Contents

VOLUME 1

Preface
About the Authors
Acknowledgments
Selected Developments
Cutoff Dates and CEB Citation

1 Creating the Tenancy
E. Houston Touceda
Patricia H. Tirey

2 Fair Housing Considerations
James Morales
Michael Rawson
Susan M. Saylor
Paul E. Smith

3 Rights and Duties During Tenancy
Ted Kimball
Nancy C. Lenvin
Myron Moskovitz

4 Counseling the Landlord
Nancy C. Lenvin

5 Counseling the Tenant
Myron Moskovitz
Sonya Bekoff Molho

6 Mobilehome Tenancies
Ronald S. Javor
Terry R. Dowdall
Robert S. Coldren
Linda J. Lester

7 Practicing Under Rent and Eviction Control Laws
Nancy C. Lenvin
Myron Moskovitz

8 Terminating the Tenancy
Myron Moskovitz

VOLUME 2

9 Unlawful Detainer: Preparing and Filing the Action
Andrew J. Wiegel

10 Unlawful Detainer: Responsive Pleadings
Sonya Bekoff Molho

11 Unlawful Detainer: Pretrial Proceedings
Sonya Bekoff Molho
Andrew J. Wiegel

12 Unlawful Detainer: Trial
Sonya Bekoff Molho
Andrew J. Wiegel

13 Unlawful Detainer: Judgment and Posttrial Proceedings
Sonya Bekoff Molho

14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues
Nancy J. Newman

Directory
Table of Statutes, Regulations, and Rules
Table of Cases
Table of References
Table of Forms
Index

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Preface

Landlord-tenant matters are a mainstay of many real estate practices and also come up frequently for general practitioners. The first edition of this book provided a much needed comprehensive resource on landlord-tenant practice in California. Focusing on residential tenancies, it guided attorneys for both landlords and tenants through every stage of the landlord-tenant relationship.

This new, fully updated edition builds on the strengths of the first edition, retaining its depth, broad scope, and focus on residential tenancies. The new edition also adds important enhancements:

- Organizational changes make the material more accessible;
- Practice tips have been added to every chapter;
- A new chapter on bankruptcy provides key forms for use in tenant bankruptcies; and
- The chapter on rent and eviction control has been completely revised to make it more practice-oriented and to fully explain recent California legislation affecting rent control.

CEB is extremely fortunate to have expert landlord-tenant practitioners as the authors of this new edition, drawn as equally as possible from the landlord and tenant bars. The authors are named on the Contents page; their biographical footnotes appear on the respective title pages of their chapters.

CEB wishes to give special thanks to Professor Myron Moskovitz of Golden Gate University School of Law, San Francisco, and Nancy C. Lenvin, formerly of Browning, Wholey & Lenvin, San Francisco. These respected attorneys wrote or coauthored several of the chapters in the new edition, bringing balance and expert practical advice (from both tenant and landlord perspectives) to key areas of landlord-tenant practice. Professor Moskovitz was also a key author of the first edition.

CEB also wishes to thank the many consultants who reviewed and commented on the manuscript. Their names are listed in the Acknowledgments.

The project supervisor for this book was Johanna Sherlin, Manager of the Real Property Group at CEB. Legal editing, including the addition of many practice tips, forms, and other original material, was performed primarily by CEB Attorney Bonnie C. Maly, with additional legal editing assistance from Craig H. Scott, Janis L. Blanchette and Dianne M. Millner.

Legal research assistance was provided by Marty Weis, assisted by Maria Borje-Bonkowski, Maria Donohoe, Bettina Fernandez, and Ken Marr. Esther Chin provided administrative assistance. The book was designed by Cheryl Ventimiglia. Robert W. Burke, Jr., prepared the index. Composition was performed by CEB's Electronic Publishing Staff.

February 2010 Update

CEB expresses its gratitude to the following authors for their continuing dedication to this publication and their contributions to this update: Professor Myron Moskovitz, Golden Gate University, San Francisco; Ronald S. Javor, Assistant Deputy Director, Division of Codes and Standards, California Department of Housing and Community Development, Sacramento; Diana D. Sam, Kaplan & Sam, San Francisco; Nancy C. Lenvin, Of Counsel, Zachs, Utrecht & Leadbetter, P.C., San Francisco; Sonya Bekoff Molho, Los Angeles; Nancy J. Newman, Hanson Bridgett LLP, San Francisco; Susan M. Saylor, Associate Chief Counsel, California Department of Fair Employment and Housing, Oakland; Paul E. Smith, Chief of Intake Branch, United States Housing and Urban Development Department, San Francisco; and Patricia H. Tirey, Kimball, Tirey & St. John, San Diego. Also, David J. Tubman, Jr., Tubman Law Group, Oakland, consulted on chapter 6.

CEB also acknowledges with appreciation those who have worked as authors or consultants on previous updates to this edition, including Michael Rawson, Public Interest Law Project, Oakland; Robert S. Coldren and Linda J. Lester, Hart, King & Coldren, Santa Ana; Mark J. Romeo, San Francisco; Andrew J. Wiegel, Wiegel & Fried, LLP, San Francisco; Clifford R. Horner, Horner & Singer, LLP, Walnut Creek; Zona Sage, Oakland; Jim Smith, Berkeley; Ted Kimball, Kimball, Tirey & St. John, San Diego; Marc Treitler, Conservice Utility Management and Billing, San Diego;

Rhonda L. Nelson, Severson & Werson, San Francisco; D. Patrick O'Laughlin, Kimball, Tirey & St. John, San Diego; Hon. Barry D. Kohn, Court Commissioner, Los Angeles Superior Court; Hon. Diana M. Wheatley, Judge, Los Angeles Superior Court; and Hon. Patricia H. Wong, Commissioner, Sacramento Superior Court.

CEB Attorney Editor Bonnie C. Maly and Legal Editors Philip Weverka and Kenneth Marr contributed to this title. Administrative support was provided by Kenya Denman and Nila Kanzaria. Elizabeth J. Asborno handled copyediting and production. Robert W. Burke updated the index. Composition was performed by CEB's Electronic Publishing staff.

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Acknowledgments

CEB gratefully acknowledges the contributions of the authors of the original edition of this book, whose work provided the foundation for this new edition. Many chapters in this new edition incorporate or adapt substantial portions of those original chapters. The authors of the original edition were:

Myron Moskovitz: Chapters 3 (Rights and Duties During Tenancy), 5 (Counseling the Residential Tenant), and 6 (Terminating the Tenancy)
Kenneth K. Baar: Chapter 9 (Rent Control)
Daniel D. Buchalter: Chapter 4 (Counseling the Residential Landlord)
Ronald S. Javor: Chapter 8 (Mobilehome Tenancies)
Richard C. Solomon: Chapter 7 (Unlawful Detainer Actions)
Benjamin L. Susman: Chapter 8 (Mobilehome Tenancies)
The Honorable W. James Ware: Chapter 2 (Selection of Tenants)

CEB also acknowledges the contributions of the attorneys who updated the original edition after its publication. They include Myron Moskovitz, Daniel D. Buchalter, and Clifford Fried.

Substantial portions of chapter 14 of this second edition are based on an earlier version of chapter 14, written in 1997 for this edition by Mark Romeo. Mr. Romeo is a sole practitioner specializing in bankruptcy law, Law Offices of Mark J. Romeo, San Francisco.

Finally, CEB is very grateful to each of the following attorneys, who served as consultants on this new edition. Their valuable insights and suggestions have made this new edition more practical, balanced, and reflective of California landlord-tenant practice.

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Selected Developments

February 2010 Update

Supreme Court Updates. A plaintiff alleging discrimination based on disability under CC §51 need not prove intent, because the American With Disabilities Act (ADA) requires only a showing that the plaintiff was denied full and equal accommodations as a result of the landlord's failure to accommodate the disability. *Munson v Del Taco, Inc.* (2009) 46 C4th 661, 94 CR3d 685. See §§2.21, 2.57, 5.7.

In *Vasquez v State* (2008) 45 C4th 243, 85 CR3d 466, the court clarified that prelitigation settlement negotiations are not required for non-catalyst theory for recovery of attorney fees under the Fair Employment and Housing Act (FEHA). See §2.56.

Under CCP §128.7, a self-representing attorney may not be awarded attorney fees incurred in the defense of meritless claims. Although court of appeal decisions allowed pro per attorneys to recover fees under a companion statute if the opposing party is guilty of bad faith tactics, the supreme court disapproved those rulings. *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475. See §13.28.

Fair Housing. Persons with disabilities may request reasonable accommodations in the screening process if necessary to afford them equal opportunity to use and enjoy a dwelling. 42 USC §3604(f)(3)(B); Govt C §12927; CC §54.1(b)(3)(B). See §2.4.

In *Bell v Tower Mgmt. Servs.* (D NJ, July 15, 2008, No. 07-CV-5305) 2008 US Dist Lexis 53514, the court held that a reasonable accommodations case must establish a nexus between accommodations being requested and the necessity for providing handicapped individuals equal opportunity in housing. See §2.9D.

In *Sutton v Freedom Square, Ltd.* (ED Mich, Oct. 15, 2008, No. 07-14897) 2008 US Dist Lexis 81600, a disabled rental applicant's request to waive minimum credit standard was unreasonable because it constituted a fundamental alteration of landlord's business. See §2.9D.

In *Matter of Yancey v New York City Hous. Auth.* (Sup Ct 2009) 879 NYS2d 661, the court reversed an eviction order on finding that a hearing officer mistakenly believed that termination of tenancy was required under facts and that the officer had no discretionary power. See §2.15.

Local ordinances and policies that deliberately target protected immigrant classes by prohibiting overcrowding in rental housing and by promoting excessive and selective enforcement of building codes against owners that rent to immigrants may be challenged under 11 USC §1983. *Young Apartments v Town of Juniper* (11th Cir 2008) 529 F3d 1027. See §2.19.

In *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602, a complaint requesting abatement of public nuisance created by owner's failure to limit secondhand smoke in outdoor common areas survived demurrer, but the court rejected a cause of action under ADA because no specific facts were alleged concerning whether tenant requested reasonable accommodations. See §2.21.

In November 2009, as urgency legislation, California amended the Unruh Act to provide that any discount or other benefit offered or given to a consumer or prospective consumer by a business because the consumer "has suffered the loss or reduction of employment or reduction of wages" will not be considered arbitrary discrimination under the Act. CC §51.13. See §§2.21, 2.58.

The ADA Amendments Act (ADAAA) was passed in 2008, clarifying Congressional intent on existing language in the ADA and specifically overturning *Sutton v United Air Lines, Inc.* (1999) 527 US 471, 144 L Ed 2d 450, 119 S Ct 2139, and *Toyota v Williams* (2002) 534 US 184, 151 L Ed 2d 615, 122 S Ct 681. Pub L 110-325, §2, 122 Stat 3553. Provisions include a bright line standard of 6 months to determine whether the duration of a condition renders it permanent; working is considered a major life activity (MLA) along with a number of additional MLAs; conditions that are episodic or in remission are to be considered as if active; and disability status is to be construed without regard to the effects of mitigating measures such as medication, equipment, or prosthetics (but not eyeglasses or contact lenses). 42 USC §12102; *Kemppainen v Aransas County Detention Ctr.* (SD Tex, June 23, 2009, No. C-08-194) 2009 US Dist

Lexis 52914). See §2.26.

A facility for the severely disabled violated the Fair Housing Act (FHA) when it drew distinctions on the basis of severity of disability in admissions eligibility criteria. *LaFlamme v New Horizons, Inc.* (D Conn 2009) 605 F Supp 2d 378. See §2.26.

In *Bell v Tower Mgmt. Servs.* (D NJ, July 15, 2008, No. 07-CV-5305) 2008 US Dist Lexis 53514, a disabled plaintiff who asked for waiver of a minimum income requirement as an accommodation to her disability, which she alleged caused her to have a lower income, was denied relief because she did not allege she "was capable of meeting the minimum income requirements prior to becoming disabled." See §2.27A.

A new section has been added that discusses the obligations of landlords in providing accessibility to persons with disabilities. Addressed in particular are design and construction requirements under the FHA, federally assisted programs subject to §504 of the Rehabilitation Act of 1973, state or local government activities subject to the ADA accessible features requirements, residential facilities covered by the ADA public accommodations accessibility requirements, and the removal of accessible features. See §2.27C.

In *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 1552, 87 CR3d 602, the ADA does not apply to privately owned houses, apartments, and condominiums. However, the public accommodations accessibility requirements in Title III of the ADA (42 USC §12182(a)) may apply to privately owned facilities. In *Nicholls v Holiday Panay Marina, LP* (2009) 173 CA4th 966, 93 CR3d 309, a tenant who rented a boat slip in a private marina was allowed to sue the owners for lack of wheelchair accessibility, and in *Kuchmas v Towson Univ.* (D Md 2008) 553 F Supp 2d 556, a resident in a private dormitory on public school property was allowed to bring an ADA action for lack of wheelchair accessibility. See §2.27C.

While the FHA does not require a dwelling to be made available to a disabled person who presents a danger to the person or property of third parties, *Boston Hous. Auth. v Bridgewaters* (Mass 2009) 898 NE2d 848 reaffirmed that this safe harbor applies only if an interactive process indicates that a reasonable accommodation is not possible. See §2.27D.

Under the ADA, the trial court has the discretion to award attorney fees to a prevailing plaintiff, unless special circumstances make the award unjust. *Jankey v Poop Deck* (9th Cir 2008) 537 F3d 1122. A prevailing defendant, however, is not entitled to fees unless the plaintiff's action was frivolous, unreasonable, or without foundation. See *Hubbard v SoBreck, LLC* (9th Cir 2009) 554 F3d 742. See §2.27E.

New sections have been added that discuss gender discrimination, including sexual harassment and domestic violence discrimination. In *Jackson v Chicago Hous. Auth.* (ND Ill, Oct. 7, 2008, No. 08 CV 278) 2008 US Dist Lexis 79655, the court held that a claim under the FHA was stated in allegations that the landlord placed a man across the hall from a female tenant whom that man had previously sexually assaulted. In *Robinson v Cincinnati Metro. Hous. Auth.* (SD Ohio, Apr. 29, 2008, No. 1:08-CV-238) 2008 US Dist Lexis 39523, the court held that the denial of a transfer request by a public housing tenant who was a victim of domestic violence did not violate the FHA. See §§2.27F-2.27H.

In *Reycraft v Lee* (2009) 177 CA4th 1211, 99 CR3d 746, a disabled guest of a mobilehome park tenant, who did not register as a guest or pay the guest fee and did not suffer any actual damages, did not have standing to state a claim under CC §54.3 for monetary damages due to lack of compliance with accessibility guidelines under the Disabled Persons Act (CC §§54-55.2). See §§2.67, 5.7.

Habitability and Premises Liability. In *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602, the court overruled demurrer to complaint requesting abatement of a public nuisance created by the owner's failure to limit secondhand smoke in outdoor common areas. See §§3.15C, 3.42, 3.48A, 3.67A.

In *Tan v Arnel Mgmt. Co.* (2009) 170 CA4th 1087, 88 CR3d 754, the court held that prior assaults on the premises were sufficiently similar to make an attack foreseeable and to place a duty on defendants to provide relatively minimal security measures. See §3.68B.

Effective January 1, 2010, the level of methamphetamine allowed on an indoor surface of the premises to be considered safe for human occupancy was increased from 0.1 micrograms per 100 square centimeters to 1.5 micrograms. Health & S C §25400.16. See §4.16C.

Rights During Tenancy. The legislature added Health & S C §11571.1, which declares that the state law is not preemptive over local ordinances relating to drug abatement and that state law remedies are not intended to prevent a tenant from asserting relief against forfeiture under CCP §1179. Civil Code §3486 was added to California nuisance law to replace former Health & S C §11571.1. It authorizes city attorneys in specified areas to bring an eviction action

against a tenant who unlawfully manufactures, sells, possesses, or uses controlled substances on the premises. See §4.44, 13.56.

When a city attorney intends to file suit to abate a nuisance in the form of an unlawful detainer action under the provisions of CC §§3485-3486, a specially prescribed 30-day notice must precede the 3-day notice and suit under CCP §1161(4). See §§8.55, 8.59.

Professional Responsibility. Effective January 1, 2010, an attorney must disclose to the client in writing the absence of professional liability insurance at the outset of the attorney-client relationship when it is reasonably foreseeable that the total amount of time to be used in representing the client will exceed 4 hours. An attorney who does not provide this notice must inform the client in writing within 30 days of the date that the attorney subsequently knows or should know that he or she no longer has the insurance. Cal Rules of Prof Cond 3-410. See §§4.2C, 5.4A.

Unlawful Detainer Proceedings. In *Espinoza v Calva* (2008) 169 CA4th 1393, 87 CR3d 492, the court denied and reversed an order for payment of past due rent, holding that the absence of a certificate of occupancy rendered the lease illegal. Once the tenant properly raises a defense of breach of the warranty of habitability, the trial court must permit the tenant to introduce evidence of the breach and may not limit the tenant to an offer of proof. If the tenant proves a defense of breach of the warranty of habitability, the court is required to make the findings under CCP §1174.2 and to give the tenant 5 days from the date of judgment to pay the back rent at the rate set by the court. See §§3.11E, 6.16, 6.73A, 10.62, 12.22, 12.28, 12.36-12.37, 12.65.

A lawsuit brought by a former tenant against a landlord who fraudulently evicted the tenant under a rent control ordinance in order to have a family member occupy the premises was not subject to an anti-SLAPP special motion to strike. *Clark v Mazgani* (2009) 170 CA4th 1281, 89 CR3d 24. A landlord's protected actions that were not the basis of plaintiff's lawsuit but merely preceded it did not support an anti-SLAPP motion. *Delois v Barrett Block Partners* (2009) 177 CA4th 940, 99 CR3d 609. See §5.18A, 7.78.

While trial courts are closed on the third Wednesday of each month due to budget issues, the Wednesdays on which the courts are closed are treated as holidays for the purpose of calculating time in which to transact judicial business. Govt C §68106. See §§10.1, 10.50, 13.2.

Effective July 1, 2009, rules regarding applications for fee waivers were amended. Current procedures are summarized in §10.13 and detailed in California Eviction Defense Manual, chap 10 (2d ed Cal CEB 1993).

The time periods and methods for opposing and replying to an opposition for motion for summary judgment in an unlawful detainer action were amended under Cal Rules of Ct 3.1351(b). Opposition to the motion and any reply to opposition may be made orally at the time of the hearing, or if a party seeks to have the court consider its opposition before the hearing, written opposition must be filed and served on or before the court day before the hearing. See §§11.35, 11.37, 11.39. Some ambiguity exists regarding what documents are required to support such motions and oppositions. See §11.38.

In *Treo @ Kettner Homeowners Ass'n v Superior Court* (2008) 166 CA4th 1055, 83 CR3d 318, the court of appeal refused to enforce an ADR provision in CC&Rs that required submission of disputes to judicial reference, because it did not meet constitutional standards for a jury trial waiver. See §11.54.

In *Swift v Superior Court* (2009) 172 CA4th 878, 91 CR3d 504, on a peremptory challenge, the court found that a judge's rulings on discovery motions were only factual in nature and did not relate to the merits of the case. The court then ordered the trial court to accept the peremptory challenge filed by plaintiff. See §12.7A.

In *Garcia v Roberts* (2009) 173 CA4th 900, 93 CR3d 286, an amendment to conform to proof proposed during an action originally brought on an oral contract unfairly prejudiced defendants because original plaintiff had denied existence of written lease in deposition and could not testify at trial. See §12.39.

A new sample jury instruction regarding a landlord's wrongful refusal of rent is provided in §12.63D.

If the affidavit of mailing that accompanies the request for entry of default has an inaccurate address, that defect is not jurisdictional. Consequently, a motion to set aside the default and the resulting judgment on that basis will not lie under CCP §473. *Rodriguez v Henard* (2009) 174 CA4th 529, 94 CR3d 313. See §13.7.

In *Fries v Rite Aid Corp.* (2009) 173 CA4th 182, 92 CR3d 523, the defendant was allowed to file a cost memorandum after the plaintiff voluntarily dismissed the action. See §§13.21, 13.23.

Mobilehome Tenancies. In *Sequoia Park Assocs. v County of Sonoma* (2009) 176 CA4th 1270, 98 CR3d 669, an ordinance imposed procedural and substantive requirements regarding park conversions in excess of those in Govt C §66427.5. The court held that the ordinance was both expressly and impliedly preempted by the state statute and

therefore invalid. See §§6.13, 6.51, 6.70.

Beginning January 1, 2010, local fire departments and districts may enforce local fire codes within a mobilehome park, relating to combustible brush and vegetation that creates an imminent fire hazard, hazardous material storage, and open fires or burning. Health & S C §18691. See §6.13.

In *Los Altos El Granada Investors v City of Capitola* (9th Cir 2009) 583 F3d 674, the court held that a litigant may reserve federal claims for hearing in federal court and that a state court rejection of those claims does not have preclusive effect on the federal court action. See §6.15.

In *Guggenheim v City of Goleta* (9th Cir 2009) 582 F3d 996, a rent control ordinance that provided for an annual rent increase of 75 percent of the consumer price index and arbitration to determine more rent to cover actual expenses effectively forced park owners to rent their property significantly below market value and was a regulatory taking. See §6.15, 7.11.

By September 1, 2010, park operators must adopt an emergency preparedness plan that includes specific posting and notice requirements. Failure to comply is deemed an immediate risk to life, health, and safety. Health & S C §18603. See §6.47.

Beginning January 1, 2010, park management may not require a homeowner who is replacing a mobilehome on a space in the park to use a specific broker, dealer, or other person as an agent in the purchase or installation of the mobilehome. CC §798.71(d). See §6.57.

After September 1, 2008, all new mobilehomes installed, and most existing mobilehomes relocated or altered, in mobilehome parks that are in specified high fire hazard areas must meet new HCD ignition-resistant construction standards. 25 Cal Code Regs §§4200-4216. See §6.57A.

