



THE STATE BAR OF CALIFORNIA

– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

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Via E-mail: civiljuryinstructions@jud.ca.gov.

Ms. Geraldine Dungo
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitations to Comment—CACI 10-03

Dear Ms. Dungo:

The Jury Instructions Committee of the State Bar of California’s Litigation Section (the committee) has reviewed the proposed new and revised civil jury instructions (CACI 10-03) and appreciates the opportunity to submit these comments.

1. CACI No. 361. Plaintiff May Not Recover Duplicative Contract and Tort Damages

Agree.

2. VF-300. Breach of Contract

Agree.

3. CACI No. 3704. Existence of “Employee” Status Disputed

The committee agrees with the proposed revisions to the instruction.

The committee believes that the quotation from *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354-355, in the fifth bullet point in the Sources and Authority describes a six-factor test that can be considered in addition to the factors set forth in the instruction. “As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. (See discussion, *ante*, at pp. 350-351.) We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee” (*Id.* at p. 355.) Thus, it appears that the quotation is not a source or authority for the traditional Restatement factors listed in the instruction. The committee suggests

moving the quotation from the Sources and Authority to the Directions for Use to alert users that factors in addition to those listed in the instruction may be relevant. (See also *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1063-1064 & fn. 14 [approving the consideration of some of these factors in addition to the traditional Restatement factors]; *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 85-86, 88-89 [same].)

4. CACI No. 3934. Damages on Multiple Legal Theories

The committee agrees with the language of the proposed new instruction, except that we would delete the prefatory language “In this case” as superfluous.

5. VF-3920. Damages on Multiple Legal Theories

This proposed new verdict form separates damages from other elements of the causes of action in a manner that is different from typical verdict forms. Verdict forms typically instruct the jury to reach the question of damages on each cause of action only if the other elements are satisfied. (E.g., “If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions”) If that language is deleted from the other verdict forms and this verdict form is used instead, as suggested in the Directions for Use, there may be a risk that the jury will not fully understand that only amounts recoverable on theories on which the jury has found liability should be included in the amounts stated in this verdict form.

The committee therefore suggests that some language be added either to this verdict form or to the other verdict forms (the Directions for Use for this verdict form could suggest modifying the other verdict forms) to ensure that jury will include in its answers to the questions on this verdict form only the amounts recoverable on theories on which the jury has found liability, rather than all damages suffered by the plaintiff.

6. CACI No. 4500. Breach of Implied Warranty of Correctness of Plans and Specifications—Essential Factual Elements

Agree.

The committee notes that the comma at the end of the sentence in the third paragraph of the Directions for Use should be a period and that the citation in the final paragraph of the Directions for Use omits the year of the opinion. Also, the citation to the same opinion in the penultimate bullet point of the Sources and Authority omits a comma before “fn. 2.”

7. CACI No. 4501. Owner’s Liability for Failing to Disclose Important Information Regarding a Construction Project—Essential Factual Elements

The committee believes that the instruction could better describe the requirement that a reasonable contractor acting diligently in similar circumstances would not have discovered the information, by modifying the second element and adding a new third element (additions underscored, deletions shown by strikethrough):

“2. That [name of defendant] had this information, and was aware that [name of plaintiff] did not know ~~it~~ the information ~~and had no reason to obtain it~~;

“3. That a reasonable contractor acting diligently in similar circumstances would not have discovered the information.”

The committee believes that this proposed new third element is clearer than “had no reason to obtain it” and is consistent with the language from *Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 754, that is quoted in the second sentence of the second bullet point in the Sources and Authority.

8. CACI No. 4502. Breach of Implied Covenant to Provide Necessary Items Within Owner’s Control—Essential Factual Elements

Agree.

9. CACI No. 4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements

The committee agrees with the language of the proposed new instruction.

The committee believes that the first sentence in the Directions for Use should be modified to refer to the result contemplated under the contract rather than only the result expected by one party to the contract (the owner):

“This instruction is for use if an owner claims that the contractor breached the contract by failing to perform the work on the project competently so that the result ~~achieved the owner’s expectations~~ was consistent with what was contemplated under the contract.”

10. CACI No. 4511. Affirmative Defense—Contractor Followed Plans and Specifications

Agree.

11. CACI No. 4520. Contractor’s Claim for Changed or Extra Work

Agree.

12. CACI No. 4521. Owner’s Claim That Contract Procedures Regarding Change Orders Were Not Followed

The committee agrees with the language of the proposed new instruction.

The committees suggests that language be added to the Directions for Use to make it clear that there may be other grounds to relieve the contractor of the requirement to strictly comply with change order requirements apart from those listed in the Directions for Use.

13. CACI No. 4522. Waiver of Written Approval or Notice Requirements for Changed or Additional Work

The committee agrees with the language of the proposed new instruction.

The committees suggests that language be added to the Directions for Use to make it clear that there may be other grounds to relieve the contractor of written approval or notice requirements for changed or additional work apart from waiver.

14. CACI No. 4523. Contractor’s Claim for Additional Compensation—Abandonment of Contract

Agree.

15. CACI No. 4524. Contractor’s Claim for Compensation Due Under Contract—Substantial Performance

The committee believes that “trivial or unimportant” in item 3 is potentially misleading, that the failure to perform need only be “unimportant” and need not be so unimportant as to be regarded as “trivial” to allow a recovery on the contract, and that “unimportant” alone would also encompass “trivial.” Accordingly, the committee would modify the instruction by striking “trivial or” in item 3.

16. CACI No. 4530. Owner’s Damages for Breach of Construction Contract—Work Does Not Conform to Contract

Agree.

17. CACI No. 4531. Owner’s Damages for Breach of Construction Contract—Failure to Complete Work

Agree.

18. CACI No. 4532. Owner’s Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay

It appears that this instruction would be appropriate only with a special verdict in which the jury decides the date of completion (or substantial completion) and the number of days of time extension. The committee believes that either a standard verdict form should be created and cross-referenced in the Directions for Use or the need for a special verdict form should be noted in the Directions for Use.

**19. CACI No. 4540. Contractor’s Damages for Breach of Construction Contract—
Change Orders/Extra Work**

Although the reference to “the parties’ agreed price for” the extra work, at the end of the instruction, would encompass a contractual provision or any other form of agreement, the committee believes that a more explicit reference to a contractual provision would make clear to the jury exactly what is being referenced. Particularly in light of the strong likelihood that the contract will contain a provision on payment for extra work, the committee suggests that the instruction should reference such a provision more explicitly by including within the brackets optional language such as “the contract provisions for.”

**20. CACI No. 4541. Contractor’s Damages for Breach of Construction Contract—
Change Orders/Extra Work—Total Cost Recovery**

Agree.

The committee notes that the period at the end of the first element should be a semicolon.

**21. CACI No. 4542. Contractor’s Damages for Abandoned Construction Contract—
Quantum Meruit Recovery**

Agree.

**22. CACI No. 4543. Contractor’s Damages for Breach of Construction Contract—
Owner-Caused Delay or Acceleration**

Agree.

**23. CACI No. 4544. Contractor’s Damages for Abandoned Construction Contract—
Inefficiency Because of Owner Conduct**

The committee believes that the words “including damages for lost profits” should be deleted from the end of the first paragraph in the instruction because the second paragraph begins “You may also award damages for lost profits”

DISCLAIMER

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Very truly yours,

Reuben A. Ginsburg
Chair, Jury Instructions Committee of the
State Bar of California's Litigation Section