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Compendium

An Outline of 23 California Common Law Business Torts

PETER R.J. THOMPSON*

INTRODUCTION

This compendium outlines the elements and some litigation considerations of twenty three business torts currently cognizable under the common law of California.¹ The intent of the author is to provide the business lawyer or litigator with a check list which may be valuable in analyzing a fact situation to determine which causes of action should be pleaded. The torts are discussed in alphabetical order for convenience of the reader and because no topical groupings are entirely satisfactory. This outline is not intended to be exhaustive: the prima facie elements of every tort are discussed, but defenses, damages and litigation considerations are mentioned only when an interesting recent trend has emerged. The material on punitive damages which is con-

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1. A cause of action for prima facie tort has not yet been recognized in California. However, the rationale of prima facie tort has been used in the analysis of other torts, for instance, intentional interference with the right to pursue a lawful calling. *See Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d 588, 592 n.3, 88 Cal. Rptr. 443, 445 n.3 (1970).

tained in the section on the tort of fraud is generally applicable to all tort causes of action, except where expressly limited as noted.

1. Abuse of Process
2. Civil Conspiracy
3. Conspiracy to Induce Breach of Contract
4. Constructive Eviction
5. Conversion
6. Fraud
7. Inducing Breach of Contract (Tortious Interference With Contract)
8. Interference with Employment Relationship
9. Interference with Prospective Economic Advantage
10. Invasion of Privacy
11. Intentional Interference with the Right to Pursue a Lawful Business
12. Malicious Prosecution
13. Misappropriation of Trade Secret
14. Negligence
15. Negligent Misrepresentation
16. Nuisance
17. Plagiarism (Copyright Infringement)
18. Products Liability
19. Slander of Title (Injurious Falsehood or Disparagement)
20. Trade Libel
21. Trademark Infringement
22. Tradename Infringement
23. Unfair Competition

1. Abuse of Process

Abuse of Process is defined as the use of "legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed."² "Process" includes, but is not limited to, execution, injunction, summons, notice of taking a deposition, discovery, and excessive or wrongful attachment. Additionally, statutory liability for wrongful attachment has existed since 1977.³

The liability phase involves two elements. The first element is a willful act in use of process which is not proper in the regular conduct of the proceeding.⁴ The second element is ulterior purpose. While malice

2. *Golden v. Dungan*, 20 Cal. App. 3d 295, 300, 97 Cal. Rptr. 577, 580 (1971). *See also Seidner v. 1551 Greenfield Owners Ass'n*, 108 Cal. App. 3d 895, 903, 166 Cal. Rptr. 803, 807 (1980).

3. CAL. CIV. PROC. CODE §490.010.

4. *Templeton Feed & Grain v. Ralston Purina Co.*, 69 Cal. 2d 461, 466, 446 P.2d 152, 155, 72 Cal. Rptr. 344, 347 (1969).

or harassment as an ulterior purpose may be inferable from an improper act, malice alone without an intentional misuse of the judicial process to obtain an unjustifiable collateral advantage is not actionable.⁵ Therefore, the key to establishing liability under this tort is not the subjective state of mind of the defendant but rather is proof of the collateral advantage sought.

*Younger v. Solomon*⁶ and *Weisenberg v. Molina*⁷ illustrate improper collateral advantage. In *Younger*, the defendant served interrogatories with an attached *confidential* letter to the California State Bar. The letter asked for responses to charges of unethical conduct by an attorney. These interrogatories constituted abuse of process because the purpose of the suit was to publicize the confidential letter *in order to damage the attorney's reputation*.⁸ In *Weisenberg*, the judgment debtor and another conspired to enter a false judgment, and execute on assets pursuant thereto, for the purpose of hindering collection by a prior judgment creditor.⁹

While it has been stated that the taking of an appeal might in some instances be an abuse of process,¹⁰ that result is unlikely because, even if frivolous or malicious, an appeal almost always has the additional and proper purpose of reversing a lower ruling.¹¹

2. Civil Conspiracy

The prima facie case for civil conspiracy requires three elements: (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts.¹²

The wrongful acts may be any civil wrong; for instance, fraud¹³ or inducing breach of contract.¹⁴ A key litigation consideration is the availability of joint and several liability.¹⁵

5. *Id.*

6. 38 Cal. App. 3d 289, 113 Cal. Rptr. 113 (1974).

7. 58 Cal. App. 3d 478, 129 Cal. Rptr. 813 (1976).

8. 38 Cal. App. 3d at 297-98, 113 Cal. Rptr. at 118-19.

9. 58 Cal. App. 3d at 489, 129 Cal. Rptr. at 819.

10. *Barquis v. Merchants Collection Ass'n of Oakland, Inc.*, 7 Cal. 3d 94, 104 n.4, 496 P.2d 817, 824 n.4, 101 Cal. Rptr. 745, 752 n.4 (1972).

11. *See Tellefsen v. Key System Transit Lines*, 198 Cal. App. 2d 611, 615, 17 Cal. Rptr. 919, 922 (1961).

12. *See Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 64, 35 Cal. Rptr. 652, 660 (1963), *citing Mox, Inc. v. Woods*, 202 Cal. 675, 677, 262 P. 302, 303 (1927).

13. *See* 202 Cal. at 676, 262 P. at 302.

14. 223 Cal. App. 2d at 65, 35 Cal. Rptr. at 660.

15. 202 Cal. at 677-78, 262 P. at 303.

3. *Conspiracy to Induce Breach of Contract*

This tort is a species of the tort of civil conspiracy. Four elements are involved: (1) conspiracy; (2) wrongful inducement or procurement of breach of contract; (3) causation; and (4) actual damages.¹⁶

From the plaintiff's perspective, one advantage of this tort over tortious interference with contract is that a *tort* action as well as a breach of contract action will lie against a party to the contract who was a member of the conspiracy,¹⁷ thus allowing punitive damages against that party.

A corporate agent, acting on behalf of the corporation, however, cannot be joined with a corporate defendant as a co-conspirator.¹⁸

4. *Constructive Eviction*

The elements of constructive eviction, as recently stated in the case of *Stoiber v. Honeychuck*,¹⁹ are: (1) landlord commits or omits an act or acts which (2) render the premises or a substantial portion thereof unfit for the purposes for which they were leased.²⁰

Because constructive eviction is not a contract action, punitive damages are available for a wrongful eviction obtained with the use of oppression, fraud, or malice.²¹ A wrongfully evicted tenant may recover damages for mental anguish and pain.²²

5. *Conversion*

The elements of an action for conversion are: (1) plaintiff's ownership or immediate right to possession of personal property; (2) defendant's wrongful act or disposition of plaintiff's property; (3) defendant's intent to exercise dominion over plaintiff's property; and (4) proximately caused damages.²³

a. Definition of "Personal Property"

Included in the definition of personal property for the purposes of conversion are choses in action represented by documents such as bonds, notes, bills of exchange, stock certificates or warehouse receipts. Even when the plaintiff does not have actual possession of the certifi-

16. See 223 Cal. App. 2d at 64, 35 Cal. Rptr. at 660.

17. *Id.* at 72, 35 Cal. Rptr. at 665.

18. *Id.* at 72-73, 35 Cal. Rptr. at 665.

19. 101 Cal. App. 3d 903, 162 Cal. Rptr. 194 (1980).

20. *Id.* at 925-26, 162 Cal. Rptr. at 205.

21. *Corwin v. Hamilton*, 154 Cal. App. 2d 829, 833, 317 P.2d 139, 141-42 (1957).

22. See *Tooke v. Allen*, 85 Cal. App. 2d 230, 239, 192 P.2d 804, 810 (1948).

23. See *Baldwin v. Marina City Properties, Inc.*, 79 Cal. App. 3d 393, 410, 145 Cal. Rptr. 406, 416 (1978); *Zaslow v. Kroenert*, 29 Cal. 2d 541, 549, 176 P.2d 1, 6 (1946).

cate, a stock share is subject to conversion.²⁴ But, unreified intangibles such as good will generally are not considered personal property.²⁵ However, their improper appropriation may be actionable in equity under the torts of unfair competition or misappropriation of trade secrets. Although tradenames are classified as personal property for the purpose of transferring ownership,²⁶ it is unlikely that a court would allow a cause of action for conversion of a tradename. The reason is that adequate remedies exist in the forms of unfair competition and statutory tradename infringement.²⁷

Money can be the subject of conversion only if it is a specifically identifiable fund or corpus, although the actual bills need not be earmarked.²⁸ However, the plaintiff must establish not merely that the defendant owes him money but that plaintiff has the right of *immediate* possession²⁹ by virtue of the fact that the defendant was plaintiff's agent with respect to that sum.³⁰ A plaintiff also has an immediate right to possess where he or she has a *lien* on the money in defendant's hands.³¹

The element of "wrongful act or disposition" requires an actual interference such as taking, destruction, alteration, transfer, use, withholding, misdelivery or failure to return.³² Interference not amounting to dispossession is not conversion, but may be actionable as a trespass to chattel.

b. Remedies for Conversion

Remedies for conversion include: (1) specific recovery of the property³³ plus damages for loss of use; (2) damages based on the value of the property based on a theory of forced sale; (3) or quasi-contractual restitution based on unjust enrichment when plaintiff's conduct has waived recovery for the tort.³⁴

24. See *Mears v. Crocker National Bank*, 84 Cal. App. 2d 637, 644, 191 P.2d 501, 505 (1948).

25. CAL. CIV. PROC. CODE §655; CAL. BUS. & PROF. CODE §1420.

26. CAL. BUS. & PROF. CODE §§14400, 14401.

27. See text accompanying notes 210-225 *infra*.

28. *Haigler v. Donnelly*, 18 Cal. 2d 674, 681, 117 P.2d 331, 335 (1941); *Weiss v. Marcus*, 51 Cal. App. 3d 590, 599, 124 Cal. Rptr. 297, 303 (1975); *Baxter v. King*, 81 Cal. App. 192, 194, 253 P. 172, 172 (1927).