Terminating Tenancies. In *Spinks v Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 90 CR3d 453, the court held that a discharged employee may not be dispossessed without regard to the circumstances surrounding her occupancy or by means of the landlord's self-help. The employee was allowed to state a claim for wrongful eviction, trespass, negligent and intentional invasion of privacy, negligent and intentional infliction of emotional distress, and negligence. See §§1.4, 3.7, 4.3A, 6.61, 8.137, 8.148-8.150.

The sale of property following the tenant's abandonment of a lease does not deprive the landlord of its available contract remedies under CC §1951.2. The landlord retains the right to claim rental loss accruing after the date of sale, except to the extent the breaching tenant can prove the rental loss was avoidable. A rental stream of a value equivalent to the sale proceeds can be determined using a market capitalization rate. *First Nat'l Mortgage Co. v Federal Realty Inv. Trust* (2009) 633 F Supp 2d 985. See §§8.14, 8.16.

The required 60-day notice to residential tenants to terminate a month-to-month or other periodic tenancy under CC §1946.1 has been extended for an indefinite period. Stats 2009, ch 347. See §8.22.

If the owner, manager, or operator is listed by the utility provider as the customer of record, the provider is required to make a good faith effort to inform the residential occupants, by means of a 10-day notice, when the account is in arrears and that the utility service will be terminated. See Pub Util C §§777, 10009, 12822, 16481. When utility service is provided through master metering, a 15-day notice is required. See Pub Util C §§777.1, 10009.1, 12822.1, 16481.1. Under certain circumstances, the residential occupants may become customers of the provider and deduct utility costs from the rent. See §8.149A.

When a tenant leaves personal property on the premises after the tenancy is terminated, or if a tenant abandons the premises, the landlord must comply with statutory procedures in the disposal of the tenant's personal property. If the personal property consists of records as defined in CC §§1980(e) and 1993(f), the tenant is presumed to be the owner of the records. CC §§1983(a), 1993.03(a). Disposition of the records is treated much the same as the tenant's other personal property. See §§8.154-8.158.

Rent Control. In *Barrientos v 1801-1825 Morton LLC* (9th Cir 2009) 583 F3d 1197, HUD rules that related to property owners opting out of Section 8 programs and allowing rents to exceed rent control levels did not preempt local rent controls. The court affirmed the trial court's grant of summary judgment in favor of the tenants, permanent injunctive relief, and award of attorney fees. See §§6.15A, 7.19, 11.63B.

A Los Angeles ordinance, enacted under CC §7060.2(d), that subjects new residential rental units to rent control if built within 5 years on land that contained rent controlled residential property that was demolished is not preempted by CC §1954.52(a) of the Costa-Hawkins Rental Housing Act. *Apartment Ass'n of Los Angeles County, Inc. v City of Los Angeles* (2009) 173 CA4th 13, 92 CR3d 441. See §§7.25, 7.64D.

The Costa-Hawkins Act preempted a Los Angeles land use plan that imposed affordable housing requirements on certain residential and mixed-use development projects of more than ten dwelling units per lot. *Palmer/Sixth St. Props. v City of Los Angeles* (2009) 175 CA4th 1396, 96 CR3d 875. See §7.25B.

A successor landlord is liable under a rent ordinance for overpayments charged to the tenant by a predecessor landlord. *Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 81 CR3d 341. See §§7.29, 12.35.

A provision of a rent ordinance purported to create a presumption of violation if the owner recovered possession on the basis of an owner move-in eviction but maintained continuous occupancy for less than 3 years; such a provision was an invalid presumption affecting the burden of proof in conflict with Evid C §500 and was preempted. *Rental Hous. Ass'n of N. Alameda County v City of Oakland* (2009) 171 CA4th 741, 757, 90 CR3d 181. See §§7.54, 7.66, 7.75.

In *Bisno v Douglas Emmett Realty Fund 1988* (2009) 174 CA4th 1534, 95 CR3d 492, the litigation privilege barred the tenant's claims of a violation of the Santa Monica rent control law arising out of the service of an eviction notice and subsequent unlawful detainer action. See §§7.55, 7.78.

Terminating Tenancies After Foreclosure. Civil Code §2924.8 was amended by Stats 2009, ch 43 (SB 306), requiring the trustee or authorized agent to mail first class an additional notice to the occupants concurrently with the mailing of the notice of trustee sale for residential real property if the billing address for the note is different from the property address. See §8.68B.

Congress has enacted preemptive legislation that temporarily protects residential tenants holding possession under a month-to-month agreement or a lease from immediate eviction after a foreclosure sale by the purchaser. See Protecting Tenants at Foreclosure Act of 2009 (Pub L 111-22, §§701-704, 123 Stat 1660). Residential tenants holding possession under a lease subordinate to the foreclosed loan are entitled to 90 days' notice of eviction after foreclosure. 12 USC §5220(a)(1). Tenants holding possession under a residential lease have the right to possession until the end of the lease term, unless the purchaser will occupy the unit as a primary residence, in which case the 90-day notice applies. 12 USC §5220(a)(2). See §§8.68C, 8.68F, 10.54.

Bankruptcy Procedures. In *Sternberg v Johnston* (9th Cir 2009) 582 F3d 1114, an attorney was held liable for emotional distress damages for willfully violating the automatic stay by defending an overly broad state court order on spousal support. See §14.6.

Federal Rule of Bankruptcy Procedure 4001(a)(3) has been amended to stay the order granting relief from stay for 14 days (previously 10 days) after entry of the order unless the bankruptcy court orders otherwise. See §§14.23, 14.29, 14.64, 14.66.

The United States Bankruptcy Court, Central District of California, has adopted an optional, preprinted form for use in opposing a stay relief motion, unless an individual judge or court department makes this form mandatory. See §14.28A.

If limited relief is granted for the purpose of continuing existing state court claims, a material amendment to the pleadings that changes the nature of the relief sought could violate the automatic stay and render any findings made in the state court void. *Griffin v Wardrobe (In re Wardrobe)* (9th Cir 2009) 559 F3d 932. See §14.29.

In the Northern District of California, a Chapter 7 trustee can move to reject a lease on 24 hours' notice without a formal hearing, so court approval of a stipulation with the trustee in such circumstances should be similarly swift. See ND Cal Local Bankr R 6006-1(b). See §14.30.

In *BEPCO, LP v 15375 Mem. Corp. (In re 15375 Mem. Corp.)* (D Del 2009) 400 BR 420, the court reversed the bankruptcy court's denial of a dismissal of debtors' petitions when the debtor had filed in bad faith. In the event of dismissal of a bad faith bankruptcy filing, the landlord may, in a separate state court proceeding, recover the attorney fees it incurred in obtaining a dismissal of the bankruptcy matter. *Chinese Yellow Pages v Chinese Overseas Mktg. Serv. Corp.* (2008) 170 CA4th 868, 88 CR3d 250. See §14.32, 14.51.

In determining the amount of rent owed under 11 USC §365(d)(3), several cases applied proration, at least as to prorated postpetition rent for the month in which the bankruptcy was filed (*i.e.,* "stub rent"). See *Goody's Family Clothing, Inc. v Mountaineer Prop. Co. II, LLC (In re Goody's Family Clothing, Inc.)* (D Del 2009) 401 BR 656; *In re Stone Barn Manhattan LLC* (Bankr SD NY 2008) 398 BR 359; *In re Manis Lumber Co.* (Bankr ND Ga, Feb. 6, 2009, No. 08-40398) 2009 Bankr Lexis 506. See §14.45.

In *In re BH S&B Holdings LLC* (Bankr SD NY 2009) 401 BR 96, the court analyzed a lease obligation to keep the premises free of liens and held that the obligation to remove a mechanics' lien filed postpetition was not an 11 USC

§365(d)(3) obligation, because under New York law a lien arises when it is filed rather than when the work is done. See §14.45A.

In *In re Brown* (Bankr WD Va 2009) 399 BR 162, the court dismissed a Chapter 13 debtor's second filing while the first case was pending, finding that it was filed in bad faith. See §14.52.

In *Duke Realty Ltd. Partnership v North Metro Mill Work Distribs., Inc. (In re Manis Lumber Co.)* (Bankr ND Ga, Feb. 6, 2009, No. 08-40398) 2009 Bankr Lexis 506, the court allowed an equitable adjustment of the effective date of rejection of a lease to 10 days after service of the debtor's rejection motion. See §14.53.

If the landlord's claimed rejection damages are directly a result of the rejection breach, they will not be allowed in addition to the capped amount of rent allowable. *In re Brown* (Bankr ND Ohio 2008) 398 BR 215. See §14.55.

A dismissal is more appropriate than conversion if more creditors would benefit from dismissal. *Shulkin Hutton, Inc. v Treiger (In the Matter of Owens)* (9th Cir, Dec. 31, 2008, No. 07-35634) 2008 US App Lexis 26947; *In re Jabarin* (Bankr ED Pa 2008) 395 BR 330. See §14.56.

On requisite findings that a debtor's counsel acted in bad faith and committed willful misconduct, the bankruptcy court has the inherent authority to suspend a lawyer from practicing in that court. *Price v Lehtinen (In the Matter of Lehtinen)* (9th Cir 2009) 564 F3d 1052. See §14.56.

March 2009 Update

Supreme Court Updates. If substandard housing endangers the health and safety of residents, a local agency may give the owner a notice to repair or abate and enforce it by having a receiver appointed to manage the property, remediate the violations, or take other action, including demolition. In *City of Santa Monica v Gonzalez* (2008) 43 C4th 905, 76 CR3d 483, the supreme court held that technical noncompliance with prelitigation notice provisions did not invalidate the receivership action or demolition order. See §§3.10, 4.50.

In *In re Marriage Cases* (2008) 43 C4th 757, 76 CR3d 683, the California Supreme Court held that the constitutional rights to privacy and equal protection prevented discrimination against same-sex couples and that statutes treating persons differently on the basis of sexual orientation are subject to strict scrutiny analysis. See §2.58.

Fair Housing. Several state courts have ruled that state and local laws prohibiting source of income discrimination also prohibit discrimination against tenants with housing assistance such as Section 8. See *Commission on Human Rights & Opportunities v Sullivan* (Conn 2008) 939 A2d 541; *Montgomery County v Glenmont Hills Assocs.* (Md App 2007) 936 A2d 325; *DiLiddo v Oxford St. Realty, Inc.* (Mass 2007) 876 NE2d 421. See §2.9B.

In *Stevens v Housing Auth. of S. Bend* (ND Ind, July 22, 2008, No. 3:08-CV-51) 2008 US Dist Lexis 55935, the court distinguished *HUD v Rucker* (2002) 535 US 125, 152 L Ed 2d 258, 122 S Ct 1230, and found that criminal activity outside the unit by persons who were not residents, guests, or under the tenant's control is not grounds for eviction. See §2.15.

In *Villas at Parkside Partners v City of Farmers Branch* (ND Tex 2008) 577 F Supp 2d 858, the court issued a temporary restraining order enjoining an ordinance that required landlords to screen tenants to determine residency status, expressing serious concerns that the ordinance may violate the supremacy and due process clauses. See §2.19.

On March 5, 2008, the U.S. Department of Justice and HUD issued a Joint Statement of the Department of Housing and Urban Development and the Department of Justice—Reasonable Modifications Under the Fair Housing Act that addressed reasonable modifications. See §§2.27, 2.27B.

A refusal to rescind an eviction notice because of the disability of a disruptive minor may be held an unreasonable refusal to accommodate under the FHA, FEHA, and the Unruh Civil Rights Act. See *McAlister v Essex Prop. Trust* (CD Cal 2007) 504 F Supp 2d 903. See §2.27A.

Neither state law access standards nor the Americans With Disabilities Act require structural modifications to portions of rental property not used by the general public. *Coronado v Cobblestone Village Community Rentals, LP* (2008) 163 CA4th 831, 77 CR3d 883. See §§2.27B, 10.68.

If the Department of Fair Employment and Housing has found against a party and the party fails to bring an administrative mandamus action, collateral estoppel may apply, but not to internal grievance procedures (*Ahmadi-Kashani v Regents of Univ. of Cal*. (2008) 159 CA4th 449, 71 CR3d 556) or grievance procedures under a collective bargaining agreement, which settles contractual, rather than statutory, disputes (*Ortega v Contra Costa Community College Dist.* (2007) 156 CA4th 1073, 67 CR3d 832). See §2.56.

In *Fair Hous. Council v Roommates.com, LLC* (9th Cir 2008) 521 F3d 1157, the court ruled that a website operator whose on-line questionnaire required subscribers to disclose their sex, family status, and sexual orientation engaged in discrimination under the Fair Housing Act and was not entitled to immunity under the Communications Decency Act of 1996. See §5.7.

Habitability and Premises Liability. In *Raven H. v Gamette* (2007) 157 CA4th 1017, 68 CR3d 897, the trial court granted summary judgment for the landlord, ruling that the injured tenant had not provided sufficient evidence to establish that the landlord's failure to provide security on her doors and windows caused the rape. The court of appeal reversed, holding that she need show only that the landlord's failures were a "substantial factor" in causing the rape, and that she had presented sufficient evidence to permit a jury to hear the case. See §§3.68, 3.68B.

A landlord has the right to enter and inspect commercially leased premises while pursuing an unlawful detainer action against a defaulting tenant. In *Stone v Center Trust Retail Props., Inc.* (2008) 163 CA4th 608, 77 CR3d 556, a slip and fall case resulting from the tenant's negligent maintenance, the court of appeal ruled that the date on which a landlord obtains a judgment for possession of the premises is the date on which the landlord becomes liable for its condition. California Civil Jury Instruction 1006 was amended to reflect the ruling. See §§3.68C, 3.72, 8.137, 13.33D.

Rights During Tenancy. Some government-subsidized housing projects are subject to contracts that limit the avenue or forum to resolve disputes for breach of the contract. In *300 DeHaro St. Invs. v Department of Hous. & Community Dev.* (2008) 161 CA4th 1240, 75 CR3d 98, the court of appeal held that mandamus was not the appropriate remedy for rent increase denials and that the owner could instead pursue declaratory relief and breach of contract causes of action in superior court. See §§3.66B, 7.14, 7.14B, 7.38.

Civil Code §1946.7, which took effect as an urgency bill on September 27, 2008, allows a tenant who is a victim of domestic violence, sexual assault, or stalking to provide a written notice of lease termination within 60 days of specified court orders or police reports and be liable only for 30 days' rent from the date of the written notice. See §§6.14, 8.21B.

Code of Civil Procedure §1161(4) was amended, effective September 27, 2008, to add a provision that a person's acts of domestic violence, sexual assault, or stalking of a resident on the premises creates a rebuttable presumption that the person has committed a nuisance and is subject to the 3-day notice to quit authorized by that section. See §§6.14, 8.21B, 8.26, 8.50, 8.55, 8.58.

Mobilehome Tenancies. In an unpublished decision, *MHC Fin. Ltd. Partnership v City of San Rafael* (ND Cal, Jan. 29, 2008, No. C00-03785) 2008 WL 440282, the court found that there was a substantial loss in value functionally equivalent to an unconstitutional taking as result of the rent control ordinance. It also held that the ordinance violated the takings clause protection by virtue of the transfer of premium value to the residents. The 98-page opinion also ruled that the San Rafael ordinance did not violate the federal due process clause. See §6.15.

In *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367, the court held that 12-month leases that allowed for rent increases upon 90 days' notice were facially valid because the lease provision expressly included the caveat "as allowed by state and local laws," which the court held incorporated the local rent control ordinance's rent increase restrictions. See §6.15.

In *SC Manufactured Homes, Inc. v Liebert* (2008) 162 CA4th 68, 76 CR3d 73, a mobilehome dealer's allegations that a mobilehome park and specified dealers were involved in an illegal tying arrangement and alleged violations of the Cartwright Act and the Unfair Competition Law, as well as tortious interference with prospective economic advantage, was denied when the court held that the facts did not support the causes of action. See §6.20.

Under Pub Util C §739.5(h), the PUC may not deny eligibility for the California Alternative Rates for Energy (CARE) Program on the basis that some residential units in a mobilehome park are not submetered. See §6.43.

Civil Code §798.26 has been amended to clarify that park management cannot enter any enclosed accessory structure without prior written consent of the resident, except in the event of an emergency or abandonment. See §§6.47, 6.115.

Under CC §798.29.6, effective January 1, 2009, management must permit a homeowner or resident to install disabled access accommodations on a lot or space if they comply with the applicable building code and, when required, are installed with a permit. See §§6.48, 6.114.

In *Surf & Sands, LLC v City of Capitola* (ND Cal, Feb. 13, 2008, No. 07-05043) 2008 US Dist Lexis 14640, a park owner's challenge of several city ordinances regulating mobilehome park rents, closures, and conversions was barred by the statute of limitations and was not ripe because the park had not sought compensation through state procedures. See §6.51.

Effective January 1, 2009, sellers must provide a declaration, as part of the sales transaction, that there is an operable certified smoke alarm in every sleeping room of a mobilehome or manufactured home (Health & S C §18029.6). No later than July 1, 2009, regulations must be adopted to ensure that water heaters in mobilehomes or manufactured homes are seismically strapped, anchored, or braced pursuant to law (Health & S C §18031.7). See §6.57A.

Rent Control. In *Small Prop. Owners v City & County of San Francisco* (2006) 141 CA4th 1388, 47 CR3d 121, the court held that a San Francisco ordinance requiring landlords to pay tenants 5 percent interest on security deposits held for more than one year was not an unconstitutional taking because the ordinance did not require the landlords to place deposits into accounts paying interest below the rate they had to pay tenants. See §§7.13, 8.170.

In *TG Oceanside, LP v City of Oceanside* (2007) 156 CA4th 1355, 68 CR3d 320, a rent control ordinance that allowed three options for rent increases met constitutional requirements, and the park owner was required to comply with the ordinance or prove the options were inadequate rather than merely substitute a different return-on-investment standard. See §§6.15, 7.10, 7.13, 7.38, 7.47, 7.75.

In *Action Apartment Ass'n v Santa Monica Rent Control Opinion Bd.* (9th Cir 2007) 509 F3d 1020, the Ninth Circuit recognized that landlords can challenge the rationality of land use regulations as a denial of substantive due process. However, the court concluded that the facial due process Fourteenth Amendment claim was time-barred and the as-applied due process claim was unripe. See §§7.10, 7.14, 7.14B, 7.47.

In *Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 81 CR3d 341, the court held that excess rent paid to a prior owner may be recovered against the current owner if the local rent ordinance provides for successor liability. See §§7.40A, 7.44, 7.56, 7.77, 7.80, 10.57.

In *Gombiner v Swartz* (2008) 167 CA4th 1365, 85 CR3d 83, the court acknowledged that a partial waiver of a right to complain to a governmental agency in a mutually agreed settlement of a specific issue may be enforceable, but the landlord cannot circumvent the local rent control ordinance setting maximum rents. See §§7.54, 7.55, 10.65, 13.39.

In *Marlin v Aimco Venezia, LLC* (2007) 154 CA4th 154, 64 CR3d 488, the court held that tenants may file actions for declaratory relief to determine whether landlords are entitled to Ellis Act evictions. The court further held that the tenants' filing was not an anti-SLAPP suit because it was not based on the landlord's filing and serving of the notice, but instead was based on the tenants' claim that the landlord was not entitled to invoke or rely on the Ellis Act. See §7.64G.

Terminating Tenancies After Foreclosure. Effective September 8, 2008, through the end of 2012, CC §2924.8 requires the trustee or authorized agent to post and mail an additional notice for the benefit of the tenant when posting the 20-day notice of trustee sale (nonjudicial foreclosure) for residential real property if the billing address for the note is different from the property address. See §§8.68B, 10.54.

Effective July 8, 2008, and sunsetting at the end of 2012, CCP §1161b requires a residential tenant holding a lease subordinate to the mortgage or a subtenant to be given 60 days' written notice to quit. See §§8.68C, 8.69, 9.36-9.39, 10.54, 12.46, 12.47.

Unlawful Detainer Proceedings. If a landlord brings an anti-SLAPP motion based on the tenant's filing a wrongful eviction action, the tenant must make a prima facie showing of his or her right to prevail. *Birkner v Lam* (2007) 156 CA4th 275, 67 CR3d 190. See §7.78.

While a jury may consider the fact that a defendant harmed non-parties in determining the reprehensibility of defendant's conduct, it may not consider the injuries to nonparties when setting the amount of punitive damages. *Philip Morris USA v Williams* (2007) 549 US 346, 166 L Ed 2d 940, 127 S Ct 1057. See §§8.135, 8.150.

While communication by an attorney with an unrepresented adverse party is not prohibited, if an attorney is aware that the adverse party may have been assisted by counsel who is not counsel of record, the attorney should clarify that fact and tell the opposing party not to reveal the content of any communications with counsel. *McMillan v Shadow Ridge at Oak Park Homeowner's Ass'n* (2008) 165 CA4th 960, 81 CR3d 550. See §9.21.

Effective January 1, 2008, California Rule of Court amendments to Cal Rules of Ct 2.253, 2.260 contain detailed requirements for electronic service of pleadings. See §9.44.

Effective July 1, 2009, Govt C §§68630-68641, regarding waiver of filing fees and other court expenses for indigent parties, will replace the procedures in Govt C §68511.3, which will be repealed on the same date. Additional classes of parties are eligible for fee waivers, and the required information and documentation for obtaining a fee waiver has been expanded. The court is also entitled to reimbursement when the party who obtains a fee waiver collects money in

satisfaction of judgment. See §§10.5, 10.13.

California Civil Jury Instructions VF-4300-VF-4302 were added as general and/or specific verdict forms for use in unlawful detainer actions. See §§12.42, 12.67.

In *Hossain v Hossain* (2007) 157 CA4th 454, 69 CR3d 356, the court held that CCP §473(b) does not apply to an attorney's failure to timely file opposition and a cross-motion to a motion to enforce a settlement because there was neither a default nor a default judgment within the meaning of §473(b). See §§12.69, 13.8.

If there are multiple counsel for appellant, service of the notice of entry of judgment and the notice of entry of the order denying a new trial on only the original attorney is sufficient to start the 60-day notice period in which to appeal. *Adaimy v Ruhl* (2008) 160 CA4th 583, 72 CR3d 926. See §13.59.

