

Chapter 5 —Drafting the Complaint

A plaintiff initiates a lawsuit by filing a complaint in the office of the clerk of his chosen court and serving a copy of the complaint, together with a [summons](#), upon the defendant. In drafting his complaint, the plaintiff must follow the rules prescribing the format of documents filed in court and the special pleading rules applicable to complaints.

§ 5.01 Format of Court Documents

[A] The Judicial Council Forms

The Judicial Council has lifted a huge burden from the shoulders of attorneys by publishing a set of forms for the following varieties of complaints and causes of action:

Personal Injury, Property Damage, Wrongful Death

- [Complaint—Personal Injury, Property Damage, Wrongful Death](#)
 - [Cause of Action—Motor Vehicle](#)
 - [Cause of Action—General Negligence](#)
 - [Cause of Action—Intentional Tort](#)
 - [Cause of Action—Premises Liability](#)
 - [Cause of Action—Products Liability](#)
 - [Exemplary Damages Attachment](#)

Contract

- [Complaint—Contract](#)
 - [Cause of Action—Breach of Contract](#)
 - [Cause of Action—Common Counts](#)
 - [Cause of Action—Fraud](#)

Unlawful Detainer

- [Complaint—Unlawful Detainer](#)

Instead of laboring through the pleading technicalities that formally prevailed in all civil actions, modern attorneys can simply fill in the blanks of the official forms with some confidence of avoiding an argument with some clerk’s office bureaucrat about whether the court’s title appears on the correct line. One must prepare an official form in compliance with the [local rules](#) for the court in which the complaint is filed.

Although the Judicial Council forms cover a majority of cases filed in California courts, the forms leave major gaps, and an attorney preparing a case for which there is no Judicial Council form must resort to the former practice of drafting the pleadings from scratch. Furthermore, the traditional rules of pleading affect the manner in which one completes the Judicial Council forms. The adoption of the Judicial Council forms has not abrogated the requirement that a complaint state facts sufficient to constitute a cause of action.¹ As one court remarked, “In some cases, merely checking a box on a Judicial Council form complaint will be sufficient. In other cases, . . . where specific allegations need be alleged, the form complaint is like a partially

¹ *People ex rel. Dep’t of Transp. v. Superior Court*, 5 Cal. App. 4th 1480, 1486, 7 Cal. Rptr. 2d 498, 501 (1992).

completed painting. It is up to the pleader to add the details that complete the picture.”² Therefore, one must know how to draft a complaint the old-fashioned way.

[B] Page Format

The plaintiff must type (or print) his complaint in *Courier*, *Times*, or *Helvetica* type not smaller than pica size on 8.5 by 11 inch paper.³ The plaintiff may use only one side of the paper, and the lines on each page must be one and one-half or double spaced and be numbered consecutively, numbered beginning with one on each page. The typist must leave a one inch top and left margin and a one-half inch right margin.⁴ The line numbers should appear at the left margin, separated from the text by a vertical column of space at least one-fifth inch wide or a single or double vertical line.⁵ Each page is numbered consecutively at the bottom, and the pages are “firmly bound together” (*i.e.*, stapled) at the top. The plaintiff must punch standard holes at the top of the complaint. For papers filed in court, the plaintiff must use recycled paper. Litigants must use recycled paper for all copies of court papers, documents, and exhibits, whether filed with the court or served on other par-

² *People ex rel. Dep’t of Transp. v. Superior Court*, 5 Cal. App. 4th 1480, 1486, 7 Cal. Rptr. 2d 498, 501 (1992).

³ RULES OF CT. 201(b). “Pica” means type occupying no more than six lines per vertical inch and with an average of not more than 12 characters per inch. The color of print must be blue-black or black. *Id.*

⁴ RULES OF CT. 201(c), (e).

⁵ RULES OF CT. 201(c). Descriptions of real property may be single spaced, and footnotes, quotations, and printed forms of corporate surety bonds and undertakings may be singled spaced and have unnumbered lines. There must be at least three line numbers for every vertical inch on the page. *Id.*

ties. By filing or serving a document to which this rule applies, the litigant certifies that the document was produced on paper purchased as recycled.⁶

[1] Cover Page

On the first page of the complaint, at the top left, the plaintiff's lawyer places his name, office address, telephone number and State Bar membership number.⁷ If the plaintiff has no lawyer, then he places his own name, office address, and telephone number in this space. Every pleading contains a caption setting forth the name of the court and county, and, in municipal court, the name of the judicial district, in which the plaintiff is bringing the action.⁸ The title of the court appears on line 8, at least three and one-half inches from the top of the page.⁹ The first two inches of space between lines 1 and 7 to the right of the page are left blank for the use of the clerk.¹⁰

Below the title of the court and to the right of the title of the case comes the number which the court clerk assigns to the case.¹¹ The clerk stamps the number of the

⁶ RULES OF CT. 201(d).

⁷ CODE CIV. PROC. § 128.7(a); RULES OF CT. 201(e)(1). If the lawyer has no office address, he may use his residence address. *Id. See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:11–21.2 (1996).

⁸ CODE CIV. PROC. § 422.30(a). Weil and Brown suggest that in counties in which the superior and municipal courts are unified, the title of the court should be in the form “Unified Courts of County.” ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:26.1 (1996)

⁹ RULES OF CT. 201(e)(3), 501(e)(3).

¹⁰ RULES OF CT. 201(e)(2), 501(e)(2).

¹¹ RULES OF CT. 201(e)(5); 501(e)(5).

case on the original complaint and, if requested, upon the copies the plaintiff’s lawyer intends to serve on the defendants or retain in his case file. Below the case name, the plaintiff’s lawyer designates “the nature of the paper” and “the character of the action or proceeding”¹² (e.g., “Complaint for Breach of Contract”).

The California Rules of Court direct that the court clerk shall not accept for filing any papers that do not comply with these rules.¹³ The court, however, may permit the filing of nonconforming papers “for good cause shown.”¹⁴ The obvious risk in submitting nonconforming papers is that if the clerk does not accept them for filing, the attorney will not have time to correct the error before the expiration of the limitations period. It is wise to submit a complaint for filing at least a few days before the expiration of the limitations period in order to reserve sufficient time to meet any unexpected objections from the clerk’s office.

[2] Designation of the Parties

Below the title of the court and against the left margin appears the case’s title, containing the names of all the parties.¹⁵

¹² RULES OF CT. 201(e)(6), 501(e)(6).

¹³ RULES OF CT. 201(i), 501(i).

¹⁴ RULES OF CT. 201(i), 501(i). *But see* City of Los Angeles v. Superior Court, 264 Cal. App. 2d 776, 773, 70 Cal. Rptr. 826, 830 (1968) (trial court lacked jurisdiction to issue a nunc pro tunc order when the attorney submitted nonconforming papers and then withdrew them to correct his error).

¹⁵ CODE CIV. PROC. § 422.40; RULES OF CT. 201(e)(4), 501(e)(4). In other pleadings one need only state the name of the first party on each side with an appropriate indication of other parties (i.e., “*et al.*”). CODE CIV. PROC. § 422.40. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:23--:57.1 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 426–429 (3d ed. 1985).

One sues an individual doing business under a fictitious name in his individual name, but one customarily indicates the party's fictitious name as well.¹⁶

Example: “John Smith, doing business as International Pizza Co.;”

One may sue a defendant under the defendant's fictitious business name, but when the defendant's true name is learned, all further proceedings should be in the defendant's true name.¹⁷

In the body of the complaint, the plaintiff should allege his own compliance with the fictitious business name statute if he does business under a fictitious business name.¹⁸ A widow who remarries and takes her new husband's last name may sue in her former name, to avoid informing the jury of her remarriage.¹⁹ If the plaintiff seeks a judgment against a partnership as well as its the members, the plaintiff must name both the firm and each partner individually.²⁰ When a party sues or is sued in his capacity as the legally appointed representative of some other person or entity (*e.g.*, trustee, guardian, conservator, executor, receiver), the pleadings customarily indicate his representative capacity.

Example: “Patricia A. Miller, as conservator of the estate of Marian Miller;
. . . .”

- ➡ Parties—Trusts
- ➡ Parties—Estates
- ➡ Parties—Children and Incompetents
- ➡ Parties—Receivers

¹⁶ Pinkerton's, Inc. v. Superior Court, 49 Cal. App. 4th 1342, 1348, 57 Cal. Rptr. 2d 356, 360 (1996).

¹⁷ Pinkerton's, Inc. v. Superior Court, 49 Cal. App. 4th 1342, 1349, 57 Cal. Rptr. 2d 356, 361 (1996).

¹⁸ BUS. & PROF. CODE § 17918.

¹⁹ Cherrigan v. City of San Francisco, 262 Cal. App. 2d 643, 652–53, 69 Cal. Rptr. 42, 48–49 (1968).

²⁰ Maclay Co. v. Meads, 14 Cal. App. 363, 370, 112 P. 195, 198 (1910).

With respect to corporate parties, the plaintiff commonly includes the term “a corporation” in the title of the action.

Example: “Allstate Insurance Co., a corporation;”

In the introductory section of the text a plaintiff corporation customarily alleges its place of incorporation and qualification to do business in California.

Example: “Plaintiff Allstate Insurance Co. is a corporation organized under the laws of Illinois and is qualified to do business in California.”²¹

A [partnership](#) or other [unincorporated association](#) may sue or be sued in the name it has assumed or by which it is known. The party’s status is customarily indicated in the caption to the pleading.

Example: “Sacco & Vanzetti, a partnership;”

One designates a governmental entity as a party according to its official title. When one names a governmental official in his official capacity, one indicates his official capacity.

Example: “Pete Wilson, as Governor of California; California Department of Transportation;”

Plaintiffs whose legal capacity depends on compliance with some statute (*e.g.*, [foreign corporations](#), [domestic corporations](#), and [building contractors](#)) should allege in the introductory paragraphs of their complaints their compliance with the statute. If compliance is a matter of public record, the defendant cannot deny the allegation on information and belief, and if the plaintiff can force the defendant to admit com-

➡ Answers—Denial on Information or Belief

²¹ The [Judicial Council forms](#) simply allege that a plaintiff corporation is “a corporation qualified to do business in California.”

pliance, the plaintiff need not prove the matter at trial.²² With respect to certain causes of action, the plaintiff's status is a material fact in the litigation, in which case the plaintiff must plead and prove its status in order to prove a prima facie case.²³

If the plaintiff's lawyer does not know the status of a defendant operating under a fictitious business name, he may consult the office of the secretary of state²⁴ to see if the defendant has registered as a domestic or foreign corporation or the office of the clerk for the county in which the defendant is located to see if the defendant has filed a fictitious business name statement.²⁵ Weil and Brown recommend that if these avenues prove unfruitful, the plaintiff should name the defendant three times—as a corporation, a partnership, and a sole proprietorship—and plead in the alternative that the defendant is each of these entities. This stratagem, according to the authors, avoids the risk that the sheriff may refuse to execute upon a default judgment based on a complaint that misidentifies the plaintiff's legal personality.²⁶ Of course, if the defendant answers the complaint, the plaintiff may ascertain the defendant's correct name and classification through discovery and amend the complaint accordingly.