29. See *Herman v. Blackman*, 142 Cal. App. 2d 613, 617, 298 P.2d 649, 651 (1956); *Metropolitan Life Ins. Co. v. San Francisco Bank*, 58 Cal. App. 2d 528, 534, 136 P.2d 853, 856 (1943); 81 Cal. App. at 194, 253 P.2d at 172-73 (1927).

30. See 18 Cal. 2d at 681, 117 P.2d at 335; *Kelly v. Steinberg*, 148 Cal. App. 2d 211, 217-18, 306 P.2d 955, 959-60 (1957).

31. See 51 Cal. App. 3d at 598, 124 Cal. Rptr. at 303.

32. See generally *Schroeder v. Auto Driveway Co.*, 11 Cal. 3d 908, 918, 523 P.2d 662, 668, 114 Cal. Rptr. 622, 628 (1974).

33. CAL. CIV. PROC. CODE §3379. See *Paterson v. Sherman*, 68 Cal. App. 2d 706, 711, 157 P.2d 863, 866 (1945).

34. See *Shahood v. Cavin*, 154 Cal. App. 2d 745, 748, 316 P.2d 700, 702 (1957).

General damages for conversion consist of a sum to compensate for the interference with possession or the right to possession. Punitive damages are available for conversion upon a showing of oppression, fraud, or malice.³⁵ The emerging law is that "malice in fact" may be shown by showing "callous disregard of plaintiff's rights."³⁶

6. Fraud

a. Prima Facie Case Elements

As set out in *Gold v. Los Angeles Democratic League*,³⁷ the liability case for common law fraud involves five elements. The first element is a false representation of material fact. A "false representation" includes an affirmative misrepresentation, non-disclosure, and concealment when defendant has a fiduciary duty or exclusive knowledge.³⁸

The false representation must relate to a matter of existing or past fact, not merely an expression of intention to act in the future or an expression of a promise.³⁹ As the court held in *Church of the Merciful Savior v. Volunteers of America, Inc.*⁴⁰

[a] declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute a fraud.⁴¹

However, a promise is actionable as fraud if the promisor had no intention of performing the promised action.⁴² The plaintiff carries the burden of proving that the defendant had no intention of performing the promise.⁴³ Whether the defendant intended to perform is a question of fact to be determined from all of the circumstances.⁴⁴ The cases are divided on the question whether nonperformance by itself is sufficient to sustain a finding that the defendant did not intend to perform.⁴⁵

The second element requires that the false representation be made with knowledge of its falsity, recklessly, or without reasonable ground for believing its truth.

35. 11 Cal. 3d at 922, 523 P.2d at 671, 114 Cal. Rptr. at 631 (1974).

36. See generally *Ferraro v. Pacific Fin. Corp.*, 8 Cal. App. 3d 339, 351-53, 87 Cal. Rptr. 226, 233-34 (1970).

37. 49 Cal. App. 3d 365, 122 Cal. Rptr. 732 (1975).

38. See *id.* at 374, 122 Cal. Rptr. at 738. See also *Younan v. Equitax, Inc.*, 111 Cal. App. 3d 498, 512, — Cal. Rptr. — (1980).

39. See *Richard P. v. Vista Del Mar Child Care Service*, 106 Cal. App. 3d 860, 865, 165 Cal. Rptr. 370, 372 (1980); *Daniels v. Oldenburg*, 100 Cal. App. 2d 724, 727, 224 P.2d 472, 474 (1950).

40. 184 Cal. App. 2d 851, 8 Cal. Rptr. 48 (1960).

41. *Id.* at 859, 8 Cal. Rptr. at 53.

42. *Id.*

43. See *id.*

44. *People v. Christenberry*, 167 Cal. App. 2d 751, 755, 334 P.2d 978, 981 (1959).

45. See 184 Cal. App. 2d at 860, 8 Cal. Rptr. at 53 (containing cases on both positions).

The third element is intent to induce reliance.⁴⁶ Intent to deceive traditionally is not required as long as plaintiff proves intent to induce reliance.⁴⁷ However, in *Sun 'n Sand, Inc. v. United California Bank*,⁴⁸ the California Supreme Court held that “[a]n action for fraudulent misrepresentation lies only when the defendant is charged with knowledge of falsity and an *intent to deceive*.”⁴⁹

Justifiable reliance is the fourth essential element of a claim for fraud.⁵⁰ As with all elements of the prima facie case, “the burden of proving this reliance is upon the party claiming fraud.”⁵¹ Reliance is not justifiable where it is “demonstrated to be unreasonable in light of plaintiff’s intelligence and experience.”⁵² Also, reliance is unjustifiable if the plaintiff made an *independent investigation* of the subject matter of the defendant’s representation and the plaintiff’s decision to enter into the transaction was based on that independent investigation.⁵³

b. General Damages

General damages for fraud are not extended to those which were caused by plaintiff’s “foreseeable reliance,” but instead are restricted to those “flowing from” the action defendant intended to induce.⁵⁴

The usual measure of fraud damages is “out-of-pocket” loss.⁵⁵ However, in a “secret profits” type of action where the usual tort measure of damages would be inadequate because plaintiff suffered no actual out-of-pocket loss, and where a breach of contract between parties in an agency, fiduciary, confidentiality, or broker-buyer relationship has elements of fraud and deceit, the court may treat the fraudulent breach as unjust enrichment under quasi-contract.⁵⁶ In *Ward v. Taggart*, a real estate broker fraudulently purported to act for a named seller, but instead used the buyer’s money to purchase the property himself and resell to the buyer at a higher price. The broker was deemed by the court to be an involuntary trustee of the secret profit.⁵⁷ Such treatment avoids the “out-of-pocket loss” tort damage restriction by allowing re-

46. See *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365, 374, 122 Cal. Rptr. 732, 738 (1975).

47. *Id.*

48. 21 Cal. 3d 671, 582 P.2d 920, 148 Cal. Rptr. 329 (1978).

49. *Id.* at 703, 582 P.2d at 942, 148 Cal. Rptr. at 351 (emphasis added).

50. See *Wagner v. Benson*, 101 Cal. App. 3d 27, 36, 161 Cal. Rptr. 516, 522 (1980); 49 Cal. App. 3d at 374, 122 Cal. Rptr. at 738.

51. *Elkind v. Woodward*, 152 Cal. App. 2d 170, 175, 313 P.2d 66, 68 (1957).

52. *Wagner v. Venson*, 101 Cal. App. 3d 27, 36, 161 Cal. Rptr. 516, 522 (1980).

53. See *Carlson v. Brickman*, 110 Cal. App. 2d 237, 245-46, 242 P.2d 94, 98-99 (1952).

54. See *Carlson v. Murphy*, 8 Cal. App. 2d 607, 611-12, 47 P.2d 1100, 1102-03 (1935).

55. CAL. CIV. CODE §3343.

56. See *Ward v. Taggart*, 51 Cal. 2d 736, 741-42, 336 P.2d 534, 537-38 (1959).

57. *Id.* at 736, 336 P.2d at 534.

covery to the degree of unjust enrichment. Furthermore, by treating the action as one in quasi-contract rather than in contract, the court avoids the prohibition against punitive damages in contract contained in California Civil Code Section 3294.⁵⁸

The 1975 Book of Approved Jury Instructions No. 12.57 and the accompanying note provide for a so-called "benefit-of-the-bargain" measure of damages in an appropriate *Ward*-type case.⁵⁹ However, Judge Hopper of the Fifth District has pointed out that it is incorrect to designate the *Ward* "unjust-enrichment" rule as a benefit-of-the-bargain rule, and that the correct non-contract measure of damages is currently in hopeless confusion.⁶⁰

c. Punitive Damages

Under California law, exemplary damages (sometimes called "punitive" damages) are recoverable for fraud pursuant to California Civil Code Section 3294, which states:

In an action for breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.⁶¹

58. *Id.* at 742, 336 P.2d at 538.

