


EXHIBIT 11A

C**Effective:[See Text Amendments]**West's Annotated California Codes [Currentness](#)Civil Code ([Refs & Annos](#))Division 4. General Provisions ([Refs & Annos](#))

Part 1. Relief

Title 3. Specific and Preventive Relief

 [Chapter 2](#). Specific Relief [Article 3](#). Specific Performance of Obligations ([Refs & Annos](#))→ **§ 3392. Parties who cannot have specific performance**

WHAT PARTIES CANNOT HAVE SPECIFIC PERFORMANCE IN THEIR FAVOR. Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default.

CREDIT(S)

(Enacted 1872.)

CROSS REFERENCES

Condition precedent,

Defined, see [Civil Code §§ 708, 1436](#).Impossible or unlawful, see [Civil Code § 1441](#).Offer of performance, see [Civil Code § 1498](#).Performance, see [Civil Code § 1439](#).Pleading performance, see [Code of Civil Procedure §§ 457, 459](#).Proof of performance, see [Code of Civil Procedure §§ 457, 459](#).Validity, see [Civil Code § 709](#).

LAW REVIEW AND JOURNAL COMMENTARIES

A buyer in default, an intransigent [seller, and the buyer's ability to assume a real property purchase contract despite its material breach](#). [A. Kenneth Hennesay, Jr., 29 Cal. Bankr. J. 497 \(2008\)](#).

Mutuality in suits for specific performance. (1940) 28 Cal.L.Rev. 492.

Mutuality of remedy in California under Civil Code § 3386. (1968) 19 Hastings L.J. 1430.

Realty sales; conditions precedent. (1953) 28 Cal.St.B.J. 198.

303. Breach of Contract—Essential Factual Elements

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

1. That [name of plaintiff] and [name of defendant] entered into a contract;
2. That [name of plaintiff] did all, or substantially all, of the significant things that the contract required [him/her/it] to do [or that [he/she/it] was excused from doing those things];
3. [That all conditions required by the contract for [name of defendant]’s performance had occurred;]
4. That [name of defendant] failed to do something that the contract required [him/her/it] to do; and
5. That [name of plaintiff] was harmed by that failure.

New September 2003; Revised April 2004, June 2006

Directions for Use

Read this instruction in conjunction with CACI No. 300, *Breach of Contract—Introduction*. In many cases, some of the above elements may not be contested. In those cases, users should delete the elements that are not contested so that the jury can focus on the contested issues.

Element 3 is intended for cases in which conditions for performance are at issue. Not every contract has conditions for performance.

If the allegation is that the defendant breached the contract by doing something that the contract prohibited, then change element 4 to the following: “That [name of defendant] did something that the contract prohibited [him/her/it] from doing.”

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

Sources and Authority

- Civil Code section 1549 provides: “A contract is an agreement to do or not to do a certain thing.” Courts have defined the term as follows: “A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing.” (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)
- A complaint for breach of contract must include the following: (1) the existence of a contract, (2) plaintiff’s performance or excuse for non-performance, (3) defendant’s breach, and (4) damages to plaintiff therefrom. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 [92 Cal.Rptr. 723].) Additionally, if the defendant’s duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove that the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)
- “Implicit in the element of damage is that the defendant’s breach *caused* the plaintiff’s damage.” (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352 [90 Cal.Rptr.3d 589], original italics.)
- Restatement Second of Contracts, section 1, provides: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”
- “The *wrongful*, i.e., the unjustified or unexcused, failure to perform a contract is a breach. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach.” (1 Witkin, Summary of California Law (10th ed. 2005) § 847, internal citations omitted.) “Ordinarily, a breach is the result of an intentional act, but negligent performance may also constitute a breach, giving rise to alternative contract and tort actions.” (*Ibid.*)
- The doctrine of substantial performance does not apply to the party accused of the breach. Restatement Second of Contracts, section 235(2), provides: “When performance of a duty under a contract is due any non-performance is a breach.” Comment (b) to section 235 states that “[w]hen performance is due, . . . anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial.”

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847

CONTRACTS

CACI No. 303

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

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

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