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 11-02

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 and verdict forms (CACI 11-02), and appreciates the opportunity to submit these comments.

1. CACI No. 333. Affirmative Defense—Economic Duress

a. The committee believes that *Rich Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1156-1157, provides no solid authority for the proposition that economic duress to avoid a settlement agreement requires that the creditor be placed in danger of imminent bankruptcy or financial ruin. Those were the facts in that case, and the court held that those facts were sufficient to establish that there was no reasonable alternative, but the court did not hold or suggest that imminent bankruptcy or financial ruin was necessary to establish that there was no reasonable alternative. The other opinions cited in the second paragraph of the Directions for Use also provide no solid authority on this point. The committee suggests deleting the entire second paragraph of the Directions for Use.

b. The first sentence of the third paragraph of the Directions for Use says to "insert the conduct that constitutes the wrongful act or threat," while the instruction itself says to "*insert relevant rule*." The committee believes that the instruction is more accurate and that no further explanation is needed in the Directions for Use, so we suggest deleting the first sentence of the third paragraph of the Directions for Use. If further explanation is desired, we suggest modifying this sentence as follows:

In the next-to-last paragraph, ~~insert the conduct that constitutes the wrongful act or threat~~ state the rule that makes the alleged conduct wrongful.

c. The second sentence of the third paragraph of the Directions for Use states, "The conduct must be something more than the breach or threatened breach of the contract itself." The committee believes that the reference to "the contract itself" is mistaken. The "contract" in the instruction is the contract that the plaintiff seeks to enforce and that the defendant claims was entered into under duress. The defendant would not claim that the breach or threatened breach of that contract forced the defendant to enter into that same contract. Instead, the contract referenced in *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1425 ("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.") must be some preexisting contract different from the contract that the plaintiff is seeking to enforce.

Moreover, the breach or threatened breach of a contract can constitute duress, as in *Rich Whillock, Inc. v. Ashton Development, supra*, 157 Cal.App.3d 1154, where the general contractor in bad faith refused to pay the contract price.

The language from *River Bank America* quoted above is quoted in the Sources and Authority and is self-explanatory, so the committee believes that an explanation in the Directions for Use is unnecessary. We also believe that the second sentence of the third paragraph of the Directions for Use is inaccurate, as stated above, so we suggest deleting this sentence.

d. The committee believes that the statement in the third sentence of the third paragraph of the Directions that there is no economic duress if the person has "an adequate legal remedy" is not helpful and is potentially misleading without further explanation. We believe that "an adequate legal remedy" in this context simply refers to the existence of a "reasonable alternative," the language used in the instruction. But "an adequate legal remedy" can have other meanings in other contexts. For example, the subcontractor in *Rich & Whillock* arguably had an adequate legal remedy by way of a legal action to recover the full payment that indisputably was due, unless that remedy was inadequate because the subcontractor would have been ruined financially meanwhile. If the lack of a reasonable alternative is what makes the legal remedy inadequate and gives rise to duress, the reference to "an adequate legal remedy" does not help to explain the use of this instruction. Accordingly, we suggest deleting this sentence and deleting the entire third paragraph of the Directions for Use.

e. The committee suggests deleting the second sentence of the quotation from *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1425, in the first new bullet point in the Sources and Authority because we believe that this language is unhelpful without further explanation, as stated above.

2. CACI No. 408. Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Activity

Agree.

3. CACI No. 451. Affirmative Defense—Contractual Assumption of Risk

a. The committee believes that the instruction should state that a release (i.e., a contractual assumption of risk) is invalid not only if the defendant was grossly negligent but also if the defendant intentionally harmed the plaintiff. Civil Code section 1668 invalidates any contract exempting a person from liability for "willful injury." We suggest adding "or intentionally harmed [*name of plaintiff*]" at the end of the first paragraph of the instruction and adding "or acted intentionally to harm [*name of plaintiff*]" after the words "grossly negligent" in the first line of the third paragraph of the instruction.