59. *Pepper v. Underwood*, 48 Cal. App. 3d 698, 707 & n.8, 122 Cal. Rptr. 343, 350 & n.8 (1975). CALIFORNIA JURY INSTRUCTIONS—CIVIL (BAJI) No. 12.57 (5th ed. 1975).

60. *See Overgard v. Johnson*, 68 Cal. App. 3d 821, 823, 137 Cal. Rptr. 412, 413 (1977).

61. CAL. CIV. CODE §3294, Because the words "oppression, fraud, or malice" in Civil Code Section 3294 are in the disjunctive, *fraud alone*, without oppression or malice, is an adequate basis for awarding punitive damages in California. *Walker v. Signal Companies, Inc.*, 84 Cal. App. 3d 982, 996, 149 Cal. Rptr. 119, 126 (1978) (quoting *Glendale Fed. Sav. & Loan Ass'n v. Marina View Heights Dev. Co.*, 66 Cal. App. 3d 101, 135-36, 135 Cal. Rptr. 802, 822 (1977)).

Oppression was defined in *Richardson v. Employers Liability Assurance Corp. Ltd.*, as "subjecting a person to cruel and unjust hardship in conscious disregard of his rights." *Richardson v. Employers Liability Assurance Corp., Ltd.*, 25 Cal. App. 3d 232, 246, 102 Cal. Rptr. 547, 556 (1972). In *Richardson*, oppression was proved when an insurance company forced an insured's claim into arbitration even though it knew that the claim was completely valid. 25 Cal. App. 3d at 245-46, 102 Cal. Rptr. at 556. In *Roth v. Shell Oil Co.*, oppression was proved when defendant Shell Oil Co. removed from a dealer's premises the Shell sign and pole, painted out the Shell colors on the pumps and building, and discontinued service to the dealer without inquiring whether the dealer had committed acts sufficient to justify termination of the Shell dealership. *Roth v. Shell Oil Co.*, 185 Cal. App. 2d 676, 683, 8 Cal. Rptr. 514, 518 (1960).

As used in Civil Code Section 3294, malice means "malice in fact," not malice implied by law. *Simmons v. Southern Pac. Transp. Co.*, 62 Cal. App. 3d 341, 368, 133 Cal. Rptr. 42, 58 (1976). Evil motive is the central element of malice in fact. *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 806, 142 Cal. Rptr. 487, 492 (1977). In *O'Hara*, the plaintiff had been raped in her apartment. The apartment building was operated by defendants. The trial court sustained a demurrer to her complaint for fraud and deceit which prayed for actual and punitive damages. The appellate court reversed, finding that the facts alleged could support an award of punitive damages. The court found "malice" in the form of "conscious disregard for safety" where the operators "knowingly misrepresented the safety and security of the complex with the intent to induce appellant to rent an apartment." *Id.* at 801-02, 142 Cal. Rptr. at 489-92.

Because the statute refers to "malice, express or implied," malice does not require proof of animosity or ill will. The case of *Schroeder v. Auto Driveway Co.*, has included within malice

Because the statute employs the word "may," the decisions whether to award punitive damages, as well as how much to award, are within the discretion of the trier of fact.⁶² In other words, a plaintiff is never "entitled" to punitive damages. Consequently, "abuse of discretion resulting from passion and prejudice" is the standard used for reviewing the *amount* of punitive damages awarded.⁶³ The standard for reviewing the factual determination that oppression, fraud or malice exists is the "familiar substantial evidence test."⁶⁴

d. Punitive Damages for Concealment-type Fraud

Punitive damages for fraud are not limited to cases of affirmative misrepresentations. In at least four cases in California, punitive damages have been awarded for concealment-type fraud. In *Hobart v. Hobart Estate Co.*,⁶⁵ exemplary damages were awarded against defendant Greene who, as president of the corporation, fraudulently omitted to tell plaintiff stockholder certain facts affecting the value of stock which plaintiff sold at depressed prices to a guardianship estate over which Greene was a guardian with the right to vote the stock.⁶⁶ In *Black v. Shearson, Hammill & Co.*,⁶⁷ punitive damages were awarded where a stockbroker, who owed a fiduciary duty to his customers, concealed from his customers adverse facts about stocks he sold to them.⁶⁸ In *McDaniel v. McDaniel*,⁶⁹ punitive damages were awarded against an ex-husband for fraudulent concealment during settlement negotiations in divorce proceedings⁷⁰ of the existence of additional assets and, finally, in *Werschkull v. United California Bank*,⁷¹ the appellate court upheld an award of punitive damages for concealment-type fraud.

"defendant's callous disregard of plaintiff's rights or acting with knowledge that defendant's conduct was substantially certain to vex, annoy and injure plaintiff." *Schroeder v. Auto Driveway Co.*, 11 Cal. 3d 908, 922, 523 P.2d 662, 666-67, 671, 114 Cal. Rptr. 622, 626-27, 631 (1974). In *Schroeder*, the court found "malice in fact" where the defendant common carrier falsely assured the plaintiffs that it was authorized under an order made by the Interstate Commerce Commission to transport plaintiff's goods. *Id.* at 915, 922, 523 P.2d at 662, 666, 114 Cal. Rptr. at 627, 631. In an action against an insurance company for breach of the implied covenant of good faith and fair dealing, the court held that the claims representatives acted *maliciously*, and with the intent to oppress, where they, *inter alia*, inadequately investigated the plaintiff's claim, and called the plaintiff a fraud. *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 822, 598 P.2d 452, 458, 157 Cal. Rptr. 482, 488 (1979).

62. 24 Cal. 3d at 821 & n.2, 598 P.2d at 458 & n.2, 157 Cal. Rptr. at 488 & n.2.

63. *Id.* at 824, 598 P.2d at 460, 157 Cal. Rptr. at 490.

64. *Id.* at 821, 598 P.2d at 458, 157 Cal. Rptr. at 488.

65. 26 Cal. 2d 412, 159 P.2d 958 (1945).

66. *Id.* at 421-22, 159 P.2d at 962-64.

67. 266 Cal. App. 2d 362, 72 Cal. Rptr. 157 (1969).

68. *Id.* at 369, 72 Cal. Rptr. at 162.

69. 275 Cal. App. 2d 927, 80 Cal. Rptr. 837 (1969).

70. *Id.* at 940-44, 80 Cal. Rptr. at 845-48.

71. 85 Cal. App. 3d 981, 149 Cal. Rptr. 829 (1978).

UCB was the trustee of its employee pension plan and, as such, breached a duty to disclose to the beneficiaries any material changes in the plan when it concealed from plaintiff employees the facts that it had amended the plan and had diverted funds.⁷²

e. Punitive Damages Without General Damages

It is sometimes stated that punitive damages cannot be awarded if no actual or compensatory damages are awarded.⁷³ Indeed, California Civil Code Section 3294 may be interpreted to support this view since it provides that "the plaintiff, *in addition to* the actual damages, may recover damages for the sake of example and by way of punishing the defendants."⁷⁴ However, the correct rule is simply that the plaintiff must have been *actually damaged* by the defendant's tortious act. In *Brewer v. Second Baptist Church*,⁷⁵ the court held that punitive damages are mere incidents of tort causes of action, and therefore punitive damages cannot be awarded unless a tort was committed.⁷⁶ In *Topanga Corp. v. Gentile*,⁷⁷ the court said that in an action for cancellation of shares, for rescission or reformation of share interests and for punitive damages,

[t]he fact that plaintiffs were not given a grant of monetary damages of a certain amount is not determinative [of the issue of punitive damages]. Plaintiff, was *indeed damaged* by defendants' fraud for defendants had, as the result of the fraud, received stock in an amount not commensurate with the value of their contribution to the corporation.⁷⁸

In addition to the above-cited authority for the general proposition that punitive damages require the *fact* of damage but not an award of compensatory money damages, at least two California cases have specifically held that punitive damages are available in a fraud action where the remedy obtained is *rescission*. In *Horn v. Guaranty Chevrolet Motors*,⁷⁹ the court stated that "[d]efendant asserts that since plaintiff elected to rescind the transaction, rather than affirm it and sue for damages, plaintiff may not have exemplary or punitive damages Fraud alone is an adequate ground for awarding punitive damages [ci-

72. *Id.* at 1004, 149 Cal. Rptr. at 844.

73. *See Birch Ranch & Oil Co. v. Campbell*, 43 Cal. App. 2d 624, 628, 111 P.2d 445, 447 (1941).

