[W]rongful acts will support a claim of economic duress when ‘a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin.’” (*Uniwill, supra*, 124 Cal.App.4th at p. 545.)
- “Economic duress has been recognized as a basis for rescinding a settlement. However, the courts, in desiring to protect the freedom of contracts and to

accord finality to a privately negotiated dispute resolution, are reluctant to set aside settlements and will apply ‘economic duress’ only in limited circumstances and as a ‘last resort.’ ” (*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1058 [37 Cal.Rptr.2d 501].)

- “Required criteria that must be proven to invalidate a settlement agreement are: ‘(1) the debtor knew there was no legitimate dispute and that it was liable for the full amount; (2) the debtor nevertheless refused in bad faith to pay and thereby created the economic duress of imminent bankruptcy; (3) the debtor, knowing the vulnerability its own bad faith had created, used the situation to escape an acknowledged debt; and (4) the creditor was forced to accept an inequitably low amount. . . .’ ” (*Perez, supra*, 157 Cal.App.4th at pp. 959–960.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 315–317

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.22, 215.122 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.24 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.07

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.03–17.06, 17.20–17.24[2]

334. Affirmative Defense—Undue Influence

[Name of defendant] claims that no contract was created because [he/she/nonbinary pronoun] was unfairly pressured by [name of plaintiff] into consenting to the contract.

To succeed, [name of defendant] must prove both of the following:

1. That [name of plaintiff] used
[a relationship of trust and confidence] [or]
[[name of defendant]’s weakness of mind] [or]
[[name of defendant]’s needs or distress]
to induce or pressure [name of defendant] into consenting to the contract; and
2. That [name of defendant] would not otherwise have consented to the contract.

If you decide that [name of defendant] has proved both of the above, then no contract was created.

New September 2003

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.
- Undue Influence. Civil Code section 1575.
- The question of undue influence is decided as a question of fact: “[D]irect evidence of undue influence is rarely obtainable and, thus the court is normally relegated to determination by inference from the totality of facts and circumstances. Indeed, there are no fixed definitions or inflexible formulas. Rather, we are concerned with whether from the entire context it appears that one’s will was overborne and he was induced to do or forbear to do an act which he would not do, or would do, if left to act freely.” (*Keithley v. Civil Service Bd. of the City of Oakland* (1970) 11 Cal.App.3d 443, 451 [89 Cal.Rptr. 809], internal citations omitted.)
- “In essence, undue influence consists of the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person. The undue susceptibility to such overpersuasive influence may be the product of physical or emotional exhaustion or anguish which results in one’s inability to act with unencumbered volition.” (*Keithley, supra*, 11 Cal.App.3d at p. 451.)
- Whether or not the parties have a confidential relationship is a question of fact:

“It is, of course, well settled that while the mere fact that a relationship is friendly and intimate does not necessarily amount to a confidential relationship, such relationship may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. It is likewise frequently emphasized that the existence of a confidential relationship presents a question of fact which, of necessity, may be determined only on a case by case basis.” (*O’Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153 [119 Cal.Rptr. 245], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 317–322

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.40–215.42, 215.130–215.132 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.70 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, § 77.352 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.07

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.03–17.06, 17.25–17.28

335. Affirmative Defense—Fraud

[*Name of defendant*] **claims that no contract was created because [his/her/nonbinary pronoun/its] consent was obtained by fraud. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That [*name of plaintiff*] represented that [*insert alleged fraudulent statement*];**
- 2. That [*name of plaintiff*] knew that the representation was not true;**
- 3. That [*name of plaintiff*] made the representation to persuade [*name of defendant*] to agree to the contract;**
- 4. That [*name of defendant*] reasonably relied on this representation; and**
- 5. That [*name of defendant*] would not have entered into the contract if [he/she/nonbinary pronoun/it] had known that the representation was not true.**

If you decide that [*name of defendant*] has proved all of the above, then no contract was created.

New September 2003

Directions for Use

This instruction covers intentional misrepresentation under the first alternative presented in Civil Code section 1572. The other types of fraud that are set forth in section 1572 are negligent misrepresentation, concealment of a material fact, and false promise.

If the case involves an alleged negligent misrepresentation, substitute the following for element 2: “That [*name of plaintiff*] had no reasonable grounds for believing the representation was true.”

If the case involves concealment, the following may be substituted for element 1: “That [*name of plaintiff*] intentionally concealed an important fact from [*name of defendant*], creating a false representation.” See CACI No. 1901, *Concealment*, for alternative ways of proving this element.

If the case involves a false promise, substitute the following for element 1: “That [*name of plaintiff*] made a promise that [he/she/nonbinary pronoun/it] did not intend to perform” and insert the word “promise” in place of the word “representation” throughout the remainder of the instruction.

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.
- Actual Fraud. Civil Code section 1572.

- Fraud can be found in making a misstatement of fact, as well as in the concealment of a fact: “Actual fraud involves conscious misrepresentation, or concealment, or non-disclosure of a material fact which induces the innocent party to enter the contract.” (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128 [54 Cal.Rptr. 533].)
- Fraud may be asserted as an affirmative defense: “One who has been induced to enter into a contract by false and fraudulent representations may rescind the contract; or he may affirm it, keeping what he has received under it, and maintain an action to recover damages he has sustained by reason of the fraud; or he may set up such damages as a complete or partial defense if sued on the contract by the other party.” (*Grady v. Easley* (1941) 45 Cal.App.2d 632, 642 [114 P.2d 635].)
- “It is well established that a defrauded defendant may set up the fraud as a defense and, in fact, may even recoup his damages by counterclaim in an action brought by the guilty party to the contract. The right to avoid for fraud, however, is lost if the injured party, after acquiring knowledge of the fraud, manifests an intention to affirm the contract.” (*Bowmer v. H. C. Louis, Inc.* (1966) 243 Cal.App.2d 501, 503 [52 Cal.Rptr. 436], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 286–309

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70–215.72, 215.144 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.40 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, § 77.353 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.24

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.03–17.09, 17.12–17.18

336. Affirmative Defense—Waiver

[Name of defendant] **claims that [he/she/nonbinary pronoun/it] did not have to [insert description of performance] because [name of plaintiff] gave up [his/her/nonbinary pronoun/its] right to have [name of defendant] perform [this/these] obligation[s]. This is called a “waiver.”**

To succeed, [name of defendant] must prove both of the following by clear and convincing evidence:

- 1. That [name of plaintiff] knew [name of defendant] was required to [insert description of performance]; and**
- 2. That [name of plaintiff] freely and knowingly gave up [his/her/nonbinary pronoun/its] right to have [name of defendant] perform [this/these] obligation[s].**

A waiver may be oral or written or may arise from conduct that shows that [name of plaintiff] gave up that right.

If [name of defendant] proves that [name of plaintiff] gave up [his/her/nonbinary pronoun/its] right to [name of defendant]’s performance of [insert description of performance], then [name of defendant] was not required to perform [this/these] obligation[s].

New September 2003

Directions for Use

This issue is decided under the “clear and convincing” standard of proof. See CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

Sources and Authority

- “Waiver is the intentional relinquishment of a known right after knowledge of the facts.” (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572 [150 P.2d 422].)
- “ ‘ “The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [Citation.]” [Citation.] Thus, “California courts will find waiver when a party intentionally relinquishes a right or when that party’s acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.” [Citation.]’ [Citation.]” (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78 [215 Cal.Rptr.3d 835].)
- “Acceptance of benefits under a lease is conduct that supports a finding of waiver.” (*Gould v. Corinthian Colleges, Inc.* (2011) 192 Cal.App.4th 1176, 1179 [120 Cal.Rptr.3d 943], internal citations omitted.)
- “Waiver is ordinarily a question for the trier of fact; ‘[h]owever, where there are

no disputed facts and only one reasonable inference may be drawn, the issue can be determined as a matter of law.’ ” (*DuBeck v. California Physicians’ Service* (2015) 234 Cal.App.4th 1254, 1265 [184 Cal.Rptr.3d 743].)

- When the injured party with knowledge of the breach continues to accept performance from the guilty party, such conduct may constitute a waiver of the breach. (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440–441 [6 P.2d 71].)
- There can be no waiver where the one against whom it is asserted has acted without full knowledge of the facts. It cannot be presumed, in the absence of such knowledge, that there was an intention to waive an existing right. (*Craig v. White* (1921) 187 Cal. 489, 498 [202 P. 648].)
- “[N]otwithstanding a provision in a written contract that expressly precludes oral modification, the parties may, by their words or conduct, waive the enforcement of a contract provision if the evidence shows that was their intent.” (*Wind Dancer Production Group, supra*, 10 Cal.App.5th at p. 80.)
- “The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and ‘doubtful cases will be decided against a waiver’.” (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107–108 [48 Cal.Rptr. 865, 410 P.2d 369].)
- “The trial court correctly instructed the jury that the waiver of a known right must be shown by clear and convincing proof.” (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61 [35 Cal.Rptr.2d 515].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 881, 882

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.57, 140.113, 140.136 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.40, 50.41, 50.110 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.08, 22.65, 22.68

337. Affirmative Defense—Novation

[*Name of defendant*] claims that the original contract with [*name of plaintiff*] cannot be enforced because the parties substituted a new and different contract for the original.

To succeed, [*name of defendant*] must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

If you decide that [*name of defendant*] has proved this, then the original contract is not enforceable.

New September 2003; Revised October 2004

Directions for Use

If the contract in question is not the original contract, specify which contract it is instead of “original.”

Although there is language in *Alexander v. Angel* (1951) 37 Cal.2d 856, 860–861 [236 P.2d 561] that could be read to suggest that a novation must be proved by the higher standard of clear and convincing proof, an examination of the history of that language and the cases upon which the language in *Alexander* depends (*Columbia Casualty Co. v. Lewis* (1936) 14 Cal.App.2d 64, 72 [57 P.2d 1010] and *Houghton v. Lawton* (1923) 63 Cal.App. 218, 223 [218 P. 475]) demonstrates that the original use of the term “clear and convincing,” carried forward thereafter without analysis, was intended only to convey the concept that a novation must clearly be shown and may not be presumed. The history of the language does not support a requirement that a party alleging a novation must prove there is a high probability (i.e., clear and convincing proof) that the parties agreed to a novation. See also, sections 279 and 280 of the Restatement Second of Contracts. A party alleging a novation must prove that the facts supporting the novation are more likely to be true than not true.