²² See ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:52 (1996).

²³ See, e.g., CAL. CONST. art. XV, § 1(2) (usury exemption for corporations).

²⁴ Secretary of State, Office of Corporate Filing, 1230 J Street, Room 209, Sacramento, California 95814. Telephone: (916) 445-0620.

²⁵ BUS. & PROF. CODE § 17918.

²⁶ ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:31-:36 (1996).

[a] Actions for Sexual Abuse of a Minor

In any action for recovery of damages suffered as a result of childhood sexual abuse where the plaintiff is 26 years of age or older, the plaintiff may not name a defendant except by a “Doe” designation in any pleadings or papers filed in the action until the plaintiff has made a showing of corroborative fact as to the charging allegations against any defendant alleged to have committed childhood sexual abuse against the plaintiff.²⁷

The plaintiff may apply for permission to amend the complaint to substitute the defendant’s true name for the fictitious designation. The application must include a certificate of corroborative fact executed by the plaintiff’s attorney. The certificate must declare that the attorney has discovered one or more facts corroborating one or more of the charging allegations against the defendant and must set forth in clear and concise terms the nature and substance of the corroborative fact. If the corroborative fact is evidenced by the testimony of a witness or the contents of a document, the attorney must include in the certificate the identity and location of the witness or document. A fact is corroborative of an allegation if it confirms or supports the allegation. The opinion of any mental health practitioner concerning the plaintiff does not constitute a corroborative fact.²⁸

If the plaintiff applies to name a defendant before that defendant’s appearance in the action, neither the application nor the certificate of corroborative fact by the attorney is served on the defendant or on any other party or attorney. If the plaintiff

²⁷ CODE CIV. PROC. § 340.1(j). Query: Why is the defendant’s privacy protected if the plaintiff is 26 years old but not if the plaintiff is less than 25 years old?

²⁸ CODE CIV. PROC. § 340.1(k)(1).

applies to name a defendant after that defendant's appearance in the action, the application is served on all parties, but the certificate of corroborative fact is not served on any party or attorney.²⁹

The court reviews the application and the certificate of corroborative fact in camera. If the certificate presents one or more facts corroborative of one or more of the charging allegations against the defendant, the court orders that the plaintiff may amend the complaint to substitute the defendant's name.³⁰ The court keeps under seal and confidential from the public and all parties to the litigation other than the plaintiff all the certificates of corroborative fact.³¹

[3] Errors in the Designation of Parties

If the complaint served upon a defendant misspells his name, the defendant must appear and object to the misnomer; otherwise, he forfeits his objection, and the judgment is binding upon him.³² If the plaintiff has taken a default judgment against him, the defendant may move to set aside the default or appeal based on the mistake (except for trivial misspellings not affecting the pronunciation of the defendant's name), but he may not attack the judgment collaterally.³³ The plaintiff may cure the mistake by amending the complaint even during trial.³⁴ The plaintiff may amend the

²⁹ CODE CIV. PROC. § 340.1(k)(2), (3).

³⁰ CODE CIV. PROC. § 340.1(l).

³¹ CODE CIV. PROC. § 340.1(m).

³² *Brum v. Ivins*, 154 Cal. 17, 20, 96 P. 876, 877-78 (1908). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:64.2-.5 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 430 (3d ed. 1985).

³³ *Brum v. Ivins*, 154 Cal. 17, 20, 96 P. 876, 878 (1908).

complaint even after the expiration of the limitations period if the defendant is correctly identified in the body of the complaint.³⁵

[4] Local Rules

Local superior courts have adopted their own rules concerning the filing of court papers.³⁶ Although most courts adopt and apply local rules in a restrained and reasonable manner, a few, to their discredit, seem to use the local rules to set traps for unwary out-of-town counsel. To avoid unpleasant surprises, one must take care to consult the local rules when preparing a complaint for filing in an unfamiliar venue. Some local rules require, for example:

- inclusion of the firm name and the names of one or more members, when the firm represents the plaintiff³⁷
- the plaintiff's full name under the designation of counsel³⁸
- blue backing pages bearing the document's description at the bottom.³⁹

Forewarned is forearmed.

³⁴ People's Fin. & Thrift Co. v. Moon, 44 Cal. App. 2d 223, 225, 112 P.2d 24, 25 (1941).

³⁵ Plumlee v. Poag, 150 Cal. App. 3d 541, 547, 198 Cal. Rptr. 66, 70 (1984).

³⁶ See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:11.1–:11.2, :20 (1996).

³⁷ S.F. SUPER. CT. R. 6.1.5.

³⁸ L.A. SUPER. CT. R. 9.2(d); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL ¶ 1(e). If the lawyer represents all the plaintiffs, he may simply designate himself as "Attorney for Plaintiffs."

³⁹ L.A. SUPER. CT. R. 9.2(f).

§ 5.02 The Complaint

[A] Attorney's Certification

By signing or filing a complaint, an attorney or unrepresented party certifies that to the best of his knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*, all of the following conditions are met:

- He is not presenting the complaint primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
- The claims alleged in the complaint are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
- The allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.⁴⁰

An attorney or party who violates these provisions is subject to {sanctions}.

[B] One Form of Civil Action

In California there is only one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs.⁴¹ This means that in all civil lawsuits, whether seeking legal or equitable remedies⁴² or sounding

⁴⁰ CODE CIV. PROC. § 128.7(b).

⁴¹ CODE CIV. PROC. § 307. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:2 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 19–22 (3d ed. 1985).

in contract or in tort,⁴³ the plaintiff commences the action by means of a complaint composed of allegations of the facts supporting the plaintiff's causes of action against the defendant. Whether the plaintiff may proceed with the action depends on whether the pleaded facts disclose a legal wrong for which the law provides a remedy to the plaintiff, not on the form of action in which he pled those facts.⁴⁴

[C] Causes of Action

- ➡ General Demurrers—
Failure to State Facts
Sufficient to Constitute
a Cause of Action
- ➡ Challenging the Court's
Jurisdiction
- ➡ Challenging the
Plaintiff's Choice of
Forum
- ➡ Challenging Service of
the Summons

At the pleading stage the inquiry focuses on whether the plaintiff has stated “facts sufficient to constitute a cause of action”⁴⁵ (assuming that the plaintiff has filed his action in a court having jurisdiction and venue, and has properly effected service of process on the defendants). Therefore, the plaintiff must strive, when stating his causes of action, to avoid any allegation or omission that would provide the defendant grounds to challenge the sufficiency of the pleading. What constitutes a sufficient pleading of any particular variety of cause of action depends on the elements of that cause of action as determined by the substantive law defining the parties' rights and duties. Through long experience, the courts have identified the elements of each cause of action. The reader may refer to Bernard Witkin's *California Procedure*⁴⁶ for the pleading requirements for causes of action not included in the [Judicial Council forms](#). There are, however, certain general rules that one must observe when attempting to state a cause of action.

⁴² Grain v. Aldrich, 38 Cal. 514, 520 (1869).

⁴³ Perry v. Robertson, 201 Cal. App. 3d 333, 339, 247 Cal. Rptr. 74, 77 (1988).

⁴⁴ Bank of Am. Nat'l Trust & Sav. Ass'n v. Gillett, 36 Cal. App. 2d 453, 455, 97 P.2d 875, 876 (1940).

⁴⁵ CODE CIV. PROC. § 430.10(e).

⁴⁶ See 4 & 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* (3d ed. 1985).

[1] Meaning of “Cause of Action”

The term “cause of action” has two meanings. In everyday discourse, lawyers use the term to refer to the different legal theories upon which a plaintiff seeks a remedy for his loss. Thus, in a product liability case one would use the term “cause of action” in this narrow sense in saying that the plaintiff is asserting three causes of action for negligence, breach of implied warranty, and strict product liability. The term “cause of action” has a broad sense, which comes into play when discussing matters such as the splitting of causes of action. In these contexts, “cause of action” is vaguely defined as the defendant’s wrongful act, in violation of a primary duty, which breaches the plaintiff’s primary right.⁴⁷ The courts have developed this definition of “cause of action” based on the “primary right theory” of Pomeroy:

Every judicial action . . . involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. . . . Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action.⁴⁸

⁴⁷ See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 23–33, 38–54 (3d ed. 1985).

⁴⁸ JOHN N. POMEROY, CODE REMEDIES 528 (5th ed. 1929). Compare *Friedberg v. Cox*, 197 Cal. App. 3d 381, 388, 242 Cal. Rptr. 851, 855 (1987) (judgment for the defendant bars a subsequent action for the same injury to the same primary right based on a different legal theory) with *Ball v. Stephens*, 68 Cal. App. 2d 843, 851, 158 P.2d 207, 212 (1945) (unsuccessful action to protect the plaintiff’s private right of way over a road does not bar the plaintiff’s subsequent action to protect his right to use the road as a public highway).

In the product liability example just given, one would say, using the term “cause of action” in its broad sense, that the plaintiff has a single cause of action (the defendant’s violation, through the provision of a defective product, of the plaintiff’s primary right to freedom from personal injury) for which the law provides a damages remedy under three separate legal theories. A plaintiff seeking relief for violation of a primary right pursues a single cause of action, even if he relies on different legal theories⁴⁹ or seeks different remedies or forms of relief.⁵⁰

One must take care to consider in which of its two meanings an opinion or statute uses the term “cause of action.” For instance, if an insured sues his insurer for bad faith, he may allege counts based on contract or tort.⁵¹ For statute of limitations purposes, he has alleged two causes of action (in the narrow sense), the contract cause of action being subject to a four-year statute of limitations⁵² and the tort cause of action being subject to a two-year statute of limitations.⁵³ But if he assigns his claim for compensation for the excess judgment and then files an action seeking damages for emotional distress, one would say, using the term “cause of action” in its broad sense, that the plaintiff has split his cause of action.⁵⁴

⁴⁹ *Bay Cities Paving & Grading, Inc. v. Lawyers Mut. Ins. Co.*, 5 Cal. 4th 854, 860, 855 P.d 1263, 1266, 221 Cal. Rptr. 2d 691, 694 (1993).