74. CAL. CIV. CODE §3294 (emphasis added).

75. 32 Cal. 2d 791, 197 P.2d 713 (1948). *Brewer* was followed in *Esparza v. Specht*, 55 Cal. App. 3d 1, 6, 127 Cal. Rptr. 493, 496 (1976).

76. 32 Cal. 2d at 801-02, 197 P.2d at 720.

77. 249 Cal. App. 2d 681, 58 Cal. Rptr. 713 (1967).

78. *Id.* at 691, 58 Cal. Rptr. at 719.

79. 270 Cal. App. 2d 477, 75 Cal. Rptr. 871 (1969).

tations omitted] and it is immaterial that plaintiff's recovery is in the form of specific restitution, rather than monetary damages."⁸⁰ In *Mahon v. Berg*,⁸¹ the court found that "[t]he broad equity powers invoked in an action for rescission because of fraud should afford such a remedy [punitive damages]."⁸²

A related but apparently unsolved question is whether punitive damages for fraud can be recovered when the remedy sought is declarative in nature. Declaratory relief is classified as an equitable remedy,⁸³ and equity generally does not award punitive damages.⁸⁴ But the court, in *Mahon v. Berg*,⁸⁵ stated that "[h]ere . . . some deterrent to fraud is equitable and reasonable. It is not afforded if the wrongdoer risks only the fruits of his fraud."⁸⁶ Although its language is interesting, *Mahon* involved the remedy of rescission, not declaratory relief. The granting of declaratory relief is premised not on the finding of *actual damage*, as is rescission, but rather is premised on an "actual controversy" as to the rights of the parties. In contrast, as outlined above, recovery of punitive damages requires proof of actual damages.

The law is equally unclear on the issue of whether punitive damages are recoverable if the plaintiff obtains an injunction but no actual damages. On the one hand, injunctive relief is the classic equitable remedy and equity generally does not award punitive damages.⁸⁷ On the other hand, the policy behind punitive damage awards, as stated by the California Supreme Court in *Egan v. Mutual of Omaha Insurance Company*,⁸⁸ is to punish wrongdoers and thus deter the commission of objectionable or wrongful acts.⁸⁹ If the plaintiff proves that the defendant committed a wrongful act constituting fraud, and that the plaintiff was actually damaged therefrom, there is no reason in principle why the policy enunciated in *Egan* should not apply to allow recovery of punitive damages as well as injunctive relief.

f. The Trend Toward Limiting Punitive Damages

No discussion of punitive damages for business torts would be complete without noting the decided trend toward limiting punitive damages or eliminating them all together. Since January 1, 1981, courts

80. *Id.* at 484, 75 Cal. Rptr. at 875-76.

81. 267 Cal. App. 2d 588, 73 Cal. Rptr. 356 (1968).

82. *Id.* at 590, 73 Cal. Rptr. at 357.

83. *Dills v. Delira Corp.*, 145 Cal. App. 2d 124, 129, 302 P.2d 397, 400 (1956).

84. *Rivero v. Thomas*, 86 Cal. App. 2d 225, 239, 194 P.2d 533, 542 (1948).

85. 267 Cal. App. 2d 588, 73 Cal. Rptr. 356 (1968).

86. *Id.* at 590, 73 Cal. Rptr. at 357.

87. 86 Cal. App. 2d at 239, 194 P.2d at 542.

88. 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979).

89. *Id.* at 825, 598 P.2d at 461, 157 Cal. Rptr. at 491.

have had discretion to prohibit, upon a showing of good cause, proof at trial of defendant's financial condition on the issue of punitive damages until the plaintiff makes a prima facie showing on liability for punitives.⁹⁰ In addition, the plaintiff is no longer permitted to even *discover* the defendant's financial condition pursuant to a claim for punitive damages unless so ordered by the court at the conclusion of a hearing to determine whether there is a "substantial probability" that the plaintiff will prevail on the claim for punitive damages.⁹¹

Judge Elkington of the First District Court of Appeal has stated that "the law of punitive damages as it has developed in this state no longer serves any public purpose, or the legitimate interests of the unentitled recipients of its constantly accelerating largess."⁹² Judge Wiener of the Fourth District, sitting as a judge of the Superior Court in San Diego, has quoted Judge Elkington with apparent sympathy.⁹³

*7. Inducing Breach of Contract Also Known as Tortious Interference with Contract*⁹⁴

Modern courts classify this tort as a species of interference with prospective economic advantage, although inducing breach of contract was historically prior.

Six elements are required:⁹⁵ (1) A valid existing contract; (2) that defendant had knowledge of; (3) defendant intended to induce breach; (4) contract in fact breached, or performance rendered more difficult;⁹⁶ (5) causation; and (6) actual damage.

A party to the contract cannot be a defendant in a suit for tortious interference with contract.⁹⁷ However, if a party to the contract conspired with another to breach the contract, the aggrieved party to the contract may sue all conspirators, including the wrongdoing party, for conspiracy to induce breach of contract.

Justification or privilege are defenses to the tort of inducing breach of contract.⁹⁸

90. CAL. CIV. CODE §3295(a).

91. *Id.* §3295(b).

92. *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 758, 168 Cal. Rptr. 237, 248 (1980) (Elkington, J., concurring).

93. *Baker v. Sequoia Ins. Co.*, No. 359221, slip op. at 3 (Super. Ct. San Diego).

94. *See Dryden v. Tri-Valley Growers*, 65 Cal. App. 3d 990, 994, 135 Cal. Rptr. 720, 723 (1977).

95. 65 Cal. App. 3d at 995, 135 Cal. Rptr. at 723.

96. *Lipman v. Brisbane Elementary School Dist.*, 55 Cal. 2d 224, 232, 359 P.2d 465, 469, 11 Cal. Rptr. 97, 101 (1961).

97. *See* 65 Cal. App. 3d at 994, 135 Cal. Rptr. at 724.

98. *Agostini v. Strycula*, 231 Cal. App. 2d 804, 809, 42 Cal. Rptr. 314, 317 (1965) (statements made in the course of official proceeding are privileged and therefore cannot form the basis of an action for inducing breach of contract).

At present, *negligent* inducement of breach of contract is not actionable in tort.⁹⁹ The only qualification to this general rule is the tort of interference with employment relationship, where an employer may maintain a tort action in negligence to recover for loss of employee services.¹⁰⁰ However, Judge Friedman of the Third District Court of Appeal has argued, quite logically, for recovery when the act is negligent, using the test for tort recovery based on “reasonable foreseeability of loss.”¹⁰¹ The California Supreme Court appears to be ready to allow a cause of action for negligent inducement of breach of contract on general tort “foreseeability” principles.¹⁰²

Compensatory damages may be measured by the capitalization of prospective profits.¹⁰³ Punitive damages are awardable for inducing breach of contract when oppression, fraud or malice is proven.¹⁰⁴

8. *Interference with Employment Relationship*

In *Offshore Rental Co. v. Continental Oil Co.*,¹⁰⁵ the California Supreme Court indicated that it disfavors this tort as “archaic” and of “minimal importance.” Thus, in a conflict of laws context under comparative impairment analysis, it applied contrary Louisiana law precluding recovery. However, the *Offshore* court assumed for the purpose of its analysis that California law grants a cause of action for interference with employment relationship.¹⁰⁶

This tort has four elements. First, there must be an interference with an employment relationship. The interference typically consists of a personal injury to the plaintiff’s employee.

Second, the interference must be intentional or negligent. In *Darmour Productions Corp. v. Baruch Corp.*,¹⁰⁷ the court found a cause of action for interference with employment relationship where a movie producer sued the defendant for *negligently* injuring an actress engaged in a current production. As a result of defendant’s negligence, plaintiff was deprived of the actress’ services.

The third and fourth elements of interference with employment relationship are causation and damage.

99. *Fifield Manor v. Finston*, 54 Cal. 2d 632, 636, 354 P.2d 1073, 1075, 7 Cal. Rptr. 377, 379 (1960).

100. See notes 105-111 and accompanying text *infra*.

101. *Adams v. Southern Pac. Transp. Co.*, 50 Cal. App. 3d, 37, 45, 123 Cal. Rptr. 216, 221 (1975).

102. See *J’Aire Corp. v. Gregory*, 24 Cal. 3d 799, 806-807 n.4, 598 P.2d 60, 65 n.4, 157 Cal. Rptr. 407, 411-12 n.4 (1979).

103. *Elsbach v. Mulligan*, 58 Cal. App. 2d 354, 367, 136 P.2d 651, 658 (1943).

104. See CAL. CIV. CODE §3294(a).

105. 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

106. *Id.* at 168, 583 P.2d at 728-29, 168 Cal. Rptr. at 874-75.

107. 135 Cal. App. 351, 353, 27 P.2d 664, 665 (1933).