Sources and Authority

- Novation. Civil Code sections 1530. 1531.
- “A novation is a substitution, by agreement, of a new obligation for an existing one, with intent to extinguish the latter. A novation is subject to the general rules governing contracts and requires an intent to discharge the old contract, a mutual assent, and a consideration.” (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 463 [98 Cal.Rptr. 482].)
- Conduct may form the basis for a novation although there is no express writing or agreement. (*Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773 [97 P.2d 798].)
- Novation is a question of fact, and the burden of proving it is upon the party

asserting it. (*Alexander v. Angel* (1951) 37 Cal.2d 856, 860 [236 P.2d 561].)

- “When there is conflicting evidence the question whether the parties to an agreement entered into a modification or a novation is a question of fact.” (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 980 [269 Cal.Rptr. 807].)
- “The ‘question whether a novation has taken place is always one of intention,’ with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement.” (*Alexander, supra*, 37 Cal.2d at p. 860, internal citations omitted.)
- “[I]n order for there to be a valid novation, it is necessary that the parties intend that the rights and obligations of the new contract be substituted for the terms and conditions of the old contract.” (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457 [118 Cal.Rptr. 695].)
- “While the evidence in support of a novation must be ‘clear and convincing,’ the ‘whole question is one of fact and depends upon all the facts and circumstances of the particular case,’ with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions.” (*Alexander, supra*, 37 Cal.2d at pp. 860–861, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 992–994

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.141 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.450–50.464 (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, §§ 77.20, 77.280–77.282 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.58[3]

338. Affirmative Defense—Statute of Limitations

[Name of defendant] contends that [name of plaintiff]’s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [name of plaintiff]’s claimed harm occurred before [insert date two or four years before date of filing].

New December 2007

Directions for Use

This instruction is for use if the defendant claims that the plaintiff’s action was not filed within the applicable four-year period for breach of a written contract (see Code Civ. Proc., § 337(1)) or two-year period for breach of an oral contract. (See Code Civ. Proc., § 339(1).) Do not use this instruction for breach of a California Uniform Commercial Code sales contract. (See Com. Code, § 2725.)

If the contract either shortens or extends the limitation period, use the applicable period from the contract instead of two years or four years.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense, CACI No. 455, *Statute of Limitations—Delayed Discovery*, may be adapted for use.

Sources and Authority

- Four-Year Statute of Limitations: Contract. Code of Civil Procedure section 337(a).
- Two-Year Statute of Limitations: Contract. Code of Civil Procedure section 339(1).
- “In general, California courts have permitted contracting parties to modify the length of the otherwise applicable California statute of limitations, whether the contract has extended or shortened the limitations period.” (*Hambrecht & Quist Venture Partners v. Am. Medical Internat.* (1995) 38 Cal.App.4th 1532, 1547 [46 Cal.Rptr.2d 33].)
- “A contract cause of action does not accrue until the contract has been breached.” (*Spear v. Cal. State Automobile Assn.* (1992) 2 Cal.4th 1035, 1042 [9 Cal.Rptr.2d 381, 831 P.2d 821].)
- “The claim accrues when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause.” (*Angeles Chem. Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119 [51 Cal.Rptr.2d 594].)
- “[T]he discovery rule may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time.” (*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 4–5 [131

Cal.Rptr.2d 680].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 508–548

5 Witkin, California Procedure (5th ed. 2008) Pleading, § 1072

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 345

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.42[2]
(Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.120 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.03 et seq.

339–349. Reserved for Future Use

350. Introduction to Contract Damages

If you decide that *[name of plaintiff]* has proved *[his/her/nonbinary pronoun/its]* claim against *[name of defendant]* for breach of contract, you also must decide how much money will reasonably compensate *[name of plaintiff]* for the harm caused by the breach. This compensation is called “damages.” The purpose of such damages is to put *[name of plaintiff]* in as good a position as *[he/she/nonbinary pronoun/it]* would have been if *[name of defendant]* had performed as promised.

To recover damages for any harm, *[name of plaintiff]* must prove that when the contract was made, both parties knew or could reasonably have foreseen that the harm was likely to occur in the ordinary course of events as result of the breach of the contract.

[Name of plaintiff] also must prove the amount of *[his/her/nonbinary pronoun/its]* damages according to the following instructions. *[He/She/Nonbinary pronoun/It]* does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages.

[Name of plaintiff] claims damages for *[identify general damages claimed]*.

New September 2003; Revised October 2004, December 2010

Directions for Use

This instruction should always be read before any of the following specific damages instructions. (See CACI Nos. 351–360.)

Sources and Authority

- Contract Damages. Civil Code section 3300.
- Damages Must Be Clearly Ascertainable. Civil Code section 3301.
- Damages No Greater Than Benefit of Full Performance. Civil Code section 3358.
- Damages Must Be Reasonable. Civil Code section 3359.
- “An element of a breach of contract cause of action is damages proximately caused by the defendant’s breach. The statutory measure of damages for breach of contract is ‘the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.’ ‘Contract damages seek to approximate the agreed-upon performance. “[I]n the law of contracts the theory is that the party injured by breach should receive as nearly as possible the equivalent of the benefits of performance.” ’ ” (*Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 9 [239 Cal.Rptr.3d 838], internal citations omitted.)

- “This aim can never be exactly attained yet that is the problem the trial court is required to resolve.” (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)
- “[D]amages may not exceed the benefit which it would have received had the promisor performed.” (*Brandon & Tibbs, supra*, 226 Cal.App.3d at p. 468, internal citations omitted.)
- “ ‘The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.’ ” (*Brandon & Tibbs, supra*, 226 Cal.App.3d at p. 455, internal citation omitted.)
- “Contractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages).” (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968 [22 Cal.Rptr.3d 340, 102 P.3d 257].)
- “General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are ‘deemed’ to have contemplated them.” (*Lewis Jorge Construction Management, Inc., supra*, 34 Cal.4th at p. 968, internal citations omitted.)
- “ ‘Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.’ ‘In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.’ ” (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)
- “[I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract.’ ” (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [42 Cal.Rptr.2d 136], internal citations omitted.)
- “The detriment that is ‘likely to result therefrom’ is that which is foreseeable to the breaching party at the time the contract is entered into.” (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)

- “Where the fact of damages is certain, as here, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation.” (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398 [112 Cal.Rptr.2d 99], footnotes and internal citations omitted.)
- “Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are ‘proximately caused’ by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain.” (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)
- “[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California.” (*Erlich, supra*, 21 Cal.4th 543 at p. 558, internal citations omitted.)
- “Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress.” (*Erlich, supra*, 21 Cal.4th at p. 559, internal citations omitted.)
- “The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years.” (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 803 [7 Cal.Rptr.2d 82], internal citation omitted.)
- “[T]he principle that attorney fees *qua* damages are recoverable as damages, and not as costs of suit, applies equally to breach of contract.” (*Copenbarger, supra*, 29 Cal.App.5th at p. 10, original italics.)
- “Numerous other cases decided both before and after *Brandt* have likewise recognized that ‘[a]lthough fee issues are usually addressed to the trial court in the form of a posttrial motion, fees as damages are pleaded and proved by the party claiming them and are decided by the jury unless the parties stipulate to a posttrial procedure.’ ” (*Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1229 [219 Cal.Rptr.3d 814].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 894–903

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.1–4.9

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*,

§§ 140.55–140.56, 140.100–140.106 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.70 et seq. (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.20 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.03 et seq.

351. Special Damages

[*Name of plaintiff*] [also] **claims damages for** [*identify special damages*].

To recover for this harm, [*name of plaintiff*] must prove that when the parties made the contract, [*name of defendant*] knew or reasonably should have known of the special circumstances leading to the harm.

New September 2003

Directions for Use

Before giving this instruction, the judge should determine whether a particular item of damage qualifies as “special.”

Sources and Authority

- Measure of Contract Damages. Civil Code section 3300.
- “ ‘Unlike general damages, special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement. Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test). [Citations.] Special damages “will not be presumed from the mere breach” but represent loss that ‘occurred by reason of injuries following from’ the breach.’ ” (*Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1010 [207 Cal.Rptr.3d 82].)
- “Special damages must fall within the rule of *Hadley v. Baxendale*, . . . that is, they must reasonably be supposed to have been contemplated or foreseeable by the parties when making the contract as the probable result of a breach.” (*Sabraw v. Kaplan* (1962) 211 Cal.App.2d 224, 227 [27 Cal.Rptr. 81], internal citations omitted.)
- “Parties may voluntarily assume the risk of liability for unusual losses, but to do so they must be told, at the time the contract is made, of any special harm likely to result from a breach [citations]. Alternatively, the nature of the contract or the circumstances in which it is made may compel the inference that the defendant should have contemplated the fact that such a loss would be ‘the probable result’ of the defendant’s breach. [Citation.] Not recoverable as special damages are those ‘beyond the expectations of the parties.’ [Citation.] Special damages for breach of contract are limited to losses that were either actually foreseen [citation] or were ‘reasonably foreseeable’ when the contract was formed.” (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1269–1270 [168 Cal.Rptr.3d 499].)