⁵⁰ *Jenkins v. Pope*, 217 Cal. App. 3d 1292, 1299 n.3, 266 Cal. Rptr. 557, 561 n.3 (1990).

⁵¹ *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 663, 328 P.2d 198, 203 (1958).

⁵² CODE CIV. PROC. § 337(1).

⁵³ CODE CIV. PROC. § 339(1).

⁵⁴ *Purcell v. Colonial Ins. Co.*, 20 Cal. App. 3d 807, 814, 97 Cal. Rptr. 874, 878 (1971).

A single injury to a single individual gives rise to a single cause of action, no matter how many legal theories the plaintiff may invoke⁵⁵ or how many elements of personal injury damages he may seek.⁵⁶ If, however, a single event or transaction violates multiple primary rights, it gives rise to multiple causes of action:

- Each victim of an accident has a separate cause of action against the tortfeasor.⁵⁷
- An act injuring one plaintiff may violate a primary right of that plaintiff's spouse, parent, child, or employer, each of whom has a separate cause of action.⁵⁸
- A single act injuring the plaintiff and damaging his property violates two primary rights and creates two tort causes of action.⁵⁹

⁵⁵ Slater v. Blackwood, 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226–27 (1975).

⁵⁶ Savage v. Emery, 255 Cal. App. 3d 603, 606, 63 Cal. Rptr. 566, 568 (1967) (no splitting of cause of action into a claim for present damages and a claim for future damages).

⁵⁷ Colla v. Carmichael U-Drive Autos, Inc., 111 Cal. App. Supp. 784, 788, 294 P. 378, 380 (1930).

⁵⁸ Sanderson v. Neimann, 17 Cal. 2d 563, 571, 110 P.2d 1025, 1029 (1941).

⁵⁹ Holmes v. David H. Bricker, Inc., 70 Cal. 2d 786, 788, 452 P.2d 647, 649, 76 Cal. Rptr. 431, 433 (1969). A single act or transaction affecting separate items or parcels of property violates a single primary right and gives rise to a single cause of action. Kidd v. Hillman, 14 Cal. App. 2d 507, 510, 58 P.2d 662, 663 (1936). On the other hand, an act or transaction affecting widely separated parcels of real property, or items of personal property and real property, produces multiple causes of action. Lynch v. Kemp, 4 Cal. 2d 440, 442, 49 P.2d 817, 818 (1935) (actions to quiet title to different parcels of real property); McNulty v. Copp, 125 Cal. App. 2d 697, 708, 271 P.2d 90, 98 (1954) (wrongful possession of residence and personal property).

Example: *D* drives his car into *P*, injuring him. Instead of stopping to render assistance, *D* drives away, and *P* suffers additional injuries.

P has two causes of action. In suing *D* for negligent driving and failure to render assistance, *P* is not pleading separate legal theories relating to a single violation of a single primary right. Rather, he is seeking compensation for separate violations of his primary right to freedom from bodily injury.⁶⁰

The same is true, of course, when multiple independent acts cause multiple invasions of the same primary right.

Example: *P* suffers bodily injury due to the negligence of *D*₁. She is taken to the hospital, where her injuries are aggravated through the negligence of doctor *D*₂. *P* sues *D*₁ and recovers a judgment. *P* then sues *D*₂, who contends that *P*'s judgment against *D*₁ is res judicata as to her cause of action for bodily injury. The court awards judgment to *D*₂.

The court erred. *P* had two causes of action, one against *D*₁ and one against *D*₂. The independent and successive acts of *D*₁ and *D*₂, differing in time and place of commission as well as in nature, produced two separate injuries and gave rise to two distinct causes of action. *P* was free to sue *D*₁ for damages resulting from the original injury alone and to sue *D*₂ separately for damages resulting from the aggravation of the original injury, and *P* could bring these actions in whatever order she pleased.⁶¹

⁶⁰ Summers v. Dominguez, 29 Cal. App. 2d 308, 313, 84 P.2d 237, 239 (1938).

Special statutory rules apply to defamation cases. A plaintiff has only one cause of action for damages for libel, slander, invasion of privacy, or any other tort based on any single publication, exhibition, or utterance, such as any one issue of a newspaper, book, or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a movie. Recovery in any action shall include all damages the plaintiff suffered in all jurisdictions.⁶²

In nuisance cases, a completed act (such as the construction of an encroaching building) creating a permanent nuisance gives rise to a single cause of action (permitting the recovery of present damages and decrease in market value).⁶³ Where, however, the defendant's course of conduct creates a continuing succession of injuries, the plaintiff has a cause of action for the harm caused by the wrongful acts up to the time of suit and may bring a separate action for harm occurring after the first trial.⁶⁴ If the plaintiff cannot determine for certain whether a nuisance is permanent or continuing, he may elect to treat it as one or the other.⁶⁵ Though a plaintiff's election of remedies is entitled to deference in doubtful cases, that choice must nevertheless be supported by evidence that makes it reasonable under the circumstances. A plaintiff cannot simply allege that a nuisance is continuing in order to avoid the bar of the statute of limitations but must present evidence that under the circumstances

⁶¹ Ash v. Mortensen, 24 Cal. 2d 654, 657, 150 P.2d 876, 877 (1944); Helling v. Lew, 28 Cal. App. 3d 434, 439, 104 Cal. Rptr. 789, 793 (1972).

⁶² CIV. CODE § 3425.3.

⁶³ Spaulding v. Cameron, 38 Cal. 2d 265, 270, 239 P.2d 625, 629 (1952).

⁶⁴ Yates v. Kuhl, 130 Cal. App. 2d 536, 540, 279 P.2d 563, 566 (1955).

⁶⁵ Spaulding v. Cameron, 38 Cal. 2d 265, 268, 239 P.2d 625, 628 (1952).

the nuisance may properly be considered continuing rather than permanent. It is only where the evidence would reasonably support either classification that the plaintiff may choose which course to pursue.⁶⁶ If the defendant has no right to continue a nuisance and has the ability to abate it, he cannot complain if the plaintiff elects to bring successive actions as damages.⁶⁷

A cause of action for destruction of lateral support emanates not from the excavation standing alone, but from the subsidence, and a new and separate cause of action arises with each new subsidence.⁶⁸

One must recover all of one's damages for a single breach of contract in one action, even if the breach caused personal injury and property damage.⁶⁹

Example: *P* buys a used car from *D* subject to an express warranty. *P* crashes the car, brings a personal injury action against *D* based on breach of the express warranty, and recovers a judgment. *P* files another action against *D* for property damage based on the same accident and same legal theory. The trial court sustains *D*'s demurrer.

⁶⁶ Beck Dev. Co., Inc. v. Southern Pac. Transp. Co., 44 Cal. App.4th 1160, 1217, 52 Cal. Rptr. 2d 518, 556-57 (1996).

⁶⁷ Spaulding v. Cameron, 38 Cal. 2d 265, 268, 239 P.2d 625, 628 (1952).

⁶⁸ Bellman v. County of Contra Costa, 54 Cal. 2d 363, 369, 353 P.2d 300, 304, 5 Cal. Rptr. 692, 696 (1960).

⁶⁹ Holmes v. David H. Bricker, Inc., 70 Cal. 2d 786, 790, 452 P.2d 647, 650, 76 Cal. Rptr. 431, 434 (1969).

The trial court ruled correctly. Although *P* possessed separate tort causes of actions for **personal injury and property damage**, all damages for a single breach of contract must be recovered in one action.⁷⁰

One may maintain successive actions upon the same contract whenever, after the first action, a new cause of action for breach of the contract arises.⁷¹ One may also bring successive actions in contract and in tort relating to a single contract.

Example: *P* sues a group of defendants for breach of their promissory note given in connection with their purchase of real property from *P*. The defendants contend successfully that *P* waived his right to a deficiency judgment, and judgment is entered in the defendants' favor. *P* sues the defendants again, this time in tort, for conspiring to conduct a sham foreclosure sale. The trial court sustains the defendants' demurrer based on the prior judgment.

The trial court erred. Although *P* sought to collect on the promissory note in both actions, the defendants' alleged breach of contract by failing to pay the note violated a different primary right from *P*'s primary right not have his note stolen.⁷²

A series of wrongful acts, each of which individually violates one primary right, may collectively constitute an invasion of a different primary right and may thus be alleged together as one cause of action.

⁷⁰ *Holmes v. David H. Bricker, Inc.*, 70 Cal. 2d 786, 790, 452 P.2d 647, 650, 76 Cal. Rptr. 431, 434 (1969).

⁷¹ CODE CIV. PROC. § 1047.

⁷² *Sawyer v. First City Fin. Corp.*, 124 Cal. App. 3d 390, 402, 177 Cal. Rptr. 398, 405 (1981).

Example: *P* alleges that her landlord, *D*, interfered with her utilities, seized her personal property, locked her out of her apartment, and assaulted her, all for the purpose of driving her out of the apartment. *D* demurs to the complaint on the ground that *P* has improperly joined causes of action for breach of contract, wrongful detention of personal property, and personal injury and has failed to allege those causes of action separately. The court sustains the demurrer.

The court erred. *P* stated a single cause of action for wrongful eviction, though *D* allegedly accomplished his goal by means of a series of acts giving rise to separate causes of action in their own right.⁷³

[2] Rule Against Splitting Causes of Action

In prosecuting a cause of action, the plaintiff's lawyer must take care to consider all of the legal theories available to his client, lest he run afoul of the rule against the splitting of causes of action.⁷⁴ If the plaintiff relies on a single legal theory in prosecuting his cause of action (in the narrow sense of the term), he may not file a second lawsuit, against the same or different defendants, prosecuting the same cause of action in reliance on a different legal theory. If, while the first action is pending, he files a second suit on the same cause of action, he may be met with demurrer based on the pending action.⁷⁵ If he files the second suit after the first, he may be met with

► Special Demurrers—
Another Action Pending

⁷³ *Tooke v. Allen*, 85 Cal. App. 2d 230, 236, 192 P.2d 804, 808 (1948).

⁷⁴ See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:147--:157 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 34–37 (3d ed. 1985).

the defense of res judicata. The rule against splitting causes of action applies even if the plaintiff could not pursue all of his legal theories in the first action.