In California, this tort has a statutory basis. California Civil Code Section 49(c) states that "the rights of personal relations forbid . . . [a]ny injury to a servant which affects his ability to serve his master" ¹⁰⁸ This statute follows the ancient common law rule which regarded an injury to a servant as a violation of a property right of the master to the services of his servants. ¹⁰⁹ According to modern definition as stated in *Darmour*, servant is synonymous with employee. ¹¹⁰

A partnership as a separate entity may not sue under this tort. Business losses suffered by the partnership entity due to injury of one partner are not recoverable by the partnership entity under this tort because the injured partner may recover on his or her own behalf for the personal loss of earnings reflected by any diminution in his or her share of the partnership income. By denying the partnership, as a separate entity, the right to recover for loss of the partner's services, the courts avoid double recovery for plaintiff's injuries. ¹¹¹

9. *Interference with Prospective Economic Advantage*

a. *Prima Facie Case Elements*

According to the leading case of *Buckaloo v. Johnson*, ¹¹² this tort has five elements: (1) economic relationship containing the probability of future economic benefit; (2) knowledge by the defendant third party of the existence of the relationship; (3) intentional or negligent ¹¹³ acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant.

b. *Defense of Competitor's Privilege*

California law recognizes a "competitor's privilege" to interfere, even intentionally, with prospective contractual relations to obtain business, so long as wrongful means are not used and the competitor's "purpose is at least in part to advance his interest in competing." ¹¹⁴ Moreover, the comment on subsection (1) of Section 768 of the Restate-

108. CAL. CIV. CODE §49(c).

109. *See Fifeild Manor v. Finston*, 54 Cal. 2d 632, 636, 354 P.2d 1073, 1075, 7 Cal. Rptr. 377, 379 (1960).

110. 135 Cal. App. at 353, 27 P.2d at 665.

111. *Sharfman v. California*, 253 Cal. App. 2d 333, 337, 61 Cal. Rptr. 266, 269 (1967).

112. 14 Cal. 3d 815, 827, 357 P.2d 865, 872, 122 Cal. Rptr. 745, 752 (1975) (interference with broker-seller relationship). *See also Frazier v. Boccardo*, 70 Cal. App. 3d 331, 338, 138 Cal. Rptr. 670, 673 (1977) (interference with attorney-client relationship).

113. *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 808, 598 P.2d 60, 65, 157 Cal. Rptr. 407, 413 (1979).

114. *Buckaloo v. Johnson*, 14 Cal. 3d 815, 828, 357 P.2d 865, 872, 122 Cal. Rptr. 745, 752 (1975); *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 21, 144 Cal. Rptr. 664, 670 (1978); RESTATEMENT (SECOND) OF TORTS §768 (1979).

ment Second of Torts concludes that a party's privilege to engage in business and compete implies a privilege to induce customers to do business with him instead of with his competitors. The extent of permissible competitive conduct was defined in *Katz v. Kapper*,¹¹⁵

Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, but every trader is left to conduct his business in his own way, so long as the methods he employs do not involve wrongful conduct such as fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival . . . or the procurement of the violation of contractual relations. If disturbance or loss comes as the result of competition, or the exercise of like rights by others, as where a merchant undersells or oversells his neighbor, it is *damnum absque injuria*.¹¹⁶

The line between free competition and interference with prospective economic advantage is not clearly drawn, but is determined on a case by case basis.¹¹⁷ Relevant criteria for this decision may be (1) the depth of the economic relationship, and (2) whether the intentional disruption was malicious or devious.¹¹⁸

The common law tort of intentional unjustified interference with the right to pursue a lawful calling¹¹⁹ was interpreted in at least one California case to be a species of interference with prospective economic advantage.¹²⁰ The practical significance of that classification is that justification becomes an affirmative defense rather than a part of the plaintiff's case¹²¹ and therefore may not be considered by the court when ruling on a demurrer unless justification appears on the face of the complaint.

c. Punitive Damages

Punitive damages are available for this tort. In *Guillory v. Godfrey*,¹²² the appellate court upheld an award of punitive damages under a cause of action classified as "wrongful or malicious interference with the formation of a contract . . ." ¹²³ In *Guillory*, defendants owned a

115. 7 Cal. App. 2d 1, 44 P.2d 1060 (1935). *Accord*, Charles C. Chapman Bldg. Co. v. California Mart, 2 Cal. App. 3d 846, 857, 82 Cal. Rptr. 830, 837 (1969) (soliciting tenants to move to competing building was privileged).

116. 7 Cal. App. 2d at 4, 44 P.2d at 1061.

117. *See* 2 Cal. App. 3d at 857, 82 Cal. Rptr. at 837.

118. 14 Cal. 3d at 828, 357 P.2d at 872, 122 Cal. Rptr. at 752 (1975) (defendant buyer, after taking advantage of plaintiff broker's efforts, induced realty seller to accept lower price by excluding broker's commission. Court found cause of action because of devious dealing).

119. *See* Willis v. Santa Ana Community Hosp. Ass'n., 58 Cal. 2d 810, 376 P.2d 568, 26 Cal. Rptr. 642 (1962).

120. *See* 79 Cal. App. 3d at 18, 144 Cal. Rptr. at 668.

121. *Id.*

122. 134 Cal. App. 2d 628, 286 P.2d 474 (1955).

123. *Id.* at 630-31, 286 P.2d at 476.

liquor store next door to plaintiff's cafe. When plaintiff hired a Negro cook, defendants harassed plaintiff and plaintiff's customers, causing a loss of business. The *Guillory* action appears to be identical to what is now called interference with prospective economic advantage, or intentional interference with a business expectancy, because plaintiff had an expectancy of future cafe business which was knowingly and intentionally interfered with by the liquor store owner defendants, causing damage to plaintiff. In *Anthony v. Enzler*,¹²⁴ sellers of real property entered into an option contract with the prospective buyers *prior* to the expiration of an exclusive listing agreement with plaintiff broker. Both the sellers and the buyers were liable for breach of the listing agreement, and the buyers were additionally liable to the broker in punitive damages for intentional interference with prospective economic advantage.¹²⁵

10. *Invasion of Privacy*

Invasion of privacy is both a common law and statutory¹²⁶ tort in California. At common law, the *prima facie* case for liability involves four elements. The first element is an "invasion," which may consist of eavesdropping, shadowing, trailing, wiretapping, electronic eavesdropping, the covert use of voice stress analyzer¹²⁷ or the commercial or noncommercial use of one's name or picture. The second element requires that the invasion be non-oral.¹²⁸

The third requirement is that the invasion be of the right to live an ordinary, private life without subjection to unwarranted or undesired publicity. News reports, however, are protected by the first amendment. In *Cox Broadcasting Corp. v. Cohn*,¹²⁹ disclosure by a television station of the name of a rape victim, obtained from public records, was held to be protected by the first amendment and therefore not subject to a suit for invasion of privacy.¹³⁰ The courts have also held that disclosure by a collection agency to a limited number of persons, for instance one's employer, is not actionable as an invasion of privacy.¹³¹

The fourth required element is that the invasion must have injured

124. 61 Cal. App. 3d 872, 132 Cal. Rptr. 553 (1976).

125. *Id.* at 877-78, 132 Cal. Rptr. at 557.

126. In 1971, the California legislature enacted a statutory damages action for invasion of privacy, which made actionable the knowing commercial use of one's photo, name or likeness without consent. CAL. CIV. CODE §3344.

127. CAL. PENAL CODE §637.3.

128. *Grimes v. Carter*, 241 Cal. App. 2d 694, 698, 50 Cal. Rptr. 808, 811 (1966).

129. 420 U.S. 469 (1975).

130. *Id.* at 496.

131. *Timperley v. Chase Collection Service*, 272 Cal. App. 2d 697, 698-99, 77 Cal. Rptr. 782, 783 (1969).

the plaintiff's feelings. Thus, the injury is not to reputation, as in defamation, but is an injury to one's peace of mind.¹³²

Invasion of privacy is not generally classified as a business tort because: (1) a business, as such, has no "feelings" which might be injured, and (2) the defendant may be either a business entity or an individual. However, there are certain types of businesses, for instance collection agencies, the media and advertising which must be aware of the invasion of privacy actions and the applicable defenses.

11. *Intentional Interference with the Right to Pursue a Lawful Business*

a. *Prima Facie Case Elements*

The three elements of plaintiff's prima facie case are: (1) an intentional; (2) interference; with a (3) lawful business, calling, trade, or occupation.¹³³

b. *The Defense of Justification*

The recent case of *Lowell v. Mother's Cake & Cookie Company*,¹³⁴ stressed that justification is an affirmative defense to this tort, whereas previous cases¹³⁵ had not clearly so stated. The practical significance of this is that justification may not be considered by the court when ruling on a demurrer unless justification appears on the face of the complaint.¹³⁶ Justification is determined "not by applying precise standards but by balancing, in light of all the circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other."¹³⁷

12. *Malicious Prosecution*

a. *Prima Facie Case Elements*

The case of *Bertero v. National General Corp.*,¹³⁸ set out the four elements of the prima facie case on liability: (1) favorable though not necessarily "final" termination of a (2) prior separate proceeding (either criminal, civil, or administrative), (3) prosecuted without probable

132. *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 116, 14 Cal. Rptr. 208, 211 (1961).