The California Rules of Court regarding payment of deposit to the superior court, the indexing of exhibits in the reporter's transcript, delivery of copies to the court, and answers to petitions to transfer have been amended. Cal Rules of Ct 8.100(d), 8.144(b)(3), 8.212(c). See §§13.59, 13.63.

In *Reichert v National Credit Sys., Inc.* (9th Cir 2008) 531 F3d 1002, a suit brought by a tenant under the Fair Debt Collection Practices Act, the court found that the collection agency for the landlord failed to establish the bona fide defense because it did not produce evidence of reasonable preventive procedures to avoid the error.

Attorney Fees. In *Cruz v Ayromloo* (2007) 155 CA4th 1270, 66 CR3d 725, the court of appeal allowed attorney fees for both contract and tort causes of action under a lease that provided that the prevailing party would be awarded fees "for all claims in any civil action *in connection with* the lease." See §13.25.

In a commercial lease that broadly defined the prevailing party, a tenant who received a voluntary dismissal while its summary judgment motion was pending was adjudged to be the prevailing party, but was denied attorney fees because CC §1717 does not permit attorney fees in the event of a voluntary dismissal. *Mitchell Land & Improvement Co. v Ristorante Ferrantelli, Inc.* (2007) 158 CA4th 479, 70 CR3d 9. See §§13.26, 13.27.

Bankruptcy Procedures. When a solvent tenant attempts to use the bankruptcy process to obtain the 11 USC §502(b)(6) cap on its landlord's damages for breach of a commercial lease, a dismissal may be properly denied if bankruptcy is in creditors' best interests. *In re 15375 Memorial Corp*. (Bankr D Del 2008) 386 BR 548. See §14.32.

An Arizona bankruptcy court held that the performance date determined whether an expense was required to be paid under 11 USC §365(d)(3). See *In re Designer Doors, Inc.* (Bankr D Ariz 2008) 389 BR 832. See §14.45.

Federal Rules of Bankruptcy Procedure 3007 includes new limitations on debtors' ability to make "omnibus" objections to invalidate large numbers of claims without making a showing as to each one. See §14.55.

Once the equitable jurisdiction of the bankruptcy court is invoked, a debtor's desire for a jury trial may not constitute sufficient cause to approve the debtor's request for voluntary dismissal of the case, if opposed by creditors and the trustee. *In re Hickman* (Bankr SD Cal 2008) 384 BR 832. See §14.56.

New forms entitled "Objection to Debtors' Motion on Proposed Going Out of Business Sale" and "Objection to Proposed Expedited Procedures for Assumption and Rejection of Leases" have been added. See §§14.62A, 14.62B.

February 2008 Update

Supreme Court Updates. In a case involving a landlord's duty to prevent injuries caused by criminal acts or third parties, the supreme court decided in *Castaneda v Olsher* (2007) 41 C4th 1205, 63 CR3d 99, that even if an owner has no duty to provide security, it may still owe a duty, by having special knowledge or by virtue of a special relationship, to take other protective measures. See §§3.68, 3.68B, 6.16, 6.20, 6.55, 6.65.

The supreme court held that it is not necessary for a person to demonstrate that a request for nondiscriminatory treatment was made and refused in order to state a claim under the Unruh Civil Rights Act. *Angelucci v Century Supper Club* (2007) 41 C4th 160, 59 CR3d 142. See §5.7.

The supreme court held that the Mobilehome Residency Law (CC §798.49(d)(4)) does not preempt local rent control ordinances to the extent that they allow mobilehome park owners to separately charge park residents for property taxes imposed on park land. *Cacho v Boudreau* (2007) 40 C4th 341, 53 CR3d 43. See §§6.15, 6.29, 6.30.

In *Action Apartment Ass'n v City of Santa Monica* (2007) 41 C4th 1232, 63 CR3d 398, the supreme court held that the litigation privilege of CC §47(b) conflicts with and thus preempts a section of a Santa Monica ordinance that authorizes civil and criminal penalties against a landlord who brings a court action to recover possession of a rental unit without a reasonable factual or legal basis. See §§7.55-7.55A, 7.78.

In *Oakland Raiders v National Football League* (2007) 41 C4th 624, 634, 61 CR3d 634, the supreme court stated

that the requirement under CCP §657 that the trial court's statement of reasons for granting a new trial be filed no later than 10 days after the order is jurisdictional, and therefore a statement of reasons filed more than 10 days after the order is ineffective. See §13.44.

Rental Agreement Forms. The California Apartment Association Furniture Inventory form has been revised. See §1.26. New rental and lease agreement forms have been revised. See §§1.81, 1.82, 1.83. Lead paint disclosures provided at the beginning of a residential tenancy must include all information on lead-based paint or hazards in the unit known by the owners or their agents, including the existence and location of inspection records and reports. See §§1.29, 1.77, 1.82A.

Fair Housing. Under CCP §1161(4), a person who unlawfully possesses or uses weapons or ammunition on the premises, or uses the premises for those purposes, is considered to have committed a nuisance. Under CC §3485, the landlord may have obligations to abate such a nuisance, or a city attorney may bring an unlawful detainer action if the owner fails to do so. See §§1.58, 3.7, 3.10, 4.44, 8.55, 8.58, 8.5, 9.4.

The definition of "sex" for the purpose of California anti-discrimination laws includes a person's gender, gender identity, and gender-related appearance and behavior. See §§2.1, 2.2, 2.19, 2.20, 2.28, 2.48, 2.49, 2.59, 4.12, 4.14, 5.7, 6.20, 9.2, 10.67.

A plaintiff stated a prima facie case for violation of the California Fair Employment and Housing Act (Govt C §§12900-12996) by pleading that a lender's policy against making loans for home daycare providers had a disparate impact on women and families with children. *Sisemore v Master Fin., Inc.* (2007) 151 CA4th 1386, 60 CR3d 719. See §§2.5, 2.21, 2.48, 2.58.

Although *Gunther v Lin* (2006) 144 CA4th 223, 50 CR3d 317 held that a showing of intentional discrimination is necessary to obtain monetary damages, in *Wilson v Haria and Gogri Corp.* (ED Cal 2007) 479 F Supp 2d 1127 the court rejected *Gunther*, as did *Johnson v Barlow* (ED Cal, June 9, 2007, No. S-06-01150) 2007 US Dist Lexis 44855. In *Wilson v PFS, LLC* (SD Cal 2007) 493 F Supp 2d 1122 the court found that the law was too unsettled for it to exercise supplemental jurisdiction over Unruh Act claims. See §§2.5, 2.21, 2.57.

The discussion of the effect of a tenant's character on the landlord's enforcement of the lease is enhanced in §2.8.

In *U.D. Registry, Inc. v State* (2006) 144 CA4th 405, 429-430, 50 CR3d 647, the court held as unconstitutional CC §1785.13's prohibition against a credit agency reporting unlawful detainer actions unless the landlord is the prevailing party. However, a credit reporting agency may be liable under 15 USC §§1681e and 1681i for inaccurately investigating or reporting whether a judgment exists against a tenant. *Dennis v BEH-1, LLC* (9th Cir 2007) 504 F3d 892. See §§2.9, 5.25A, 13.75.

Beginning in 2008, under CC §1940.3, landlords may not inquire about or obtain documents regarding a tenant's or prospective tenant's immigration of citizenship status. See §§2.12, 2.19, 2.20.

Residency preferences must not have the effect of delaying or otherwise denying admission to the program based on the protected classes. 24 CFR §960.206(b)(1)(iii). Local residency preferences violate the federal Fair Housing Act if they disproportionately exclude racial or ethnic minorities. *Comer v Cisneros* (2d Cir 1994) 37 F3d 775, 793. See also *Langlois v Abington Hous. Auth.* (1st Cir 2000) 207 F3d 43. See §2.14A.

Local ordinances that prohibit certain forms of discrimination against existing or prospective tenants who hold Section 8 vouchers are not preempted by 42 USC §1437(f). *Rosario v Diagonal Realty* (2007) 840 NYS2d 748, 872 NE2d 860. See §2.17.

In *Drenik v Ohanesian* (ED Cal, Aug. 15, 2006, No. 05-209) 2006 US Dist Lexis 60870, a landlord who refused to rent a second-floor unit to a family with children was in violation of the Fair Housing Act. See §2.23.

The Fair Housing Act, Americans with Disabilities Act, and the Fair Employment and Housing Act create remedies for persons who are denied housing due to their disabilities. Substantial discussion regarding accommodations for such persons were added to this 2008 update to provide additional guidance. See §§2.26-2.27C, 2.29.

Transitional housing for homeless persons is subject to the restrictions of the Fair Housing Act. *Community House, Inc. v City of Boise* (9th Cir 2007) 490 F3d 1041. See §2.30.

A new housing discrimination complaint form has been provided by the Department of Housing and Urban Development. See §2.34.

If the plaintiff shows a prima facie case of disparate treatment by the landlord, the landlord may present evidence that it has a legitimate safety concern, not based on stereotypes, that justifies the discrimination. *Community House, Inc. v City of Boise* (9th Cir 2007) 490 F3d 1041. See §2.63.

Tenant Rights During Tenancy. The use of testers is a common method to gather evidence of housing discrimination. Significant discussion has been added to this 2008 update regarding the use of testers. See §2.66. A list of categories of plaintiffs who have standing to bring discrimination cases is also provided. See §2.67. Increased analysis of the calculation of statutes of limitation in such cases is enhanced. See §2.69.

There is no insurance coverage for a judgment against a landlord for breach of lease due to failing to keep the premises in good condition where the only damages are economic loss. *Golden Eagle Ins. Corp. v Cen-Fed Ltd.* (2007) 148 CA4th 976, 56 CR3d 279. See §3.9.

Health & Safety Code §17958.3 was added to require residential hotels to provide a locking receptacle for each unit in the hotel. See §3.12.

A plaintiff may recover actual damages, including emotional distress damages, when a landlord attempts to collect rent, increase rent, or serves a 3-day notice after being notified of substandard conditions on the property. *McNairy v C.K. Realty* (2007) 150 CA4th 1500, 59 CR3d 429. See §§3.15A, 3.36, 3.38, 3.67, 5.9, 5.16, 7.78.

In *Barber v Chang* (2007) 151 CA4th 1456, 60 CR3d 760, the court held that summary judgment was not appropriate where a perpetrator had exhibited prior similar threatening conduct and landlord did not undertake minimally burdensome measures to address known threat of aggressive tenant. See §3.68B.

A landlord who obtains a writ of possession in an unlawful detainer action has a duty to inspect the premises even if the tenant remains in possession. Failure to do so might lead to liability to third parties who are injured by defects that might have been cured by proper maintenance. *Stone v Center Trust Retail Props.* (2007) 146 CA4th 1435, 53 CR3d 668. See §3.72.

Included in this 2008 update is discussion regarding requiring that renters obtain renter's insurance. See §4.43B.

An online interactive roommate matching website may be subject to FHA anti-discrimination provisions for questionnaires it requires prospective members to complete but not for the members' answers to an open-ended "Additional Comments" form. *Fair Hous. Council v Roommates.com, LLC* (9th Cir 2007) 489 F3d 921, rehearing granted en banc (9th Cir 2007) 2007 US App Lexis 23922. See §5.7.

A San Francisco landlord must have "just cause" to remove or sever housing services such as parking or storage. San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.2(r). In March, 2007, the San Francisco Rent Control Board declined to adopt regulations to implement this legislation, thereby leaving it up to the courts to interpret the provisions. The Rent Board did, however, amend Regulation 12.20(a) to allow landlords to evict for a tenant's breach of an obligation or covenant of the tenancy after a substantial decrease in housing services involving garages, storage space, or access to common areas, so long as the tenant has received a commensurate rent reduction for loss of the service. See §§5.14, 7.54.

An arbitration provision was unenforceable where there was a high degree of substantive unconscionability arising from a class action waiver included in a service agreement. *Gatton v T-Mobile USA, Inc.* (2007) 152 CA4th 571, 61 CR3d 344. See §5.16.

When a landlord illegally enters the tenant's premises, the only express statutory remedy that allows for the recovery of damages and penalties for a "significant and intentional violation of CC §1954" is in CC §1940.2. Discussion of this remedy and other legal theories applicable to these issues has been enhanced in this February 2008 update. See §5.17.

An ordinance outlawing picketing within 300 feet of residence was constitutional because it was content neutral and narrowly tailored to serve a significant government interest. *Klein v San Diego County* (9th Cir 2006) 463 F3d 1029. See §5.37.

Mobilehome Tenancies. In an effort to clarify the confusion created by the terms "manufactured home" and "mobilehome," the legislature has amended the Mobilehomes-Manufactured Housing Act of 1980 (Health & S C §§18000-18153), which is now known as the Manufactured Housing Act of 1980. See §§6.1, 6.4, 6.8.

Several new cases have addressed the constitutionality of mobilehome rent control ordinances. For discussions of *MHC Fin. Ltd. Partnership v City of San Rafael* (ND Cal, Dec. 5, 2006, No. C00-3785) 2006 US Dist Lexis 89195, *Stardust Mobile Estates, LLC v City of San Buenaventura* (2007) 147 CA4th 1170, 55 CR3d 218, *S.G. Borello & Sons v City of Hayward* (ND Cal, Nov. 20, 2006, No. C03-0891) 2006 US Dist Lexis 86293, and *Equity Lifestyle Props. Inc. v County of San Luis Obispo* (9th Cir, Sept. 17, 2007, No. 05-55406) 2007 US App Lexis 22142, see §§6.15, 6.21, 7.10, 7.11, 7.13, 7.14, 7.14B, 7.31.

Effective January 1, 2008, after the sale of a mobilehome, management is prohibited from requiring a mobilehome's

removal unless management has provided the homeowner with a notice particularly specifying the condition that permits requiring removal of the mobilehome. CC §798.73(e). See §6.58.

In *SC Manufactured Homes, Inc. v Canyon View Estates, Inc*. (2007) 148 CA4th 663, 56 CR3d 79, involving a dispute between a mobile home dealer and a landlord, the court denied attorney fees because the matter did not arise out of the MRL. In *Cruz v Ayromloo* (2007) 155 CA4th 1270, 66 CR3d 725, the court interpreted an attorney fee clause in a lease that stated "if civil action is instituted in connection with this Agreement" holding that it was broad enough to encompass causes of action for both breach of the lease as well as tort causes of action. See §6.89.

Rent Control. Discussion of just cause and retaliatory eviction ordinances has been significantly enhanced in this 2008 update.

Tenants have no right to insist that compliance with the Subdivided Lands Act (Bus & P C §§11000-11200) be undertaken as a precondition to an eviction based on the Ellis Act, and a landlord does not violate the Subdivided Lands Act by selling partial interests in a building withdrawn from rent or lease under the Ellis Act. *Daro v Superior Court* (2007) 151 CA4th 1079, 61 CR3d 716. See §§7.64, 7.64B, 7.64E, 7.64G, 11.63B.

Discussion of the requirements of just cause and Ellis Act evictions, including relocation assistance, has been enhanced in this 2008 update in §§7.54, 7.55, 7.56, 7.63, 7.64, 7.64F, 7.65, 7.76A.

The Ellis Act does not prevent a city from enforcing mitigation conditions granting relocation rights to existing tenants when those rights are part of a vesting tentative tract map under the local land use and environmental review process. *Lincoln Place Tenants Ass'n v City of Los Angeles* (2007) 155 CA4th 425, 452, 66 CR3d 120. See §7.64D, 7.64G, 7.64H, 11.62, 11.63B.

Unlawful Detainer Proceedings. Participation by a party's insurer instead of the party itself has invalidated a settlement agreement. *Elnekave v Via Dolce Homeowners Ass'n* (2006) 142 CA4th 1193, 48 CR3d 663. See §9.18.

Stipulated judgments are commonly used in unlawful detainer actions. This 2008 updates discusses bringing an action for retaliatory eviction after entering into a stipulated judgment. See §9.18B.

Service on a managing agent employed by a party (but not specifically authorized to accept service of summons and complaint and not shown to be in "regular and frequent contact" with the party) is insufficient service under CCP §416.90 despite the party's actual receipt of the summons and complaint. *Summers v McClanhan* (2006) 140 CA4th 403, 44 CR3d 338. See §9.48.

In *Parsons v Superior Court* (2007) 149 CA4th Supp 1, 58 CR3d 48, the court upheld a motion to quash that challenged the use of a 30-day notice to terminate a houseboat tenancy because a 60-day notice is required by CC §800.70 and the inappropriate notice resulted in lack of jurisdiction by the court. See §§8.23, 8.62, 10.20, 10.21, 10.29, 10.31, 10.40.

Effective January 1, 2008, the Judicial Council is required to adopt rules prescribing the time for filing and serving opposition and reply papers, if any, relating to a motion under §1167.4 (motion to quash) or CCP §1170.7 (summary judgment motion) in an unlawful detainer action. Stats 2007, ch 113, §2. See §§10.24, 11.37.

Effective January 1, 2008, discovery statutes were substantially amended to shorten time periods in discovery proceedings, including propounding and responding to discovery requests, and in motions to enforce discovery rights in unlawful detainer actions. Stats 2007, ch 113. See §§11.5-11.30.

A judge's failure to respond to a CCP §170.1(a)(7) challenge (disqualification for physical impairment), after the issuance of a permanent injunction on a judgment which had become final, did not amount to a "consent" to the disqualification. *North Beverly Park Homeowner's Ass'n v Bisno* (2007) 147 CA4th 762, 54 CR3d 644. See §12.3.

A party may exercise a post-appeal peremptory challenge if the matter is assigned, on remand, to the trial judge who originally heard the case. CCP §170.6(a)(2). However, on remand, a party may only exercise one post-appeal peremptory challenge even if that party did not make a pre-appeal challenge. *Casden v Superior Court* (2006) 140 CA4th 417, 44 CR3d 474. See §12.5.

Under CCP §473(b) a reversal from default judgment was required after the court struck a defendants' answer as discovery sanction and then entered default and a default judgment. *Matera v McLeod* (2006) 145 CA4th 44, 51 CR3d 331. See §13.8.

After a landlord dismissed an unlawful detainer suit that claimed the tenant was holding over, the court ruled that CC §1717 did not apply and defendant, as prevailing party under CCP §1032(a)(4), was entitled to attorney fees. *Drybread v Chipain Chiropractic Corp.* (2007) 151 CA4th 1063, 60 CR3d 580. See §13.27.

In a case currently on review, a court, in allowing attorney fees when the party was a self-represented attorney, referred to case law concerning Fed R Civ P 11, on which CCP §128.7 is modeled. *Musaelian v Adams* (review granted Oct. 10, 2007, S156045; superseded opinion at 153 CA4th 882, 63 CR3d 603). See §13.28.

In determining the res judicata effect of a judgment, the court in *McAlister v Essex Prop. Trust* (CD Cal 2007) 504 F Supp 2d 903 found the judgment was res judicata effect because tenants prevailed on affirmative defense based on discrimination in unlawful detainer action. In *Stein v Braum Inv. & Dev., Inc.* (9th Cir Cal 2007) 2007 US App Lexis 18971, however, the state court judgment was not given res judicata effect because record did not establish that tenants' defense based on discrimination was fully and fairly litigated in eviction action. See §13.39.

In *Gill Petroleum, Inc. v Hayer* (2006) 137 CA4th 826, 40 CR3d 648, the court held that while CCP §1179 requires a tenant to pay past rent due as a condition to obtaining relief from forfeiture, the trial court retains broad equitable discretion to determine other conditions for relief. See §13.56.

In *Colony Hill v Ghamaty* (2006) 142 CA4th 1408, 48 CR3d 798 the court of appeal lacked jurisdiction to review an attorney fee award because the order granting fees was neither included in the judgment nor separately appealed. See §13.59.

Bankruptcy Procedures. An insurer does not violate the automatic stay when it determines its obligations under a policy and acts to withdraw the defense of a prepetition lawsuit. *In re Benz* (BAP 9th Cir 2007) 368 BR 861. See §14.8.

When a proof of claim is filed, the bankrupt tenant's security deposit must be applied to the capped amount of damages allowable under 11 USC §502(b)(6), even if the deposit is in the form of a letter of credit. *In re Connectix Corp.* (Bankr ND Cal 2007) 372 BR 488. The rule requiring application of a letter of credit to a capped claim may not apply if no proof of claim is filed. *EOP-Colonnade of Dallas Ltd. Partnership v. Faulkner (In re Stonebridge Technols., Inc.)* (5th Cir 2005) 430 F3d 260. See §§14.12, 14.55.

When a landlord's motion to dismiss a bankruptcy case for bad faith is granted, the landlord may, in a separate state court proceeding, recover the attorney's fees it incurred in obtaining dismissal of the bankruptcy matter. *Circle Star Assocs. v Liberate Technols.* (2007) 147 CA4th 1203, 55 CR3d 232. See §14.32, 14.51.

Any order under 11 USC §365(d)(4)(B) extending the initial (120-day) deadline in which a landlord must accept or reject the lease must be entered before the deadline expires, and the court has no discretion to extend the time after the date expires. *In re Tubular Technols. LLC* (Bankr D SC 2006) 362 BR 243. See §14.44.

A utility bill, usually sent by the landlord to the tenant on a monthly basis, but because of a malfunctioning meter was billed postpetition in one lump sum for 18-month prepetition period, was not required to be paid under §365(d)(3). *In re Pac-West Telecomm, Inc.* (Bankr Del 2007) 2007 Bankr Lexis 3332 (unpublished). See §14.45.

A debtor's default under a covenant requiring continuous operations was an "historical fact" that could not be cured and rendered the contract unassembled. *Worthington v GMC (In re Claremont Acquisition Corp.)* (9th Cir 1997) 113 F3d 1029. See §14.45A.

The United States Supreme Court confirmed that a contract allowing recovery of attorney fees that is enforceable under substantive nonbankruptcy law is enforceable in a bankruptcy context unless the Bankruptcy Code expressly provides otherwise. *Travelers Cas. & Sur. Co. of Am. v Pacific Gas & Elec. Co.* (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199. The holding has had a material impact on litigants seeking fees in bankruptcy proceedings. For example, *DeRoche v Arizona Indus. Comm. (In re DeRoche)* (9th Cir 2006) 434 F3d 1188, cited in the 2006 update, was vacated and remanded for further consideration consistent with *Travelers. DeRoche v Arizona Indus. Comm. (In re DeRoche)* (2007) ___ US ___, 167 L Ed 361, 127 S Ct 1873. Another bankruptcy court has granted an amended motion to recover fees based on the change in law represented by *Travelers. Qmect, Inc., v Burlingame Capital Partners II, LP (In re Qmect, Inc.)* (Bankr ND Cal 2007) 368 BR 882. See §14.51.