Example: *P* sues *D*₁ and *D*₂ in federal court for violating his civil rights, and he asks the federal court to exercise pendent jurisdiction over his state law negligence claim. *P* bases both claims on his false arrest by *D*₁, a police officer employed by *D*₂. When the federal court declines to exercise pendent jurisdiction, *P* dismisses *D*₂ and proceeds to trial against *D*₁ on his civil rights claim. After losing in federal court, *P* sues *D*₂ in state court on the negligence claim. *D*₂ moves for summary judgment based on res judicata. The trial court grants the motion.

The trial court ruled correctly. *P*'s civil rights and negligence claims represent separate remedies for the same cause of action. Once the federal court declined to exercise pendent jurisdiction over *P*'s negligence claim, *P* had a choice between (1) dismissing the federal action and refileing the case in state court, or (2) abandoning the negligence claim and proceeding to trial on the civil rights claim. By filing suit on the negligence claim after having proceeded to judgment in federal court on the civil rights claim, *P* split his cause of action.⁷⁶

The rule against splitting causes of action exists for two purposes, to protect defendants from a multiplicity of suits and to force plaintiffs to present all of their legal

⁷⁵ CODE CIV. PROC. § 430.10(c).

⁷⁶ *Mattson v. City of Costa Mesa*, 106 Cal. App. 3d 441, 454, 164 Cal. Rptr. 913, 922 (1980).

theories at one time in one forum.⁷⁷ Since the rule exists for the defendant's benefit, he may forego its benefit by failing to raise it.⁷⁸

The rule against splitting causes of action bars multiple suits on the same cause of action, not multiple suits on multiple causes of action. Even though a plaintiff has the right to join separate causes of action in the same lawsuit, he has no obligation to do so.⁷⁹

[3] Joinder of Causes of Action

A plaintiff, or group of plaintiffs, who alleges a cause of action against one or more defendants may join with that cause of action any other causes of action which he, or any of his coplaintiffs, has against any of the defendants.⁸⁰ One of the causes of action, however, must implicate all of the defendants.⁸¹

► Parties—Permissive
Joinder of Defendants

Joinder is permissive, not mandatory.⁸² The plaintiff, if he wishes, may bring separate lawsuits on his separate causes of action, though he will probably incur greater expense, will run the risk of **splitting his cause of action** if he mistakenly believes that one cause of action is two causes of action, and may be collaterally es-

⁷⁷ Wulfjen v. Dolton, 24 Cal. 2d 891, 894–95, 151 P.2d 846, 848 (1944).

⁷⁸ Williams v. Krumsiek, 109 Cal. App. 2d 456, 460, 241 P.2d 40, 42 (1952).

⁷⁹ Sawyer v. First City Fin. Corp., 124 Cal. App. 3d 390, 398–99, 177 Cal. Rptr. 398, 402 (1981).

⁸⁰ CODE CIV. PROC. § 427.10(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:158–:166 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 291–297 (3d ed. 1985).

⁸¹ CODE CIV. PROC. § 379(a).

⁸² Edgar v. Citraro, 112 Cal. App. 183, 186, 297 P. 653, 654 (1931).

topped from pursuing the second lawsuit by an adverse judgment in the first lawsuit.⁸³

The plaintiff does not have exclusive control over the joinder of causes of action. If the plaintiff elects to join causes of action in a single lawsuit, the defendant may move the court to order a separate trial of any causes of action.⁸⁴ If the plaintiff elects to bring separate lawsuits involving a common question of law or fact, the defendant may move the court to order a joint trial of the actions or to consolidate the actions.⁸⁵ If the plaintiff files the lawsuits in separate counties, the defendant may

- with the permission of the presiding judge, petition the chairperson of the Judicial Council to “coordinate” the lawsuits, so that the actions may be tried together in a single forum⁸⁶
- move the judge of a court in which one of the actions is pending to transfer the other actions to that court for coordination with the pending action.⁸⁷

[D] The Mechanics of Pleading

To plead a cause of action, one states the facts constituting the cause of action, in ordinary and concise language.⁸⁸ One must plead one’s claims in separate causes of

⁸³ *Perez v. City of San Bruno*, 27 Cal. 3d 875, 885, 616 P.2d 1287, 1292, 168 Cal. Rptr. 114, 119 (1980).

⁸⁴ CODE CIV. PROC. § 1048(b). See {[Severance](#)}.

⁸⁵ CODE CIV. PROC. § 1048(a). See {[Consolidation of Actions](#)}.

⁸⁶ CODE CIV. PROC. § 404. See {[Coordination of Actions](#)}.

⁸⁷ CODE CIV. PROC. § 403; RULES OF CT. 1500.

⁸⁸ CODE CIV. PROC. § 425.10(a). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:71–:84 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 332 (3d ed. 1985).

action. In this context, “[cause of action](#)” is used in its broad sense as a violation of the plaintiff’s primary right. Thus, one may incorporate separate legal theories in stating a single cause of action,⁸⁹ though the better practice is to plead each legal theory upon which one relies in separate counts, even though each theory provides a remedy for the violation of the same primary right.

Each cause of action is separately numbered⁹⁰ and contains a heading identifying the nature of claim and, in cases involving multiple plaintiffs or defendants, the parties by whom and against whom the cause of action is pleaded.⁹¹

Example:

“Second Cause of Action for Breach of
Contract by Plaintiff Jane Jones’s Against
Defendants John Smith and Apex Corporation”

The factual allegations are arranged in numbered paragraphs, using Arabic numerals. Paragraph numbering runs sequentially from the beginning of the complaint to the end.⁹² Subparagraphs are indented and are labelled alphabetically, rather than numerically.⁹³

⁸⁹ *Landeros v. Flood*, 17 Cal. 3d 399, 413, 551 P.2d 389, 396, 131 Cal. Rptr. 69, 76 (1976).

⁹⁰ RULES OF CT. 201(g), 501(g).

⁹¹ L.A. SUPER. CT. R. 9.3(b); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 1(d).

⁹² L.A. SUPER. CT. R. 9.2(b); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 1(b).

⁹³ SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 1(b).

[1] Ultimate Facts

In order to state a cause of action, one must plead *ultimate facts*, as opposed to evidentiary facts or legal conclusions.⁹⁴ Ultimate facts are the facts establishing the elements of the plaintiff’s cause of action, as determined from the substantive law. Evidentiary facts are details not essential to the proof of an element of the cause of action. Legal conclusions are statements concerning the legal consequences flowing from pleaded or assumed facts.

The concept of “ultimate fact” is fluid, depending on the context in which the term is being used. An ultimate fact in the context of one cause of action may constitute an evidentiary fact in a different context. The importance of the distinctions among ultimate facts, evidentiary facts, and legal conclusions has diminished as courts have attached less and less importance to compliance with pleading requirements going beyond the purpose of informing the defendant of the nature of the plaintiff’s claim and of the factual circumstances on which the claim is based. Nevertheless, these concepts retain a role in the pleading process, if only in informing the pleader what to avoid.

If the plaintiff pleads evidentiary facts or conclusions of law in place of ultimate facts, the defendant may demur to the complaint for [failing to state facts sufficient to constitute a cause of action](#).⁹⁵ If the plaintiff pleads evidentiary facts or conclusions

⁹⁴ See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:82–:91b (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 348–351 (3d ed. 1985).

⁹⁵ CODE CIV. PROC. § 430.10(e); *Careau & Co. v. Security Pac. Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1390, 272 Cal. Rptr. 387, 396–97 (1990).

➔ Motions to Strike—
Grounds

of law in addition to ultimate facts, the court may disregard the surplusage or strike it from the complaint.

[a] Conclusions of Law

Legal conclusions include allegations concerning the unlawfulness, wrongfulness, or unauthorized nature of a particular action:⁹⁶

- “unlawful”⁹⁷
- “against public policy”⁹⁸
- “arbitrary and capricious”⁹⁹
- “fraudulent”¹⁰⁰
- “unjust and unreasonable.”¹⁰¹

Allegations that the defendant is indebted to the plaintiff or that a debt is due and owing are legal conclusions,¹⁰² as are naked allegations that the defendant breached

⁹⁶ See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 338–345 (3d ed. 1985).

⁹⁷ Foerst v. Hobro, 125 Cal. App. 476, 478, 13 P.2d 1055, 1056 (1932).

⁹⁸ Roberts v. Roberts, 81 Cal. App. 2d 871, 886, 185 P.2d 381, 389 (1947).

⁹⁹ Sklar v. Franchise Tax Bd., 185 Cal. App. 3d 616, 621, 230 Cal. Rptr. 42, 46 (1986).

¹⁰⁰ Brousseau v. Jarrett, 73 Cal. App. 3d 864, 872, 141 Cal. Rptr. 200, 205 (1977).

¹⁰¹ Uchida Inv. Co. v. Inagaki, 108 Cal. App. 2d 647, 651, 239 P.2d 644, 647 (1952).

¹⁰² Knox v. Buckman Contracting Co., 139 Cal. 598, 599, 73 P. 428, ??? (1903) (“the whole of said note is owing”); Smith v. Bentson, 127 Cal. App. Supp. 789, 793, 15 P.2d 910, 911 (1932) (“became indebted”).

a contract.¹⁰³ The same is true of allegations that a person was or was not acting in his official capacity.¹⁰⁴

In a number of contexts the law recognizes exceptions to the rule against pleading legal conclusions, either by recharacterizing a legal conclusion as an ultimate fact or by expressly sanctioning the pleading of legal conclusions:

- In actions for ejectment,¹⁰⁵ for recovery of personal property,¹⁰⁶ and to quiet title,¹⁰⁷ the plaintiff may plead his ownership of the property in question.
- In negligence actions, the plaintiff may plead the conclusion that the defendant's act or omission was negligent.¹⁰⁸
- In cases of vicarious liability, the plaintiff may plead in conclusory terms that the actor was the defendant's agent and was acting in the scope of his employment.¹⁰⁹

¹⁰³ *Byrne v. Harvey*, 211 Cal. App. 2d 92, 118, 27 Cal. Rptr. 110, 125 (1962).

¹⁰⁴ *Hancock v. Burns*, 158 Cal. App. 2d 785, 790, 323 P.2d 456, 459 (1958).

¹⁰⁵ *Payne v. Treadwell*, 16 Cal. 220, 243 (1860) ("It is sufficient, therefore, in a complaint in ejectment for the plaintiff to aver in respect to his title, that he is seized of the premises . . .").