- “When reference is made to the terms of the contract alone, there is ordinarily little difficulty in determining what damages arise from its breach in the usual course of things, and the parties will be presumed to have contemplated such damages only. But where it is claimed the circumstances show that a special purpose was intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily follow from a breach by the other party), and such purpose was known to the other party, the facts showing the special purpose and the knowledge of the other party must be averred. This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because in the usual course of events the purchaser could have supplied himself with like commodities at the market price. And if special circumstances existed entitling the purchaser to greater damages for the defeat of a special purpose known to the contracting parties (as, for example, if the purchaser had already contracted to furnish the goods at a profit, and they could not be obtained in the market), such circumstances must be stated in the declaration with the facts which, under the circumstances, enhanced the injury.” (*Mitchell v. Clarke* (1886) 71 Cal. 163, 164–165 [11 P. 882], internal citation omitted.)
- “[I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract. The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting.” (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)
- “Contract damages must be clearly ascertainable in both nature and origin. A contracting party cannot be required to assume limitless responsibility for all consequences of a breach and must be advised of any special harm that might result in order to determine whether or not to accept the risk of contracting.” (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 560 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)
- “ ‘[F]oreseeability is to be determined as of the time of the making of the contract’; ‘what must be foreseeable is only that the loss would result if the breach occurred’; ‘it is foreseeability only by the party in breach that is determinative’; ‘foreseeability has an objective character’; and ‘the loss need only have been foreseeable as a probable, as opposed to a necessary or certain, result of the breach.’ ” (*Ash, supra*, 223 Cal.App.4th at p. 1270.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 896

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.13
(Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.61 et seq.
(Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or
Opposing Damages in Contract Actions*, 7.04[6], 7.08[3]

352. Loss of Profits—No Profits Earned

To recover damages for lost profits, [name of plaintiff] must prove that it is reasonably certain [he/she/nonbinary pronoun/it] would have earned profits but for [name of defendant]’s breach of the contract.

To decide the amount of damages for lost profits, you must determine the gross, or total, amount [name of plaintiff] would have received if the contract had been performed and then subtract from that amount the costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]] [name of plaintiff] would have had if the contract had been performed.

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

This instruction applies to both past and future lost profit claims. Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*, or CACI No. 351, *Special Damages*.

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- Damages Must Be Clearly Ascertainable. Civil Code section 3301.
- “Lost profits may be recoverable as damages for breach of a contract. ‘[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.’ Such damages must ‘be proven to be certain both as to their occurrence and their extent, albeit not with ‘mathematical precision.’ ” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773–774 [149 Cal.Rptr.3d 614, 288 P.3d 1237].)
- “Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled.” (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856,

873–874 [274 Cal.Rptr. 168], internal citations omitted.)

- “Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. [Citations.] In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. [Citations.]” (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774.)
- “Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. ‘[W]here the operation of an established business is prevented or interrupted, as by a . . . breach of contract . . . , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.’ ” (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774.)
- “ ‘On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] . . . But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability.’ ” (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774.)
- “Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market.” (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698–1699 [42 Cal.Rptr.2d 136], internal citations omitted.)
- “Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that ‘[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits. Net profits are the gains made from sales ‘after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.’ ” (*Resort Video, Ltd.*, *supra*, 35 Cal.App.4th at p. 1700, internal citations omitted.)
- “It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery.” (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 904–907
California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery

of Money Damages, §§ 4.11–4.17

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

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

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or
Opposing Damages in Contract Actions*, 7.12

353. Loss of Profits—Some Profits Earned

To recover damages for lost profits, *[name of plaintiff]* must prove that it is reasonably certain *[he/she/nonbinary pronoun/it]* would have earned more profits but for *[name of defendant]*'s breach of the contract.

To decide the amount of damages for lost profits, you must:

1. First, calculate *[name of plaintiff]*'s estimated total profit by determining the gross amount *[he/she/nonbinary pronoun/it]* would have received if the contract had been performed, and then subtracting from that amount the costs *[including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]]* *[name of plaintiff]* would have had if the contract had been performed;
2. Next, calculate *[name of plaintiff]*'s actual profit by determining the gross amount *[he/she/nonbinary pronoun/it]* actually received, and then subtracting from that amount *[name of plaintiff]*'s actual costs *[including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]]*; and
3. Then, subtract *[name of plaintiff]*'s actual profit, which you determined in the second step, from *[his/her/nonbinary pronoun/its]* estimated total profit, which you determined in the first step. The resulting amount is *[name of plaintiff]*'s lost profit.

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*, or CACI No. 351, *Special Damages*.

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- Damages Must Be Clearly Ascertainable. Civil Code section 3301.
- “Lost profits may be recoverable as damages for breach of a contract. ‘[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.’ Such damages must ‘be proven to be certain both as to their occurrence

and their extent, albeit not with ‘mathematical precision.’ ” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773–774 [149 Cal.Rptr.3d 614, 288 P.3d 1237].)

- “Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled.” (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873–874 [274 Cal.Rptr. 168], internal citations omitted.)
- “Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. [Citations.] In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. [Citations.]” (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774[.])
- “Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. ‘[W]here the operation of an established business is prevented or interrupted, as by a . . . breach of contract . . . , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.’ ” (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774.)
- “ ‘On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] . . . But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability.’ ” (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774.)
- “Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market.” (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698–1699 [42 Cal.Rptr.2d 136], internal citations omitted.)
- “Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that ‘[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits.’ Net profits are the gains made from sales ‘after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.’ ” (*Resort Video, Ltd.*, *supra*,

35 Cal.App.4th at p. 1700, internal citations omitted.)

- “It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery.” (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 904–907

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.11–4.17

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

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.12

354. Owner's/Lessee's Damages for Breach of Contract to Construct Improvements on Real Property

To recover damages for breach of a contract to construct improvements on real property, [name of plaintiff] must prove:

[[The reasonable cost to [name of plaintiff] of completing the work;]

[And the value of loss of use of the property;]

[And the reasonable cost of alternative housing from the date the work was to have been completed until the date the work was completed;]

[Less any amounts unpaid under the contract with [name of defendant];]]

[or]

[The difference between the fair market value of the [lessee's interest in the] property and its fair market value had the improvements been constructed.]

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*. The bracketed options state alternative measures of damage. Choose the option appropriate to the facts of the case. For a definition of "fair market value," see CACI No. 3501, *"Fair Market Value" Explained*.

Sources and Authority

- "The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff's property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed. A different rule applies, however, where improvements are to be made on property not owned by the injured party. 'In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and 3359 of the Civil Code, the proper measure of damages is the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived.' " (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, (1977) 66 Cal.App.3d 101, 123–124 [135 Cal.Rptr. 802], internal citations omitted.)
- "If the work were to be done on plaintiffs' property the proper measure of

damages would ordinarily be the reasonable cost to plaintiffs of completing the work. A different rule applies, however, when the improvements are to be made on property that is not owned by the injured party.” (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600 [262 P.2d 305], internal citations omitted.)

- “It is settled . . . that the measure of damages for the breach of a building construction contract is ordinarily such sum as is required to make the building conform to the contract. In such situations, the diminution of value rule cannot be invoked and the measure of damages is not the difference between the actual value of the property and its value had it been constructed in accordance with the plans and specifications.” (*Kitchel v. Acree* (1963) 216 Cal.App.2d 119, 123 [30 Cal.Rptr. 714], internal citations omitted.)
- “The available damages for defective construction are limited to the cost of repairing the home, including lost use or relocation expenses, or the diminution in value.” (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 561 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)
- “Where the measure of damages turns on the value of property, whether liability sounds in tort or breach of contract, the normal standard is market value. The definition of market value and the principles governing its ascertainment are the same as those applicable to the valuation of property in eminent domain proceedings and in ad valorem taxation of property. In *Sacramento etc. R. R. Co. v. Heilbron*, market value was defined as ‘the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.’ That classic exposition with subsequent refinements has always been the accepted definition of market value in California.” (*Glendale Federal Savings & Loan Assn.*, *supra*, 66 Cal.App.3d at pp. 141–142, internal citations and footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 937–939

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.10 et seq. (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.100 (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts And Subcontracts*, § 30D.223 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 10, *Seeking or Opposing Statutory Remedies in Contract Actions*, 10.05

355. Obligation to Pay Money Only

To recover damages for the breach of a contract to pay money, [name of plaintiff] must prove the amount due under the contract.

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*. If there is a dispute as to the appropriate rate of interest, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

Sources and Authority

- Damages for Breach of Obligation to Pay Money. Civil Code section 3302.
- Interest on Contract Damages. Civil Code section 3289.
- “The section is part of the original Civil Code and was intended to codify a common-law rule of damages for breach of a contract to pay a liquidated sum. In *Siminoff v. Jas. H. Goodman & Co. Bank*, the court after careful and extensive analysis concluded that section 3302 was not intended to abolish the common-law measure of damages for dishonor of a check. *Hartford*, in reaching the opposite conclusion, failed even to note the common-law rule or the California cases which had followed it, and did not discuss the strong arguments in its favor advanced in the *Siminoff* opinion. The *Hartford* holding on section 3302 no longer applies to the instant problem since section 3320 clearly constitutes ‘a legislative recognition that a depositor whose check is wrongfully dishonored may thereby sustain “actual damage” beyond the amount of the check’ and thus supersedes the *Hartford* holding on the measure of damages.” (*Weaver v. Bank of America National Trust & Savings Assn.* (1963) 59 Cal.2d 428, 436, fn. 11 [30 Cal.Rptr. 4, 380 P.2d 644], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 936

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][a]

356. Buyer's Damages for Breach of Contract for Sale of Real Property (Civ. Code, § 3306)

To recover damages for the breach of a contract to sell real property, [name of plaintiff] must prove:

1. The difference between the fair market value of the property on the date of the breach and the contract price;
2. The amount of any payment made by [name of plaintiff] toward the purchase;
3. The amount of any reasonable expenses for examining title and preparing documents for the sale;
4. The amount of any reasonable expenses in preparing to occupy the property; and
5. [Insert item(s) of claimed consequential damages].

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*. If the appropriate rate of interest is in dispute, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of “fair market value,” see CACI No. 3501, *“Fair Market Value” Explained*.

Sources and Authority

- Damages for Breach of Contract to Convey Real Property. Civil Code section 3306.
- Interest on Contract Damages. Civil Code section 3289.
- “The rules of damages for a breach of a contract to sell or buy real property are special and unique. To the extent that the measure of compensatory damages available to a buyer or seller of real property for a breach of a contract are different from the general measure of compensatory damages for a breach of contract, the special provisions for damages for a breach of a real property sales contract prevail.” (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 751 [118 Cal.Rptr.3d 531].)
- “A simple reading of the statute discloses that by its explicit terms it is adaptable only to a failure to convey, and not to a delay in conveying.” (*Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 330 [343 P.2d 341].)
- “This court itself has recently described section 3306 as providing for ‘loss-of-

bargain damages’ measured by the difference between the contract price and the fair market value on the date of the breach.” (*Reese v. Wong* (2001) 93 Cal.App.4th 51, 56 [112 Cal.Rptr.2d 669], internal citation omitted.)