Debtors have much latitude to reject executory contracts (including leases), and courts will apply a liberal business judgment rule to the decision. See, *e.g., Agarwal v Pomona Valley Med. Group, Inc. (In re Pomona Valley Med. Group, Inc.)* (9th Cir 2007) 476 F3d 665, 670. See §14.53.

A bare objection to a claim, without substance, may be inadequate to overcome the presumption of a claim's validity, even if the claim lacks appropriate documentation. *Campbell v Verizon Wireless S-CA (In re Campbell)* (BAP 9th Cir 2005) 336 BR 430. See §14.55.

The Ninth Circuit confirmed that claims for damages not directly arising from the rejection of the lease are not limited by the §502(b)(6) cap. *Saddleback Valley Community Church v. El Toro Materials Co. (In re El Toro Materials Co.)* (9th Cir 2007) 2007 US App Lexis 22991 (unpublished). See §14.55.

A debtor's bad faith concealment of assets can work a forfeiture of the debtor' right to convert from Chapter 7 to Chapter 13. *Marrama v Citizens Bank of Massachusetts* (2007) 549 US 365, 166 L Ed 2d 956, 127 S Ct 1105. See §14.56.

February 2007 Update

Limited Scope Representation. Limited scope representation (also called "unbundling") is a relationship between an attorney and a client in which the scope of the legal services provided by the attorney will be limited to specific tasks. To assist attorneys in this area, the State Bar of California has created guidelines. Handy checklists were added to the book in this 2007 update so that confusion and malpractice claims can be avoided or minimized. See §§4.2A-4.2B, 5.4A-5.4B. Unlawful detainer actions are a prime area for unbundled services, both for tenants and landlords. While tenants are more likely to need limited scope representation, many practitioners find that low income landlords also benefit from such assistance. See §§9.23A, 10.3A.

Supreme Court Updates. The supreme court decided in *Wasatch Prop. Mgmt. v Degrate* (2005) 35 C4th 1111, 29 CR3d 262 that when a landlord terminates or fails to renew a Section 8 contract, a tenant is entitled to, under CC §1954.535, a 90-day notice of termination. The 90-day notice is required regardless of whether or not the property is under rent control. The court also implicitly condoned the use of a no-cause notice by finding that the tenant was entitled to have such a notice be a 90-day notice. See §1.36.

In *Apartment Ass'n, Inc. v City of Los Angeles* (2006) 136 CA4th 119, 38 CR3d 575, the supreme court denied the petition for review of a court of appeals, holding that CC §1954.535 preempts a city ordinance which prohibits a landlord, after termination or nonrenewal of a Section 8 housing contract, from ever charging the tenant more than the tenant's portion of the rent. See §§1.36, 3.66, 7.19, 7.25, 7.25B.

The California Supreme Court ruled that a city may deny a rental subsidy to a lessee of city property that discriminates on the basis of sexual orientation. *Evans v City of Berkeley* (2006) 38 C4th 1, 40 CR3d 205. See §5.7.

The supreme court decided *Cacho v Boudreau* (2007) 40 C4th 341, 53 CR3d 43, overruling the court of appeal, which had invalidated a landlord's pass-through of a proportional share of real property taxes. The court of appeal had ruled that because the Mobilehome Residency Law (MRL) (CC §798.49(d)(4)) expressly excludes property taxes from the provision allowing local governments to permit pass-throughs of government-imposed fees and assessments, the MRL therefore preempted local ordinances to the contrary. The supreme court disagreed. See §§6.15, 6.29-6.30.

Fair Housing. Congress has amended the United States Housing Act of 1937 (42 USC §1437-1437z-7) to prevent a public housing agency, or a landlord operating under that act, from discriminating against victims of domestic violence, dating violence, or stalking and has provided a means for the landlord to obtain a certification of the tenant's status as a victim of domestic violence and/or stalking. See §§1.33, 1.36, 2.15A, 2.17, 2.19.

In *Vance v Bakas* (ND Cal, Mar. 1, 2006, No. C-05-3385) 2006 US Dist Lexis 11183, the court found that plaintiffs stated a claim for disparate impact on the basis of familial status and sex under the federal Fair Housing Act (FHA) (42 USC §§3601-3631) and the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) where the landlord informed the plaintiffs they would not be allowed to rent the property for the operation of a home day-care business. See §§2.5, 2.9B.

Several communities across the country have enacted ordinances requiring landlords to screen tenant households for legal residency status, thus making it a crime to rent to households with members lacking documentation of legal residency. At least one California municipality has adopted such an ordinance, which is being challenged in federal court. A federal court in Pennsylvania has issued (on supremacy, due process, equal protection, and FHA grounds) a temporary restraining order enjoining enforcement of a similar ordinance. *Lozano, et al. v City of Hazelton* (MD Penn. 2006) No. 06-cv-56-JMM. See §§2.19, 4.14.

In *Ross v Ragingwire Telecommunications, Inc.* (review granted Nov. 30, 2005, S138130; superseded opinion at 132 CA4th 590, 33 CR3d 803), the court held that a request to permit marijuana use prescribed for a disability pursuant to Compassionate Use Act (Health & S C §11362.5) is an unreasonable accommodation request. See §2.27A.

A landlord is under no obligation to provide accommodations unless a request is made, but requests do not need to include the words "reasonable accommodations" or "modifications." *Douglas v Kriegsfeld Corp.* (DC 2005) 884 A2d 1109. See §2.27C.

A court may not award minimum monetary and other monetary damages under CC §52 if plaintiff has not proven intentional discrimination. *Gunther v Lin* (2006) 144 CA4th 223, 50 CR3d 317. See §2.57.

Registered sex offenders are not a "protected class" under the Unruh Act. 89 Ops Cal Atty Gen 85 (2006). See §2.57.

The exclusion of a transgender individual from a nightclub for failure to conform to a dress code that prohibited men from wearing dresses or skirts is arbitrary and therefore discriminatory under the Unruh Act. The Department of Fair Employment and Housing, however, may not claim a trebling of damages in cases brought under the Unruh Act before the Fair Employment and Housing Commission (FEHC). *DFEH v Marion's Place* (2006) (FEHC Decision 03-04-070, Feb. 1, 2006) 2006 CAFEHC Lexis 1. See §§2.58-2.59.

A plaintiff's acceptance of CCP §998 offer precludes recovery of attorney fees under the Unruh Act because there is no finding of defendant's liability under the Act. *Doran v North State Grocery* (2006) 137 CA4th 484, 491, 39 CR3d 922. See §2.59.

Tenant Rights During Tenancy. Abatement is not available in a commercial lease. In *Underwood v Corsino* (2005) 133 CA4th 132, 34 CR3d 542, the trial court's abatement of a commercial tenant's rent was reversed even when the tenant had successfully defended an unlawful detainer action based on a theory that the landlord's conduct had frustrated the purpose of the lease. See §§3.15A, 3.18, 10.58, 12.28.

Where plaintiff's damages derive solely from breach of contract, plaintiff may not recover damages for emotional stress arising solely from property damage or economic injury, as contrasted with personal injury. Framing the cause of action in terms of negligence does not avoid this rule. *Butler-Rupp v Lourdeaux* (2005) 134 CA4th 1220, 36 CR3d 685. See §§3.67, 5.22.

Once having undertaken to provide security services, a property owner may be liable if the security services are provided in a negligent manner. *Mukthar v Latin Am. Sec. Serv.* (2006) 139 CA4th 284, 42 CR3d 563. See §§3.68, 3.68C.

In addition to showing that harmful conduct was foreseeable and that there was a breach of duty, the injured party must also show a causal link between the injury and the defendant's failure to provide adequate security measures. *Rinehart v Boys & Girls Club* (2005) 133 CA4th 419, 34 CR3d 677. See §§3.68, 3.68C.

A lease requiring a tenant to maintain and repair a roof may not reasonably be construed to require the tenant to replace the roof with a new roof. *ASP Props. Group v Fard* (2005) 133 CA4th 1257, 35 CR3d 343. See §3.73.

When bringing an anti-SLAPP (strategic lawsuit against public participation) motion in a retaliatory suit filed by a landlord, a party must achieve a practical benefit in order to receive an award of attorney fees. In *Mann v Quality Old Time Serv., Inc.* (2006) 139 CA4th 328, 42 CR3d 607, attorney fees were awarded when one cause of action was eliminated by an anti-SLAPP motion, thereby narrowing the scope of the lawsuit, limiting discovery, reducing potential recoverable damages, and altering the settlement posture of the case. See §§5.18A, 13.40A.

In *Endres v Moran* (2006) 135 CA4th 952, 37 CR3d 786, however, attorney fees were denied where the defendants' successful anti-SLAPP motion did not affect the factual allegations or change the possible recovery or the work involved in trying the case. See §§5.18A, 13.40A.

In *Goldman v Cohen* (2d Cir 2006) 445 F3d 152, the court ruled that the filing of an unlawful detainer action seeking recovery of unpaid residential rent is an initial communication within the Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692o). This ruling necessitated landlord attorneys to include a debt validation notice in the unlawful detainer complaint. Congress addressed the problem in the Financial Services Regulatory Relief Act of 2006 (Pub L 109-351, 120 Stat 1966), specifically exempting "formal pleadings" as an initial communication under the FDCPA. See 15 USC §1692g(d). See §§9.45, 13.74.

The service of a notice to quit against commercial tenants that prevents them from conducting business is a frustration of purpose. The court also held that a court may abate rent if a residential landlord breaches the implied warranty of habitability, but there is no statutory authority to permit the abatement of rent for a commercial tenant who successfully defends an unlawful detainer action. *Underwood v Corsino* (2005) 133 CA4th 132, 34 CR3d 542. See §§3.15A, 3.18, 10.58, 12.28.

Mobilehome Tenancies. Mobilehome owners and mobilehome park operators are now subject to the Methamphetamine Contaminated Property Clean-Up Act of 2005 (Health & S C §§25400.10-25400.47), and they are responsible for the costs of remediation of methamphetamine storage areas and laboratories. Health & S C §§25400.19-25400.47. See §6.13.

Civil Code §798.20 was amended to prohibit discrimination on the additional bases of familial status, disability, or sexual orientation for membership in any private club or organization that is a condition for tenancy in a park. See

§§6.14A, 6.20.

Hillsboro Props. v City of Rohnert Park (2006) 138 CA4th 379, 41 CR3d 441 addressed remedies when a rent control ordinance is found unconstitutional. The park owner sought a rent increase as compensation for rent increases lost during a period in which the unconstitutional ordinance was in effect. The city's ordinance allowed rent increases to achieve a fair rate of return, but plaintiff only claimed an increase for the retroactive loss under the so-called "Kavanau adjustment" (*Kavanau v Santa Monica Rent Control Bd.* (1993) 16 C4th 761, 66 CR2d 672; see §7.14). The court of appeal sustained the city's refusal to consider the adjustment because plaintiff did not prove he was denied a fair rate of return. See §§6.15, 7.14B, 7.38.

Rent Control. In *Bohbot v Santa Monica Rent Control Bd.* (2005) 133 CA4th 456, 34 CR3d 827, the court held that a Santa Monica rent control requirement that owners obtain removal permits before owner occupancy does not apply to legally converted condominiums. The court also struck down a regulation that prohibited a landlord from bringing a second owner-occupancy case against a tenant within 4 years of an owner-occupancy case dismissed without prejudice prior to trial. The regulation conflicts with CCP §581, which allows a plaintiff to voluntarily dismiss a case without prejudice prior to commencement of the trial. Left intact, however, is a regulation which prohibits a landlord from bringing a second owner-occupancy case within 4 years against a tenant who prevailed on the merits in the first case. See §§4.52, 7.65, 7.68.

Where a mobilehome park owner fails to exhaust its administrative remedies, a court action based on inverse condemnation, due process, or equal protection is subject to a demurrer. *Los Altos El Granada Investors v City of Capitola* (2006) 139 CA4th 629, 43 CR3d 434. See §§7.11, 7.14B.

Where two rent control amendments conflict because they are amended by two different acts passed at different times, the last amendment repeals the first and operates as the only amendment to the original section. *Garber v Levit* (2006) 141 CA4th Supp 1, 46 CR3d 348. See §§7.17, 7.65.

HUD regulations preempt local rent control laws only during the period that the properties are subject to federal regulation. Neither a federal regulations nor a mortgage subsidy program preempts local rent control laws as applied to properties that are no longer subject to federal regulation. *Independence Park Apartments v U.S.* (Fed Cir 2006) 449 F3d 1235. See §7.19.

A landlord may not evict nonresident tenants who pay the rent where such tenants are still protected by the just cause eviction protections of a rent control law. *Borten v Santa Monica Rent Control Bd.* (2006) 141 CA4th 1485, 47 CR3d 178. See §§7.23A-7.24.

Where an administrative decision does not substantially affect a vested right, the trial court will consider only whether the findings are supported by substantial evidence. *Jaramillo v State Bd. for Geologists & Geophysicists* (2006) 136 CA4th 880, 39 CR3d 170. See §7.51.

If the trial court, in reviewing a rent board decision, vacates the board's decision, it may not set the amount of a rent increase but must remand the case to the rent control board. *Carson Gardens, LLC v City of Carson Mobilehome Park Rental Review Bd.* (2006) 135 CA4th 856, 37 CR3d 768. See §7.51.

The San Francisco Residential Rent Stabilization and Arbitration Ordinance has been amended to require that a landlord have just cause to remove or sever certain housing services such as parking and/or storage from a tenancy. If the parties dispute a certain item, a court will determine whether just cause exists to sever and/or remove that item. Either party may then petition the rent board to determine the amount of the corresponding rent reduction. See §§1.59, 7.54.

A landlord may not be required, under a rent control ordinance, to notify tenants about their rights to receive relocation payments and to state the amount of payment which the landlord believes to be due. Such a requirement places a burden on the landlord to state a belief as to the tenant's entitlement to assistance and creates a substantive defense in eviction cases not contemplated by the Ellis Act (Govt C §§7060-7060.7). *Johnson v City & County of San Francisco* (2006) 137 CA4th 7, 40 CR3d 8. See §§7.64, 7.64F, 7.64H.

The court of appeal upheld an ordinance requiring payments to a tenant displaced by an Ellis Act withdrawal of that tenant's building. The court considered recent amendments to Govt C §7060.1(c) that allow a local public entity to mitigate adverse impacts on persons displaced by withdrawal of a rental unit. The court specifically left open the question of whether the amount of the payment in any particular case was reasonable. *Pieri v City & County of San Francisco* (2006) 137 CA4th 886, 40 CR3d 629. See §7.64H.

Terminating Tenancies. Effective January 1, 2007, CC §1946.1 was re-enacted with minor changes, so that

currently (until January 1, 2010) landlords are required by CC §1946.1, in most situations, to give a 60-day notice to residential tenants to terminate a month-to-month or other periodic tenancy, unless any tenant has resided in the unit for less than 1 year or the unit is up for sale. The 60-day notice requirement does not affect commercial tenancies, nor does it impede the authority of local public entities to regulate the basis for an eviction of a residential tenant. CC §1946.1(g). See §8.22.

When a landlord wishes to terminate a periodic tenancy to sell a residential unit, CC §1946.1(d) requires the use of a 30-day notice if several requirements are met at the time the landlord gives the notice. See §8.22A.

Under CC §1946.1(e), after the landlord has given notice of termination, a residential tenant may also give notice to terminate the tenancy, provided that the tenant's notice is for a period at least as long as the term of the periodic tenancy (usually 30 days) and the proposed date of termination occurs before the landlord's proposed date of termination (usually 60 days). See §8.20.

Unlawful Detainer Proceedings. For purposes of the mandatory provision of CCP §473(b), a default means only a defendant's failure to answer a complaint, while a default judgment means only a judgment entered after the defendant has failed to answer and the defendant's default has been entered. Where a judgment was neither a default nor a default judgment for purposes of CCP §473(b), the mandatory relief provision of that statute did not apply. *Vandermoon v Sanwong* (2006) 142 CA4th 315, 47 CR3d 772. See §12.69.

If the moving party fails to properly give notice of the motion, the court's order setting aside the default and default judgment is void. *Moghaddam v Bone* (2006) 142 CA4th 283, 47 CR3d 602. See §§12.69, 13.8.

Relief under CCP §473(b) is not available from sanctions imposed for the deliberate failure to respond to discovery or oppose discovery motions. *Jerry's Shell v Equilon Enters., LLC* (2005) 134 CA4th 1058, 36 CR3d 637. See §13.8.

The court is also not permitted, under CCP §473(b), to set aside a summary judgment if the losing party's counsel filed an opposition, but failed to file an affidavit seeking a continuance to allow expert witness more time to examine evidence. *Ambrose v Michelin N. Am., Inc.* (2005) 134 CA4th 1350, 37 CR3d 1. See §13.8.

In seeking relief under CCP §473(b), an affidavit setting forth the attorney's "mistake, inadvertence, surprise, or neglect" must be signed by an attorney who represented the client and caused the mistake even if that attorney is not the attorney of record in the unlawful detainer case. *SJP, LP v City of Los Angeles* (2006) 136 CA4th 511, 39 CR3d 55. See §13.8.

An order granting summary judgment, unlike a summary judgment order, is not an appealable order and, thus, does not trigger the attorney fees motion filing deadline under Cal Rules of Ct 3.1702(b)(1). *Saben, Earlix & Associates v Fillet* (2005) 134 CA4th 1024, 36 CR3d 610. See §13.33C.

The court may award contract rent payable as a condition of relief from forfeiture of a lease under CCP §1179, even though the court's judgment awards per diem charges at a higher rate. *Gill Petroleum, Inc. v Hayer* (2006) 137 CA4th 826, 40 CR3d 648. See §13.56.

A motion for reconsideration may not extend the time to file an appeal. In *Safeco Ins. Co. v Architectural Facades Unlimited, Inc.* (2005) 134 CA4th 1477, 36 CR3d 754, the trial court granted defendants' motions for summary judgment. Three days after plaintiff filed its motion for reconsideration, the trial court signed and entered the judgment, divesting itself of jurisdiction to rule on the motion for reconsideration. As a result, the filing of plaintiff's reconsideration motion had no effect on the time limits to file a notice of appeal. Defendants' appeal, filed 66 days after the date of service of notice of entry of the judgment, was untimely. See §13.59.

Bankruptcy Procedures. The bankruptcy court has no authority to decline jurisdiction over a dispute concerning whether the automatic stay has been violated, nor may it attempt to avoid future automatic stays with an in rem order. *Johnson v TRE Holdings (In re Johnson)* (BAP 9th Cir 2006) 346 BR 190. See §§14.4, 14.7.

A willful violation of the automatic stay has been very broadly defined to include mere knowledge of the stay and intentionally taking the action; a good faith belief that the stay did not apply is irrelevant to whether a willful violation of it has occurred. *Ozenne v Bendon (In re Ozenne)* (BAP 9th Cir 2006) 337 BR 214. See §14.6.

A sanction of contempt should not be issued for violating the automatic stay or a discharge injunction without a finding of fact that the violation was made with actual knowledge of the injunction. *ZiLog, Inc. v Corning (In re ZiLog, Inc.)* (9th Cir 2006) 450 F3d 996. See §§14.6, 14.56.

Acts taken by the debtor itself are not considered subject to the stay. See *Irwin Mortgage Co. v Tippett (In re Craig Tippett)* (BAP 9th Cir 2006) 338 BR 82. See §14.8.

Rejection of a lease does not bar an action to recover on the balance of a security deposit, even if held as a letter of

credit. *First Ave. W. Bldg. LLC v James (In re Onecast Media, Inc.)* (9th Cir 2006) 439 F3d 558. See §14.12.

United States Code, Title 11, §521(i)(1), added in the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), mandates an "automatic" dismissal on the 46th day after a bankruptcy petition is filed, if a Chapter 7 or 13 debtor fails to file all of the information required, though it is unclear what is meant by "automatic." *In re Riddle* (Bankr SD Fla 2006) 344 BR 702. See §14.32.

Attorney fees are not recoverable in bankruptcy for litigating issues peculiar to federal bankruptcy law. An exception exists for the litigation of state law issues. *DeRoche v Arizona Indus. Comm. (In re DeRoche)* (9th Cir 2006) 434 F3d 1188. See §14.51.

Under 11 USC §502(a), a proof of claim is deemed allowed unless a party in interest objects. Filing a timely claim with sufficient documentation creates a presumption of the validity of the claim. If the debtor rebuts that presumption, however, the claimant has the burden of proving the amount of the claim. *Litton Loan Servicing v Garvida (In re Garvida)* (BAP 9th Cir 2006) 347 BR 697. A bare objection to a claim, without substance, may be inadequate to overcome the presumption of a claim's validity, even if the claim lacks appropriate documentation. *Campbell v Verizon Wireless S-CA (In re Campbell)* (BAP 9th Cir 2005) 336 BR 430. See §14.55.

If a lease is terminated under state law before a bankruptcy, the damages limitation of 1 year or 15 percent under 11 USC §502(b)(6)(A) will apply to all amounts accruing from that date, even if future damages attributable to lost rent for the full lease term were awarded to the landlord in a judgment before the bankruptcy. Attorney fees recoverable under such an action, however, may be claimed in addition to the capped amount of rental damages allowed by §502(b)(6). See *Wall St. Plaza, LLC v JSJF Corp. (In re JSJF Corp.)* (BAP 9th Cir 2006) 344 BR 94. See §14.55.

Effective January 1, 2007, an extensive reorganization of the California Rules of Court took effect. California Rules of Court cites in this publication have been updated to the new rule number. Concordance tables of old and new rule numbers and a link to any amendments to the Rules are available on http://www.ceb.com.