¹⁰⁶ *Stockton Morris Plan Co. v. Mariposa*, 99 Cal. App. 2d 210, 213, 221 P.2d 232, 234 (1950).

¹⁰⁷ *Peninsula Properties Co. v. Santa Cruz County*, 34 Cal. 2d 626, 629, 213 P.2d 489, 491 (1950).

¹⁰⁸ *Hoyem v. Manhattan Beach City Sch. Dist.*, 22 Cal. 3d 508, 514, 585 P.2d 851, 854, 150 Cal. Rptr. 1, 4 (1978).

¹⁰⁹ *Kisekey v. Carpenters' Trust*, 144 Cal. App. 3d 222, 230, 192 Cal. Rptr. 492, 496 (1983). *But see Moore v. Regents of the Univ.*, 51 Cal. 3d 120, 134 n.12, 793 P.2d 479, 486 n.12, 271 Cal. Rptr. 146, 153 n.12 (1990) (criticizing such allegations as "generic boilerplate").

- In conversion cases, the plaintiff may plead in conclusory terms that the defendant converted the plaintiff's property.¹¹⁰
- In contract actions, the plaintiff may plead generally that he duly performed all the contract conditions on his part.¹¹¹
- In pleading his performance of conditions precedent under a statute or city or county ordinance, the plaintiff may allege generally that he duly performed all the conditions on his part required by the statute or ordinance.¹¹²
- In pleading a cause of action based on the res judicata effect of a prior judgment, the plaintiff need not allege facts supporting the rendering court's jurisdiction but may plead generally that the judgment was "duly given or made" and has become final.¹¹³
- In pleading common counts for money had and received, goods sold and delivered, work and labor done, materials furnished, or on an open book account one may plead the legal conclusion that the defendant is indebted to the plaintiff for some sum.¹¹⁴

¹¹⁰ *Lowe v. Ozmun*, 137 Cal. 257, 260, 70 P. 87, 88 (1902).

¹¹¹ CODE CIV. PROC. § 457. Where the condition is an event, as distinguished from an act to be performed by the plaintiff, a specific allegation of the happening of the condition is a necessary part of pleading the defendant's breach. *Clack v. State ex rel. Dep't of Pub. Works*, 275 Cal. App. 2d 743, 748, 80 Cal.Rptr. 274, 277 (1969). General pleadings are controlled by specific allegations. Thus, a general allegation of due performance will not suffice if the plaintiff also sets forth what has actually occurred and such specific facts do not constitute due performance. *Careau & Co. v. Security Pac. Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1389–90, 272 Cal. Rptr. 387, 396 (1990).

¹¹² CODE CIV. PROC. § 459.

[b] Evidentiary Facts

The flip side of the rule against pleading legal conclusions is the rule against pleading evidentiary facts.¹¹⁵ Common violations of this rule, however, do not fall into similar patterns. The best that one can say is that the rule requires the pleader to allege the ultimate matters constituting the elements of his cause of action and forbids him from implying those matters by means of detailed recitations of the evidence by which he intends to prove those matters. The rule exists to discourage prolixity and to achieve “that definiteness, certainty, and perspicuity which it was one of the paramount objects sought to be enforced by the code system of pleading.”¹¹⁶ Because of the expense that a [motion to strike](#) entails, modern litigants normally prefer the burden of verbose pleadings.

[2] Allegations on Information or Belief

Although the Code of Civil Procedure recognizes the right of a defendant to base his answering allegations on the ground that he has no information or belief upon the subject to enable him to respond to an allegation of the complaint,¹¹⁷ the Code

¹¹³ CODE CIV. PROC. § 456. This statute comes into play only when the judgment emanated from a court of limited jurisdiction. The law presumes the jurisdiction of a court of general jurisdiction. *Weller v. Dickinson*, 93 Cal. 108, 110, 28 P. 854, 854–55 (1892). The distinction between courts of general jurisdiction and courts of limited jurisdiction now retains significance only with respect to judgments of other states or nations. EVID. CODE § 666 (“Any court of this state or the United States, or any court of general jurisdiction in any other state or nation . . . is presumed to have acted in the lawful exercise of its jurisdiction.”)

¹¹⁴ *Pike v. Zadig*, 171 Cal. 273, 276, 152 P. 923, 924–25 (1915).

¹¹⁵ See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 346–347 (3d ed. 1985).

¹¹⁶ *McCaughey v. Shuette*, 117 Cal. 223, 226, 46 P. 666, 666 (1896).

does not expressly confer the same right on plaintiffs. The Code, however, recognizes the practice by providing that the plaintiff may verify the complaint by attaching an affidavit stating that his allegations are true of his own knowledge, “except as to the matters which are therein stated on his or her information or belief”¹¹⁸ The Official Forms provide for allegations on information or belief.

One may not employ the device of allegations on information or belief as a means to avoid a direct allegation as to a matter within the plaintiff’s knowledge or within his ability to ascertain.¹¹⁹

[3] Incorporating Documents by Reference

With respect to causes of action for breach of contract and the like, the plaintiff must allege the execution of the contract and its essential terms. Instead of alleging these matters directly, a plaintiff whose cause of action depends on a written document may plead the terms of that document by attaching the document as an exhibit to the complaint and alleging the incorporation of the document in the complaint by reference to the exhibit.¹²⁰ If the material provisions of the document are ambigu-

¹¹⁷ CODE CIV. PROC. § 431.30(e).

¹¹⁸ CODE CIV. PROC. § 446. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:127–:133 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 352–353 (3d ed. 1985).

¹¹⁹ *Searcy v. Hemet Unified Sch. Dist.*, 177 Cal. App. 3d 792, 802, 223 Cal. Rptr. 206, 211 (1986) (allegations regarding purported “enactments” ascertainable from the public records); *Thompson v. Sutton*, 50 Cal. App. 2d 272, 279, 122 P.2d 975, 979 (1942) (allegations regarding ownership of easement).

¹²⁰ *Lambert v. Haskell*, 80 Cal. 611, 612, 22 P. 327, 328 (1899). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:134–:135 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 381–388 (3d ed. 1985).

ous, the plaintiff must allege the document's true meaning or face the risk that the trial court may sustain the defendant's demurrer for failure to state a cause of action.¹²¹

If the document constitutes the basis of the plaintiff's cause of action, as in a cause of action for breach of a written contract, the incorporation of the document by reference incorporates the recitals, and those recitals may supply allegations essential to the plaintiff's cause of action.¹²² Where a written instrument is unambiguous and is incorporated by reference into a complaint, the court may strike any allegations in the pleading inconsistent with the incorporated writing.¹²³

➔ Challenging the Complaint—Motions to Strike

Example: *P* alleges that *D*, the trustee of a trust, lacks the power to prosecute or defend litigation. The trust instrument, incorporated by reference in *P*'s complaint, expressly grants *D* these powers.

The trust instrument supersedes *P*'s contradictory allegations, which are treated as surplusage for the purpose of determining whether the complaint states a cause of action.¹²⁴

If, on the other hand, the document does not form the basis for the plaintiff's cause of action, but merely represents an incidental component of the claim, then incorporation of the document by reference does not incorporate recitals in the document, and

¹²¹ Beck v. American Health Group Int'l, Inc., 211 Cal. App. 3d 1555, 1561, 260 Cal. Rptr. 237, 241 (1989).

¹²² Byrne v. Harvey, 211 Cal. App. 2d 92, 103, 27 Cal. Rptr. 110, 115 (1962).

¹²³ Nichols v. Canoga Indus., Inc., 83 Cal. App. 3d 956, 965, 148 Cal. Rptr. 459, 465 (1977).

¹²⁴ Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 46 Cal. App. 2d 684, 691, 116 P.2d 786, 789 (1941).

the plaintiff must still allege the ultimate facts comprising the cause of action, unless the complaint expressly refers to the attached document for the purpose of supplying allegations of ultimate facts.

Example: *P* submits a creditor’s claim to the administratrix of an estate for the reasonable value of services provided to the decedent. *P* sues the administratrix without alleging the value of those services but attaches the creditor’s claim and incorporates it in the complaint “as though set out at length herein.”

The creditor’s claim supplies the missing allegation of value.¹²⁵

Because there is little to lose by incorporating a document by reference for the broadest possible purposes, there is seldom reason to employ narrow language of incorporation.

[4] Incorporating Earlier Allegations by Reference

If the plaintiff alleges a second cause of action or a second count of the same cause of action pleaded under a different legal theory, he may avoid needless repetition of facts alleged in an earlier count or cause of action by incorporating those allegations by reference in the later count or cause of action.¹²⁶ The pleader may also incorporate by reference allegations in another pleading in the same case,¹²⁷ even one superseded by a later pleading,¹²⁸ but earlier allegations already found to be de-

¹²⁵ Klein v. Farmer, 70 Cal. App. 2d 51, 59, 160 P.2d 30, 35 (1945).

¹²⁶ Cal-West Nat’l Bank v. Superior Court, 185 Cal. App. 3d 96, 101, 229 Cal. Rptr. 431, 434 (1986). See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 389–391 (3d ed. 1985).

¹²⁷ Reid v. Merrill, 4 Cal. 2d 693, 695, 52 P.2d 218, 219 (1935).

ficient bring their deficiencies with them.¹²⁹ One may not incorporate by reference allegations in pleadings filed in another action.¹³⁰

[5] Pleading in the Alternative

Although one may not make alternative allegations within the same count,¹³¹ one may set forth the same cause of action in varied and inconsistent counts.¹³² The court may not require the plaintiff to elect between inconsistent counts—the decision as to which count, if any, the evidence sustains lies with the finder of fact upon the conclusion of the trial.¹³³

The occasion to plead inconsistent counts may arise when the plaintiff’s uncertainty concerning the facts leads him to uncertainty concerning the proper legal theory upon which his cause of action rests.¹³⁴

Example: *P* knows that *Decedent* died when he fell from a streetcar as it was slowing to the stop, but he does not know whether the streetcar stopped and then started suddenly or whether the streetcar jerked forward in the process of slowing. In his complaint for wrongful death, *P*

¹²⁸ *Ogier v. Pacific Oil & Gas Dev. Corp.*, 132 Cal. App. 2d 496, 499, 282 P.2d 574, 576 (1955).

¹²⁹ *People v. Oken*, 159 Cal. App. 2d 456, 459–60, 324 P.2d 58, 61 (1958).

¹³⁰ *People ex rel. Carrillo v. Ramon de la Guerra*, 24 Cal. 73, 78 (1864).