- “It is settled that when a seller of real property fails or refuses to convey, a buyer who has made advance payments toward the purchase price may recover interest on those payments as damages for breach of contract. This rule is not limited to sales of real property; it applies to sales in general.” (*Al-Husry v. Nilsen Farms Mini-Market, Inc.* (1994) 25 Cal.App.4th 641, 648 [31 Cal.Rptr.2d 28], internal citations omitted.)
- Section 3306 does not ordinarily apply to breach of an unexercised option to buy property. (*Schmidt v. Beckelman* (1960) 187 Cal.App.2d 462, 470–471 [9 Cal.Rptr. 736].)
- “ ‘Generally, [consequential] damages are those which, in view of all facts known by the parties at the time of the making of the contract, may reasonably be supposed to have been considered as a likely consequence of a breach in the ordinary course of events. This provision would conform the measure of damages in real property conveyance breaches to the general contract measure of damages which is specified in Civil Code 3300: “. . . all the detriment proximately caused (by the breach), or which, in the ordinary course of things, would be likely to result therefrom.” ’ ” (*Stevens Group Fund IV v. Sobrato Development Co.* (1991) 1 Cal.App.4th 886, 892 [2 Cal.Rptr.2d 460], quoting the Assembly Committee on Judiciary.)
- “Moreover, in none of the foregoing cases does it appear that the buyer demonstrated the existence of the other requisites for an award of consequential or special damages, i.e., that the seller knew of the buyer’s purpose in purchasing the property and that the anticipated profits were proved with reasonable certainty as to their occurrence and amount.” (*Greenwich S.F., LLC, supra*, 190 Cal.App.4th at p. 757.)
- “The plain language of section 3306, adding consequential damages to the general damages and other specified damages recoverable for breach of a contract to convey real property, the legislative history of the 1983 amendment acknowledging that the addition of consequential damages would conform the measure of damages to the general contract measure of damages, and the generally accepted inclusion of lost profits as a component of consequential or special damages in other breach of contract contexts and by other states in the context of breach of contracts to convey real property, taken together, persuade us that lost profits may be awarded as part of consequential damages under section 3306 upon a proper showing.” (*Greenwich S.F., LLC, supra*, 190 Cal.App.4th at p. 758, internal citations omitted.)
- “Rents received from the lease of the property in this case are not properly an item of consequential damages. Here, plaintiff introduced evidence as to the fair market value of the property which included these profits. To allow these as consequential damages under these circumstances would have permitted a double

recovery for plaintiff.” (*Stevens Group Fund IV, supra*, 1 Cal.App.4th at p. 892.)

- “[T]he phrase ‘to enter upon the land’ refers to the taking of possession rather than the use of the property.” (*Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1011 [207 Cal.Rptr.3d 82].)
- “We think the phrase ‘and interest’ should continue to be read as referring to the generally applicable provisions of [Civil Code] section 3287 regarding prejudgment interest. As amended in 1967, subdivision (a) of section 3287 establishes a right to recover prejudgment interest on damages ‘capable of being made certain by calculation’ and subdivision (b) gives the court general discretionary authority to award prejudgment interest where damages are ‘based upon a cause of action in contract . . .’ The discretionary authority conferred by subdivision (b) will ordinarily apply to loss-of-bargain damages measured by the contract price/market value differential.” (*Rifkin v. Achermann* (1996) 43 Cal.App.4th 391, 397 [50 Cal.Rptr.2d 661].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 926–928

California Real Property Remedies Practice (Cont.Ed.Bar 1980; 1999 supp.) Breach of Seller-Buyer Agreements, §§ 4.11–4.14

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 11-D, *Buyer’s Remedies Upon Seller’s Breach—Damages And Specific Performance*, ¶ 11:184 (The Rutter Group)

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser*, § 569.22 (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.12 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][f]

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.37, 8.58

357. Seller's Damages for Breach of Contract to Purchase Real Property

To recover damages for the breach of a contract to buy real property, [name of plaintiff] must prove:

1. The difference between the amount that was due to [name of plaintiff] under the contract and the fair market value of the property at the time of the breach; [and]
 2. [Insert item(s) of claimed consequential damages, e.g., resale expenses].
-

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*. If there is a dispute regarding the appropriate rate of interest, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of “fair market value,” see CACI No. 3501, *“Fair Market Value” Explained*.

Sources and Authority

- Damages for Breach of Contract to Purchase Real Property. Civil Code section 3307.
- “It is generally accepted that the equivalent of value to the seller is fair market value. Fair market value is reckoned ‘in terms of money.’ ” (*Abrams v. Motter* (1970) 3 Cal.App.3d 828, 840–841 [83 Cal.Rptr. 855], internal citations omitted.)
- “The “value of the property” to [plaintiff] is to be determined as of the date of the breach of the agreement by [defendant].” (*Allen v. Enomoto* (1964) 228 Cal.App.2d 798, 803 [39 Cal.Rptr. 815], internal citation omitted.)
- There can be no damages where the value to the owner equals or exceeds the contract price. (*Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 792 [62 Cal.Rptr. 553], internal citation omitted.)
- “[T]he view that this section is exclusive, and precludes other consequential damages occasioned by the breach, was rejected in *Royer v. Carter*. Under Civil Code, section 3300, other damages are recoverable, usually embracing the out-of-pocket expenses lost by failure of the transaction.” (*Wade v. Lake County Title Co.* (1970) 6 Cal.App.3d 824, 830 [86 Cal.Rptr. 182], internal citation omitted.)
- “[C]ourts have permitted consequential damages, only where the seller has diligently attempted resale after the buyer has breached the contract.” (*Askari v.*

R & R Land Co. (1986) 179 Cal.App.3d 1101, 1107 [225 Cal.Rptr. 285], internal citation omitted.)

- “[I]f the property increases in value before trial and the vendor resells the property at a price higher than the value of the contract, there are no longer any loss of bargain damages.” (*Spurgeon v. Drumheller* (1985) 174 Cal.App.3d 659, 664 [220 Cal.Rptr. 195].)
- “The same rule of no loss of bargain damages to the vendor applies where the resale is for the same price as the contract price.” (*Spurgeon, supra*, 174 Cal.App.3d at p. 664, internal citations omitted.)
- “For the reason that no loss of bargain damages are available to a seller if there is a resale at the same or a higher price than the contract price, the law imposes on the seller of the property the duty to exercise diligence and to make a resale within the shortest time possible. In discussing the duty to mitigate where the vendee seeks return of a deposit, the *Sutter* court states the requirement that resales be made with reasonable diligence ‘states a policy applicable to resales of real property. Whether the resale is made one, two or three months later, or whether it be a year or more, it should be made with reasonable diligence to qualify the vendor to an allowance of an off-set against the vendee’s claim for restitution of money paid.’ ” (*Spurgeon, supra*, 174 Cal.App.3d at p. 665, internal citations omitted.)
- “Although it is well settled in the foregoing authorities that damages under Civil Code section 3307 for the difference between the contract price and property value may be insufficient to give the vendor the benefit of his bargain and he is entitled also to resale expenses and some costs of continued ownership, he should not be permitted to receive a windfall at the purchaser’s expense.” (*Smith v. Mady* (1983) 146 Cal.App.3d 129, 133 [194 Cal.Rptr. 42].)
- “Inasmuch as under *Abrams* and *Sutter* the vendor has an obligation to resell promptly in order to obtain consequential damages and the resale price may fix the property value as a basis for Civil Code section 3307 damages, we are impelled to conclude that there is no inherent separateness in the original sale and subsequent resale transactions. The increased resale price should not be disregarded in considering an offset to consequential damages awarded to a vendor against a defaulting purchaser of real property.” (*Smith, supra*, 146 Cal.App.3d at p. 133.)
- “The owner of real or personal property may competently testify to its value.” (*Newhart, supra*, 254 Cal.App.2d at p. 789, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 929–934

California Real Property Remedies Practice (Cont.Ed.Bar 1980; 1999 supp.), Breach of Seller-Buyer Agreements, §§ 4.37–4.43

California Practice Guide: Real Property Transactions, Ch. 11-C, ¶¶ 11:101–11:110, Seller’s Remedies Upon Buyer’s Breach-Damages and Specific Performance (The

Rutter Group)

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser*, § 569.22 (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.12 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][f]

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.37, 8.58

358. Mitigation of Damages

If [name of defendant] breached the contract and the breach caused harm, [name of plaintiff] is not entitled to recover damages for harm that [name of defendant] proves [name of plaintiff] could have avoided with reasonable efforts or expenditures. You should consider the reasonableness of [name of plaintiff]’s efforts in light of the circumstances facing [him/her/nonbinary pronoun/it] at the time, including [his/her/nonbinary pronoun/its] ability to make the efforts or expenditures without undue risk or hardship.

If [name of plaintiff] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she/nonbinary pronoun/it] spent for this purpose.

New September 2003

Sources and Authority

- “ ‘ “The doctrine of mitigation of damages holds that ‘[a] plaintiff who suffers damage as a result of . . . a breach of contract . . . 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.” ’ Under the doctrine, ‘[a] plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion.’ However, ‘[t]he duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable.’ ” (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 111 [186 Cal.Rptr.3d 295], internal citations omitted.)
- ‘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].)
- “Whether a plaintiff acted reasonably to mitigate damages . . . is a factual matter to be determined by the trier of fact” (*Agam, supra*, 236 Cal.App.4th at p. 111.)
- “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.” (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41 [21 Cal.Rptr.2d 110], internal citation omitted.)
- “A party injured by a breach of contract is required to do everything reasonably possible to negate his own loss and thus reduce the damages for which the other party has become liable. The plaintiff cannot recover for harm he could have foreseen and avoided by such reasonable efforts and without undue expense.