We also suggest adding "or the defendant intentionally harmed the plaintiff" at the end of the first sentence of the third paragraph of the Directions for Use and adding Civil Code section 1668 to the Sources and Authority.

b. The second sentence of the third paragraph of the Directions for Use is confusing. We believe that the point is that primary assumption of risk may apply if an inherently dangerous sport or activity is involved, not that the doctrine may apply if the defendant was grossly negligent and an inherently dangerous sport or activity is involved. We suggest that this sentence be clarified or deleted.

4. CACI No. 453. Injury Incurred in Course of Rescue

Agree.

5. CACI No. 518. Medical Malpractice: Res Ipsa Loquitur

This committee commented on the proposed revisions to CACI No. 417 on res ipsa loquitur in regular negligence cases in the spring (CACI 11-01). Some of the proposed revisions later were revised in response to comments, but we had no opportunity to comment on those later revisions. Those same revisions are now reflected in the proposed revisions to CACI No. 518. Our comments on these proposed revisions also apply to similar language in CACI No. 417.

Res ipsa loquitur is a presumption affecting the burden of producing evidence. (Evid. Code, § 646, subd. (b).) The effect of such a presumption, if established, is that the jury must find that the presumed fact is true if the defendant fails to present evidence to the contrary. (*Id.*, § 604.) If the defendant presents rebuttal evidence, the presumption drops from the case and the jury must decide the existence or nonexistence of the presumed fact without regard to the presumption. (*Ibid.*)

The res ipsa loquitur presumption is established if the three conditions listed in the instruction exist. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825-826.) Whether those conditions exist is a question of fact for the jury unless the evidence supports only one conclusion as a matter of law. (*Newing v. Cheatam* (1975) 15 Cal.3d 351, 359, 362-364.) If the jury finds that the three conditions exist, the jury must find that the defendant's negligence was a proximate cause of the occurrence (*Brown, supra*, at p. 826), unless the defendant presents evidence that would support a contrary finding (Evid. Code, § 646, subd. (c)). If the defendant

presents such evidence, (1) the jury must decide whether the presumed facts are true by weighing the evidence without regard to the presumption (*Brown*, *supra*, at p. 826), and (2) the jury, upon request, must be instructed in accordance with Evidence Code section 646, subdivision (c).

a. We stated in our prior comments that CACI No. 417 is appropriate only if the defendant presents evidence to rebut the presumption that the defendant's negligence caused the plaintiff's harm. The same is true of CACI No. 518. Both instructions state that if the jury finds that the three conditions are established, the jury may, but is not required to, find that the defendant was negligent or that the defendant's negligence was a substantial factor in causing the plaintiff's harm. This is correct only if the defendant presented rebuttal evidence. (Evid. Code, § 646, subd. (c) & (c)(1).) Absent rebuttal evidence, the jury should be instructed that if it finds that the three conditions are established, it must find that the defendant's negligence was a proximate cause of the occurrence.[1] (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th at p. 826; Evid. Code, § 604; Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 646, pp. 200-201.) The Directions for Use for both instructions should clearly state that the instructions are proper only if the court finds that the defendant presented rebuttal evidence sufficient to support a finding that the defendant was not negligent or that the defendant's negligence was not a proximate cause of the occurrence.

b. The second and third sentences of the final paragraph of both instructions are mandated by Evidence Code section 646, subdivision (c)(2) if the defendant presented rebuttal evidence (which is the only situation in which this these instructions should be given). This language is mandatory, not optional, and should not be bracketed. The first sentence of those paragraphs, stating that the defendant presented evidence that would support a finding that the defendant was not negligent or that the defendant's negligence was not a proximate cause, does not belong in these instructions because the court decides whether there is sufficient rebuttal evidence, and to instruct the jury on this would only add to the confusion and would be of no benefit. We therefore suggest removing the brackets on the final paragraph of the instructions and deleting the first sentence of that paragraph.

c. The second paragraph of the Directions for Use refers to the second paragraph of the instruction, the point of which is that even if the jury finds that the plaintiff fails to establish the three conditions for res ipsa loquitur, the jury may find based on its consideration of all of the evidence (not only the evidence presented in support of the three conditions) that the defendant was negligent.[2]

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[1] The proposed third paragraph of the Directions for Use in CACI No. 518 states that the jury *must* find that the defendant's negligence was a proximate cause of the occurrence if it finds that the three conditions are satisfied and the defendant presents no rebuttal evidence. This is correct (Evid. Code, § 604), and it shows that this instruction, which includes the statement that the jury *may or may not* find that the defendant's negligence was a proximate cause, is not appropriate in those circumstances but instead is appropriate only if the defendant presented rebuttal evidence. The Directions for Use should clearly say so.