¹³¹ *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 809, 143 P.2d 952, 955 (1943).

¹³² *Rader Co. v. Stone*, 178 Cal. App. 3d 10, 29, 223 Cal. Rptr. 806, 816 (1986). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:140–:146 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 354–365 (3d ed. 1985).

¹³³ *Ramsden v. Western Union*, 71 Cal. App. 3d 873, 881, 138 Cal. Rptr. 426, 431 (1977).

¹³⁴ See, e.g., *Flournoy v. State*, 275 Cal. App. 2d 806, 811, 80 Cal. Rptr. 485, 488–89 (1969).

alleges each version of the facts in separate counts. The trial court denies *D*'s demand that *P* elect between his inconsistent counts.

The trial court ruled correctly. *P* was free to plead separate counts alleging negligence against *D* in as many ways as *P* believed his evidence would show.¹³⁵

Example: *P* sues *Dr. D* for the wrongful death of her child. In her first count she pleads that *D* operated on the child negligently. In her second count she alleges the *D* operated on the child without *P*'s consent. The trial court orders *P* to elect between her inconsistent counts.

The trial court erred. *P*'s uncertainty concerning the facts caused her uncertainty concerning the nature of her cause of action—medical malpractice causing the death of her child or a trespass to the person. *P* had a right to plead to plead alternative causes of action in separate counts.¹³⁶

► Parties—Pleading in the Alternative

The plaintiff may state alternative causes of action against different defendants if the plaintiff is uncertain as to which of them is responsible for the plaintiff's loss.

If the plaintiff elects to employ a [verified complaint](#) in order to compel a [verified answer](#) from the defendant, the plaintiff may not plead contradictory facts in alternative counts,¹³⁷ even if he alleges the contradictory facts on [information or belief](#).

¹³⁵ Froeming v. Stockton Elec. R.R., 171 Cal. 401, 404, 153 P. 712, 714 (1915).

¹³⁶ Figletti v. Frick, 203 Cal. 246, 248–49, 263 P. 534, 535–36 (1928).

¹³⁷ Steiner v. Rowley, 35 Cal. 2d 713, 718–19, 221 P.2d 9, 12 (1950).

§ 5.02 The Complaint

Nor may the plaintiff use the device of pleading in the alternative to pursue mutually exclusive remedies.¹³⁸

[E] Prayer for Relief or Statement of Damages

A complaint must contain a demand for a judgment providing the relief to which the plaintiff claims he is entitled. If the plaintiff seeks money damages, he must state the amount, unless he has brought the case in superior court to recover actual or punitive damages for personal injury or wrongful death.¹³⁹

Example: “Plaintiff prays for damages of \$100,000, for interest on the damages at the rate of ten percent per year from April 1, 1995, for attorneys’ fees according to proof, for costs of suit, and for such other relief as is fair, just, and equitable.”

In such cases, the plaintiff’s statement of the nature and amount of the damages he seeks serves as a substitute for a prayer for relief. The statement of damages must include a separate indication of the special and general damages sought.¹⁴⁰ The defendant may request a statement of damages at any time.¹⁴¹ Before seeking a

➔ [Form: Request for Statement of Damages](#)

¹³⁸ Verdier v. Verdier, 36 Cal. 2d 241, 249, 223 P.2d 214, 219 (1950) (spouse required to elect between her rights under her separation agreement and her statutory remedies).

¹³⁹ CODE CIV. PROC. § 425.10(b). The prohibition on prayers for specific dollar amounts extends to other causes of action bearing a close relation to a cause of action for personal injury or wrongful death. Jones v. Interstate Recovery Serv., 160 Cal. App. 3d 925, 929, 206 Cal. Rptr. 924, 927 (1984). A personal injury or wrongful death complaint that contains an improper prayer for relief is subject to a [motion to strike](#). CODE CIV. PROC. § 436. See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:167–:182.1 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 447–450 (3d ed. 1985).

¹⁴⁰ Plotitsa v. Superior Court, 140 Cal. App. 3d 755, 762, 189 Cal. Rptr. 769, 773 (1983).

§ 5.02 The Complaint

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➔ Form: Statement of Damages

default judgment, the plaintiff must file a statement of damages, even if the defendant has not requested one.¹⁴²

In cases in which the plaintiff seeks punitive damages, the plaintiff must refrain from praying for a specific amount.¹⁴³ The code provides no comparable procedure by which the defendant may obtain a statement regarding the amount of punitive damages the plaintiff seeks. The plaintiff, however, may preserve the right to seek punitive damages on a default judgment by serving upon the defendant the following statement or its substantial equivalent:

NOTICE TO _____: (Insert name of defendant or cross-defendant)
_____ (Insert name of plaintiff or cross-complainant) reserves the right to seek
\$_____ (Insert dollar amount) in punitive damages when _____
(Insert name of plaintiff or cross-complainant) seeks a judgment in the suit filed against you.

(Insert name of attorney or party appearing in propria persona)

(date)¹⁴⁴

The prayer for relief, statement of damages, or reservation of right to seek punitive damages play their crucial role in cases in which the defendant fails to answer the complaint, leaving the plaintiff to seek a default judgment. The relief granted to the plaintiff, if there is no answer, cannot exceed what the plaintiff demanded in his complaint, in his statement of damages, or in his reservation of right to seek punitive damages.¹⁴⁵ (In contested cases, the court may grant the plaintiff any relief consis-

¹⁴¹ CODE CIV. PROC. § 425.11(b).

¹⁴² CODE CIV. PROC. § 425.11(c).

¹⁴³ CIV. CODE § 3295(e).

¹⁴⁴ CODE CIV. PROC. § 425.115(b).

§ 5.02 The Complaint

→ Service of the Summons and Complaint

tent with the case made by the complaint and may grant relief different from or greater than that prayed for in the complaint.¹⁴⁶) Therefore, the plaintiff should pray for relief as specifically as possible, lest the defendant default and leave the plaintiff stuck with an insufficient prayer for relief. The prayer for relief should include attorneys' fees and prejudgment interest if the plaintiff contends that he is entitled to them.¹⁴⁷ If the defendant has not appeared in the action, the plaintiff must serve the statement of damages in the same manner as a summons.¹⁴⁸ To avoid duplication of effort, therefore, the plaintiff may facilitate seeking a default judgment by serving the statement of damages with the summons and complaint.

The prayer for relief also determines whether the action satisfies the court's jurisdictional requirement for a particular **amount in controversy** and bears upon the determination whether the action is "legal," as opposed to "equitable," thereby entitling the parties to a trial by jury.

→ General Demurrers—Failure to State Facts Sufficient to Constitute a Cause of Action

A defective prayer for relief does not affect the validity of the complaint as a statement of a cause of action.¹⁴⁹

¹⁴⁵ CODE CIV. PROC. §§ 425.115(f), 580.

¹⁴⁶ CODE CIV. PROC. § 580; Singleton v. Perry, 45 Cal. 2d 489, 498–99, 289 P.2d 794, 800 (1955); Newby v. Vroman, 11 Cal. App. 4th 283, 286, 14 Cal. Rptr. 2d 44, 46 (1992) (court may award prejudgment interest in a contested case despite the plaintiff's failure to include prejudgment interest in the prayer for relief); Damele v. Mack Trucks, Inc., 219 Cal. App. 3d 29, 41, 267 Cal. Rptr. 197, 204 (1990) (statement of damages does not limit the court's power to award greater damages in a contested case).

¹⁴⁷ Wiley v. Rhodes, 223 Cal. App. 3d 1470, 1474, 273 Cal. Rptr. 279, 281 (1990) (the plaintiff may not recover attorneys' fees under a default judgment unless the prayer for relief included attorneys' fees).

¹⁴⁸ CODE CIV. PROC. § 425.11(d)(1).

¹⁴⁹ Gomez v. Volkswagen of Am., Inc., 169 Cal. App. 3d 921, 925, 215 Cal. Rptr. 507, 510 (1985).

[F] Subscription

The complaint must be signed by at least one attorney of record in the attorney's individual name. If the plaintiff is not represented by an attorney, the complaint must be signed by the plaintiff. The court will [strike](#) the complaint unless the omission of the signature is corrected promptly after it is called to the attention of the attorney or the plaintiff.¹⁵⁰

[G] Verification

The plaintiff may, if he wishes, verify the complaint. In general, complaints need not be verified. Verification is necessary only when called for by a particular statute.¹⁵¹ A verified complaint has the advantage that the defendant must file a [verified answer](#) (except governmental defendants¹⁵²) and may not rely on a [general denial](#) of the plaintiff's allegations¹⁵³ (except in municipal court actions subject to the rules for economic litigation¹⁵⁴). The plaintiff, however, forfeits his right to [plead in the alternative](#) and accomplishes little in terms of pinning down the plaintiff's story that he could not achieve through carefully drafted [requests of admissions](#).

One verifies a pleading by attaching to it one's affidavit that the allegations contained in the complaint are true of one's own knowledge, except as to matters al-

¹⁵⁰ CODE CIV. PROC. § 128.7(a); § 446. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:183–184 (1996).

¹⁵¹ *Murrieta Valley Unified Sch. Dist. v. County of Riverside*, 228 Cal. App. 3d 1212, 1222, 279 Cal. Rptr. 421, 427 (1991).

¹⁵² CODE CIV. PROC. § 446.

¹⁵³ CODE CIV. PROC. § 431.30(d).

¹⁵⁴ CODE CIV. PROC. §§ 90–100.

leged on information or belief.¹⁵⁵ As to those matters, the plaintiff must state that he believes them to be true. The plaintiff may dispense with the formality of swearing to the complaint before a notary public by (1) providing an unsworn verification that recites that he declares it to be true under penalty of perjury, (2) signing it, and (3) either (a) stating the date and place of its execution within California, or (b) stating the date of its execution and declaring that it is “so certified or declared under the laws of the State of California.”¹⁵⁶

If the plaintiff is absent from the county where his attorney has his office or otherwise cannot verify the complaint, or if the facts are within the knowledge of someone other than the plaintiff, the attorney or the other person may verify the complaint, provided that the person verifying the complaint sets forth in the affidavit the reasons why the plaintiff is not verifying the complaint.¹⁵⁷ When a corporation is a party, an officer of the corporation may verify the complaint. If someone other than the plaintiff verifies the complaint, the attorney, or the officer verifying the complaint on behalf of a corporate plaintiff, must state that he has read the complaint and that he is informed and believes that the matters stated in the complaint

¹⁵⁵ CODE CIV. PROC. § 446. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:185–:196 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 413–422 (3d ed. 1985).