133. *See Willis v. Santa Ana Community Hosp. Ass'n.*, 58 Cal. 2d 806, 810, 376 P.2d 568, 570, 26 Cal. Rptr. 640, 642 (1962); *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 18, 144 Cal. Rptr. 664, 668 (1978).

134. 79 Cal. App. 3d 13, 18, 144 Cal. Rptr. 664, 668 (1978).

135. *See* 58 Cal. 2d at 810, 376 P.2d at 570, 26 Cal. Rptr. at 642 (1962).

136. 79 Cal. App. 3d at 19, 144 Cal. Rptr. at 668 (1978).

137. 58 Cal. 2d 806, 810, 376 P.2d 568, 570, 26 Cal. Rptr. 640, 642 (1962).

138. 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974).

cause, and (4) with malicious intent (ill will or improper purpose).¹³⁹

Good faith reliance by a party on counsel, after full disclosure, constitutes probable cause, and judgment against the present plaintiff, even though reversed on appeal, is *conclusive* of probable cause.¹⁴⁰

b. Damages

As damages you can recover your attorney's fees from the prior malicious prosecution if the first judgment did not provide them.

As with all torts, punitive damages are available when oppression, fraud or malice is proven. In *Allard v. Church of Scientology*,¹⁴¹ punitive damages in a malicious prosecution lawsuit were authorized against the employer-church where the founder and chief official of the church, L. Ron Hubbard, initiated the "fair game policy" whereby church "enemies . . . may be deprived of property or injured by any means. . . ."¹⁴² In *Allard*, the "means" used was the filing of a lawsuit for conversion without probable cause.

c. Recent Trends

In the past few years, California courts have established a number of points in the area of malicious prosecution which are of interest to litigators. A cause of action for malicious prosecution of a civil suit can now be based on a cross-complaint asserted by your opponent in the prior action. In *Bertero v. National General Corp.*,¹⁴³ the California Supreme Court rejected arguments that a cross-complaint is not an "initiation of civil proceeding" and that a cross-complaint is merely defensive.¹⁴⁴

The *Bertero* court also adopted *both* the subjective and the objective ("reasonable man") tests for determining whether there was probable cause to institute the proceeding.¹⁴⁵ Thus, liability may attach if *either* test is met.

An important consideration in this area is that an attorney will be liable for professional malpractice if he or she prosecutes a claim which a reasonable lawyer would not regard as tenable or unreasonably neglects to investigate the facts and the law.¹⁴⁶

139. *Id.* at 50, 529 P.2d at 613-14, 118 Cal. Rptr. at 189-90.

140. *See generally* *Gause v. McClelland*, 102 Cal. App. 2d 762, 763-65, 228 P.2d 91, 91-92 (1951).

141. 58 Cal. App. 3d 439, 443 n.1, 129 Cal. Rptr. 797, 800 n.1 (1976).

142. *Id.*

143. 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974).

144. *Id.* at 51-53, 529 P.2d at 614-15, 118 Cal. Rptr. at 190-92.

145. *Id.* at 55, 529 P.2d at 617, 118 Cal. Rptr. at 193.

146. *Tool Research and Eng'g. Corp. v. Henigson*, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

Two recent cases have clarified the question whether *dismissals* are “favorable terminations” for purposes of a malicious prosecution suit. In *Minasion v. Sapse*,¹⁴⁷ the court ruled that a dismissal under California Code of Civil Procedure Section 583(a) for failure to prosecute is a “favorable termination.” On the other hand, in *Lackner v. La Croix*, the court held that dismissal based on the statute of limitations does not reflect on the merits of the cause of action and thus will not support a subsequent suit for malicious prosecution.¹⁴⁸ The apparent distinction between the cases is that *Minasion* involved a dismissal on *substantive* grounds while *Lackner* was dismissed on *procedural* grounds. Such a distinction should be irrelevant in determining whether a suit was *brought* without probable cause. The key should be whether the prior suit was without probable cause, without regard to whether the result was “favorable” or “unfavorable” on procedural grounds.

13. Misappropriation of Trade Secret

a. Prima Facie Case Elements

The elements of the common law action for misappropriation of trade secrets are set out in *Diodes, Inc. v. Franzen*.¹⁴⁹

The first element is the existence of a “trade secret.” A trade secret is defined as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives one a competitive advantage over one’s competitors who do not know it or use it.”¹⁵⁰ Trade secrets need not be so unique as to be patentable,¹⁵¹ but the “competitive advantage” element necessarily requires some uniqueness. Customer lists, for example, may or may not constitute trade secrets depending on the extent of the prior business relationship and the employee’s role in developing the list.¹⁵² By contrast, realty listings are not considered trade secrets in California.¹⁵³

Second, there must be an appropriation through use, disclosure or non-disclosure. No appropriation occurs when use of the secret is obtained by means of “independent invention” or “reverse engineer-

147. 80 Cal. App. 3d 823, 145 Cal. Rptr. 829 (1978).

148. 25 Cal. 3d 747, 750, 602 P.2d 393, 394, 159 Cal. Rptr. 693, 694 (1979).

149. 260 Cal. App. 2d 244, 67 Cal. Rptr. 19 (1968).

150. *Sinclair v. Aquarius Elec. Inc.*, 42 Cal. App. 3d 216, 221, 116 Cal. Rptr. 654, 658 (1974).

151. *Id.* at 222, 116 Cal. Rptr. at 658. The Supreme Court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) held that state trade-secret law is not preempted by federal patent law even if the trade secret *could* have been patented. *Id.* at 491-93.

152. *See generally* *King v. Pacific Vitamin Corp.*, 256 Cal. App. 2d 841, 847-49, 64 Cal. Rptr. 486, 489-90 (1967).

153. *See* *California Francisco Inv. Corp. v. Vronis*, 14 Cal. App. 3d 318, 322-23, 92 Cal. Rptr. 201, 204-05 (1971).

ing.”¹⁵⁴

Third, the appropriation must be wrongful. In general, wrongful appropriation means a breach of an express or implied contract not to use or disclose a trade secret, or breach of a trust or a personal confidence.¹⁵⁵ Disclosure is actionable if made by one with a duty not to disclose, for example, an employee.¹⁵⁶ Non-disclosure is actionable if there is a fiduciary duty to disclose.¹⁵⁷ Use of a trade secret is actionable where a secret was wrongfully obtained, for instance, by theft, wire-tapping or aerial photography.¹⁵⁸

b. Accrual of Cause of Action

In California, a trade secret is not in the nature of property (so that each new wrongful appropriation would be a new wrong thereby extending the statute of limitations as a continuing tort); rather, it is an aspect of a confidential or contractual relationship.¹⁵⁹ Therefore, this cause of action accrues at the *first* adverse use of the trade secret because that is the point at which the relationship is breached.¹⁶⁰

Defenses to misappropriation of trade secrets include consent, waiver, secret developed by employee and accidental disclosure.

14. Negligence

Negligence is defined at common law as the breach of a duty owed to the plaintiff which is the cause in fact and proximate cause of plaintiff's actual injury.¹⁶¹ The tort of negligence, of course, is not primarily applicable to competitive business situations. The major appeal to business law litigators of negligence may be its use in the products liability area, where a cause of action in negligence allows an appeal to the jury's moral sensibilities due to the element of breach of a duty.

A key litigation consideration in negligence actions is the allocation of loss between multiple defendants under the doctrines of contribution

154. 42 Cal. App. 3d at 226, 116 Cal. Rptr. at 661 (1974).

155. See generally *Ojala v. Bohlin*, 178 Cal. App. 2d 292, 299-300, 2 Cal. Rptr. 919, 924 (1960). See also *Davies v. Krasna*, 14 Cal. 3d 502, 535 P.2d 1161, 121 Cal. Rptr. 705 (1975).

156. 178 Cal. App. 2d 300, 2 Cal. Rptr. at 924 (1960).

157. See *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 347, 411 P.2d 921, 935-36, 49 Cal. Rptr. 825, 839-40 (1965).

158. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 n.5 (1974).

159. *Monolith Portland Midwest Co. v. Kaiser Aluminum & Chem. Corp.*, 407 F.2d 288, 293 (9th Cir. 1969). See also *Thompson v. California Brewing Co.*, 150 Cal. App. 2d 469, 473-76, 310 P.2d 436, 438-40 (1957).