[2] This is so regardless of whether the defendant presented rebuttal evidence, which suggests that a separate instruction would be helpful for the situation where the defendant presented no rebuttal evidence.

"An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. See Prosser, Res Ipsa Loquitur: A Reply to Professor Carpenter, 10 So.Cal.L.Rev. 459 (1937). In appropriate cases, therefore, the jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more probable than not that the defendant was negligent. Such an instruction would be appropriate, for example, in a case where there was evidence of the defendant's negligence apart from the evidence going to the elements of the res ipsa loquitur doctrine." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 646, p. 199, quoted in part in *Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155, 1163.)

Accordingly, the committee suggests modifying the second paragraph of the Directions for Use as follows:

> The second paragraph explains that <u>even</u> if the plaintiff fails to establish res ipsa loquitur as a presumption, the jury may still find for the plaintiff if it finds ~~the plaintiff's evidence presented in support of res ipsa loquitur more persuasive than the defendant's evidence~~ <u>based on its consideration of all of the evidence that the defendant was negligent</u>. (See *Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155, 1163~~-1164~~.)

6. CACI No. 2021. Private Nuisance—Essential Factual Elements

Agree.

7. CACI No. 2508. Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation

a. The committee agrees that it is appropriate to briefly explain the continuing violation in the instruction. We suggest modifying the instruction for greater clarity. First, we would move the sentence "[*Name of plaintiff*] filed a complaint with the DFEH on [*date*]." from the beginning of the second paragraph to the end of the first paragraph. Second, we would modify the rest of the second paragraph of the instruction as follows:

> ~~[*Name of defendant*] claims that its alleged unlawful practice that triggered the requirement to file a complaint occurred no later than [*date more than one year before DFEH complaint was filed*].~~ [*Name of plaintiff*] claims that <u>the complaint was timely filed because</u> [*name of defendant*]'s unlawful practice was a continuing ~~violation so that the requirement to file a complaint was triggered no earlier than [*date less than one year before DFEH complaint was filed*]~~ <u>course of conduct and some of the conduct occurred within one year before the date on which [*name of plaintiff*] filed [his/her] complaint with the DFEH. [*Name of plaintiff*]'s complaint was timely filed with respect to all of the alleged unlawful acts if those acts constitute a continuing course of conduct</u>.

b. In light of the newly defined term "DFEH," "department" in the first enumerated element of the instruction should be changed to "DFEH."

8. CACI No. 2526. Affirmative Defense—Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)

Agree.

9. CACI No. 2804: Removal or Noninstallation of Power Press Guards—Essential Factual Elements

Agree.

10. CACI No. 3009: Local Governmental Liability—Failure to Train—Essential Factual Elements

a. Deliberate indifference is shown if the defendant actually knew or it should have been obvious that its inadequate training program was likely to result in the deprivation of a constitutional right. (*Connick v. Thompson* (2011) 131 S.Ct. 1350, 1360.) The second element of the existing instruction accurately states this rule. *Connick* states that a pattern of similar constitutional violations by untrained employees ordinarily is necessary to establish that the defendant had the required knowledge or had "constructive notice" (i.e., that it should have been obvious). (*Ibid.*) Thus, in the language of the second element of the instruction, such a pattern ordinarily is necessary to establish either that the defendant "knew" or that "it should have been obvious to it."