However, the injured party is not precluded from recovery to the extent that he has made reasonable but unsuccessful efforts to avoid loss.” (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460 [277 Cal.Rptr. 40], internal citations omitted.)

- “The burden of proving that losses could have been avoided by reasonable effort and expense must always be borne by the party who has broken the contract. Inasmuch as the law denies recovery for losses that can be avoided by reasonable effort and expense, justice requires that the risks incident to such effort should be carried by the party whose wrongful conduct makes them necessary. Therefore, special losses that a party incurs in a reasonable effort to avoid losses resulting from a breach are recoverable as damages.” (*Brandon & Tibbs, supra*, 226 Cal.App.3d at pp. 460–461, internal citations omitted.)

Secondary Sources

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.56 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.77 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, §§ 65.103, 65.121 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.12[6][b], 7.15[4]

359. Present Cash Value of Future Damages

To recover for future harm, *[name of plaintiff]* must prove that the harm is reasonably certain to occur and must prove the amount of those future damages. The amount of damages for future harm must be reduced to present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future. *[Name of defendant]* must prove the amount by which future damages should be reduced to present value.

To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide *[name of plaintiff]* with the amount of *[his/her/nonbinary pronoun/its]* future damages.

[You may consider expert testimony in determining the present cash value of future damages.] [You must use [the interest rate of _____ percent/ [and] *[specify other stipulated information]*] agreed to by the parties in determining the present cash value of future damages.]

New September 2003; Revised December 2010, June 2013

Directions for Use

Give this instruction if future damages are sought and there is evidence from which a reduction to present value can be made. Give the next-to-last sentence if there has been expert testimony on reduction to present value. Unless there is a stipulation, expert testimony will usually be required to accurately establish present values for future losses. Give the last sentence if there has been a stipulation as to the interest rate to use or any other facts related to present cash value.

It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].)

Present-value tables may assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- Future Damages. Civil Code section 3283.
- “In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective. A judgment for the plaintiff in such an action absolves the defendant from any duty, continuing or otherwise, to perform the contract. The judgment for damages is substituted for the wrongdoer’s duty to perform the contract.” (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 598 [262 P.2d 305], internal citations omitted.)

- “If the breach is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. Furthermore, even if a breach is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract. The circumstances of each case determine whether an injured party may treat a breach of contract as total.” (*Coughlin, supra*, 41 Cal.2d at pp. 598–599, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1719

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46
(Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.09[3]

360. Nominal Damages

If you decide that [name of defendant] breached the contract but also that [name of plaintiff] was not harmed by the breach, you may still award [him/her/nonbinary pronoun/it] nominal damages such as one dollar.

New September 2003

Sources and Authority

- Nominal Damages. Civil Code section 3360.
- “A plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him, since the defendant’s failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages. The maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right. Accordingly, nominal damages, which are presumed as a matter of law to stem merely from the breach of a contract may properly be awarded for the violation of such a right. And, by statute, such is also the rule in California.” (*Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632–633 [337 P.2d 499], internal citations omitted.)
- “With one exception . . . an unbroken line of cases holds that nominal damages are limited to an amount of a few cents or a dollar.” (*Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1089 [105 Cal.Rptr. 198], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 903
- 15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.14, 177.71 (Matthew Bender)
- 1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[11]

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/nonbinary pronoun/it] spent in preparing for contract performance. These amounts are called “reliance damages.” [Name of plaintiff] must prove the amount that [he/she/nonbinary pronoun/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/nonbinary pronoun/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.)
- “The lost earnings found by the jury constituted harm flowing not from the *breach* of any contract but from plaintiff’s *entry into* the contract in the expectation of receiving the promised options. Such ‘reliance’ damages may sometimes be recovered on a contract claim ‘[a]s an alternative’ to expectation damages.” (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 788 [211 Cal.Rptr.3d 743], original italics.)

- “[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 (11th ed. 2017) Contracts, § 894 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

362–369. Reserved for Future Use

370. Common Count: Money Had and Received

[Name of plaintiff] **claims that** [name of defendant] **owes** [him/her/nonbinary pronoun/it] **money. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] received money that was intended to be used for the benefit of [name of plaintiff];**
 2. **That the money was not used for the benefit of [name of plaintiff]; and**
 3. **That [name of defendant] has not given the money to [name of plaintiff].**
-

New June 2005

Directions for Use

The instructions in this series are not intended to cover all available common counts. Users may need to draft their own instructions or modify the CACI instructions to fit the circumstances of their case.

Sources and Authority

- “The common count is a general pleading which seeks recovery of money without specifying the nature of the claim Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.’ However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff.” (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)
- “Although such an action is one at law, it is governed by principles of equity. It may be brought ‘wherever one person has received money which belongs to another, and which “in equity and good conscience,” or in other words, in justice and right, should be returned. . . . The plaintiff’s right to recover is governed by principles of equity, although the action is one at law.’ ” (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)
- “A cause of action for money had and received is stated if it is alleged [that] the defendant “is indebted to the plaintiff in a certain sum ‘for money had and received by the defendant for the use of the plaintiff.’ ” . . . ’ The claim is viable ‘ “wherever one person has received money which belongs to another, and which in equity and good conscience should be paid over to the latter.” ’ As juries are instructed in CACI No. 370, the plaintiff must prove that the defendant received money ‘intended to be used for the benefit of [the plaintiff],’ that the money was

not used for the plaintiff's benefit, and that the defendant has not given the money to the plaintiff." (*Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454 [151 Cal.Rptr.3d 804], internal citations omitted.)

- “ ‘The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received.’ Recovery is denied in such cases unless the defendant himself has actually received the money.” (*Rotea v. Izuel* (1939) 14 Cal.2d 605, 611 [95 P.2d 927], internal citations omitted.)
- “[S]ince the basic premise for pleading a common count . . . is that the person is thereby ‘waiving the tort and suing in assumpsit,’ any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and . . . ‘one cannot be held to be a constructive trustee of something he had not acquired.’ One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money.” (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15 [101 Cal.Rptr. 499], internal citations omitted.)
- “ ‘This kind of action to recover back money which ought not in justice to be kept is very beneficial, and, therefore, much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff’s situation contrary to the laws made for the protection of persons under those circumstances.’ ” (*Minor v. Baldrige* (1898) 123 Cal. 187, 191 [55 P. 783], internal citation omitted.)
- “ ‘As Witkin states in his text, “[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract.” ’ A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract.” (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)
- “In the common law action of general assumpsit, it is customary to plead an indebtedness using ‘common counts.’ In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are ‘(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.’ ” (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)
- “A common count is not a specific cause of action, . . . rather, it is a simplified

form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable.” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

- “The cause of action [for money had and received] is available where, as here, the plaintiff has paid money to the defendant pursuant to a contract which is void for illegality.” (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623 [33 Cal.Rptr.2d 276], internal citations omitted.)
- “ ‘It is well established in our practice that an action for money had and received will lie to recover money paid by mistake, under duress, oppression or where an undue advantage was taken of plaintiffs’ situation whereby money was exacted to which the defendant had no legal right.’ ” (*J.C. Peacock, Inc. v. Hasko* (1961) 196 Cal.App.2d 353, 361 [16 Cal.Rptr. 518], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 561

12 California Forms of Pleading and Practice, Ch. 121, *Common Counts*, §§ 121.24[1], 121.51 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, § 43.25 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

371. Common Count: Goods and Services Rendered

[Name of plaintiff] **claims that** [name of defendant] **owes** [him/her/nonbinary pronoun/it] **money for** [goods delivered/services rendered]. **To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] requested, by words or conduct, that [name of plaintiff] [perform services/deliver goods] for the benefit of [name of defendant];**
 2. **That [name of plaintiff] [performed the services/delivered the goods] as requested;**
 3. **That [name of defendant] has not paid [name of plaintiff] for the [services/goods]; and**
 4. **The reasonable value of the [goods/services] that were provided.**
-

New June 2005

Sources and Authority

- “ “Quantum meruit refers to the well-established principle that ‘the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.’ [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that ‘the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made.’ ” [Citation.]’ ‘The underlying idea behind quantum meruit is the law’s distaste for unjust enrichment. If one has received a benefit which one may not justly retain, one should “restore the aggrieved party to his [or her] former position by return of the thing or its equivalent in money.” [Citation.]’ “ ‘The measure of recovery in *quantum meruit* is the reasonable value of the services rendered *provided* they were of direct benefit to the defendant.” [Citations.]’ In other words, quantum meruit is equitable payment for services already rendered.” (*E. J. Franks Construction, Inc. v. Sahota* (2014) 226 Cal.App.4th 1123, 1127–1128 [172 Cal.Rptr.3d 778], original italics, internal citations omitted.)
- “ ‘The common count is a general pleading which seeks recovery of money without specifying the nature of the claim Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.’ However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by

the plaintiff.” (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- “To recover on a claim for the reasonable value of services under a quantum meruit theory, a plaintiff must establish both that he or she was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant.” (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794 [9 Cal.Rptr.3d 734], internal citation omitted.)
- “[W]here services have been rendered under a contract which is unenforceable because not in writing, an action generally will lie upon a common count for quantum meruit.” (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996 [90 Cal.Rptr.2d 665].)
- “Although such an action is one at law, it is governed by principles of equity. It may be brought ‘wherever one person has received money which belongs to another, and which “in equity and good conscience,” or in other words, in justice and right, should be returned. . . . The plaintiff’s right to recover is governed by principles of equity, although the action is one at law.’ ” (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)
- “ ‘As Witkin states in his text, “[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract.” ’ A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract.” (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)
- “In the common law action of general assumpsit, it is customary to plead an indebtedness using ‘common counts.’ In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are ‘(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.’ ” (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)
- “A common count is not a specific cause of action, . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable.” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 554

12 California Forms of Pleading and Practice, Ch. 121, *Common Counts*, §§ 121.25, 121.55–121.58 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, §§ 44.33, 44.40 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

372. Common Count: Open Book Account

A book account is a written record of the credits and debts between parties [to a contract/in a fiduciary relationship]. [The contract may be oral, in writing, or implied by the parties' words and conduct.] A book account is “open” if entries can be added to it from time to time.