February 2006 Update

New Residential Lease Disclosures. In 2005, the legislature revised the disclosure requirements regarding Megan's Law (statewide database of registered sex offenders). It also established disclosure, remediation, and record-keeping obligations for property owners under Health & S C §25400.10 when the property is contaminated by methamphetamine. Civil Code §1940.7.5 was repealed; it required owners to disclose the presence of a controlled substance. See §§1.29, 3.10, 3.11B, 4.16C.

Supreme Court Updates. Contractual predispute jury trial waivers are invalid, but predispute arbitration and judicial reference agreements are enforceable. *Grafton Partners LP v Superior Court* (2005) 36 C4th 944, 32 CR3d 5. Proposed legislation would allow predispute waivers in commercial transactions. See §§1.30, 11.54.

Fair Housing. The supreme court allowed an action to proceed under the Unruh Civil Rights Act (CC §51) against a country club that discriminated against a member and her registered domestic partner in *Koebke v Bernardo Heights Country Club* (2005) 36 C4th 824, 31 CR3d 565. See §§2.21, 2.58, 10.67.

The Unruh Act was amended in 2005 to expressly prohibit landlords from discriminating on the basis of marital status and sexual orientation. See §§2.48, 2.57-2.58, 5.7, 10.67.

In uncodified declarations expressed in Stats 2005, ch 420, §2; the legislature stated that the classes protected from discrimination, as listed in the Unruh Civil Rights Act (CC §§51-52), are to be construed as illustrative rather than restrictive. See §§2.21, 2.58.

Effective January 1, 2006, persons protected under the Unruh Act include those who are perceived to have any particular characteristic of the listed classes in the Act or who associate with persons who have, or are perceived to have, any particular characteristic of the listed classes. CC §51(e)(5). See §§2.57-2.58, 8.118, 10.67.

A landlord's refusal to accept a Section 8 Housing Choice Voucher does not violate the source of income discrimination restrictions of the Equal Credit Opportunity Act (ECOA), 15 USC §1691, because a residential lease is not a credit transaction. *Laramore v Ritchie Realty Mgmt. Co.* (7th Cir 2005) 397 F3d 544. See §2.9B.

A refusal to communicate with a home-seeker via a telephone relay-service operator for the deaf was held to be an illegal response to a request for reasonable accommodation by a disabled person in *U.S. v Space Hunters, Inc.* (SD NY 2004) 2004 US Dist Lexis 23699, WL 2674608, aff'd in part and vacated in part (2d Cir 2005) 429 F3d 416. See §2.27.

Two recent cases interpreting attorney fee provisions in the California Fair Employment and Housing Act (FEHA)

(Govt C §§12900-12996) are *Graham v DaimlerChrysler* (2004) 34 C4th 553, 21 CR3d 331, *Horsford v Board of Trustees of Cal. State Univ.* (2005) 132 CA4th 359, 33 CR3d 644, and *EEOC v United Parcel Serv.* (9th Cir 2005) 424 F3d 1060, discussed in §2.56.

The Fair Employment and Housing Act provides more protections than does CC §54.1 for tenants who need companion animals for psychiatric disabilities. See *Auburn Woods I Homeowners Ass'n v FEHC* (2004) 121 CA4th 1578, 18 CR3d 669. See §§1.62, 2.60.

Officers of a corporation cannot ordinarily be held personally liable for their failure to ensure the corporation's compliance with the Fair Housing Act (42 USC §§3601-3631), except when an agent acts under the authority of a licensed real estate broker or if the corporate veil can be pierced. See *Holley v Crank* (9th Cir 2004) 400 F3d 667. See §2.68.

Landowner Duties & Liabilities. In *Andrews v Mobile Aire Estates* (2005) 125 CA4th 578, 22 CR3d 832, the court held that the implied covenant of quiet enjoyment requires a landlord to take reasonable measures to protect a tenant from the substantial annoyances of a neighboring tenant who resides on the same property. See §§3.5-3.7, 6.16.

Effective January 1, 2006, Health & S C §§25400.10-25400.46 established stringent remediation and record-keeping obligations for a property owner who has been notified by the city that the property is contaminated by methamphetamine. See §§1.29, 3.10, 3.11B, 4.16C.

The supreme court recently reiterated that even if a landowner has no duty to provide security guards or take expensive preventative measures when it has knowledge about potential criminal activity, it may still owe a duty by virtue of a special relationship to call 911 or give a warning, to protect a tenant, an invitee, or a customer from third-party criminal acts. See *Morris v De La Torre* (2005) 36 C4th 260, 30 CR3d 173; *Delgado v Trax Bar & Grill* (2005) 36 C4th 224, 30 CR3d 145; *Wiener v Southcoast Childcare Ctrs., Inc.* (2004) 32 C4th 1138, 12 CR3d 615, cited in §3.68C.

A court of appeal held that an exculpatory provision in a lease did not bar a commercial tenant's lawsuit for damages caused by mold caused by the landlord's "active" negligence. See *Burnett v Chimney Sweep,* LLC (2004) 123 CA4th 1057, 20 CR3d 562, cited in §3.69.

A landlord who sells his property is not liable to third parties injured after the sale, even if the injury was caused by the landlord's negligence before the sale—unless the landlord concealed the defect from the new owner. *Lewis v Chevron U.S.A. Inc.* (2004) 119 CA4th 690, 14 CR3d 636. See §3.71.

After a tenant abandons the lease, the landlord may withhold from the deposit only unpaid rent that has accrued as of the date the deposit is required to be refunded, but may not withhold or offset future rent damages the landlord may later recover under CC §1951.2. *250 L.L.C. v Photopoint Corp.* (2005) 131 CA4th 703, 32 CR3d 296. See §§4.28C, 8.168, 8.173A, 8.175, 14.12.

For strategies and developments in rent control jurisdictions, where tenants may attempt to sublease their rent-controlled units (or not use them as a primary residence), see §§4.38, 7.23A, 7.28-7.28A, 7.38A.

For additional strategies for drafting late fee clauses in rental agreements following the decision in *Orozco v Casimiro* (2004) 121 CA4th Supp 7, 17 CR3d 175, see §§1.41, 4.43A, 8.40.

In *Cook v City of Buena Park* (2005) 126 CA4th 1, 23 CR3d 700, a court of appeal held unconstitutional on due process grounds a local ordinance in a non rent control jurisdiction that gave the local police chief discretion to force a landlord to evict tenants suspected of illegal drug activity because the landlord was given insufficient information or time to prevail in an eviction action and was required to prevail in the action to avoid criminal penalties. See §§4.44, 8.59.

Tenant Rights During Tenancy. A court of appeal held an option to renew a lease was not superseded by a later estoppel certificate, because read together the lease and estoppel certificate were ambiguous. See *Minor v Tustin Avenue Investors, LLC* (2004) 116 CA4th 264, 272, 10 CR3d 178. See §§4.41, 5.9.

When a landlord petitioned for injunctive relief against a tenant who demonstrated with others at the landlord's church, the court of appeal required the trial court to grant the tenant's anti-SLAPP motion, defeating the landlord's suit. *Thomas v Quintero* (2005) 126 CA4th 635, 24 CR3d 619. See §§5.18A, 5.37.

A new anti-SLAPP statute, CCP §425.18, operative October 5, 2005, limits the use of anti-SLAPP motions to strike in SLAPPback malicious prosecution actions by setting different standards and procedures for motions to strike in those actions. See §5.18A.

Mobilehome Tenancies. The preemptive nature of the HCD statutes was reaffirmed in *County of Santa Cruz v Waterhouse* (2005) 127 CA4th 1483, 26 CR3d 543. Also, the PUC provided additional clarity on costs that may be

passed through via a rent increase in a two-phase PUC hearing process, resulting in Decision 04-04-043 (costs for serving the common areas, the submeter, the pedestal, and other specified costs) and Decision 04-11-033. See §§6.13, 6.15.

As a result of the decision in *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, and in response to the City of Cotati's petition for rehearing, the Ninth Circuit withdrew its prior opinion and affirmed the District Court's decision in *Cashman v City of Cotati* (9th Cir 2005) 415 F3d 1027. See §§6.15, 7.10.

In a second round of appeals in *MHC, Inc. v City of San Jose* (9th Cir 2005) 420 F3d 1022, the court held that the fair return challenges were barred by res judicata arising from the state court decision and that other claims were unripe for lack of exhausting administrative remedies or were barred by the statute of limitations. See §6.15.

In *H.N. & Frances C. Berger Found. v City of Escondido* (2005) 127 CA4th 1, 25 CR3d 19, the court of appeal invalidated a rent increase based on averaging three different rent increase rates, because two of them were not within the range of reasonable rents based on a fair rate of return standard, but the court ruled that the determination of fair rent by the rent board need not follow any specific formula in making its determination. See §§6.15, 7.12-7.13, 7.42, 7.47.

A mobilehome rent control ordinance adopted by a city council after presentation of an initiative petition, and then amended with retroactive effect by the council to correct inadvertent and insignificant errors was upheld by the court of appeal in *MHC Fin. Ltd. Partnership Two v City of Santee* (2005) 125 CA4th 1372, 23 CR3d 622. See §§6.15, 7.10, 7.12.

In *Andrews v Mobile Aire Estates* (2005) 125 CA4th 578, 22 CR3d 832, the court held a landlord could be liable for not taking reasonable measures to protect a tenant from the substantial annoyances of a neighboring tenant in a mobilehome park. See §§3.5-3.7, 6.16.

The Attorney General ruled, in 87 Ops Cal Atty Gen 148 (2004), that a local government may promote the development and preservation of senior mobilehome parks despite the prohibition in Govt C §65008 on local government actions to discriminate on the basis of age. See §6.18.

Mobilehome park management may not require a first right of refusal for a mobilehome sold in the park to a third party in rental agreements entered into or renewed on or after January 1, 2006. Such an agreement may be separately negotiated after the lease is in effect. CC §798.19.5. See §§6.20, 6.54.

Effective January 1, 2006, CC §798.36(b) authorizes mobilehome park owners to charge a reasonable fee for cleaning or clearing a resident's lot if the resident fails to do so after notice. See §6.33.

Rent Control. (Also see developments in "Mobilehome Tenancies," above.) In *San Remo Hotel, LP v City & County of San Francisco* (2005) 545 US 323, 162 L Ed 2d 315, 125 S Ct 2491, the United States Supreme Court rejected the arguments of an owner who sought review of a federal takings claim *de novo* in federal court after litigating and losing the federal takings claims in the California courts, which had decided the owner's state takings claims under an interpretation of California law that was coextensive with federal law. See §7.14.

A constitutional challenge to rent control in commercial tenancies was heard in *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, which reversed a summary judgment in favor of an oil company that had challenged a state rent cap on gasoline franchises. See §§6.15, 7.10-7.11.

Under *Wasatch Prop. Mgmt. v Degrate* (2005) 35 C4th 1111, 29 CR3d 262, Section 8 tenants are entitled to 90-day notice prior to eviction rather than the standard 30-day notice, regardless of whether the unit is subject to any rent control law. See §§1.36, 7.19, 10.66.

A Santa Monica rent board regulation that would deny rent control protection if the tenant does not make the rental unit the tenant's principal place of residence was upheld as a valid exercise of the board's rule making authority in *Bisno v Santa Monica Rent Control Bd.* (2005) 130 CA4th 816, 30 CR3d 441. See §§7.23A, 7.38A.

For strategies and developments in rent control jurisdictions, where tenants may attempt to sublease their rent-controlled units (or not use them as a primary residence), see §§4.38, 7.23A, 7.28-7.28A, 7.38A.

An owner of a hotel that is being withdrawn from the rental housing market need not comply with requirements imposed by the city's sprinkler ordinance, nor need the owner first obtain a permit to convert or demolish the building. *Reidy v City & County of San Francisco* (2004) 123 CA4th 580, 19 CR3d 894. In response to *Reidy*, the Ellis Act was amended to allow cities having a population of over 1,000,000 to prohibit most residential hotel owners from going out of the residential hotel business. See §§7.64, 7.64B.

Damages After Lease Termination. The landlord's duty to mitigate damages under CC §1951.2 does not require him to run the business that was operated by the tenant, nor to sell the property. Therefore, profits made from the landlord's running the business or selling the property will not be deducted from recoverable damages. *Lu v Grewal* (2005) 130 CA4th 841, 30 CR3d 623. See §§5.19, 8.14.

Unlawful Detainer Procedures. Between January 1, 2003, and January 1, 2006, landlords were required by CC §1946.1 to give a 60-day notice to residential tenants to terminate a month-to-month tenancy, but that law was repealed by its own terms. See §§8.22, 8.69. Consequently, chap 8 was substantially amended.

There are new judicial council forms for proving service of summons; the landlord must file with the court Judicial Council Form POS-010, Proof of Service of Summons or Judicial Council Form POS-015, Notice And Acknowledgment of Receipt with the original summons. See CCP §417.10(a) and chaps 9-13.

Many California Rules of Court applicable to unlawful detainer practice in chaps 9-14 were revised.

The statutes providing relief for underpayment of filing fees (CCP §§411.20-411.21) were substantially revised. See §10.1B.

The legislature created a complex statutory scheme (see Govt C §§26826, 68511.3, 70612, 70614; Bus & P C §§6321-6322.1) to establish a uniform schedule of filing fees and other civil fees for the superior courts. See Stats 2005, chs 75, 706, cited in §10.5.

A party whose attorney failed to file a timely answer is entitled to mandatory relief from a default judgment under CCP §473(b). *Solv-All v Superior Court* (2005) 131 CA4th 1003, 32 CR3d 202. See §§10.48, 13.8.

Effective January 1, 2005, the Judicial Council adopted a mandatory request form for setting an unlawful detainer case for trial. Tenants may use it to request a jury trial if not already done in the answer. See Judicial Council Form UD-150, Request/Counter-Request to Set Case for Trial—Unlawful Detainer and discussion throughout chap 11.

Effective July 1, 2005, the "Civil Discovery Act of 1986" (CCP §§2016-2036) was repealed and the new "Civil Discovery Act" (CCP §§2016.010-2036.050) became operative. In chapter 11, we replaced all 1986 discovery citations with citations to the new Act. See §11.4.

Revised Judicial Council judgment forms (both stipulated and court judgments) for unlawful detainer actions are reprinted in chaps 9, 13.

The trial judge who ruled on a summary judgment motion is not subject to a peremptory challenge following a remand by the court of appeal for the trial court to explain its reasoning. *Geddes v Superior Court* (2005) 126 CA4th 417, 23 CR3d 857. See §§12.5, 12.7.

The jury instructions on the implied warranty of habitability in chap 12 were revised to address issues in current practice.

Bankruptcy Procedures. The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) (Pub L 109-8, 119 Stat 23) generally applies to bankruptcy petitions filed on or after October 17, 2005. But some provisions affect proceedings occurring either before or after the October date if the bankruptcy was pending on the enactment date (April, 2005). Many changes significantly affect landlord-tenant relationships and include:

- limitations on the availability of the stay to individual or joint debtors who are repeat bankruptcy filers (see §4.4);
- two additional exceptions to the automatic stay that apply to residential tenants, if the landlord already has a judgment for possession, or if the landlord is attempting to evict the tenant for endangering the property or illegally using controlled substances on it (see §§14.3, 14.8-14.9, 14.16, 14.16B-14.17, 14.19, 14.31);
- extensive revisions making dismissal of bankruptcy cases more readily available (see §14.32);
- standards applicable to determination of whether a transfer is a preference (see §14.37);
- a firm deadline for assumption or rejection of commercial leases (see §§14.43-14.44, 14.47-14.49, 14.53);
- clarification of the effect of a non-monetary default on a debtor-tenant's right to assume a lease (see §14.45A);
- stronger protections against a non-conforming lease assignment (see §14.50); and
- capping a landlord's administrative claim for rejection of a lease after it has been assumed in bankruptcy (see §§14.43, 14.52, 14.55).

Debtors have no burden of proving to creditors that the stay exists before liability for violating the stay can be imposed. *Morris v Peralta (In re Peralta)* (BAP 9th Cir 2004) 317 BR 381, 389. See §14.6.

A Ninth Circuit court affirmed the preclusive effect of a state court fraud judgment on a nondischargeability action in bankruptcy court. See *Muegler v Bening* (9th Cir 2005) 413 F3d 980, cited in §§14.15, 14.20.

Bankruptcy courts are moving toward requiring electronic filing and eliminating paper filing; counsel should consult local rules for current filing requirements and how to apply for an exemption from them. See §14.24 and Warning in §14.58.

It is improper for a solvent tenant to use the bankruptcy process to obtain the 11 USC §502(b)(6) cap on its landlord's damages for breach of a commercial lease. See *NMSBPCSLDHB, LP v Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)* (3d Cir 2004) 384 F3d 108, and *In re Liberate Technols.* (Bankr ND Cal 2004) 314 BR 206, cited in §14.32.

Before the 2005 Act, there was a statutory presumption in favor of allowing bankruptcy relief requested by the debtor. See *Voelkel v Naylor (In re Voelkel)* (BAP 9th Cir 2005) 322 BR 138, which reversed a bankruptcy court's order dismissing a case because the court did not cite facts rebutting the statutory presumption of 11 USC §707(b) and articulate the clear abuse in the evidence. In the 2005 Act, however, the presumption has been deleted from §707(b). See §14.32.

A motion to dismiss may be appropriate when an otherwise solvent debtor files bankruptcy for the purpose of obtaining the limit on a landlord's claims for damages for breach of lease provided by 11 USC §502(b)(6). See *NMSBPCSLDHB, LP v Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)* (3d Cir 2004) 384 F3d 108, cited in §§14.32, 14.56.

Attorney fee issues continue to be litigated; if the litigation is commenced by the trustee and fails, fundamental fairness may support an award of attorneys fees to the prevailing party, as an administrative expense. *In re Good Taste, Inc.* (Bankr D Alaska 2004) 317 BR 112. See §14.51.

A bankruptcy court has equitable authority to allow rejection of a commercial lease retroactive to the date of the petition. *Pacific Shores Dev., LLC v At Home Corp. (In re At Home Corp.)* (9th Cir 2004) 392 F3d 1064. See §14.53.

Security deposits may only be applied to the *capped amount* of damages allowable on a landlord claim. See *AMB Prop., LP v Official Creditors for the Estate of AB Liquidating Corp. (In re AB Liquidating Corp.)* (9th Cir 2005) 416 F3d 961, cited in §14.55.

Bankruptcy courts continue to impose sanctions against debtor's counsel for bad faith petitions and frivolous tactics. See *Miller v Cardinale (In re Deville)* (9th Cir 2004) 361 F3d 539; *Smyth v City of Oakland (In re Brooks-Hamilton)* (BAP 9th Cir 2005) 329 BR 270. See §14.56.

New mandatory Judicial Council forms for state court, giving notice of the automatic stay and of modification or termination of the stay are in §§14.57, 14.67A.

Newly revised mandatory stay relief motion forms for bankruptcy courts in the Central District are reprinted in §§14.65-14.66A.

February 2005 Update

Legislation Affecting Residential Tenancies. Effective January 1, 2005, a landlord may not demand that a tenant pay rent or security deposits in cash unless the tenant has previously attempted to pay the landlord with a check drawn on insufficient funds or the tenant has instructed the drawee to stop payment on a check, draft, or money order. Even then, the landlord may only demand a cash payment for no more than 3 months after a check bounces. CC §1947.3. See §§1.21A, 1.30, 1.40, 1.42, 3.3A, 3.65, 4.30, 4.33.

Effective January 1, 2005, CC §1940.1(a) was amended to prohibit a proprietor from requiring an occupant of a residential hotel to move or to check out and reregister before the expiration of 30 days' occupancy if a purpose is to have that occupant maintain transient occupancy status under CC §1940(b)(1), which would deprive the tenant of the protections under CC §§1940-1954.1. See §1.3C.

Effective January 1, 2005, hotels that have a contractual obligation to provide a guest room to an arriving person may use self-help to evict guests who do not pay rent or who do not leave on the agreed date by the agreed time, with conditions. CC §1865. See §1.3D.

An amendment to federal law governing the contractual rights of members of the military (50 USC App §§501-596) allows a servicemember to terminate a lease agreement on the giving of 30 days' written notice. See §§1.73, 8.21A.

Ellis Act Cases. In *Santa Monica Rent Control Bd. v Pearl Street, LLC* (2003) 109 CA4th 1308, 135 CR2d 903, the rent board sued to enjoin the landlord from entering into sham tenancies in order to evade the recontrol provisions of the Ellis Act. The landlord claimed that the suit was a strategic lawsuit against public participation (SLAPP), but the court disagreed, holding that the suit was based primarily on whether the landlord was entitled to charge market rents.

See §§7.64C, 10.38A.

To curtail attempts to circumvent notice and reporting requirements for Ellis Act evictions, San Francisco added provisions to its eviction control ordinance that punish both civilly and criminally a landlord who, among other things, requests that a tenant move, or threatens to recover possession either verbally or in writing (unless the landlord has a good faith intent to evict and actually goes forward with it), or seeks or obtains a tenant's waiver of rights under the ordinance. These provisions were held to be an unconstitutional denial of free speech in *Baba v Board of Supervisors of the City & County of San Francisco* (2004) 124 CA4th 504, 21 CR3d 428. See §§7.64F, 7.67.

Unlawful Detainer Procedures. Effective January 1, 2005, CCP §1166 requires a residential landlord to attach to an unlawful detainer complaint copies of the termination notice and, in many cases, the applicable written lease or rental agreement. Also, for both residential and nonresidential tenancies, the complaint must allege the method used to serve the required termination notice by either completing all related items on the Judicial Council form or attaching to the complaint the proof of service of the notice. Pleading verification details are also affected. See §§9.37, 9.42, 10.31.

A landlord may not evict a tenant on the basis that water heaters must be braced to protect against earthquake damage. Health & S C §19211(c). See §§8.23, 8.72.

A group of tenants may sue to enjoin their evictions and to address housing rights violations before the unlawful detainer actions are actually filed. See *Price v City of Stockton* (9th Cir 2004) 390 F3d 1105, cited in §§11.63, 11.63B.

A pro bono attorney is entitled to monetary sanctions on a successful discovery motion, even if the attorney does not charge the client for services in connection with the case. *Do v Superior Court* (2003) 109 CA4th 1210, 135 CR2d 855. See §11.29.