The proposed revision inserts "because of a pattern of similar violations" so that it modifies "knew" but does not modify "it should have been obvious to it." The committee believes that this is incorrect because a pattern of similar violations ordinarily is necessary for either "knew" or "obvious." Also, the revised instruction brackets "or it should have been obvious to it," making this optional language, but we believe that "obvious" should always be instructed as an alternative to "knew" and that this language in the instruction should not be optional.

The committee suggests modifying the second element of the instruction as follows:

> That [<u>because of a pattern of similar violations,</u>] [*name of local governmental entity*] knew ~~because of a pattern of similar violations[~~, or it should have been obvious to it,~~]~~ that the inadequate training program was likely to result in a deprivation of the right [*specify right violated*];

b. The Directions for Use should be revised to state that the bracketed language "[because of a pattern of similar violations]" should be deleted only if the court finds that the evidence would support a finding of deliberate indifference absent a pattern of similar violations.

11. CACI No. 3017: Supervisor Liability for Acts of Subordinates

Agree.

12. CACI No. 3712. Joint Ventures

The second paragraph of the Directions for Use explains how to modify the instruction if the joint venture was for a noncommercial purpose. The committee believes that more guidance should be provided on how to modify the instruction in those circumstances. *Shook v. Beals* (1950) 96 Cal.App.2d 963, 970, refers to a "common purpose" in a noncommercial joint undertaking. We believe that similar general language should be used in the instruction. Accordingly, we suggest that the second paragraph of the Directions for Use be modified as follows:

> If there is no commercial purpose to the venture, this instruction may be modified as follows:
>
> (i) by deleting elements 2 and 4, which do not apply to a noncommercial enterprise~~. Also modify elements 1 and 3 to substitute another word for "business" depending on the kind of activity involved.~~;
> (ii) by changing element 1, substituting for "business undertaking" the phrase "common purpose or objective"; and
> (iii) by changing element 3, substituting for "the business" the phrase "common undertaking."
>
> (See *Shook v. Beals* (1950)~~,~~ 96 Cal.App.2d 963, 969-970 [217 P.2d 56]; see also *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 872 [32 Cal.Rptr.3d 351].)

13. VF-4200. Termination for Failure to Pay Rent—Essential Factual Elements

Question 4 in the proposed verdict form deviates from the instruction on which it is based, CACI No. 4200, by combining two elements—that the plaintiff was harmed and that the debtor's conduct was a substantial factor in causing harm—in one question. We believe that these two elements involve two distinct factual findings that should be separate in the verdict form. Accordingly, we suggest that question 4 be separated into two questions.

14. VF-4201. Constructive Fraudulent Transfer

a. Question 3 in the proposed verdict form deviates from the instruction on which it is based, CACI No. 4202, by combining the same two elements as above with respect to VF-4200. For the same reasons, we suggest that question 3 be separated into two questions.

b. We believe that the jury would more readily comprehend question 3 if it were modified as follows:

Did [*name of debtor*] ~~fail to~~ receive a reasonably equivalent value in exchange for the [transfer/obligation]?

In our view, a more straightforward question is more important than making the yes/no answers fall in line, and the jury will not be thrown off by a "no" answer to this question after previous "yes" answers because the verdict form tells the jury what to do in the event of either a "yes" or a "no" answer to this question.

15. VF-4202. Constructive Fraudulent Transfer--Insolvency

Question 6 in the proposed verdict form deviates from the instruction on which it is based, CACI No. 4203, by combining the same two elements as above with respect to VF-4200 and VF-4201. For the same reasons, we suggest that question 6 be separated into two questions.

16. CACI No. 4302: Termination for Failure to Pay Rent—Essential Factual Elements

The committee agrees with the proposed revisions, except for the last sentence of the third paragraph of the Directions for Use. This sentence explains why language referring to the actual receipt of notice is omitted from the instruction. After the Directions for Use has stated the rule that compliance with the statutory requirements must be shown if the fact of receipt (or "service") is disputed, we believe that this additional step explaining why the language has been deleted from the instruction is unwarranted. We would delete this sentence.

17. CACI No. 4303: Sufficiency and Service of Notice of Termination for Failure to Pay Rent

Same comment as in CACI No. 4202 above.