[*Name of plaintiff*] claims that there was an open book account in which financial transactions between the parties were recorded and that [*name of defendant*] owes [him/her/nonbinary pronoun/it] money on the account. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] and [*name of defendant*] had financial transactions with each other;
2. That [*name of plaintiff*], in the regular course of business, kept [a written/an electronic] account of the debits and credits involved in the transactions;
3. That [*name of defendant*] owes [*name of plaintiff*] money on the account; and
4. The amount of money that [*name of defendant*] owes [*name of plaintiff*].

New December 2005; Revised November 2019

Directions for Use

The instructions in this series are not intended to cover all available common counts. Users may need to draft their own instructions or modify the CACI instructions to fit the circumstances of the case.

Include the second sentence in the opening paragraph if the account is based on a contract rather than a fiduciary relationship. It is the contract that may be oral or implied; the book account must be in writing. (See Code Civ. Proc., § 337a [book account must be kept in a reasonably permanent form]; *Joslin v. Gertz* (1957) 155 Cal.App.2d 62, 65–66 [317 P.2d 155] [book account is a detailed statement kept in a book].)

Sources and Authority

- “ ‘A book account may be deemed to furnish the foundation for a suit in assumpsit . . . only when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant.’ . . . ‘The term “account,” . . . clearly requires the recording of sufficient information regarding the transaction involved in the suit, from which the debits and credits of the respective parties may be determined, so as to permit the striking of a balance to

ascertain what sum, if any, is due to the claimant.’ ” (*Robin v. Smith* (1955) 132 Cal.App.2d 288, 291 [282 P.2d 135], internal citations omitted.)

- “A book account is defined . . . as ‘a detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.’ It is, of course, necessary for the book to show against whom the charges are made. It must also be made to appear in whose favor the charges run. This may be shown by the production of the book from the possession of the plaintiff and his identification of it as the book in which he kept the account between him and the debtor. An open book account may consist of a single entry reflecting the establishment of an account between the parties, and may contain charges alone if there are no credits to enter. Money loaned is the proper subject of an open book account. Of course a mere private memorandum does not constitute a book account.” (*Joslin, supra*, 155 Cal.App.2d at pp. 65–66, internal citations omitted.)
- “A book account may furnish the basis for an action on a common count ‘. . . when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant.’ ” A book account is described as ‘open’ when the debtor has made some payment on the account, leaving a balance due.” (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708 [220 Cal.Rptr. 250], internal citations and footnote omitted.)
- “A *book account* is a detailed statement of debit/credit transactions kept by a creditor in the regular course of business, and in a reasonably permanent manner. In one sense, an *open-book account* is an account with one or more items unsettled. However, even if an account is technically settled, the parties may still have an open-book account, if they anticipate possible future transactions between them.” (*Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579, fn. 5 [53 Cal.Rptr.3d 887, 150 P.3d 764], original italics, internal citation omitted.)
- “[T]he most important characteristic of a suit brought to recover a sum owing on a book account is that the amount owed is determined by computing *all* of the credits and debits entered in the book account.” (*Interstate Group Administrators, Inc., supra*, 174 Cal.App.3d at p. 708.)
- “It is apparent that the mere entry of dates and payments of certain sums in the credit column of a ledger or cash book under the name of a particular individual, without further explanation regarding the transaction to which they apply, may not be deemed to constitute a ‘book account’ upon which an action in *assumpsit* may be founded.” (*Tillson v. Peters* (1940) 41 Cal.App.2d 671, 679 [107 P.2d 434].)
- “The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of

bookkeeping as distinguished from mere private memoranda.” (*Egan v. Bishop* (1935) 8 Cal.App.2d 119, 122 [47 P.2d 500].)

- “The common count is a general pleading which seeks recovery of money without specifying the nature of the claim. Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.’ However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff.” (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)
- “Although such an action is one at law, it is governed by principles of equity. It may be brought ‘wherever one person has received money which belongs to another, and which “in equity and good conscience,” or in other words, in justice and right, should be returned . . . The plaintiff’s right to recover is governed by principles of equity, although the action is one at law.’ ” (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)
- “[S]ince the basic premise for pleading a common count . . . is that the person is thereby ‘waiving the tort and suing in assumpsit,’ any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and . . . ‘one cannot be held to be a constructive trustee of something he had not acquired.’ One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money.” (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15 [101 Cal.Rptr. 499], internal citations omitted.)
- “‘As Witkin states in his text, “[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract.”’ A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract.” (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)
- “In the common law action of general assumpsit, it is customary to plead an indebtedness using ‘common counts.’ In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are ‘(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.’ ” (*Farmers Ins. Exchange v. Zerlin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)
- “A common count is not a specific cause of action, . . . rather, it is a simplified

form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable.” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 561

1 California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts*, §§ 8.20, 8.47 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, § 43.28 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

373. Common Count: Account Stated

An account stated is an agreement between the parties, based on prior transactions between them establishing a debtor-creditor relationship, that a particular amount is due and owing from the debtor to the creditor. The agreement may be oral, in writing, or implied from the parties' words and conduct.

[Name of plaintiff] claims that [name of defendant] owes [him/her/nonbinary pronoun/it] money on an account stated. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] owed [name of plaintiff] money from previous financial transactions;
2. That [name of plaintiff] and [name of defendant], by words or conduct, agreed that the amount that [name of plaintiff] claimed to be due from [name of defendant] was the correct amount owed;
3. That [name of defendant], by words or conduct, promised to pay the stated amount to [name of plaintiff];
4. That [name of defendant] has not paid [name of plaintiff] [any/all] of the amount owed under this account; and
5. The amount of money [name of defendant] owes [name of plaintiff].

New December 2005; Revised November 2019

Sources and Authority

- “ ‘An account stated is an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing. [Citation.] To be an account stated, “it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing.” [Citation.] ’ ” (*Leighton v. Forster* (2017) 8 Cal.App.5th 467, 491 [213 Cal.Rptr.3d 899].)
- “The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the amount due.” (*Zinn v. Fred R. Bright Co.* (1969) 271 Cal.App.2d 597, 600 [76 Cal.Rptr. 663], internal citations omitted.)
- “The agreement of the parties necessary to establish an account stated need not be express and frequently is implied from the circumstances. In the usual

situation, it comes about by the creditor rendering a statement of the account to the debtor. If the debtor fails to object to the statement within a reasonable time, the law implies his agreement that the account is correct as rendered.” (*Zinn, supra*, 271 Cal.App.2d at p. 600, internal citations omitted.)

- “An account stated is an agreement, based on the prior transactions between the parties, that the items of the account are true and that the balance struck is due and owing from one party to another. When the account is assented to, ‘it becomes a new contract. An action on it is not founded upon the original items, but upon the balance agreed to by the parties. . . .’ Inquiry may not be had into those matters at all. It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement.’ ” (*Gleason v. Klamer* (1980) 203 Cal.App.3d 782, 786–787 [163 Cal.Rptr. 483], internal citations omitted.)
- “To be an account stated, ‘it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing.’ The agreement necessary to establish an account stated need not be express and is frequently implied from the circumstances. When a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered. Actions on accounts stated frequently arise from a series of transactions which also constitute an open book account. However, an account stated may be found in a variety of commercial situations. The acknowledgement of a debt consisting of a single item may form the basis of a stated account. The key element in every context is agreement on the final balance due.” (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752–753 [241 Cal.Rptr. 883], internal citations omitted.)
- “An account stated need not be submitted by the creditor to the debtor. A statement expressing the debtor’s assent and acknowledging the agreed amount of the debt to the creditor equally establishes an account stated.” (*Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715, 726 [209 Cal.Rptr. 757], internal citations omitted.)
- “‘The common count is a general pleading which seeks recovery of money without specifying the nature of the claim Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.’ However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff.” (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)
- “The account stated may be attacked only by proof of ‘fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument.’ The

defendant ‘will not be heard to answer when action is brought upon the account stated that the claim or demand was unjust, or invalid.’ ” (*Gleason, supra*, 103 Cal.App.3d at p. 787, internal citations omitted.)

- “An account stated need not cover all the dealings or claims between the parties. There may be a partial settlement and account stated as to some of the transactions.” (*Gleason, supra*, 103 Cal.App.3d at p. 790, internal citation omitted.)
- “In the common law action of general assumpsit, it is customary to plead an indebtedness using ‘common counts.’ In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are ‘(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.’ ” (*Farmers Ins. Exchange v. Zerlin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)
- “A common count is not a specific cause of action, . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable.” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 561

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 1003, 1004

1 California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts*, §§ 8.10, 8.40–8.46 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

374. Common Count: Mistaken Receipt

[Name of plaintiff] **claims that** [name of defendant] **owes [him/her/nonbinary pronoun/it] money [that was paid/for goods that were received] by mistake. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of plaintiff] [paid [name of defendant] money/sent goods to [name of defendant]] by mistake;**
 2. **That [name of defendant] did not have a right to [that money/the goods];**
 3. **That [name of plaintiff] has asked [name of defendant] to return the [money/goods];**
 4. **That [name of defendant] has not returned the [money/goods] to [name of plaintiff]; and**
 5. **The amount of money that [name of defendant] owes [name of plaintiff].**
-

New December 2005

Sources and Authority

- “As Witkin states in his text, “[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract.” ’ A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract.” (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)
- “It is well settled that no contract is necessary to support an action for money had and received other than the implied contract which results by operation of law where one person receives the money of another which he has no right, conscientiously, to retain. Under such circumstances the law will imply a promise to return the money. The action is in the nature of an equitable one and is based on the fact that the defendant has money which, in equity and good conscience, he ought to pay to the plaintiffs. Such an action will lie where the money is paid under a void agreement, where it is obtained by fraud or where it was paid by a mistake of fact.” (*Stratton v. Hanning* (1956) 139 Cal.App.2d 723, 727 [294 P.2d 66], internal citations omitted.)
- Restatement First of Restitution, section 28, provides:

A person who has paid money to another because of a mistake of fact and who does not obtain what he expected in return is entitled to restitution from the other if the mistake was induced:

- (a) by the fraud of the payee, or
 - (b) by his innocent and material misrepresentation, or
 - (c) by the fraud or material misrepresentation of a person purporting to act as the payee's agent, or
 - (d) by the fraud or material misrepresentation of a third person, provided that the payee has notice of the fraud or representation before he has given or promised something of value.
- "Money paid upon a mistake of fact may be recovered under the common count of money had and received. The plaintiff, however negligent he may have been, may recover if his conduct has not altered the position of the defendant to his detriment." (*Thresher v. Lopez* (1921) 52 Cal.App. 219, 220 [198 P. 419], internal citations omitted.)
 - " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)
 - "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. . . . The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)
 - "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerlin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)
 - "A common count is not a specific cause of action, . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of

action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable.” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 561

12 California Forms of Pleading and Practice, Ch. 121, *Common Counts*, § 121.25 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

375. Restitution From Transferee Based on Quasi-Contract or Unjust Enrichment

[Name of plaintiff] **claims that** [name of defendant] **must restore to** [name of plaintiff] [specify, e.g., money] **that** [name of defendant] **received from** [name of third party], **but that really should belong to** [name of plaintiff]. [Name of plaintiff] **is entitled to restitution if** [he/she/nonbinary pronoun] **proves that** [name of defendant] **knew or had reason to know that** [name of third party] [specify act constituting unjust enrichment, e.g., embezzled money from [name of plaintiff]].