160. See *King v. Pacifica Vitamin Corp.*, 256 Cal. App. 2d 841, 844-45, 64 Cal. Rptr. 486, 487 (1967).

161. See generally 46 CAL. JUR., *Negligence* §§1 (definition of negligence), 2 (active or passive negligence), 3 (statutory basis of liability) (3d ed. 1980).

and indemnity.¹⁶² In brief, contribution is the right of a judgment debtor who has paid more than his proportionate share of the judgment to recover from a joint tortfeasor judgment debtor the latter's *proportionate* share of the judgment.¹⁶³ Contribution is based only on the number of judgment debtors not on the relative fault of the defendants.¹⁶⁴ A right to contribution ripens only after a joint judgment has been rendered.¹⁶⁵ The procedure requires that the party seeking contribution file a noticed motion for a judgment of contribution, together with an affidavit regarding available assets of the other defendants.¹⁶⁶

Indemnity, on the other hand, is a loss-shifting device based on relative fault.

Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred. . . . This obligation may be expressly provided for by contract . . . , it may be implied from a contract not specifically mentioning indemnity, or it may arise from the equities of particular circumstances¹⁶⁷

The key to the law of equitable indemnity is that the liability should be shifted from a passively negligent defendant to an actively negligent defendant.¹⁶⁸ Traditional equitable indemnity was total and resulted in a complete transfer of liability.¹⁶⁹ However, shortly after California adopted the comparative negligence rule¹⁷⁰ apportioning relative fault as between plaintiffs and defendants, the rule of comparative fault was applied between defendants to allow *partial* equitable indemnity.¹⁷¹ Thus, under the current law, a defendant may cross-complain against any person, whether or not currently a defendant, to obtain total or partial indemnity.¹⁷² This allows compulsory joinder of, and indemnity from, negligent nonparties whom the plaintiff may have elected not to sue for tactical reasons, such as not joining an individual in order to focus on a corporate defendant. It must be noted, however, that partial indemnity is not available until *after* the party seeking indemnifica-

162. Contribution is not available for intentional torts. CAL. CIV. PROC. CODE §875(d). Indemnity is restricted to negligence actions because it is based on the comparative degrees and amounts of negligence of the defendants.

163. CAL. CIV. PROC. CODE §§875-880 (releases from and contribution among joint tortfeasors).

164. *Id.* §876.

165. *Id.* §875(a).

166. *Id.* §878.

167. *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal. 3d 622, 628 537 P.2d 97, 100, 119 Cal. Rptr. 449, 452 (1975).

168. *See id.* at 629, 119 Cal. Rptr. at 453.

169. *See Gardner v. Murphy*, 54 Cal. App. 3d 164, 168, 126 Cal. Rptr. 302, 304 (1975).

170. *Li v. Yellow Cab. Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

171. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 591, 599, 578 P.2d 899, 907, 912, 146 Cal. Rptr. 182, 190, 195 (1978).

172. *Id.* at 607, 578 P.2d at 912, 146 Cal. Rptr. at 200.

tion has paid its share of the judgment.¹⁷³

Defense counsel should not overlook the effect of good faith settlements. A tortfeasor who settles in good faith is immune from contribution and indemnity.¹⁷⁴ The settling defendant, however, can pursue indemnity and contribution from nonsettling tortfeasors, whether or not named as defendants.

One California appellate judge recently suggested that punitive damages are now awardable in *all* negligence actions because legal malice includes "an intention to perform an act that the actor . . . *should know* . . . will very probably cause harm," and "the essence of actionable negligence [is] that the risk of danger to the plaintiff 'would have been *foreseen* . . . by a reasonable person'"¹⁷⁵

15. *Negligent Misrepresentation*

In California, the rapidly evolving tort of negligent misrepresentation is a form of fraud or deceit.¹⁷⁶ Six elements are required for the *prima facie* case on liability.

First, the defendant must make an actual, not merely an implied, false representation.¹⁷⁷ Second, the false representation must be made for business purposes in the course of a business or profession.¹⁷⁸ Therefore, the scope of liability is restricted to those persons to whom the representation was actually made in the course of a business or profession. Third, that the false representation is made without reasonable grounds for believing it to be true. Fourth, the false representation must be made with the intent of inducing reliance.¹⁷⁹ Fifth, the plaintiff has to justifiably rely.¹⁸⁰ Finally, the sixth element requires that there be proximately caused damage.¹⁸¹

In a widely cited¹⁸² example of a complaint stating a cause of action for negligent misrepresentation, plaintiff successfully alleged that the Hearst Corporation, publisher of Good Housekeeping Magazine, com-

173. See generally *Adams v. Cerritor Trucking Co.*, 79 Cal. App. 3d 957, 145 Cal. Rptr. 310 (1978).

174. CAL. CIV. PROC. CODE §877.6(c).

175. *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 761, 168 Cal. Rptr. 237, 249-50 (1980) (Elkington, J., concurring opinion) (quoting, in part, 4B WITKIN, SUMMARY OF CALIFORNIA LAW §496 (8th ed. 1974)).

176. See generally CAL. CIV. CODE §1710(2).

177. *Huber, Hunt & Nichols v. Moore*, 67 Cal. App. 3d 278, 304, 136 Cal. Rptr. 603, 619 (1977).

178. See *Hawkins v. Oakland Title Ins. & Guar. Co.*, 165 Cal. App. 2d 116, 128, 331 P.2d 742, 749 (1958).

179. CAL. CIV. CODE §1710.

180. *Hale v. George A. Hormel & Co.*, 48 Cal. App. 3d 73, 86, 121 Cal. Rptr. 144, 152 (1975).

181. *Id.*

182. See *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969). See generally 48 Cal. App. 3d at 85, 121 Cal. Rptr. at 152.

mitted the tort of negligent misrepresentation when it issued a Good Housekeeping Seal without carefully examining a product which caused injury.¹⁸³

16. Nuisance

The common law tort of nuisance is now defined in California by Civil Code Section 3479, which provides that:

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.¹⁸⁴

The basic remedies for nuisance include injunction and damages.¹⁸⁵

Nuisance is not of course a classic "business tort" since both businesses and individuals may be either the perpetrator or the victim of the nuisance. However, business counsel must be aware of the statutory nuisances¹⁸⁶ which apply to their particular type of business as well as the general nuisances such as obstruction, encroachment and pollution, including noise pollution.¹⁸⁷

A public nuisance is defined in California Civil Code Section 3480 as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."¹⁸⁸ One significance of the difference between private and public nuisances is that there is *no* statute of limitations on a public nuisance.¹⁸⁹

17. Plagiarism (Copyright Infringement)

In general, the common law protects a copyright before general publication, and compliance with the Federal Copyright Law,¹⁹⁰ protects it thereafter. The California common law action for copying a protectable literary property has been preempted by the Federal Copyright Revision Act of 1976, which created a new federal common law copy-

183. 276 Cal. App. 2d at 682-83, 81 Cal. Rptr. at 521.

184. CAL. CIV. CODE §3479.

185. CAL. CIV. PROC. CODE §731.

186. See California Government Code Section 815, providing that a public entity is not liable for an injury except as otherwise provided by statute, is not applicable to statutory nuisances. *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 937 n.13, 496 P.2d 480, 491 n.13, 101 Cal. Rptr. 568, 579 n.13 (1972).

187. See generally 6 Cal. 3d at 936 n.13, 496 P.2d at 491 n.13, 101 Cal. Rptr. at 579 n.13.

188. CAL. CIV. CODE §3480.

189. *Id.* §3490.

190. 17 U.S.C. §§1 et. seq. (1976).

right.¹⁹¹ Therefore, federal law now controls the area of copyrights.

In the related area of reproduction of fine art, if an artist transfers a work of fine art to another on or after January 1, 1976, the right of reproduction is reserved to the *artist* unless the reproduction right is specifically transferred along with the fine art, or unless the transfer of the fine art is pursuant to an employment relationship.¹⁹²

18. *Products Liability*

Products liability is, of course, not a tort in itself but rather a generic term covering four distinct theories of recovery, only two of which sound in tort. The other two are contractual in nature. One injured in using a product may sue in contract on the basis of an express contractual warranty where an untrue statement of fact about the quality of the product was made. Other possible contractual actions are based on implied warranties of merchantability¹⁹³ and fitness for a particular purpose.¹⁹⁴

Negligence is another theory of recovery for injuries caused by a defective product. Special litigation considerations in negligence include the greater opportunity to appeal to the jury's sense of moral outrage and emotions because negligence involves a showing of moral culpability, as contrasted with a strict products liability action which does not necessarily involve culpability. However, assumption of risk, comparative negligence, and due care are defenses to negligence which are not available in strict products liability.