18. CACI No. 4328: Affirmative Defense—Tenant Was Victim of Domestic Violence, Sexual Assault, or Stalking

a. According to Code of Civil Procedure section 1161.3, the prior act of domestic violence, sexual assault, or stalking must be documented in a court order or law enforcement report issued or written "within the last 180 days." (Code Civ. Proc., § 1161.3, subd. (a)(1)(A) & (B). This apparently means within 180 days before the termination of the tenancy (see *id.*, subd. (a)), which could be described as the end of the three-day notice period. Accordingly, the committee suggests modifying the second element as follows:

That the act[s] of [domestic violence/sexual assault/[or] stalking] [was/were] documented in a [court order/law enforcement report] <u>[issued/written] within 180 days before the end of the three-day notice period</u>;

b. Subdivision (a) of the statute states that "a landlord shall not terminate a tenancy or fail to renew a tenancy based on . . ." the specified acts. The fourth element of the instruction states this requirement as follows:

That [*name of plaintiff*] filed this lawsuit because of the act[s] of domestic violence/sexual assault/[or] stalking].

The committee suggests that it would be more faithful to the statute to state not that the plaintiff filed the lawsuit because of the acts, but that the plaintiff sought to terminate the tenancy because of the acts. Accordingly, we suggest the following modifications:

That [*name of plaintiff*] ~~filed this lawsuit~~ served the three-day notice to pay rent or vacate the property because of the act[s] of domestic violence/sexual assault/[or] stalking].

c. The latter part of the instruction pertains to an exception allowing the landlord to terminate the tenancy in certain circumstances (Code Civ. Proc., § 1161.3, subd. (b)) even if the plaintiff establishes the elements of the affirmative defense. The first element in this part of the instruction states that the defendant "later" allowed the offender to visit the property. The committee believes that "later" in this context is potentially ambiguous as to later than what, and the latter part of the sentence explains that the defendant must have allowed the offender to visit the property after the police report or court order. We suggest deleting the word "later."

d. Code of Civil Procedure section 1161.3, subdivision (b)(1)(B) refers to the landlord's reasonable belief that the offender "poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession . . . ." The second option in the first element in the latter part of the instruction refers to a physical threat to persons, but omits any reference to a tenant's right to quiet possession. We note that the statute does not refer to merely a "threat" to a tenant's right of quiet possession, but to a "physical threat" to a tenant's right of quiet possession. We suggest that the second option in the first element be modified as follows:

[*Name of plaintiff*] reasonably believed that the presence of the person who committed the act[s] of [domestic violence/sexual assault/[or] stalking] posed a physical threat to other persons with a right to be on the property or to another tenant's right of quiet possession.

e. The second element in the latter part of the instruction states that the defendant "previously gave at least three days' notice to [*name of defendant*] to correct this situation." The committee believes that "this situation" should be clarified and that the instruction should expressly state that the conduct described in the first element must have persisted for the landlord to establish this exception to the affirmative defense. We suggest the following modifications:

[*Name of plaintiff*] previously gave at least three days' notice to [*name of defendant*] to correct ~~this~~ the situation described immediately above, but the defendant failed to do so.

19. User Guide

a. The committee suggests the following modifications to the paragraph on Uncontested Elements for greater clarity:

> In many cases, elements that are uncontested may be omitted. For example, ~~the requirement that the plaintiff~~ in an age discrimination case, the defendant may not dispute that the plaintiff is ~~must be~~ age 40 or older ~~may be obvious to the jury and safely omitted~~. In other cases, however, omitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof. In these cases, it is better to include all the elements and then indicate that one or more of them have been agreed to by the parties as ~~not at issue~~ established. One possible approach is as follows:

b. The committee suggests the following modifications to the paragraph on Irrelevant Factors for greater clarity:

> Factors are matters that the jury might consider in ~~determining whether a party's burden of proof on the elements has been met~~ making a factual finding. From a list of possible factors, there may be some that have no relevance to the case and on which no evidence was presented. These irrelevant factors may safely be omitted from the instruction.

DISCLAIMER

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Very truly yours,

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