New November 2019

Directions for Use

This instruction is for use in a claim for restitution based on the doctrines of quasi-contract and unjust enrichment. Under quasi-contract, one is entitled to restitution of one's money or property that a third party has misappropriated and transferred to the defendant if the defendant had reason to believe that the thing received had been unlawfully taken from the plaintiff by the third party. (*Welborne v. Ryman-Carroll Foundation* (2018) 22 Cal.App.5th 719, 725–726 [231 Cal.Rptr.3d 806].) The elements of a claim for unjust enrichment are receipt of a benefit and unjust retention of the benefit at the expense of another. (*Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 238–242 [239 Cal.Rptr.3d 908].) Unlawfulness is not required.

Sources and Authority

- “ “[Quasi-contract] is an *obligation* . . . created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to [its] former position by return of the thing or its equivalent in money. [Citations.]” ’ The doctrine focuses on equitable principles; its key phrase is ‘ “unjust enrichment,” ’ which is used to identify the ‘transfer of money or other valuable assets to an individual or a company that is not entitled to them.’ ” (*Welborne, supra*, 22 Cal.App.5th at p. 725, original italics, internal citations omitted.)
- “Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another. A person is enriched if he receives a benefit at another’s expense. The term ‘benefit’ ‘denotes any form of advantage.’ Thus, a benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss. Even when a person has received a benefit from another, he is required to make restitution ‘only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.’ ” (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51 [57 Cal.Rptr.2d 687, 924 P.2d 996], internal citations omitted.)
- “[T]he recipient of money who *has reason to believe* that the funds he or she

receives were stolen may be liable for restitution.” (*Welborne, supra*, 22 Cal.App.5th at p. 726, original italics.)

- “A transferee who would be under a duty of restitution if he had knowledge of pertinent facts, is under such duty if, at the time of the transfer, he suspected their existence.” (*Welborne, supra*, 22 Cal.App.5th at p. 726 [quoting Restatement of Restitution, § 10].)
- “[Defendant] also errs in its claim that this matter may not be tried to a jury. The gist of an action in which a party seeks only money damages is legal in nature even though equitable principles are to be applied. As appellant argues, this is an express holding of *Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 728 [91 Cal.Rptr.2d 881].” (*Welborne, supra*, 22 Cal.App.5th at p. 728, fn. 8, internal citation omitted.)
- “[U]njust enrichment is not a cause of action. Rather, it is a general principle underlying various doctrines and remedies, including quasi-contract.” (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911 [81 Cal.Rptr.3d 503], internal citation omitted.)
- “Unlike a claim for damages based on breach of a legal duty, appellants’ unjust enrichment claim is grounded in equitable principles of restitution. An individual is required to make restitution when he or she has been unjustly enriched at the expense of another. A person is enriched if he or she receives a benefit at another’s expense. The term ‘benefit’ connotes *any* type of advantage. [¶] Appellants have stated a valid cause of action for unjust enrichment based on [defendant]’s unjustified charging and retention of excessive fees which the title companies passed through to them.” (*Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 721–722 [132 Cal.Rptr.2d 220], original italics, internal citations omitted.)
- “Although some California courts have suggested the existence of a separate cause of action for unjust enrichment, this court has recently held that ‘ “[t]here is no cause of action in California for unjust enrichment.” [Citations.] Unjust enrichment is synonymous with restitution. [Citation.] ’ ” (*Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1138 [117 Cal.Rptr.3d 262], internal citation omitted.)
- “California law on unjust enrichment is not narrowly and rigidly limited to quasi-contract principles, as defendants contend. ‘[T]he doctrine also recognizes an obligation *imposed* by law regardless of the intent of the parties. In these instances there need be no relationship that gives substance to an implied intent basic to the “contract” concept, rather the obligation is imposed because good conscience dictates that under the circumstances the person benefited should make reimbursement.’ ” (*Professional Tax Appeal, supra*, 29 Cal.App.5th at p. 240, original italics.)
- “Finally, plaintiff’s complaint also stated facts that, if proven, are sufficient to defeat a claim that defendants were bona fide purchasers without notice of plaintiff’s claim. ‘[A] bona fide purchaser is generally not required to make

restitution.’ But, ‘[a] transferee with knowledge of the circumstances surrounding the unjust enrichment may be obligated to make restitution.’ [¶] For a defendant to be ‘ “without notice” ’ means to be ‘without notice of the facts giving rise to the restitution claim.’ ‘A person has notice of a fact if the person either knows the fact or has reason to know it. [¶] . . . A person has reason to know a fact if [¶] (a) the person has received an effective notification of the fact; [¶] (b) knowledge of the fact is imputed to the person by statute . . . or by other law (including principles of agency); or [¶] (c) other facts known to the person would make it reasonable to infer the existence of the fact, or prudent to conduct further inquiry that would reveal it.’ ” (*Professional Tax Appeal, supra*, 29 Cal.App.5th at p. 241, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 1050 et seq.

12 California Forms of Pleading and Practice, Ch. 121, Common Counts, § 121.25 (Matthew Bender)

376–379. Reserved for Future Use

380. Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.)

[Name of plaintiff] **claims that the parties entered into a valid contract in which [some of] the required terms were supplied by [specify electronic means, e.g., e-mail messages]. If the parties agree, they may form a binding contract using an electronic record. An “electronic record” is one created, generated, sent, communicated, received, or stored by electronic means. [E.g., E-Mail] is an electronic record.**

[Name of plaintiff] **must prove, based on the context and surrounding circumstances, including the conduct of the parties, that the parties agreed to use [e.g., e-mail] to formalize their agreement.**

[[Name of plaintiff] **must have sent the contract documents to [name of defendant] in an electronic record capable of retention by [name of defendant] at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system limits or prohibits the ability of the recipient to print or store it.]**

New December 2012; Revised December 2016

Directions for Use

This instruction is for use if the plaintiff is relying on the Uniform Electronic Transactions Act (UETA, Civ. Code, § 1633.1 et seq.) to prove contract formation. If there are other contested issues as to whether a contract was formed, also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The first paragraph asserts that electronic means were used to supply some or all of the essential elements of the contract. Give the third paragraph if a law requires a person to provide, send, or deliver information in writing to another person. (See Civ. Code, § 1633.8(a).)

The most likely jury issue is whether the parties agreed to rely on electronic records to finalize their agreement. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct. (See Civ. Code, § 1633.5(b).)

The UETA does not specify any particular transmissions that meet the definition of “electronic record,” such as e-mail or fax. (See Civ. Code, § 1633.2(g).)

Nevertheless, there would seem to be little doubt that e-mail and fax meet the definition. The parties will probably stipulate accordingly, or the court may find that the particular transmission at issue meets the definition as a matter of law.

If a law requires a signature, an electronic signature satisfies the law. (Civ. Code, § 1633.7(d).) The UETA defines an electronic signature as an electronic sound, symbol, or process attached to or logically associated with an electronic record and

executed or adopted by a person with the intent to sign the electronic record. (Civ. Code, § 1633.2(h); see Gov. Code, § 16.5(d) (digital signature).) The validity of an electronic signature under this definition would most likely be a question of law for the court. If there is an issue of fact with regard to the parties' intent to use electronic signatures, this instruction will need to be modified accordingly.

Sources and Authority

- “Electronic Record” Defined Under UETA. Civil Code section 1633.2(g).
- “Electronic Signature” Defined Under UETA. Civil Code section 1633.2(h).
- Agreement to Conduct Transaction by Electronic Means. Civil Code section 1633.5(b).
- Enforceability of Electronic Transactions. Civil Code section 1633.7.
- Providing Required Information by Electronic Means. Civil Code section 1633.8(a).
- Attributing Electronic Record or Signature to Person. Civil Code section 1633.9.
- “ ‘Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct. . . . ‘The absence of an explicit agreement to conduct the transaction by electronic means is not determinative; however, it is a relevant factor to consider.’ ” (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 989 [182 Cal.Rptr.3d 154].)
- “Under Civil Code section 1633.7, enacted in 1999 as part of the Uniform Electronic Transactions Act, an electronic signature has the same legal effect as a handwritten signature.” (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 843 [181 Cal.Rptr.3d 781], internal citations omitted.)
- “Civil Code section 1633.9 addresses how a proponent of an electronic signature may authenticate the signature—that is, show the signature is, in fact, the signature of the person the proponent claims it is.” (*Ruiz, supra*, 232 Cal.App.4th at p. 843.)
- “We agree that a printed name or some other symbol might, under specific circumstances, be a signature under UETA” (*J.B.B. Investment Partners, Ltd., supra*, 232 Cal.App.4th at p. 988.)
- “The trial court’s analysis was incomplete. Attributing the name on an e-mail to a particular person and determining that the printed name is ‘[t]he act of [this] person’ is a necessary prerequisite but is insufficient, by itself, to establish that it is an ‘electronic signature.’ . . . UETA defines the term ‘electronic signature.’ Subdivision (h) of section 1633.2 states that ‘ “[e]lectronic signature” means an electronic sound, symbol, or process attached to or logically associated with an electronic record and *executed or adopted by a person with the intent to sign the electronic record.*’ (Italics added; see CACI No. 380 [party suing to enforce an agreement formalized by electronic means must prove ‘based on the context and surrounding circumstances, including the conduct of the parties, that the parties

agreed to use [e.g., e-mail] to formalize their agreement . . .]’ ” (*J.B.B. Investment Partners, Ltd.*, *supra*, 232 Cal.App.4th at pp. 988–989, original italics.)