If the defendant in an unlawful detainer case prevails within 60 days after the complaint is filed by either dismissal or judgment, access to the court file is permanently blocked for persons other than the parties and their counsel. CCP §1161.2. See §5.15.

The tenant may be able to file a special motion to strike the unlawful detainer under CCP §425.16 on the ground that the landlord's suit is a strategic lawsuit against public participation (SLAPP), but some courts are not receptive to such motions. See §§5.18A, 8.110, 10.38A.

Housing Discrimination and Civil Rights. Fair housing laws not only prohibit discriminatory refusals to rent, but also require a landlord to assume reasonable financial burdens to accommodate disabled residents, which may include alteration of administrative polices against allowing guarantors on leases (*Giebeler v M & B Assocs.* (9th Cir 2003) 343 F3d 1143) or allowing pets (*Auburn Woods I Homeowners Ass'n v FEHC* (2004) 121 CA4th 1578, 18 CR3d 669; *Janush v Charities Hous. Dev. Corp.* (ND Cal 2000) 169 F Supp 2d 1133). See §§2.27, 10.68.

No showing of intentional discrimination is required under the California Unruh Act when violation of the Act is premised on violation of the federal Americans with Disabilities Act. *Lentini v California Ctr. for the Arts* (9th Cir 2004) 370 F3d 837. See §§2.5, 2.57, 10.68.

All public housing authorities must adopt five-year Public Housing Agency Plans (PHA Plans) that must include the policy on admissions, including residency preferences, which may be adopted or implemented only in accordance with fair housing and other nondiscrimination laws. *Langlois v Abington Hous. Auth.* (D Mass 2002) 234 F Supp 2d 33. See §2.14.

Over the last decade, many affordable-housing developments have been financed with state and federal "tax credits." A new section was added to chapter 2 describing how project owners must comply with antidiscrimination laws. See §2.18A.

A district court's dismissal of an action that alleged discrimination and retaliation based on the plaintiff's gender, under the federal Fair Housing Act was reversed in *Edwards v Marin Park, Inc.* (9th Cir 2004) 356 F3d 1058. The court of appeals held that her allegation that defendant "targeted… a disproportionate number of women" met the relaxed pleading standards of federal procedures. See §§2.30, 6.14A.

The Department of Fair Employment and Housing may request the Fair Employment and Housing Commission to conduct mediation of a complaint at any time after the complaint is filed. The DFEH may, however, withdraw a request for mediation at any time to pursue an investigation. See §2.54.

Habitability and Premises Liability. A long-term failure to comply with housing or building codes may subject an owner to penalties, sanctions, and attorney fees and costs. See *City of Santa Paula v Narula* (2003) 114 CA4th 485, 8 CR3d 75, cited in a new section of chapter 4 (§4.49) discussing (from a landlord's perspective) repairs and building code compliance.

Because collateral estoppel precludes an issue decided in small claims court from being relitigated (*Pitzen v Superior Court* (2004) 120 CA4th 1374, 16 CR3d 628), it may be unacceptably risky to have a tenant litigate in small claims court a complex issue such as implied warranty of habitability without counsel. See §§5.16, 5.39.

In *MacKinnon v Truck Ins. Exch.* (2003) 31 C4th 635, 3 CR3d 228, a "pollution exclusion" provision in a comprehensive general liability insurance policy was held not to preclude coverage for the landlord's defense and indemnity in a tenant's suit for injuries from exposure to pesticides negligently applied by the landlord. See §3.47.

In *Vasquez v Residential Invs., Inc.* (2004) 118 CA4th 269, 12 CR3d 846, a landlord who, after notice, failed to replace a broken glass pane in the door to tenant's apartment was held to owe a duty to replace the pane, because the burden of doing so was minimal compared to the foreseeable danger of entry by criminals. See §3.68B.

For new developments in premises liability in the commercial context, see §3.68C.

In *Yuzon v Collins* (2004) 116 CA4th 149, 10 CR3d 18, an invitee who was bitten by a tenant's dog sued the landlord, but the court upheld summary judgment for the landlord, finding no substantial evidence that the landlord knew the dog was vicious. See §3.72.

Mobilehome Tenancies. Effective July 7, 2004, new California regulations governing mobilehome parks and special occupancy parks took effect. See §6.1.

Effective January 1, 2005, CC §798.16(b) requires that mobilehome park management must return an executed copy of the rental agreement to the homeowner within 15 business days after management has received the rental agreement signed by the homeowner. See §6.21.

The Recreational Vehicle Park Occupancy Law (CC §§799.20-799.79) governs the removal of recreational vehicles and park trailers (of defaulting residents) from recreational vehicle parks (or the recreational vehicle portion of a mobilehome park). Effective January 1, 2005, newly enacted CC §§1866-1867 permit the summary removal of vehicles, including recreational vehicles. See §§6.1, 6.5.

Park management may neither charge a homeowner for initial landscaping on the space nor require the homeowner to purchase, rent, or lease goods or services from any person for the landscaping or, effective January 1, 2005, for landscaping, remodeling, or maintenance. See §6.39.

Effective January 1, 2005, if a third-party billing agent prepares utility bills when park management provides utility services, CC §798.38(c) requires management to disclose specified information about that agent in each resident's billing. Further, Pub Util C §739.5(g) requires the PUC to accept and respond to complaints regarding the rights of master meter customers and users. See §6.43.

Under CC §798.25, management can amend park rules and regulations without homeowners' consent after 6 months' written notice. Effective January 1, 2005, CC §798.25(d) permits management to avoid the resident consent requirement and the 6-month notice period if the amendment is mandated by a change in law, ordinance, or government regulation. See §6.45.

For special rules, effective January 1, 2005, for the removal of vehicles from a homeowner's or resident's driveway or designated parking space, see CC §798.28.5(b), cited in §6.47.

Rules governing the conversion of mobilehome parks to another use were amended effective January 1, 2005, in Govt C §65863.7, which triggers the protection of the Mobilehome Parks Act (Health & S C §§18200-18700) if a park closes or changes use as a result of an order by an enforcement agency. See §§6.13, 6.50.

Some mobilehome parks include many utilities or service fees in the rent. In *Yucaipa Mobilehome Residents' Ass'n v Knollwood Mobilehome Estate, Ltd.* (CPUC Decision 04-05-056, Oct. 28, 2004; http://www.cpuc.ca.gov/published/final_decision), the Public Utilities Commission overruled the local rent board and ordered that $111,445 in costs for a trench containing water lines and master metered electric and gas lines be apportioned out of the rent increase pass-through, since they were included in the approved utility fees as costs related to the repair and maintenance of the submetered gas and electric utility systems. See §6.13.

A district court's dismissal of an action that alleged discrimination and retaliation based on the plaintiff's gender, subject to the federal Fair Housing Act was reversed in *Edwards v Marin Park, Inc.* (9th Cir 2004) 356 F3d 1058. The court of appeals held that her allegation that defendant "targeted… a disproportionate number of women" met the relaxed pleading standards of federal procedures. See §§2.30, 6.14A.

In *Morgan v City of Chino* (2004) 115 CA4th 1192, 9 CR3d 784, the court held that due process and the city's mobilehome rent control ordinance merely require the city to take into account the costs related to capital improvements (along with other expenses and income) when determining whether the owner is receiving a fair rate of return. An

owner is not entitled to a fair return on a capital improvement investment, separate and apart from the return on the property as a whole. See §§6.15, 7.35.

Beginning January 1, 2005, net listings of mobilehomes for sale are strictly regulated under Health & S C §§18014.5, 18060.5, which establish written disclosure requirements for licensed and unlicensed mobilehome dealers. Park management may not prohibit the listing or sale of a manufactured home or mobilehome in the park and may not, as a condition of buyer approval, require that the selling homeowner authorize the management or any other specified broker, dealer, or person to act as the sales agent. CC §798.71(b)-(c). See §6.57.

In the event of misrepresentation or fraud in the purchase or sale of a mobilehome or manufactured home, the seller or buyer may be entitled to reimbursement from the Manufactured Home Recovery Fund. See Health & S C §§18070-18070.7, cited in §6.57.

Terminations of tenancy and eviction procedures are explained in §§6.62-6.89, which were revised and substantially reorganized for this update to clarify the procedures, made complicated by various rights held by park owners and possessory or other rights in the mobilehome held by lenders, homeowners, and tenants of homeowners.

See also cases listed under "Rent Control and Vacancy Decontrol," below.

Rent Control and Vacancy Decontrol. Several reported cases examined the constitutionality of mobilehome rent control ordinances on both facial and as-applied bases but rejected the claims on procedural grounds. See *Hacienda Valley Mobile Estates v City of Morgan Hill* (9th Cir 2003) 353 F3d 651 (facial challenge barred by statute of limitations and as-applied taking challenge not ripe); *Carson Harbor Village, Ltd. v City of Carson* (9th Cir 2004) 353 F3d 824 (similar ripeness outcome); *Ventura Mobilehome Communities Owners Ass'n v City of San Buenaventura* (9th Cir 2004) 371 F3d 1046 (lack of ripeness in both facial and as-applied challenges). See §§6.15, 7.11.

In 2004 a successful constitutional challenge was made to San Francisco's eviction control ordinance that punished both civilly and criminally a landlord who (1) requests that a tenant move or threatens to recover possession either verbally or in writing, unless the landlord has a good faith intent to evict and does actually go forward with the eviction, (2) seeks or obtains a tenant's agreement not to cooperate with an investigation by the city for violations of the ordinance, and (3) seeks or obtains a tenant's waiver of rights under the ordinance. The court held these attempts to restrict a landlord's actions were an unconstitutional denial of free speech in *Baba v Board of Supervisors of the City & County of San Francisco* (2004) 124 CA4th 504, 21 CR3d 428. See §§7.12, 7.55, 7.64F.

In *Topa Equities, Ltd. v City of Los Angeles* (9th Cir 2003) 342 F3d 1065, the Ninth Circuit Court of Appeals ruled that the Los Angeles Rent Stabilization Ordinance was not preempted by federal law. Thus, the landlord must adhere to the requirements of the local ordinance and not increase rents to market levels until units are vacated. See §§1.35, 7.19.

When major disruptions from code violations or other defects continue for a lengthy period, tenants may be entitled to a rent decrease, but in a rent controlled city they must individually petition the local rent control board. See *Ocean Park Assocs. v Santa Monica Rent Control Bd.* (2004) 114 CA4th 1050, 8 CR3d 421, cited in §§5.11, 7.39.

In the absence of a limitations provision in a local rent control ordinance, stating a deadline for when court review of a rent board decision must be filed, the governing time period is 90 days after the date that the rent board sends notice of its final decision. See *Liang v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2004) 124 CA4th 775, 21 CR3d 715, cited in §7.51.

See also cases listed in Selected Developments under "Ellis Act Cases" and "Mobilehome Tenancies," above.

Rental Agreements and Security Deposits. Since January 1, 2001, a landlord has been required to give a 60-day notice of a rent increase for a residential tenancy if the increase is greater than 10 percent of the rent charged to the tenant during the preceding 12 months. In 2004, the sunset provision of the law was repealed, so the 60-day notice requirement is indefinitely extended. See §3.65A.

In *Minor v Tustin Avenue Investors, LLC* (2004) 116 CA4th 264, 10 CR3d 178, the tenant sued to enforce an option to renew (after accepting an estoppel certificate when the property was sold), and the court of appeal concluded that the lease and estoppel certificate, read together, were ambiguous on the question whether an option existed. Because neither party offered extrinsic evidence to explain it, the court construed the ambiguous contract against the owner. See §4.41.

Because some lease transactions are recorded, the Attorney General issued an opinion that a county recorder may accept for recordation a document entitled "memorandum of lease" that states that the parties have executed a certain unrecorded lease, describes various terms of the lease, is signed, and includes a certificate of acknowledgment. 87 Ops

Cal Atty Gen 1 (2004). See §1.13.

In commercial tenancies, a landlord may not collect "key money" unless it is disclosed in writing in the prospective (not existing) lease. See CC §1950.8, discussed in §§4.28, 4.29A.

Civil Code §1947.3 provides that a landlord may not demand cash as payment for either rent or a security deposit. See §§1.30, 4.24.

When a tenant breaks a lease, a landlord may be able to recover selling expenses. See *Millikan v American Spectrum Real Estate Servs. Cal., Inc.* (2004) 117 CA4th 1094, 12 CR3d 459 (it was foreseeable that landlord would sell property rather than bear burden of vacant commercial building indefinitely). See §§5.19, 8.16.

An amendment to federal law (50 USC App §§501-596), applicable to all military servicemembers and their dependents, allows a servicemember to terminate a lease agreement on giving 30 days' written notice. See §§1.73, 8.21A.

Court Procedures, Fees, and Rules. Effective January 1, 2005, CCP §411.20 provides that when a paper is filed with the court and the check is later returned without payment by the bank (or the check is for an amount less than the required fee), the clerk shall mail notice to the party and the party will have 20 days from the mailing date to pay the fee. See §10.1B.

If an individual completes and files a fee waiver form, but there is "substantial evidentiary conflict" about the right to proceed in forma pauperis, the trial court may not deny the application for a waiver without a noticed hearing to determine eligibility. *Cruz v Superior Court* (2004) 120 CA4th 175, 14 CR3d 917. See §10.8.

A motion may be made to advance or reset a trial date (Cal Rules of Ct 375.1), or for a continuance (Cal Rules of Ct 375). Extensions of unlawful detainer trial dates are strictly limited by CCP §1170.5(c), which requires a hearing and possible order requiring the tenant to pay rent into court as a condition to the court's granting an extension. See §§11.41, 11.45.

A trial judge's decision on a pretrial motion to resolve a conflict of laws issue is not a trial under §170.6(a)(2); consequently the moving party has no right to disqualify the judge after the decision is affirmed by the court of appeal. *State Farm Mut. Auto. Ins. Co. v Superior Court* (2004) 121 CA4th 490, 17 CR3d 146. See §12.5.

Effective January 1, 2004, Cal Rules of Ct 229, governing the preparation of proposed jury instructions, was revised. See §12.44.

As a result of budget deficits, filing fees and other government service fees associated with court actions are increasing and need to be checked frequently. For example, Govt C §26733.5 now provides that costs of eviction, *i.e.,* serving a writ of possession or posting and serving a copy of the writ, are $75, plus an additional $50 (effective January 1, 2005, and if needed) "for removing an occupant or occupants from the premises and putting a person in possession of the premises." See §§13.23, 13.69. Note also that Cal Rules of Ct 1(b)(1) now requires payment of a $655 (instead of a $265) filing fee when a notice of appeal is filed. See §13.59.

Attorney Fees. A new statute, effective January 1, 2004, provides that any landlord who brings an unlawful detainer action based on a tenant's nonpayment of rent and who is found to be in violation of CC §1942.4 (statutory habitability standards) is liable for reasonable attorney fees and costs of the suit. See CCP §1174.21, cited in §§3.15A, 3.41, 13.25.

A city or county ordinance may serve as authority for an award of attorney fees. *City of Santa Paula v Narula* (2003) 114 CA4th 485, 8 CR3d 75. See §13.25.

Bankruptcy. The bankruptcy rule that a security deposit held by a landlord must be applied to the *capped amount* of damages allowable for a claim under 11 USC §502 applies even if the security deposit is in the form of a letter of credit rather than cash. *Redback Networks, Inc. v Mayan Networks Corp. (In re Mayan Networks Corp.)* (BAP 9th Cir 2004) 306 BR 295. See §14.12.

Assets that vest in the debtor on plan confirmation may revest in the bankruptcy estate on conversion to Chapter 7. See *Captain Blythers, Inc. v Thompson (In re Captain Blythers, Inc.)* (BAP 9th Cir 2004) 311 BR 530. See §14.16A.

When a tenant has filed bankruptcy after a judgment for possession has been entered in a state court, a bankruptcy court can generally rule that the judgment for possession is preclusive under collateral estoppel principles. A Ninth Circuit bankruptcy appellate panel has ruled that for determining this type of issue, a bankruptcy court has exclusive jurisdiction. See *Huse v Huse-Sporsen (In re Birting Fisheries, Inc.)* (BAP 9th Cir 2003) 300 BR 489. See §14.20.

There is a split of authority concerning whether 11 USC §525(a) precludes evicting a public housing tenant for

nonpayment of rent. The most recent example occurred in a case from a bankruptcy trial court in Pennsylvania, which allowed the eviction. See *In re Valentin* (Bankr ED Pa 2004) 309 BR 715, cited in §14.27.

A well established bankruptcy rule that requires the debtor to pay *prorated* daily rent for each day after the petition is filed until a lease is rejected has been questioned by some courts. Although the Ninth Circuit has not addressed the issue, proration is commonly applied in lower courts within the circuit. See, *e.g., In re Nat'l Refractories & Minerals Corp.* (Bankr ND Cal 2003) 297 BR 614; *Sticka v Lambert (In re Lambert)* (BAP 9th Cir 2002) 283 BR 16, cited in §14.45.

Under 11 USC §503, administrative expenses are required to be "actual and necessary," and they are allowed only in their "reasonable value." The conflict among the circuit courts of appeal continues. In the Ninth Circuit, if a landlord's claim does not arise from postpetition, prerejection conduct, it will not have administrative priority. See, *e.g., K-4, Inc. v Midway Engineered Wood Prods., Inc. (In re Treesource Indus.)* (9th Cir 2004) 363 F3d 994; *In re Nat'l Refractories & Minerals Corp.* (Bankr ND Cal 2003) 297 BR 614, cited in §14.46.

Because bankruptcy courts focus on realizing value from leases for the estate, a use restriction that effectively prevents assignment may be viewed as an unlawful restriction on bankruptcy rights and disregarded under 11 USC §365(f). More recent authority from the Fourth Circuit, however, holds that the specific provisions in 11 USC §365(b)(3) trump the more general provision of 11 USC §365(f), so an assignment in violation of a use restriction in a shopping center lease cannot be approved. *Trak Auto. Corp. v West Town Ctr. (In re Trak Auto Corp.)* (4th Cir 2004) 367 F3d 237. See §14.50.

Because landlords have an administrative claim for postpetition rent through the date of rejection, landlords and debtor-tenants have disagreed about whether a formal order approving the rejection is required before the debtor's administrative rent obligation ceases. If the lease was not deemed rejected under operation of law, the majority view is that rejection is effective when the court enters an order approving the rejection, rather than when the motion for approving the rejection is filed. See cases cited in §14.53.

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1

Creating the Tenancy

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I. NATURE OF LANDLORD-TENANT RELATIONSHIP
- A. Created by Agreement; Terminology §1.1
- B. Dual Character of Landlord-Tenant Agreement §1.2
- C. Distinguished From Other Relationships
  - 1. Proprietor-Lodger §1.3
    - a. Under Common Law §1.3A
    - b. Under CC §1940 §1.3B
    - c. Exclusions Under CC §1940 §1.3C
    - d. Effect on Evictions and Abandoned Personal Property §1.3D
  - 2. Employer-Employee §1.4
  - 3. Seller-Purchaser §1.5
  - 4. Licenses §1.6
  - 5. Tenant Roommates §1.7
    - a. As Tenants of Owner §1.7A
    - b. As Subtenants of Tenant §1.7B
  - 6. Cotenant Owners §1.7C

II. TYPES OF TENANCIES
- A. Fixed-Term Tenancy §1.8
- B. Periodic Tenancy §1.9
- C. Tenancy at Will §1.10
- D. Tenancy at Sufferance §1.11
- E. Trespassers §1.11A

III. DRAFTING LANDLORD-TENANT AGREEMENT
- A. Option to Use Preprinted Forms §1.12
- B. Written or Oral Agreement?
  - 1. Legal Requirements §1.13
  - 2. Advantages and Disadvantages
    - a. For Landlord §1.14
    - b. For Tenant §1.15
- C. Requisites of Agreement
  - 1. Parties
    - a. Capacity to Enter Into Lease §1.16
    - b. Execution
      - (1) By Spouses §1.17
      - (2) By Joint Tenants or Tenants in Common §1.18
      - (3) By Corporations and Other Entities §1.19
      - (4) By Agents §1.20
    - c. Listing All Tenants §1.21
    - d. Required Agent and Service of Process Information; Copy of Lease; CC §1962 §1.21A
  - 2. Rent §1.22
  - 3. Description of Premises
    - a. Basic Parameters §1.23
    - b. Condition of the Premises
      - (1) Joint Pre-Possession Inspection §1.24
      - (2) Form: Move-In/Move-Out Itemized Statement (California Apartment Association Form 16.0) §1.25
      - (3) Form: Furniture Inventory (California Apartment Association Form 16.1) §1.26
  - 4. Deposits, Screening Fees, Key Money §1.26A
  - 5. Term §1.27
  - 6. Use of Premises §1.28

7. Required Disclosures §1.29
D. Prohibited Provisions §1.30
E. Special Considerations in Jurisdictions With Rent Control Ordinances §1.31
F. Special Requirements for Government-Owned and Government-Subsidized Rental Housing §1.32
1. Public Housing
a. HUD Requirements Imposed on Public Housing Authority §1.33
b. Regulations Governing Tenant Conduct §1.34
2. FHA-Subsidized Rental Programs §1.35
3. Section 8 Programs §1.36

IV. BASIC RESIDENTIAL LEASE OR RENTAL AGREEMENT
A. Form: Parties §1.37
B. Form: Description of Premises §1.38
C. Form: Deposit on Execution of Agreement §1.39
D. Rent
1. Form: Monthly Amount; Manner of Payment §1.40
2. Form: Late Charges §1.41
3. Form: Rent Check Returned for Insufficient Funds §1.42
4. Form: Notice That Failure to Pay Rent on Time May Be Reported to Credit Record Agencies §1.43
E. Form: Term §1.44
F. Occupants
1. Form: Identification; Joint Liability §1.45
2. Form: Guests, Boarders, Lodgers, and Roommates §1.46
G. Form: Indemnification of Landlord §1.47
H. Deposits; Screening Fees
1. Security Deposit
a. Form: Amount and Terms of Security Deposit §1.48
b. Form: Provision for Maintaining Security Deposit by Multiple Tenants §1.49
c. Form: Replenishment and Increase of Deposit §1.50
2. Form: Nonrefundable Applicant Screening Fee §1.51
I. Condition of Premises
1. Form: Landlord's Duty to Maintain Premises §1.52
2. Form: Statement of Condition of Premises §1.53
J. Form: Assignment and Subletting §1.54
K. Form: Use of Premises §1.55
L. Form: Utilities §1.56
M. Tenant Obligations and Restrictions
1. Form: Tenant's Obligation to Maintain and Protect Landlord's Property §1.57
2. Form: Tenant's Obligations to Refrain from Disturbance, Unlawful Conduct, and Waste §1.58
3. Form: Tenant's Obligation to Comply With Rules and Regulations §1.59
4. Form: Conditions Governing Tenant Repairs and Alterations §1.60
5. Form: Tenant Agreement to Maintain Premises as Consideration for Rental §1.61
6. Form: Pets §1.62
7. Form: Waterbeds §1.63
8. Form: No Automobile Repair §1.64
N. Form: Tenant's Death or Disability §1.65
O. Form: Landlord's Entry on Premises; Notice §1.66
P. Breach of Covenant
1. Form: Covenants Are Material and Reasonable §1.67
2. Form: Consequences of Tenant's Breach; Service of Notice §1.68
Q. Form: Misrepresentation in Tenant's Application §1.69
R. Form: Malicious Holding Over; Statutory Damages §1.70
S. Form: Personal Property Remaining on Premises §1.71
T. Form: Possession of Premises §1.72
U. Form: Tenant's Termination for Cause Under Fixed-Term Lease §1.73
V. Form: Attorney Fees §1.74
W. Form: No Waiver §1.75
X. Form: Service of Notices §1.76
Y. Form: Lead Disclosure §1.77
Z. Concluding Paragraphs
1. Form: Entire Agreement §1.78
2. Form: Signatures §1.79

V. SAMPLE RESIDENTIAL LEASES AND RENTAL AGREEMENTS §1.80
A. Form: Rental Agreement (Month-to-Month) (California Apartment Association Form 2.0) §1.81

B. Form: Lease Agreement (California Apartment Association Form 2.1) §1.82
C. Form: Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (California Apartment Association Form LEAD1) §1.82A
D. Forms: Residential Lease or Month-to-Month Rental Agreement (CAR Form LR-14); Lease/Rental Commission Agreement (CAR Form LCA-6) §1.83
E. Form: Residential Lease-Rental Agreement and Deposit Receipt (Professional Publishing Form 105) §1.84
F. Form: Lease Agreement (National Housing Law Project Standard Form Lease (California)) **[Deleted]** §1.85

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I. NATURE OF LANDLORD-TENANT RELATIONSHIP

§1.1 A. Created by Agreement; Terminology

This chapter discusses the creation of the landlord-tenant contract in the context of residential tenancies. Commercial leases are considerably more complex and present more difficult drafting problems than do residential agreements. For discussion of drafting commercial leases, and form lease provisions, see Office Leasing: Drafting and Negotiating the Lease (Cal CEB 1996).