The dominant theory of recovery in products liability actions is strict liability in tort for a defective product. *Greenman v. Yuba Power Products, Inc.*¹⁹⁵ outlines the three elements of a prima facie case in strict liability, which are (1) the defendant made the product, (2) the product was defective when it left the defendant's control, and (3) proximately caused damages.¹⁹⁶

There are four kinds of product "defects": manufacture, design, packaging and warning. A design defect will be found either if:

The plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or

. . . .

The plaintiff proves that the product's design proximately caused in-

191. *Id.* §§301-302 (1976).

192. CAL. CIV. CODE §982(c).

193. CAL. COM. CODE §2314.

194. *Id.* §2315.

195. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

196. *See id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 697.

jury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the rule of danger inherent in such design.¹⁹⁷

Under the case of *Cronin v. J.B.E. Olson Corp.*,¹⁹⁸ a product need not be “unreasonably dangerous” to trigger strict liability in tort: Only a “defect” is required.

Misuse of the product in an unforeseeable way is a defense to strict liability because the resulting injury is outside the scope of risk.¹⁹⁹ Misuse of the product in a foreseeable way is not a defense to strict liability because the resulting injury would be within the scope of risk.

19. Slander of Title

Slander of title is defined as the (1) oral or written; (2) intentional; (3) false disparagement of the; (4) title to real or personal property; (5) causing; (6) actual pecuniary damage.²⁰⁰

It is not necessary to show that any specific business deal was impaired. The recoverable damages consist of the general impairment of vendability plus costs of litigation or other process necessary to remove doubt cast on title.²⁰¹

Examples of slander of title include the recordation of an abstract of judgment despite a stay of execution, the placing of a sign on a neighbor's house falsely announcing a cloud on the title,²⁰² the false announcement by a lessor to a buyer of a lease from the lessee that the lease is invalid,²⁰³ and the filing of a master plan by a developer which falsely implied the right to use plaintiff neighbor's property.²⁰⁴

20. Trade Libel (Injurious Falsehood or Disparagement)

The case of *Erlich v. Etner*,²⁰⁵ stated the six necessary elements for trade libel, which are (1) intentional; (2) disparagement (untrue statement of fact); (3) of the quality; (4) of property; (5) causing; (6) specific pecuniary damage.²⁰⁶

The key difference between libel and trade libel is that the essence of

197. *Barker v. Lull Eng. Co. Inc.*, 20 Cal. 3d 413, 426-27, 573 P.2d 443, 452, 143 Cal. Rptr. 225, 234 (1978).

198. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

199. *Id.* at 123, 501 P.2d at 1155, 104 Cal. Rptr. at 435.

200. *See Glass v. Gulf Oil Corp.*, 12 Cal. App. 3d 412, 419, 89 Cal. Rptr. 514, 518-19 (1970) (quoting RESTATEMENT OF TORTS §624 (1938)).

201. *Id.* at 423-24, 436-39, 89 Cal. Rptr. at 521-22, 531-33.

202. *Phillips v. Glazer*, 94 Cal. App. 2d 673, 674, 211 P.2d 37, 38 (1949).

203. *Baker v. Kale*, 83 Cal. App. 2d 89, 91, 189 P.2d 57, 59 (1948).

204. *Glass v. Gulf Oil Corp.*, 12 Cal. App. 3d 412, 417-19, 89 Cal. Rptr. 514, 517-19 (1970).

205. 224 Cal. App. 2d 69, 36 Cal. Rptr. 256 (1964).

206. *Id.* at 73, 36 Cal. Rptr. at 258.

libel is nonmonetary damage to the reputation of an individual, whereas specific money damage to a business is required for trade libel. It is insufficient to show a general decline in business. The plaintiff must identify *particular* purchasers who refrained from dealing with the plaintiff.²⁰⁷

The defenses of privilege are generally the same for both libel and trade libel.²⁰⁸ However, truth is not actually a "defense" to trade libel because untruth is an element of the plaintiff's prima facie case.

21. *Trademark Infringement*

In California, this tort sounds in common law unfair competition.²⁰⁹ Statutory proscription of trademark infringement is contained in sections 14320 through 14324 of the California Business and Professions Code.

22. *Tradename Infringement*

In California, this tort also sounds in common law unfair competition.²¹⁰ Business and Professions Code Sections 14330, 14340 and 14402 contain the statutory framework for suits for tradename infringement.

23. *Unfair Competition*

In California, common law unfair competition is an umbrella for a variety of arguably separate torts such as trademark and tradename infringement, "palming off," "passing off," and "imitation of product."

The modern trend in both the statutes and the common law is to expand the scope of liability for unfair competition, imposing "increasingly higher standards of fairness or commercial morality in trade."²¹¹

a. Prima Facie Case Elements

Three elements are required for the prima facie case of common law unfair competition. First, there must be the imitation of an appearance or name. Fraudulent intent need not be shown.²¹²

Second, the plaintiff must be known to the public by such name, design or appearance. This element is qualified by the "secondary mean-

207. *Id.* at 73-74, 36 Cal. Rptr. at 259.

208. *See generally* CAL. CIV. CODE §47.

209. *See* text accompanying notes 210-224 *infra*.

210. *See* text accompanying notes 210-224 *infra*.

211. *Ball v. American Trial Lawyers Ass'n*, 14 Cal. App. 3d 289, 301-02, 92 Cal. Rptr. 228, 236 (1971).

212. *See id.* at 303-304, 92 Cal. Rptr. at 237.

ing" doctrine. That doctrine provides that if a geographical, generic or descriptive word acquires, in the mind of a substantial number of prospective purchasers, a second meaning as referring to a *particular* person or association, use of that name may be enjoined.²¹³ Generic or common descriptive terms are not protectable unless they have acquired a secondary meaning.²¹⁴ The plaintiff need not have been responsible for the development of the secondary meaning.²¹⁵ In the area of trademarks and tradenames, "inherently distinctive marks (*i.e.*, fanciful, arbitrary or suggestive) are protectable . . . without . . . a secondary meaning."²¹⁶

The third element in the *prima facie* case for common law unfair competition is the likelihood of deceiving or confusing the buying public.²¹⁷ Actual deception of particular persons need not be shown.²¹⁸

b. Statutory Unfair Competition

In sections 17200 through 17208 of the California Business and Professions Code, statutory liability for unfair competition and false advertising has recently been expanded, and new procedures added.²¹⁹ Statutory unfair competition includes (1) unlawful, unfair or fraudulent business practices;²²⁰ (2) unfair, deceptive, untrue or misleading advertising;²²¹ and (3) false advertising.²²² The plaintiff should therefore consider alleging both common law and statutory unfair competition. Also, general *and punitive* damages may be recoverable for statutory unfair competition, in contrast to the equitable relief limitation at common law.²²³

Is a statutory unfair competition action triable before a jury if damages are prayed for? Probably not. Statutory unfair competition sounds in equity as does the common law action.²²⁴ Although Section 17203 of the Business and Professions Code gives the judge the general

213. *See, e.g.*, *Academy of Motion Picture Arts and Sciences v. Benson*, 15 Cal. 2d 685, 688, 104 P.2d 650, 652 (1940); 14 Cal. App. 3d at 302, 92 Cal. Rptr. at 236.

214. *North Carolina Dairy Foundation, Inc. v. Foremost-McKesson*, 92 Cal. App. 3d 98, 106-07, 154 Cal. Rptr. 794, 798-99 (1979) (trademark); 14 Cal. App. 3d at 302, 92 Cal. Rptr. at 236 (trade name).

215. *Allied Artists Pictures Corp. v. Friedman*, 68 Cal. App. 3d 127, 135, 137 Cal. Rptr. 94, 98 (1977).

216. 92 Cal. App. 3d at 106, 154 Cal. Rptr. at 798-99.

217. *See* 68 Cal. App. 3d 127, 136, 137 Cal. Rptr. 94, 99 (1977).

218. 14 Cal. App. 3d at 310, 92 Cal. Rptr. at 242.

219. *See* CAL. BUS. & PROF. CODE §§17200-17208.

220. *Id.* §17200.

221. *Id.*

222. *Id.* §§17200, 17500.

223. *See* *United Farm Workers of America v. Superior Court*, 47 Cal. App. 3d 334, 345, 120 Cal. Rptr. 904, 911 (1975); CAL. BUS. & PROF. CODE §§17203, 17535.

224. CAL. BUS. & PROF. CODE §17203.

equitable power to award damages to restore the aggrieved party to the status quo, the author has found no case that held or stated that a damages action under that section is thereby transformed from an equitable action into an action which is triable before a jury.

Statutory proscription of infringement remedies under tradename, and servicemark, supplementing remedies under common law unfair competition, can be found at Sections 14320 through 14342 and 14402 of the Business and Professions Code.²²⁵

225. *Id.* §§14320-14342, 14402.