- “In the face of [plaintiff]’s failure to recall electronically signing the 2011 agreement, the fact the 2011 agreement had an electronic signature on it in the name of [plaintiff], and a date and time stamp for the signature, was insufficient to support a finding that the electronic signature was, in fact, ‘the act of’ [plaintiff].” (*Ruiz*, *supra*, 232 Cal.App.4th at p. 844.)
- “[W]hether [defendant]’s printed name constituted an ‘electronic signature’ within the meaning of UETA or under the law of contract, are legal issues” (*J.B.B. Investment Partners, Ltd.*, *supra*, 232 Cal.App.4th at p. 984.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts § 11

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 15, *Attacking or Defending Existence of Contract—Failure to Comply With Applicable Formalities*, 15.32

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.26 (Matthew Bender)

27 California Legal Forms: Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.17 (Matthew Bender)

381–399. Reserved for Future Use

VF-300. Breach of Contract

We answer the questions submitted to us as follows:

1. Did *[name of plaintiff]* and *[name of defendant]* enter into a 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 plaintiff]* do all, or substantially all, of the significant things that the contract required *[him/her/nonbinary pronoun/it]* to do?

_____ Yes _____ No

If your answer to question 2 is yes, [skip question 3 and] answer question 4. If you answered no, [answer question 3 *if excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

- [3. Was *[name of plaintiff]* excused from having to do all, or substantially all, of the significant things that the contract required *[him/her/nonbinary pronoun/it]* to do?

_____ 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 all the conditions that were required for *[name of defendant]*'s performance occur?

_____ Yes _____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if waiver or excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

- [5. Were the required conditions that did not occur [excused/waived]?

_____ 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 defendant]* fail to do something that the contract required *[him/her/nonbinary pronoun/it]* to do?

_____ Yes _____ No]

[or]

[Did *[name of defendant]* do something that the contract prohibited *[him/her/nonbinary pronoun/it]* from doing?

_____ Yes _____ No]

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

7. Was *[name of plaintiff]* harmed by *[name of defendant]*'s breach of contract?

_____ 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 [including *[insert descriptions of claimed damages]*]: \$_____]

[b. Future [economic] loss [including *[insert descriptions of claimed 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 April 2004; Revised December 2010, June 2011, June 2013, June 2015, May 2020

Directions for Use

This verdict form is based on CACI No. 303, *Breach of Contract—Essential Factual*
214

Elements. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow.

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.

Optional questions 2 and 3 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 2 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) Include question 3 if the plaintiff claims that the plaintiff was excused from having to perform an otherwise required obligation.

Optional questions 4 and 5 address conditions precedent to the defendant's performance. Include question 4 if the occurrence of conditions for performance is at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 5 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515].)

Note that questions 4 and 5 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 6. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse or waiver should be included after question 6.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 8.

If specificity is not required, users do not have to itemize the damages listed in question 8. 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, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

**VF-301. Breach of Contract—Affirmative Defense—Unilateral
Mistake of Fact**

We answer the questions submitted to us as follows:

- 1. Was [name of defendant] mistaken about [insert description of mistake]?**

_____ **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] know that [name of defendant] was mistaken and use that mistake to take advantage of [him/her/nonbinary pronoun/it]?**

_____ **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 mistake caused by [his/her/nonbinary pronoun/its] excessive carelessness?**

_____ **Yes** _____ **No**

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 4. Would [name of defendant] have agreed to enter into the contract if [he/she/nonbinary pronoun/it] had known about the mistake?**

_____ **Yes** _____ **No**

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 April 2004; Revised December 2010

Directions for Use

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 form is not a stand-alone verdict form. It may be incorporated into VF-300, *Breach of Contract*, if the elements of the affirmative defense are at issue.

This verdict form is based on CACI No. 330, *Affirmative Defense—Unilateral Mistake of Fact*. The verdict forms do not address all available affirmative defenses. The parties may need to create their own verdict forms to fit the issues involved in the case.

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-302. Breach of Contract—Affirmative Defense—Duress

We answer the questions submitted to us as follows:

1. Did *[name of plaintiff]* use a wrongful act or wrongful threat to pressure *[name of defendant]* into consenting to the 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. Was *[name of defendant]* so afraid or intimidated by the wrongful act or wrongful threat that *[he/she/nonbinary pronoun]* did not have the free will to refuse to consent to the contract?

_____ 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. Would *[name of defendant]* have consented to the contract without the wrongful act or wrongful threat?

_____ Yes _____ No

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 April 2004; Revised December 2010

Directions for Use

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 form is not a stand-alone verdict form. It may be incorporated into VF-300, *Breach of Contract*, if the elements of the affirmative defense are at issue.

This verdict form is based on CACI No. 332, *Affirmative Defense—Duress*. The verdict forms do not address all available affirmative defenses. The parties may need to create their own verdict forms to fit the issues involved in the case.

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-303. Breach of Contract—Contract Formation at Issue

We answer the questions submitted to us as follows:

1. Were the contract terms clear enough so that the parties could understand what each was required to do?

_____ 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 the parties agree to give each other something of value?

_____ 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 the parties agree to the terms of the contract?

_____ 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]* do all, or substantially all, of the significant things that the contract required *[him/her/nonbinary pronoun/it]* to do?

_____ Yes _____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date the form].]

- [5. Was *[name of plaintiff]* excused from having to do all, or substantially all, of the significant things that the contract required *[him/her/nonbinary pronoun/it]* to do?

_____ 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 all the conditions that were required for *[name of defendant]*'s performance occur?

_____ Yes _____ No

If your answer to question 6 is yes, [skip question 7 and] answer question 8. If you answered no, [answer question 7 if *excuse_or waiver is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form.]

- [7. Were the required conditions that did not occur [excused/waived]?**

_____ 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. [Did [name of defendant] fail to do something that the contract required [him/her/nonbinary pronoun/it] to do?**

_____ Yes _____ No]

[or]

[Did [name of defendant] do something that the contract prohibited [him/her/nonbinary pronoun/it] from doing?

_____ Yes _____ No]

If your answer to [either option for] question 8 is yes, then answer question 9. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

- 9. Was [name of plaintiff] harmed by [name of defendant]’s breach of contract?**

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 10. What are [name of plaintiff]’s damages?**

- [a. Past [economic] loss [including] [insert descriptions of claimed damages]:**

\$_____]

- [b. Future [economic] loss [including] [insert descriptions of claimed 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 October 2004; Revised December 2010, June 2015, May 2020

Directions for Use

This verdict form is based on CACI No. 302, *Contract Formation—Essential Factual Elements*, and CACI No. 303, *Breach of Contract—Essential Factual Elements*. The elements concerning the parties' legal capacity and legal purpose will likely not be issues for the jury. If the jury is needed to make a factual determination regarding these issues, appropriate questions may be added to this verdict form.

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.

Optional questions 4 and 5 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 4 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) Include question 5 if the plaintiff claims that the plaintiff was excused from having to perform an otherwise required obligation.

Optional questions 6 and 7 address conditions precedent to the defendant's performance. Include question 6 if the occurrence of conditions for performance is at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 7 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/ Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515].)

Note that questions 6 and 7 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 8. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse on waiver should be included after question 8.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 10.

If specificity is not required, users do not have to itemize all the damages listed in

question 10. 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, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-304. Breach of Implied Covenant of Good Faith and Fair Dealing

We answer the questions submitted to us as follows:

1. Did *[name of plaintiff]* and *[name of defendant]* enter into a 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 plaintiff]* do all, or substantially all, of the significant things that the contract required *[him/her/nonbinary pronoun/it]* to do?

_____ Yes _____ No]

If your answer to question 2 is yes, [skip question 3 and] answer question 4. If you answered no, [answer question 3 *if excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

- [3. Was *[name of plaintiff]* excused from having to do all, or substantially all, of the significant things that the contract required *[him/her/nonbinary pronoun/it]* to do?

_____ 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 all the conditions that were required for *[name of defendant]*'s performance occur?

_____ Yes _____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if waiver or excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

- [5. Were the required conditions that did not occur [excused/waived]?

_____ 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 defendant]* unfairly interfere with *[name of plaintiff]*'s right to receive the benefits of the contract?

_____ 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 plaintiff]* harmed by *[name of defendant]*'s interference?

_____ 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 **[including** *[insert descriptions of claimed damages]*]:

\$_____]

- [b. Future **[economic]** loss **[including** *[insert descriptions of claimed 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 June 2014; Revised June 2015

Directions for Use

This verdict form is based on CACI No. 325, *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements*.

The special verdict forms in this series are intended only as models. They may need to be modified depending on the facts of the case.

Optional questions 2 and 3 address acts that the plaintiff must have performed

before the defendant's duty to perform is triggered. Include question 2 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) Include question 3 if the plaintiff claims that he or she was excused from having to perform an otherwise required obligation.

Optional questions 4 and 5 address conditions precedent to the defendant's performance. Include question 4 if the occurrence of conditions for performance is at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 5 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/ Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515].) Note that questions 4 and 5 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 8.

If specificity is not required, users do not have to itemize the damages listed in question 8. 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, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*. If counts for both breach of express contractual terms and breach of the implied covenant are alleged, this verdict form may be combined with CACI No. VF-300, *Breach of Contract*. Use VF-3920 to direct the jury to separately address the damages awarded on each count and to avoid the jury's awarding the same damages on both counts. (See *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].)

VF-305–VF-399. Reserved for Future Use