¹⁵⁶ CODE CIV. PROC. § 2015.5. A verification made “under penalty of perjury under the laws of the State of Illinois,” not under California law, is not an effective verification. *Myzer v. Emark Corp.*, 45 Cal. App. 4th 884, 890 n.4, 53 Cal. Rptr. 2d 60, 64 n.4 (1996).

¹⁵⁷ Code of Civil Procedure section 446 does not authorize attorney verifications where the absence of the party creates no inability on his part to verify. *DeCamp v. First Kensington Corp.*, 83 Cal. App. 3d 268, 275, 147 Cal. Rptr. 869, 873 (1978).

are true and that he alleges that they are true on that ground.¹⁵⁸ By verifying based on information or belief, the verifier destroys the value of the verification as an affidavit based on personal knowledge.

In a limited set of cases, the plaintiff must verify the complaint. These include:

- actions to quiet title¹⁵⁹
- proceedings seeking extraordinary writs¹⁶⁰
- probate proceedings¹⁶¹
- actions for unlawful detainer¹⁶²
- petitions to recover escheated property¹⁶³
- actions seeking the involuntary dissolution of corporations¹⁶⁴
- Uniform Reciprocal Enforcement of Support Act cases¹⁶⁵
- actions against vessels.¹⁶⁶

¹⁵⁸ CODE CIV. PROC. § 446.

¹⁵⁹ CODE CIV. PROC. § 761.020.

¹⁶⁰ CODE CIV. PROC. §§ 1069 (certiorari), 1086 (mandate), 1103 (prohibition); PENAL CODE §§ 1474, 1475 (habeas corpus).

¹⁶¹ PROB. CODE § 1021(a).

¹⁶² CODE CIV. PROC. § 1166.

¹⁶³ CODE CIV. PROC. § 1355.

¹⁶⁴ CORP. CODE § 1800.

¹⁶⁵ FAM. CODE § 4824(a).

¹⁶⁶ HARB. & NAV. CODE § 495.

§ 5.03 Special Pleading Requirements

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(If the plaintiff is a governmental entity, public agency, or public official suing in his official capacity, the complaint need not be verified.¹⁶⁷) By failing to provide a required verification, the plaintiff renders his complaint vulnerable to a [motion to strike](#). A verification deficient in form is nevertheless effective where criminal sanctions for perjury might apply if the allegations declared to be true were, in fact, not true or if they were not known to be true.¹⁶⁸ The plaintiff may cure a defect or omission by amending the complaint, even after the statute of limitations has run.¹⁶⁹

§ 5.03 Special Pleading Requirements

[A] Conspiracy

➡ Pre-Filing Procedures—
Attorney Conspiracy
Claims

The making of a conspiracy does not, by itself, vest the victim with a cause of action against the conspirators. Rather, the existence of a conspiracy may render additional parties liable for the wrong.¹⁷⁰ Therefore, in order to state a cause of action against a conspirator based on the actions of another conspirator, the plaintiff must allege a cause of action based on those actions¹⁷¹ and must allege (1) the formation

¹⁶⁷ CODE CIV. PROC. § 446; *Murrieta Valley Unified Sch. Dist. v. County of Riverside*, 228 Cal. App. 3d 1212, 1222–23, 279 Cal. Rptr. 421, 427 (1991).

¹⁶⁸ *Ancora-Citronelle Corp. v. Green*, 41 Cal. App. 3d 146, 150, 115 Cal. Rptr. 879, 881 (1974); *see Sheeley v. City of Santa Clara*, 215 Cal. App. 2d 83, 86, 30 Cal. Rptr. 121, 881 (1963) (notary's mistaken use of acknowledgment form rather than jurat did not negate plaintiff's substantial compliance with verification requirement)

¹⁶⁹ *United Farm Workers v. Agricultural Labor Relations Bd.*, 37 Cal. 3d 912, 915, 694 P.2d 138, 140, 210 Cal. Rptr. 453, 455 (1985).

¹⁷⁰ *Okun v. Superior Court*, 29 Cal. 3d 442, 454, 175 Cal. Rptr. 157, 164 (1981). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:92.10–:11 (1996).

and operation of the conspiracy, (2) the wrongful acts done pursuant to the conspiracy, and (3) the damage resulting from such acts.¹⁷²

[B] Defendant's Duty to Control Third Party

In cases based on the defendant's failure to control the actions of a third party, the plaintiff must allege more than that the defendant negligently allowed the third party to injure the plaintiff. The plaintiff must allege the facts supporting the duty of care the defendant owed to the plaintiff. In an action against a governmental entity for failure to protect the plaintiff from a third party, the plaintiff must further allege the statute or regulation that imposed on the defendant a mandatory duty to control the third party.¹⁷³

Example: *P* sues *City* based on a police officer's failure to prevent a drunk driver whom he had stopped from continuing to drive. *P* does not allege any statute or regulation imposing on the policy a mandatory duty to prevent a drunk from driving. The trial court grants *City's* motion for judgment on the pleadings.

¹⁷¹ *Manor Inv. Co. v. F.W. Woolworth, Inc.*, 159 Cal. App. 3d 586, 595, 206 Cal. Rptr. 37, 42–43 (1984), *disapproved on other grounds*, *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 521 n.10, 869 P.2d 454, 464 n.10, 28 Cal. Rptr. 2d 475, 485 n.10 (1994).

¹⁷² *Schick v. Bach*, 193 Cal. App. 3d 1321, 1327–28, 238 Cal. Rptr. 902, 906 (1987).

¹⁷³ *Lehto v. City of Oxnard*, 171 Cal. App. 3d 285, 292, 217 Cal. Rptr. 450, 454 (1985). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:102.6–:102.9 (1996).

§ 5.03 Special Pleading Requirements

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The trial court ruled correctly. A litigant seeking to plead the breach of a mandatory duty must specifically allege the applicable statute or regulation.¹⁷⁴

➔ Conclusions of Law

Although generally one may allege negligence in conclusory terms, actions under the Tort Claims Act against public common carriers for failing to control violent passengers are subject to the general rule that one must plead a statutory cause of action with particularity.¹⁷⁵

Example: *P* alleges that *District* is a common carrier, that *P* was a passenger on board one of *District's* buses, that *District* knew assaults regularly occurred on this bus route, that the bus driver had been specifically notified that a violent argument had erupted among the passengers, and that the bus driver had done nothing to protect *P*. The trial court sustains *District's* demurrer.

The trial court erred. *P's* complaint alleged *District's* special duty and negligence with sufficient particularity.

[C] Fraud

➔ Form: Causes of Action—Fraud

With respect to causes of action including an element of fraud, the plaintiff must allege the fraud with particularity.¹⁷⁶ This means that the plaintiff must allege facts showing who made the fraudulent misrepresentation, how, when, and where he made the misrepresentation, and to whom he made the misrepresentation.¹⁷⁷ If the

¹⁷⁴ Lehto v. City of Oxnard, 171 Cal. App. 3d 285, 292, 217 Cal. Rptr. 450, 454 (1985).

¹⁷⁵ Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 795, 710 P.2d 907, 916, 221 Cal. Rptr. 840, 849–50 (1985).

defendant is a corporation, the plaintiff must allege facts showing that the person who made the misrepresentation did so within the scope of his authority as an agent of the corporation.¹⁷⁸ If the defendant made multiple misrepresentations, the plaintiff may satisfy the pleading requirements for fraud by alleging a representative selection of misrepresentations.¹⁷⁹

If it appears from the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, then the strict pleading requirements are relaxed,¹⁸⁰ especially if the defendant is a fiduciary as to the plaintiff.¹⁸¹

[D] Commercial Torts

In *Khoury v. Maly's, Inc.*¹⁸² the court extended the heightened pleading standard to a series of commercial tort causes of action. In cases based on tortious interfer-

¹⁷⁶ *Michaelian v. State Compensation Ins. Fund*, 50 Cal. App. 4th 1093, 1113, 58 Cal. Rptr. 2d 133, 146 (1996). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:92–:92.5 (1996).

¹⁷⁷ *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 73, 269 Cal. Rptr. 337, 345 (1990). This special pleading requirement does not apply to actions under consumer protection statutes. *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 212 n.11, 673 P.2d 660, 669 n.11, 197 Cal. Rptr. 783, 792 n.11 (1983).

¹⁷⁸ *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157, 2 Cal. Rptr. 2d 861, 862 (1991).

¹⁷⁹ *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 218, 673 P.2d 660, 673, 197 Cal. Rptr. 783, 796 (1983).

¹⁸⁰ *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 217, 673 P.2d 660, 672, 197 Cal. Rptr. 783, 795–96 (1983).

¹⁸¹ *Eldreidge v. Tymshare, Inc.*, 186 Cal. App. 3d 767, 777, 230 Cal. Rptr. 815, 821 (1986).

ence with business relations the plaintiff must plead specific facts.¹⁸³ Similarly, in unfair business practices cases¹⁸⁴ the plaintiff must state with particularity the facts supporting the statutory elements of the violation.¹⁸⁵

[E] Declaratory Relief

Anyone who wants a declaration of his rights or duties with respect to another may bring an action for a declaratory judgment, provided that there is an “actual controversy” relating to the legal rights and duties of the respective parties.¹⁸⁶ In pleading a cause of action for declaratory relief, one need not plead facts showing that one is entitled to a judgment in his favor. One need only plead facts showing the existence of an actual controversy and request that the court adjudge the parties’ rights and duties.¹⁸⁷

[F] Punitive Damages

In a tort case the plaintiff may recover punitive damages if he proves by clear and convincing evidence that the defendant has been guilty of malice, oppression, or fraud.¹⁸⁸ “Malice” means conduct intended to injure the plaintiff or despicable conduct carried on with a willful and conscious disregard of the rights or safety of oth-

¹⁸² 14 Cal. App. 4th 612, 17 Cal. Rptr. 2d 708 (1993). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:102.15–.26 (1996).

¹⁸³ *Khoury v. Maly’s, Inc.*, 14 Cal. App 4th 612, 618, 17 Cal. Rptr. 2d 708, 711–12 (1993).

¹⁸⁴ *See* BUS. & PROF. CODE §§ 17000 *et seq.*

¹⁸⁵ *Khoury v. Maly’s, Inc.*, 14 Cal. App 4th 612, 618, 17 Cal. Rptr. 2d 708, 712 (1993).

¹⁸⁶ CODE CIV. PROC. § 1060. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:102.10 (1996).