The landlord-tenant relationship is created by a contract between the parties. This contract is known by a variety of names, *e.g.,* rental agreement, lease, month-to-month agreement. It may be oral, written, or implied (see §1.13). *Samuels v Ottinger* (1915) 169 C 209, 146 P 638. The contract must show (expressly or from the facts) that the parties intend to create a landlord-tenant relationship (*Gavina v Smith* (1944) 25 C2d 501, 154 P2d 681; *Beckett v City of Paris Dry Goods Co.* (1939) 14 C2d 633, 96 P2d 122), and it must:

- designate the parties;
- describe the premises;
- specify the rent to be paid and the time and manner of payment; and
- specify the term for which the tenant will rent the property.

City of Santa Cruz v MacGregor (1960) 178 CA2d 45, 2 CR 727; *Frey v Corbin* (1948) 84 CA2d 536, 191 P2d 21.

Terminology in landlord-tenant contracts is somewhat imprecise and subject to inconsistent usage. The statutes use the terms "lease" and "rental agreement" (see, *e.g.,* CC §§798.8, 1953) but do not define them. The section that provides authority for the basic landlord-tenant agreement, CC §1925, does not use either term:

> Hiring is a contract by which one gives to another the temporary possession and use of property, other than money for reward, and the latter agrees to return the same to the former at a future time.

The term "lease" is commonly used to mean an agreement that creates a tenancy for a fixed term, *i.e.,* an "estate for years." See §1.8. Support for this interpretation may be found in a number of cases in which the courts held that the tenancy created by a lease must be for a definite and agreed-on term, with possession of the premises reverting to the landlord on expiration of the term. *Stone v City of Los Angeles* (1931) 114 CA 192, 299 P 838. See *City of Santa Cruz v MacGregor, supra*; *Frey v Corbin, supra*. See the form lease in §1.82.

The term "rental agreement" usually refers to the agreement that creates the most common form of periodic tenancy, a month-to-month tenancy. See §1.9. Although the decisions in *Stone, MacGregor*, and *Frey* do not expressly distinguish between a lease creating an estate for years and a rental agreement creating a periodic tenancy, they implicitly support such a distinction because a periodic tenancy is a tenancy for an indefinite term that does not terminate automatically on expiration of a specified term. A periodic tenancy terminates only when one of the parties gives notice of termination under CC §1946 or §1946.1. See §1.9.

"Lease" and "rental agreement" are terms often used as discussed above, but they are also invoked in a broader sense. For example, the legislature specified the term "rental agreement" for the contract between a mobilehome owner and the mobilehome park management. In this context, the term is synonymous with "lease." CC §798.8. On the other hand, the term "lease" is frequently used to include all manner of contracts between the landlord and tenant for the use and occupancy of real property. See, *e.g.,* Health & S C §§18005.6, 18209, which define "lease" under statutes regulating mobilehome parks in virtually identical language: "Lease is an oral or written contract for the use, possession, and occupation of property. It includes rent." See also *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, in which the supreme court held that the implied warranty of habitability is an implied provision in residential "leases," apparently using the term "leases" to encompass all manner of contracts creating residential tenancies.

The terms "lessor" and "lessee" are not used in this book to discuss relations between the landlord and tenant in general because the authors have found that too often these terms are used to describe only the parties to a formal lease. See *Stone v City of Los Angeles, supra*. Although "landlord" is not a strictly gender-neutral term, the authors use

the terms "landlord" and "tenant" throughout the book when referring to the relationship in its broad sense.

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§1.2 B. Dual Character of Landlord-Tenant Agreement

A lease or rental agreement has a dual character: It is both a conveyance of an estate in real property (*Ellingson v Walsh, O'Connor & Barneson* (1940) 15 C2d 673, 104 P2d 507), creating "privity of estate," and a contract between the landlord and tenant (see CC §1925) creating "privity of contract."

Historically, the landlord-tenant contract was regarded as a conveyance of an estate in real property, and the rights and obligations arising from it were interpreted according to the law of real property. The doctrine of independent covenants, for example, resulted from the courts' interpretation of lease obligations under real property rules. Under this doctrine, the landlord's obligation to maintain the premises was considered independent of the tenant's obligation to pay rent. See *Arnold v Krigbaum* (1915) 169 C 143, 146 P 423. *Note:* The historical development of landlord-tenant law from its common-law roots is traced in *Green v Superior Court* (1974) 10 C3d 616, 622, 111 CR 704.

Sensing limitations in the rigid application of real property concepts to the modern landlord-tenant relationship, courts increasingly recognized the contractual nature of lease arrangements and began to analyze such agreements by referring to contract law principles. See *Green v Superior Court, supra*; *Medico-Dental Bldg. Co. v Horton & Converse* (1942) 21 C2d 411, 132 P2d 457; *Groh v Kover's Bull Pen, Inc.* (1963) 221 CA2d 611, 34 CR 637. In *Green*, for example, the court held that application of contract principles is particularly appropriate for residential leases of urban dwelling units. The court held that under contract law the rent and habitability covenants in a lease should be interpreted as *mutually dependent,* so that the tenant's obligation to pay rent would be dependent on the landlord's performance of his or her covenant to maintain and repair the premises. *Green v Superior Court* (1974) 10 C3d 616, 635, 111 CR 704. The courts continue to hold, however, that the lease covenants are independent in commercial tenancies. Thus, a commercial tenant cannot withhold rent for the landlord's failure to repair the premises; the tenant's remedy is to bring an action for breach of the lease. *Schulman v Vera* (1980) 108 CA3d 552, 558, 166 CR 620. See extended discussion in California Eviction Defense Manual §§19.11-19.17 (2d ed Cal CEB 1993).

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C. Distinguished From Other Relationships

§1.3 1. Proprietor-Lodger

Historically, the rights and obligations of parties to a lease or rental agreement differed markedly, depending on whether their relationship was that of landlord and tenant or proprietor and lodger. Because many occupants (who were considered lodgers under common law) were made subject to California landlord-tenant statutes by the enactment of CC §1940 (see §1.3B), the distinction between tenants and lodgers is not currently significant. Under CC §1940(b), only certain categories of transient hotel guests are treated as lodgers in the historical sense, *i.e.,* as exempt from most statutes regulating the landlord-tenant relationship. See §1.3C. In addition, CC §1946.5 sets forth special rules for a single lodger who resides in an owner-occupied dwelling unit.

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§1.3A a. Under Common Law

Under common law, a lodger has no cognizable interest in real property, but merely occupies a portion of premises under the control of another. See *Stowe v Fritzie Hotels* (1955) 44 C2d 416, 282 P2d 890. Although a tenant has the right to exclusive possession of the leased premises and is responsible for their care and condition (*Green v Watson* (1964) 224 CA2d 184, 36 CR 362), a lodger merely has nonexclusive use of the premises while the proprietor maintains actual or exclusive possession (*Stowe v Fritzie Hotels, supra*). Under CC §1940(b), certain classes of transient occupants are considered lodgers that are still governed by the common law. See §1.3C.

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§1.3B b. Under CC §1940

Unless exempt under CC §1940(b), persons who hire dwelling units (including tenants, lessees, boarders, lodgers, and others) are subject to most statutes that regulate the hiring of dwellings, specifically:

- Civil Code §§1940-1954.1 (see CC §1940(a)); and
- Portions of the Code of Civil Procedure that prohibit "self-help" eviction and provide for eviction by unlawful detainer actions (see CCP §§1159, 1161).

Commonly encountered examples of affected lodgers are two or more persons who rent a room in a private home, nontransient residents of hotels or residence clubs, and roommates. Although a "lodger," each of these persons is probably subject to those statutes.

The tenant-lodger distinction under the common law, however, may still determine other rights and obligations not regulated by those statutes. For example, two or more persons who rent a room or rooms in a private home may be entitled to notice and unlawful detainer proceedings before eviction (see CCP §1161; chaps 8-9) and remedies under habitability statutes (see CC §§1941-1942; §§3.11, 3.24, 3.36), but they may not have rights under the implied warranty of habitability (see §§3.16-3.48). Lodgers are not subject to other chapters in Title V of the Civil Code (*e.g.*, implied covenant of quiet enjoyment; see CC §1927; §§3.5-3.7) unless specifically included.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.3C c. Exclusions Under CC §1940

§1.3C c. Exclusions Under CC §1940

Lodgers excluded under CC §1940(b), who are subject to common law rules (see §§1.3A, 1.3D), are those who:

- Maintain transient occupancy in a hotel, motel, residence club, or other facility when the occupancy is or would be subject to tax under Rev & T C §7280 and have not made valid payment for all room and other related charges owing as of the last day on which their occupancy is or would be subject to §7280 tax; or
- Maintain occupancy in a hotel or motel in which the proprietor retains a right to enter and control the dwelling unit and provides, under CC §1940(b)(2), the following services to all residents:
- Facilities for safeguarding personal property, as provided in CC §1860;
- Central telephone service subject to tariffs filed with the California Public Utilities Commission;
- Maid, mail, and room services;
- Occupancy for periods of less than 7 days; and
- Food service meeting specified requirements.

NOTE: Under Rev & T C §7280, local governments may tax occupancy for 30 days or less in a hotel, inn, tourist home, time-share, house, motel, or other lodging. Effective January 1, 2005, CC §1940.1(a) was amended to prohibit a proprietor from requiring an occupant of a "residential hotel," as defined in Health & S C §50519, to move or to check out and reregister before the expiration of 30 days' occupancy if a purpose is to have that occupant maintain transient occupancy status under CC §1940(b)(1). Evidence that an occupant was required to check out and reregister creates a rebuttable presumption, affecting solely the burden of producing evidence, of that purpose. CC §1940.1(a). As a result, an occupant who has paid the landlord a full month's rent is entitled to the protections under CC §§1940-1954.1 (see §1.3B), even if he or she has not yet occupied the unit for 30 days. Many municipalities also have ordinances defining "transient occupancy."

Thus, other than residential hotels offering only long-term occupancy, many formal hotel-type facilities are exempt from the basic landlord-tenant provisions of the Civil Code and the Code of Civil Procedure and are instead governed by the common law rules stated in §§1.3A, 1.3D. Many less formal arrangements (*e.g.,* occupancy in roominghouses and residential hotels), however, are not exempt, and occupancies under those arrangements are covered by most landlord-tenant statutes even though they are classed as lodgers at common law. See §§1.3-1.3B. The existence of an exemption under CC §1940(b)(1) seems to turn on the status of both the facility and the occupant: Only a *transient* occupant (*i.e.,* a person who resides in one of the listed facilities for fewer than 30 days) is excluded.

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§1.3D d. Effect on Evictions and Abandoned Personal Property

At common law, one of the primary factors distinguishing a lodger from a tenant is the landlord's right to use "self-help" to evict a lodger, *i.e.*, not to be required to follow the steps set forth in unlawful detainer statutes. See, *e.g.*, *Roberts v Casey* (1939) 36 CA2d Supp 767, 93 P2d 654. The occupants defined in CC §1940(b), *i.e.*, those with short-term tenancies in formal hotel-type facilities, are subject to self-help evictions because they are expressly excluded from statutes authorizing lawsuits for forcible entry (CCP §1159; see §8.138) and requiring unlawful detainer as the only legal means of eviction (CCP §1161; see chap 9). See also §§1.3A, 1.3C. Conversely, the occupants defined in CC §1940(a) are covered by the forcible entry and unlawful detainer statutes and may legally resist self-help evictions. See §1.3B.

In many "roommate" situations, the landlord cannot use self-help but must use unlawful detainer to evict an occupant who might be categorized as a lodger at common law but is nevertheless covered by landlord-tenant statutes. See §1.7.

Hotel, motel, inn, boarding house, and lodging-house keepers have liens against the tenant's or lodger's personal property, enforceable only after final judgment in an action to recover rent charges. CC §§1861, 1861a. These liens cannot be enforced against any of the tenant's property otherwise exempt from enforcement of a money judgment. CC §§1861, 1861a. This exemption renders the liens rather meaningless for most residential tenants and lodgers because household furnishings and personal effects "ordinarily and reasonably necessary" to the debtor are exempt under CCP §704.020. When landlord-tenant statutes apply to the tenant or lodger under CC §1940(a), however, disposition of exempt and nonexempt personal property left on the premises on termination of the tenancy and after judgment is governed by CCP §1174(e)-(i) and CC §§1980-1991. See §§8.154-8.161.

Under CC §§1861 and 1861a, the landlord or proprietor may enter the premises under a court order and take possession of the personal property pending litigation of the claim. To obtain a writ, a proprietor must show the probable validity of his or her claim. CC §§1861.8, 1861.10. In contrast, a landlord must show that the property is about to be destroyed, substantially devalued, or removed from the premises. CC §1861a. In each case, the landlord or proprietor must post an undertaking. CC §§1861.21, 1861a.

Hotels that have a contractual obligation to provide the room to an arriving person may use self-help to evict guests who do not pay rent or who do not leave on the agreed date by the agreed time, with conditions. CC §1865.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.4 2. Employer-Employee

§1.4 2. Employer-Employee

The attorney for the landlord or tenant may need to determine whether an occupant of rental premises is merely an employee of the landlord, or both an employee and a tenant, or whether the employee was a tenant before becoming an employee, because the rights and obligations of the parties differ depending on the characterization. As a general rule, if the occupancy is connected with services to be performed by the employee, or is required by the landlord in connection with such services, the occupant is regarded as an employee and not as a tenant. See *Mitchell v Davis* (1862) 20 C 45; *Wukaloff v Malibou Lake Mountain Club* (1950) 96 CA2d 147, 214 P2d 832. Most resident managers, caretakers, and janitors are therefore not regarded as tenants. See, *e.g., Cook v Klenk* (1904) 142 C 416, 76 P 57. If the occupancy is treated as independent of the services to be rendered, however, and the occupant is granted exclusive control of the premises, he or she may be a tenant as well as an employee. See *Morris v Iden* (1913) 23 CA 388, 138 P 120.

The primary importance of the distinction between employee and employee-tenant lies in their respective occupancy rights when the employment is terminated. An employee has no further right to occupy the premises when the employment terminates (see *Eichhorn v De La Cantera* (1953) 117 CA2d 50, 255 P2d 70; see also *Chan v Antepenko* (1988) 203 CA3d Supp 21, 250 CR 851) and is not entitled to notice terminating the tenancy (CCP §1161(1)). An occupant who is a tenant as well as an employee, however, may continue to occupy the premises, despite termination of the employment, until the landlord terminates the tenancy by serving proper notice. (See §8.84 on notice requirements.) Thus, an employee-tenant is essentially a tenant at will (see §1.10).

In *Spinks v Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 90 CR3d 453, the court both distinguished and disapproved of the decision in *Chan*. The *Spinks* case dealt with an employee of a corporate tenant who had rented an apartment from defendant landlord for use by the employee. When the employee was terminated, the corporate tenant returned possession of the premises to the landlord, but the terminated employee refused to move. The landlord resorted to self-help and moved the employee out. The employee then sued the landlord under various causes of action. The trial court awarded summary judgment to the landlord, but the court of appeal overturned the award. The court distinguished *Chan,* holding that the case did not involve "landlord self-help." The *Spinks* decision then went on to state: "Second, to the extent that *Chan* suggests that any discharged employee may be dispossessed —without regard to the circumstances surrounding his occupancy and by means of the landlord's self-help—we reject that suggestion as contrary to the law of the state." 171 CA4th at 1042.

WARNING: Most employment agreements contain a specific time period during which the employee is required to vacate the premises after termination of employment. The employment agreement must be reviewed if an unlawful detainer occurs.

Although a mere employee's right to occupancy terminates when the employment ends, if the former employee does not vacate the premises, the landlord still must take the appropriate steps to file and proceed with an unlawful detainer action (see chap 9) to evict the employee. *Eichhorn v De La Cantera, supra*. The employee becomes a tenant at sufferance (see §1.11) on termination of the employment, and thus must be evicted by legal process although the employee is not entitled to notice before the landlord files an unlawful detainer action. *Karz v Mecham* (1981) 120 CA3d Supp 1, 174 CR 310; *Eichhorn v De La Cantera, supra*. Although no notice is required, a landlord who gives notice must be cautious because the notice may convert the occupancy into a tenancy. In *Karz v Mecham, supra,* the employer served a notice stating that the rent would be $200 per month if the employee did not vacate. The court held that this notice converted the tenancy at sufferance into a month-to-month tenancy, which could be terminated only by service of a 30-day notice to terminate.

PRACTICE TIP: If the property is subject to a rent control ordinance, the practitioner must check the ordinance carefully. A terminated employee who had been a tenant before becoming an employee may be treated as a tenant on termination and may be entitled to certain rights and protections under the ordinance.

Existence of an employment relationship does not deprive an employee-tenant of other defenses and causes of

action, such as retaliatory eviction (see §§8.109-8.136). In *S. P. Growers Ass'n v Rodriguez* (1976) 17 C3d 719, 131 CR 761, the court held that the tenants stated a defense to an unlawful detainer action by alleging that the grower-landlord sought to evict them in retaliation for an action that they filed under federal farm labor legislation.

WARNING: Landlord attorneys need to be cognizant that the law is unsettled as to whether wrongful termination can serve as a defense to an unlawful detainer action based on an employee termination (see, *e.g., Vargas v Municipal Court* (1978) 22 C3d 902, 150 CR 918; *S. P. Growers Ass'n v Rodriguez, supra*. If a landlord is forced to try such an issue in an unlawful detainer action, the potential res judicata or collateral estoppel effects could be disastrous in a separate action brought by the tenant for wrongful termination.

Landlords should also be aware of state requirements regulating the employment of apartment-house managers. If the owner does not reside on the premises, a building of 16 or more residential units must have a resident manager, janitor, housekeeper, or other responsible person who has charge of the apartment house. 25 Cal Code Regs §42. Local laws may impose similar or more stringent requirements.

An apartment-house manager is usually treated as an employee of the owner, not as an independent contractor, and thus is subject to legal requirements concerning the employment relationship: minimum wage and overtime law; social security; worker's compensation; and limitations on the value of the apartment that may be credited against wages. For discussion of the ramifications of this relationship, see §§4.45-4.49; 7 Miller & Starr, California Real Estate §§19.9-19.11 (3d ed 2000).

On provisions in CC §§1962, 1962.5 that require the owner to disclose building manager, service of process, and other agency information to tenants, see §§1.21A, 1.29.

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§1.5 3. Seller-Purchaser

In some cases, it may not be readily apparent whether an occupant of real property holds it as a tenant or as a purchaser under a contract providing that title will pass to the occupant on completion of the specified payments. A sale of property under an installment land sale contract may confuse this issue, because legal title under such a contract remains in the seller and passes to the buyer only on completion of the contract payments. On installment land sales contracts, see California Real Property Sales Transactions §§9.14-9.17 (4th ed Cal CEB 2007); California Real Property Remedies and Damages, chap 4 (2d ed Cal CEB 2002). Although the instrument is called a "lease," and the payments are called "rent," the transaction is a sale if fee title eventually will pass to the buyer-occupant. *Bachenheimer v Palm Springs Mgmt. Corp.* (1953) 116 CA2d 580, 254 P2d 153; *Moss v Williams* (1948) 84 CA2d 830, 191 P2d 804.