¹⁸⁷ *Maguire v. Hibernia Sav. & Loan Soc’y*, 23 Cal.2d 719, 728, 146 P.2d 673, 677 (1944).

ers.¹⁸⁹ “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.¹⁹⁰ “Fraud” for purposes of punitive damages means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intent to deprive a person of property or legal rights or otherwise causing injury.¹⁹¹ An employer is not subject to liability for punitive damages based on the acts of an employee unless the employer (1) had advance knowledge of the employee’s unfitness and employed him with a conscious disregard of the rights or safety of others, or (2) authorized or ratified the wrongful conduct for which the damages are awarded, or (3) was personally guilty of oppression, fraud, or malice. In order for a corporation to incur liability for punitive damages, the incriminating act must have been committed by an officer, director, or managing agent.¹⁹²

In order to pursue punitive damages, the plaintiff must allege more than that the defendant acted with malice, oppression, and fraud or engaged in despicable conduct.¹⁹³ The plaintiff must allege facts supporting the conclusion that the defendant acted with malice, oppression, or fraud.¹⁹⁴

¹⁸⁸ CIV. CODE § 3294(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:93–101.19 (1996).

¹⁸⁹ CIV. CODE § 3294(c)(1).

¹⁹⁰ CIV. CODE § 3294(c)(2).

¹⁹¹ CIV. CODE § 3294(c)(3).

¹⁹² CIV. CODE § 3294(b).

¹⁹³ *Brousseau v. Jarrett*, 73 Cal. App. 3d 864, 872, 141 Cal. Rptr. 200, 205 (1977).

¹⁹⁴ *Perkins v. Superior Court*, 117 Cal. App. 3d 1, 6–7, 172 Cal. Rptr. 427, 430 (1981).

Example: *P* alleges that *D Corp.* knew that an oral contraceptive that it manufactured was of a type that posed a danger to users of the drug but that *D Corp.* decided to market the drug anyway. The trial court overrules *D Corp.*'s demurrer.

The trial court erred. The complaint failed to allege either that *D Corp.* intended to injure *P* or that *D Corp.* consciously disregarded the danger that it knew that its product posed to *P*.

[G] Avoiding Defenses

The plaintiff bears the burden of pleading the ultimate facts constituting his cause of action but need not plead additional facts to negate defenses that he anticipates the defendant may assert.¹⁹⁵ If the plaintiff nevertheless pleads such additional facts, they are superfluous. They do not detract from the essential allegations as a statement of facts constituting a cause of action,¹⁹⁶ but the defendant may move the court to [strike](#) them.¹⁹⁷ The defendant admits nothing by not denying superfluous allegations,¹⁹⁸ and he does not raise the anticipated defense by denying the superfluous allegations.¹⁹⁹ One must keep in mind, however, the distinction between facts pleaded to negate an anticipated defense and negative allegations pleaded as an element of

¹⁹⁵ *Four Star Elec., Inc. v. F & H Constr.*, 7 Cal. App. 4th 1375, 1381–822, 10 Cal. Rptr. 2d 1, 4 (1992). See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 374–380 (3d ed. 1985).

¹⁹⁶ *Munson v. Bowen*, 80 Cal. 572, 574, 22 P. 253, 253 (1889).

¹⁹⁷ *Anglo Am. Land Co. v. Sundberg*, 66 Cal. App. 331, 333, 225 P. 874, 874 (1924).

¹⁹⁸ *Canfield v. Tobias*, 21 Cal. 349, 351 (1863).

¹⁹⁹ *Rogers v. Rogers*, 49 Cal. App. 2d 366, 368, 121 P.2d 819, 820 (1942).

the plaintiff's cause of action. The rule against negating anticipated defenses applies to the former, not to the latter.

In limited instances special statutes compel the plaintiff to allege facts to negate an anticipated defense.²⁰⁰ A defendant may attack by special demurrer a contract claim if one cannot ascertain from the pleading whether the contract is written, oral, or implied by conduct.²⁰¹ This requirement serves the purpose of allowing the defendant to raise at the pleading stage the defense that the plaintiff's contract claim is barred by the statute of limitations. To avoid a demurrer, the plaintiff must anticipate the statute of frauds defense by alleging the nature of the contract—written or oral—and, if oral, by alleging facts taking the contract outside the reach of the statute of frauds.

If the complaint discloses that the applicable limitations period has expired, the plaintiff must anticipate the statute of limitations defense by pleading facts showing an excuse for not filing the complaint sooner.²⁰² The same is true of equitable claims apparently barred by the defense of laches.²⁰³

²⁰⁰ See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:102–:102.2, :139.1 (1996).

²⁰¹ CODE CIV. PROC. § 430.10(g). See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 472–473 (3d ed. 1985).

²⁰² *County of Alameda v. Superior Court*, 195 Cal. App. 3d 1283, 1286, 241 Cal. Rptr. 312, 314 (1987). See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 877–881 (3d ed. 1985).

²⁰³ *Cf. Barndt v. County of Los Angeles*, 211 Cal. App. 3d 397, 403, 259 Cal. Rptr. 372, 376 (1989). See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 913 (3d ed. 1985).

➔ Venue

[H] Venue

In general, a plaintiff need not plead facts showing that he filed his action in a proper court.²⁰⁴ Certain statutory provisions, however, require that the plaintiff, by means of a verified complaint, plead compliance with venue requirements in various consumer cases, including:

- actions on retail installment contracts or retail installment accounts under the Unruh Act²⁰⁵
- actions on conditional sale contracts or purchase orders under the Rees-Levering Motor Vehicle Sales and Finance Act²⁰⁶
- municipal court actions arising from offers of consumer goods, services, or credit or from transactions consummated as a result of unsolicited telephone calls from sellers engaged in the business of consummating transactions of that kind²⁰⁷
- municipal court actions for unlawful detainer.²⁰⁸

The [Official Forms](#) for tort and contract actions contain check boxes by which the plaintiff may indicate one or more bases of venue in such cases.

²⁰⁴ See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:65–:70 (1996).

²⁰⁵ CIV. CODE § 1812.10; CODE CIV. PROC. § 396a.

²⁰⁶ CIV. CODE § 2984.4; CODE CIV. PROC. § 396a.

²⁰⁷ CODE CIV. PROC. §§ 395(b), 396a.

²⁰⁸ CODE CIV. PROC. §§ 396a, 1161.

➔ Pre-Filing Procedures—
Actions Requiring
Presuit Court
Clearance

[I] Court Permission

One may not bring an action against an attorney based upon a civil conspiracy with his client unless the court so orders.²⁰⁹ Likewise, one may not assert a negligence claim against a person serving without compensation as a director or officer of a nonprofit corporation unless the court has entered an order allowing the action.²¹⁰ With respect to attorney conspiracy claims, the Civil Code provides that the defendant may raise the plaintiff's failure to obtain court permission by way of a demurrer,²¹¹ which implies that the plaintiff must allege court permission in his complaint. The statutes contain no similar provision with respect to claims against directors and officers of nonprofit corporations, but presumably the pleading requirements for such claims are the same.

§ 5.04 Role of Pleadings

In modern times, pleadings serve a greatly diminished role.²¹² Though they originally framed the issues in litigation, pleadings now serve little purpose beyond identifying who is in the lawsuit, the general nature of the plaintiff's claims, which claims are and are not time barred, and which court has jurisdiction and venue over the parties and their dispute. If the evidence presented at trial varies from the allegations in the complaint, the court's response depends on whether the defendant was

²⁰⁹ CIV. CODE § 1714.10(a).

²¹⁰ CODE CIV. PROC. § 425.15.

²¹¹ CIV. CODE § 1714.10(b).

²¹² See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:7.1–.6 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 337, 406–412 (3d ed. 1985).

misled “to his prejudice in maintaining his action or defense upon the merits.”²¹³ If he was not misled, then the variance is immaterial, and the court may direct that the facts be found according to the evidence or order an amendment of the complaint to conform to the proof.²¹⁴ If the defendant was misled, the court may order the pleadings amended “upon such terms as may be just.”²¹⁵ Only if the plaintiff produces evidence of an entirely separate set of facts from those alleged, constituting an entirely different cause of cause from the one pled, is there a failure of proof, entitling the defendant to judgment in his favor.²¹⁶

The pleadings play a continuing role in informing the parties what facts are controverted. The plaintiff is bound by the material allegations of his complaint (*i.e.*, his allegations of **ultimate facts**, as opposed to **evidentiary facts** and **conclusions of law**), and the defendant is precluded from offering evidence to refute the complaint’s material allegations unless he disputes them in his answer.²¹⁷ (The only exception is when the plaintiff makes inconsistent material allegations by **pleading in the alternative**.) To avoid the consequences of a mistaken admission, the pleader may seek to amend his pleading.²¹⁸ He may not, however, use the procedure of amendment to

²¹³ CODE CIV. PROC. § 469.

²¹⁴ CODE CIV. PROC. § 470.

²¹⁵ CODE CIV. PROC. § 469.

²¹⁶ CODE CIV. PROC. § 471; *Fineberg v. Niekerk*, 175 Cal. App. 3d 935, 939, 221 Cal. Rptr. 106, 107–08 (1985).

²¹⁷ CODE CIV. PROC. § 431.20(a).

²¹⁸ *Macomber v. State*, 250 Cal. App. 2d 391, 399, 58 Cal. Rptr. 393, 399 (1967).

§ 5.05 Filing the Complaint

avoid the consequences of a truthful allegation inimical to his cause of action unless he provides a satisfactory explanation for the change.²¹⁹

§ 5.05 Filing the Complaint

➔ The Summons and
Service of Process

Upon the completion of the final draft of the complaint, the plaintiff's lawyer takes the original and several copies of the complaint, plus an original summons and several copies of the summons, to the clerk's office, where he submits the original complaint for filing and pays the filing fee. The plaintiff must also submit a completed [Civil Case Cover Sheet](#).²²⁰

The total fee for filing the first paper in a civil action in superior court is \$182.²²¹ The clerk stamps the filing date on the face of the original complaint, files it in the court's file, stamps the copies of the complaint to conform to the original, returns them to the plaintiff's lawyer, and [issues the summons](#).

²¹⁹ Blain v. Doctor's Co., 222 Cal. App. 3d 1048, 1058, 272 Cal. Rptr. 250, 255 (1990).

²²⁰ RULES OF CT. 982.2(a). The plaintiff need not serve the cover sheet with the complaint. *Id.*

²²¹ GOV. CODE § 26820.4.