The importance of the distinction between tenants and purchasers lies in the different remedies available to the landlord for a breach of the lease or rental agreement. If the "tenants" have taken occupancy as tenants, *e.g.,* in the context of a lease-option, and not as vendees-in-possession, the owner may proceed with unlawful detainer. See *Provouskivitz v Snow* (1977) 74 CA3d 554, 141 CR 531.

Practitioners should note that "option to buy" language should be carefully drafted to avoid the creation of an equitable interest in the subject premises. Tenants are routinely credited with a portion of the "rent" paid under the lease towards the option amount, which matures into a "down payment" deemed received on the satisfactory completion of the lease term. In the event of a lease default, all "credits" should be deemed forfeited, and the option "terminated," to avoid the repugnant scenario of evicting a tenant still vested with an option entitlement. Further, such equity interest may cloud the landlord's prerogative to terminate the tenancy through an unlawful detainer remedy, unless the lease reserves that right over and above the tenant's option rights and other interests. *Provouskivitz v Snow, supra*.

If the property is being sold to the "tenant" under a contract of sale, unlawful detainer is not available to the property owner as a remedy for the "tenant's" breach. *Marvell v Marina Pizzeria* (1984) 155 CA3d Supp 1, 202 CR 818; *Greene v Municipal Court* (1975) 51 CA3d 446, 124 CR 139. Instead, the owner must either proceed under the nonjudicial foreclosure remedies provided in the contract or bring an action in ejectment or to quiet title. CC §3375; see *Hicks v Lovell* (1883) 64 C 14, 27 P 942, overruled on other grounds in *Harding v Harding* (1906) 148 C 397, 83 P 434. See California Real Property Remedies and Damages, chaps 4, 7, 10 (2d ed Cal CEB 2002).

PRACTICE TIP: To recover possession of the premises when they are occupied under a sales agreement, the practitioner must determine the status of the occupant when he or she took possession: If as a tenant (*e.g.,* lease with option to buy) unlawful detainer may be used; if as a buyer (*e.g.,* vendee-in-possession) ejectment, quiet title, or other nonsummary procedure must be used.

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§1.6 4. Licenses

A license confers a privilege to perform a particular act or series of acts on the land of another. Because a license is a personal right rather than a property interest, it usually cannot be assigned. *Eastman v Piper* (1924) 68 CA 554, 229 P 1002. Unlike a tenancy, a license does not convey an estate in land nor a contract right to possession and use of the property. *Kaiser Co. v Reid* (1947) 30 C2d 610, 184 P2d 879. Whether a particular contract is a license or a lease is a question of law to be determined by the court from the contract itself. *Kaiser Co. v Reid, supra*; *Von Goerlitz v Turner* (1944) 65 CA2d 425, 150 P2d 278. License issues frequently arise in commercial, rather than residential, contexts. Because a license is an arrangement merely to perform certain acts on the property rather than to occupy the property exclusively, it usually contemplates some business activity, *e.g.,* mining or operating a concession. See *Qualls v Lake Berryessa Enters., Inc.* (1999) 76 CA4th 1277, 91 CR2d 143.

Historically, the distinction between a license and a lease was important in determining the extent of the owner's right to reenter the premises and to terminate the occupancy. In the absence of estoppel, the owner could terminate a license at will, without notice or judicial proceedings. *Stoner v Zucker* (1906) 148 C 516, 83 P 808; *Von Goerlitz v Turner, supra*. Licenses in most recent reported cases are for commercial purposes. Although the common-law at-will rule probably still applies (a license may be terminated without recourse to notice or unlawful detainer proceedings) the only right of "self-help" with regard to a licensee *might* apply to a short-term residential guest. Eviction of a licensee is governed by CCP §1161(1).

PRACTICE TIP: Practitioners should advise a landlord client not to undertake a self-help eviction in any situation, including eviction of a licensee.

If the contract gives exclusive possession of the premises against all the world, including the owner, it is a lease. If it merely confers a privilege to occupy under the owner, it is a license. *Qualls v Lake Berryessa Enters., Inc., supra*.

When determining whether a contract is a license or a lease, courts examine the nature of the possessory interest granted. For example, an arrangement for mining gold was held to be a license in the property because the licensee's interest was in the proceeds and not in the land (*Wheeler v West* (1886) 71 C 126, 11 P 871). In *Northern Light Mining Co. v Blue Goose Mining Co.* (1914) 25 CA 282, 143 P 540, however, a similar agreement was held to be a lease because the agreement gave the licensee a mining privilege and an interest in the land, and because the licensee's interest was assignable. A tenant in a shopping center who has a right to use sidewalks, parking lots, and similar facilities in common with other tenants has only a license, and not a lease, with respect to those facilities. *Nahas v Local 95 Retail Clerks Int'l Ass'n* (1956) 144 CA2d 808, 301 P2d 932. This distinction may be only a technical one because it is doubtful that a landlord could revoke the license without breaching the lease.

In *Golden W. Baseball Co. v City of Anaheim* (1994) 25 CA4th 11, 31 CR2d 378, the court held that an agreement between a baseball team and a property owner that gave the team the use of a stadium and a minimum number of parking spaces for a portion of game days and retained for the property owner the use of the unused spaces on game days and the property's use on all other occasions was not a lease but more akin to an easement or license. In *Wukaloff v Malibou Lake Mountain Club* (1950) 96 CA2d 147, 214 P2d 832, the court held that the concessionaire of a dining facility in a private club was an invitee rather than a tenant. In *Beckett v City of Paris Dry Goods Co.* (1939) 14 C2d 633, 96 P2d 122, on the other hand, the court held that an agreement under which an optometrist conducted an optical department in a department store was a lease, on the basis of the language and terms of the agreement.

Other rights accruing under a tenancy arrangement (*e.g.,* the covenant of quiet enjoyment (see §§3.5-3.7) and the implied warranty of habitability (see §§3.16-3.48)) presumably would not be available to a mere licensee.

PRACTICE TIP: Parking rights issues are common in apartment communities and often involve the towing of unauthorized vehicles. Recognizing parking spaces as "amenities" and not part of the leased property is an important distinction to clarify in the lease agreement.

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§1.7 5. Tenant Roommates

Many tenants attempt to deal with the increasing scarcity and resulting high cost of rental housing by sharing housing with roommates. Attorneys should consider the legal ramifications of such arrangements and be prepared to advise both landlord and tenant clients of their rights and obligations. The legality of shared housing arrangements has been upheld in California, and the courts will be skeptical of local zoning ordinances limiting the right of unrelated adults to share housing. See *City of Santa Barbara v Adamson* (1980) 27 C3d 123, 164 CR 539; *College Area Renters & Landlord Ass'n v City of San Diego* (1996) 43 CA4th 677, 50 CR2d 515.

There are two basic types of roommate arrangements when the landlord does not live in the rental unit:

- Those in which all roommates have a contractual arrangement with the landlord; and
- Those in which the roommates have an arrangement with one tenant who has a contractual relationship with the landlord.

The second type is fraught with problems for the landlord and is often discouraged. And the second type may be less advantageous for occupants not in privity with the landlord in some rent-controlled jurisdictions. See, *e.g.*, San Francisco Residential Rent Stabilization and Arbitration Board Rules and Regulations §6.15C, which allows the master tenant to evict a subtenant without cause under specified conditions.

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§1.7A a. As Tenants of Owner

Under the first roommate arrangement, all roommates are named in, and sign, a lease or series of leases. Thus, each roommate is in privity of contract with the landlord, and a normal landlord-tenant relationship exists between them. If there is only one lease, each roommate is liable for the entire rent, regardless of the arrangement among the roommates themselves, unless the landlord expressly agrees to accept rent from each roommate as his or her sole share. See CC §§1659-1660. It is therefore in the landlord's interest to make each roommate responsible for the entire rent, but in each roommate's interest to pay only his or her share as negotiated with the "original tenant." Roommates in this situation should make an agreement of their own on the manner of paying rent and utilities and the effect on the tenancy of a roommate's departure or default. For discussion of such agreements, see Portman & Brown, California Tenants' Rights (16th ed 2005).

When each tenant has a contractual relationship with the landlord, it is probably impossible for one roommate to expel another by the usual means of terminating the tenancy and evicting a tenant (see chaps 8-9); only the landlord may do so with respect to each roommate. It might be possible to expel such a roommate by means of an action to partition the cotenancy. On partition, see California Real Property Remedies and Damages, chap 8 (2d ed Cal CEB 2002).

PRACTICE TIP: As a practical matter, an unlawful detainer action may be brought by the landlord only against the unwanted roommate with an arrangement for the tenant to reimburse the landlord for attorney fees and costs. The tenant must refrain from accepting substituted service of the summons and complaint because he could be deemed the landlord's agent.

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§1.7B b. As Subtenants of Tenant

In the second common roommate situation—the "original" tenant takes in other occupants, *i.e.,* "roommates," after entering into an agreement with the landlord—the roommates probably are technically lodgers of the original tenant, unless they enter into a direct contractual relationship with the landlord. They also are considered to be subtenants if they have a contractual arrangement for possession with the tenant. At common law, characterization as a lodger meant that the original tenant could terminate the interests of the new roommates by "self-help" eviction, without recourse to the unlawful detainer provisions. See §1.3D. Under CC §1940, however, it appears that the roommates are considered to be "persons who hire dwelling units," and therefore are subject to the requirements of California landlord-tenant law. CC §§1940-1954.1. As such, their interests may be terminated only by means of notice and unlawful detainer procedures. CCP §§1159-1179a.

WARNING: Some jurisdictions have local ordinances defining roommates as tenants entitled to protection under the ordinance in certain circumstances. In *DeZerega v Meggs* (2000) 83 CA4th 28, 99 CR2d 366, *e.g.*, the court found that under Berkeley's eviction control ordinance a roommate of a former tenant was a person "entitled to the use or occupancy" of the rental unit and thus could not be evicted except for just cause. Other jurisdictions contain special regulations for "master tenants" in the capacity of landlords, and master tenants should be familiar with them. See, *e.g.,* San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.9(b); San Francisco Residential Rent Stabilization and Arbitration Board Rules and Regulations §§6.15A-6.15D. For further discussion, see chap 7.

Because of the problems frequently encountered in identifying and actually evicting all tenants residing on the premises (see §§8.67, 13.70-13.73), this form of roommate arrangement is not advantageous to the landlord. To avoid this situation, the landlord might provide in the lease or rental agreement that the original tenant must notify the landlord promptly of any additional parties on the premises or that the premises may only be occupied by the persons identified in the body of the lease. See §1.46. A provision absolutely prohibiting subletting or assigning the lease is also well advised. After being notified—and such notification or knowledge is often difficult to obtain—the landlord might choose to raise the rent if the lease or rental agreement permits, or commence eviction proceedings. At the very least, the landlord should enter into some form of contractual arrangement with the new roommates, if known of, such as an entirely new lease with all the cotenants, or a parallel agreement with the new roommates. The landlord's acceptance of rent from the new roommates might create a month-to-month tenancy with them. See §1.9.

PRACTICE TIP: In a rent-controlled jurisdiction, renting out rooms in a single-family home may subject the property to the local ordinance, with each room becoming a "dwelling unit." Depending on zoning and other factors, however, a single-family residence may not be subject to rent control, even if rooms are rented out. *Gabor v Cox* (1994) 26 CA4th Supp 16, 31 CR2d 925.

WARNING: Relationships between roommates are often personal melodramas. A landlord is best advised to stay out of personal interactions between tenants in most instances. A common consequence of roommate situations is small claims court litigation against the landlord for failure to return the security deposit paid by one occupant to another. A landlord should have a written policy in the rental agreement regarding renting to new roommates and a provision for the return of the security deposit.

For further discussion of the various problems arising in roommate situations, assignments, and subletting, see §§3.49-3.59A, 4.40-4.40B, 5.28-5.32, 7.62.

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§1.7C 6. Cotenant Owners

Owners of real property who share title as tenants in common may, by title or agreement, designate their respective rights of possession in all or part of the property. See California Real Property Sales Transactions §§4.20-4.23, and App O (4th ed Cal CEB 2007). They may terminate their relationship by statutory partition. See California Real Property Remedies and Damages, chap 8 (2d ed Cal CEB 2002). Occasionally, their legal relationship may take the form of landlord and tenant, in which event an unlawful detainer action may be available on the default of the cotenant having exclusive possession. For example, in *Rossetto v Barross* (2001) 90 CA4th Supp 1, 110 CR2d 255, an agreement among owners holding the real property as tenants in common that one cotenant would occupy the property and pay all expenses created a landlord-tenant relationship between the nonpossessing owners on the one hand and the possessing owner on the other.

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II. TYPES OF TENANCIES

§1.8 A. Fixed-Term Tenancy

A tenancy for a fixed term (or "estate for years") is a common form of leasehold interest. It is usually created by a written lease, and if the term of the lease exceeds one year the lease must be written. CC §1624(a)(3). See §1.82 for a sample fixed-term lease. In such a tenancy, the tenant has exclusive use and possession of the premises for a specified term (from less than a year to any number of years); the tenancy terminates automatically on expiration of the term. *Camp v Matich* (1948) 87 CA2d 660, 197 P2d 345; *Palmer v Zeis* (1944) 65 CA2d Supp 859, 151 P2d 323.

To create an estate for years, the duration of the tenant's possession must be specifically computed, so that the beginning and ending dates are determinable. *Camp v Matich, supra*. As long as the period is specified, a tenancy for a fixed term is created; even if the term specified is one month, the tenancy is an estate for years and not a month-to-month tenancy. *Stoppelkamp v Mangeot* (1871) 42 C 316.

A tenant who holds over after expiration of a specified term becomes a tenant at sufferance (see §1.11). *Colyear v Tobriner* (1936) 7 C2d 735, 62 P2d 741; *Hull v Laugharn* (1934) 3 CA2d 310, 39 P2d 478. A tenant holding over has bare possession of the property; the landlord may bring an unlawful detainer action to evict such a tenant without first giving notice to terminate the tenancy. CCP §1161(1). If the landlord accepts rent from a tenant who holds over, however, a presumption arises that a month-to-month tenancy has been created (CC §1945), and the landlord must serve the tenant with a 30-day or 60-day notice to terminate the tenancy, as prescribed by CC §§1946 and 1946.1, before commencing an unlawful detainer action (see §§8.69-8.82).

NOTE: Under ordinances with just cause eviction requirements, a tenant who holds over becomes a month-to-month tenant and may be evicted only for just cause. Expiration of a lease is not just cause *unless* the landlord wants the tenant to execute a new lease with the same terms and conditions and the tenant refuses. See chap 7.

The tenancy for a fixed term has advantages and disadvantages for both parties. From the tenant's point of view, a fixed-term tenancy provides the certainty of the right to occupy the premises for a definite period of time at a fixed rent, without the possibility that the landlord will terminate the tenancy by giving a 30-day or 60-day notice (CC §§1946, 1946.1) or increase the rent by giving a 30-day or 60-day notice (CC §827). See §§3.65-3.66, 8.69-8.82. Tenants in jurisdictions with "just-cause" eviction controls (see §7.54) may prefer a month-to-month tenancy (see §1.9) because under a fixed-term lease the tenant remains liable for the rent for the entire term, and may have difficulty in arranging to sublet or assign the right to occupy the premises if he or she vacates. On assignment and subletting, see §§3.49-3.59A.

The certainty of the fixed nature of the term and periodic rent in a fixed-term tenancy may be advantageous for the landlord. Because the tenancy expires automatically on expiration of the term without notice to the tenant, the landlord may file an unlawful detainer action immediately if the tenant holds over (CCP §1161; see §8.82), except in jurisdictions in which rent control ordinances restrict this right (see §7.54).

If the lease provides that a residential periodic tenancy is renewed or extended automatically at the end of the lease term, the lease must bring that to the attention of the lessee by inserting that provision in eight-point bold-face type. The lease must also contain a recital of the fact that the provision is included in the agreement, in eight-point boldface type, immediately above the tenant's signature line. CC §1945.5. Some fixed-term tenancy agreements require the service of a 30-day notice by the tenant or the landlord of their intent not to renew the lease, and otherwise require the lease to renew automatically on a month-to-month basis. Depending on the language, this could be construed to fall under the provisions of CC §1945.5. In those circumstances, the landlord may be required to serve a 30-day notice to terminate the month-to-month tenancy created after the expiration of the lease unless notice of nonrenewal was served in accordance with the lease. See §§8.69-8.70. However, if the lease clearly states that the landlord has discretion to renew or not renew the lease, the landlord may file an unlawful detainer action immediately. See §§1.44, 8.2, 8.82, 9.44.

PRACTICE TIP: If the lease requires the landlord to give a 30-day notice of intent not to renew, make sure that the notice is worded in the form of a "Thirty-day Notice of Intent Not To Renew Lease." Because there is currently no expectancy that a lease will be renewed under California law (see, *e.g., Ferry v McNeil* (1963) 214 CA2d 411, 29 CR 577), this wording diminishes potential defenses such as retaliation and discrimination at the unlawful detainer stage.

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§1.9 B. Periodic Tenancy

A periodic tenancy is a tenancy that continues for successive periods of the same length for an indefinite term. See *Camp v Matich* (1948) 87 CA2d 660, 197 P2d 345. The most common example of a periodic tenancy is the month-to-month tenancy regularly used in modern residential hirings.

A periodic tenancy in residential property may be defined in terms of any period; unless the rental agreement specifies otherwise, the agreement period is determined by the interval between rental payments (*i.e.,* annual, monthly, and weekly rental payments respectively imply year-to-year, month-to-month, and week-to-week tenancies). CC §1944; *Camp v Matich, supra*; *Palmer v Zeis* (1944) 65 CA2d Supp 859, 151 P2d 323.

If a residential rental agreement specifies neither the tenancy period, nor the rent intervals, the hiring is presumed to create a month-to-month tenancy. CC §1944. A hiring of nonresidential property for an unspecified term is presumed to create a month-to-month tenancy, and a hiring of real property for agriculture or grazing purposes is presumed to create a fixed, one-year tenancy. CC §1943. When a tenant for a fixed term holds over after expiration of the term, and the landlord accepts monthly rent payments, the tenancy is extended as a periodic tenancy. CC §1945; see *Knox v Wolfe* (1946) 73 CA2d 494, 167 P2d 3.

Unlike a tenancy for a fixed term (see §1.8), a periodic tenancy does not terminate by mere lapse of time. See *Camp v Matich, supra*. It can be terminated only when one of the parties gives the notice to terminate required by CC §1946 or §1946.1. On termination of month-to month tenancies, see §§8.69-8.80.

An advantage of a month-to-month tenancy for both parties is that it can be terminated by either party's giving notice to terminate. See CC §§1946, 1946.1. Thus, the tenant has more flexibility than under a fixed-term lease and the landlord can remove an undesirable tenant without cause, or change the terms of the agreement by serving a notice of change of terms of tenancy (see CC §827, discussed in §§3.65-3.65B). These advantages may not exist for a landlord under a rent control ordinance, and do not exist for a landlord with a fixed-term lease (see §1.8). Many local rent control ordinances restrict the situations in which landlords can terminate month-to-month tenancies without good cause (see §7.54).

Some local ordinances have created a hybrid of fixed-term and periodic tenancies by requiring landlords to offer all residential tenants leases for at least a one-year period. See, *e.g.*, *Roble Vista Assocs. v Bacon* (2002) 97 CA4th 335, 342, 118 CR2d 295, which upheld such an ordinance after it examined the issue of state law preemption and concluded that "there is no full and complete state coverage of the field of the duration of leases so as to 'clearly indicate' that the field is exclusively a matter of state concern."

With enactment of CC §1954.53 in 1995, rent-controlled jurisdictions had to begin phasing out prohibitions on landlords' raising the rent when premises became vacant, so that as of January 1, 1999, vacancy decontrol was fully implemented. Since that date, an owner is entitled to reset the initial rents of any new tenants. See §7.25.

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§1.10 C. Tenancy at Will

A tenancy at will is created when the tenant enters the premises with the landlord's consent, for an indefinite period, and with no express provision for rent. *Covina Manor v Hatch* (1955) 133 CA2d Supp 790, 284 P2d 580. Such a tenancy is created by the express or implied agreement of the parties. *Carteri v Roberts* (1903) 140 C 164, 73 P 818 (implied agreement); *Blum v Robertson* (1864) 24 C 127 (express agreement). A tenancy at will obligates the tenant to pay rent by operation of law rather than by contract, even in the absence of a lease. *Parkmerced Co. v San Francisco Rent Stabilization & Arbitration Bd.* (1989) 215 CA3d 490, 495, 263 CR 617. The landlord's consent is crucial to the creation of a tenancy at will, and it may take very little for a tenancy at will to be *implied;* the landlord's acquiescence, silence, or failure to take action are often sufficient. See *Parkmerced Co. v San Francisco Rent Stabilization & Arbitration Bd., supra*. A tenant who enters without permission is either a tenant at sufferance (see §1.11) or a trespasser (see §1.11A), and the landlord may terminate such occupation without serving a notice to quit. Tenancies at will arise in a variety of ways, *e.g.*:

- entry under a void oral contract (*Carteri v Roberts, supra*; *Hall v Wallace* (1891) 88 C 434, 26 P 360);
- entry under a void parol lease (*Phelan v Anderson* (1897) 118 C 504, 50 P 685; *Psihozios v Humberg* (1947) 80 CA2d 215, 181 P2d 699);
- entry while negotiations for a lease are pending (*Miller v Smith* (1960) 179 CA2d 114, 3 CR 492; *Linnard v Sonnenschein* (1928) 94 CA 729, 272 P 315);
- remaining in possession of the premises after rescission of contract of sale (*Simpson v Applegate* (1888) 75 C 342, 17 P 237);
- by implication (*Moy v Silveira* (1960) 184 CA2d 80, 7 CR 251).

PRACTICE TIP: A tenancy at will may be found where a parent allows a child to live in his or her residence and the parent then dies, or when a relationship breaks up and only one party is the sole owner of the premises.

Although landlords have the right to terminate a tenancy at will, they must give 30 days' notice in the manner prescribed in CCP §1162 in order to do so. CC §789. The landlord's acceptance of periodic rent payments, however, converts a tenancy at will into a periodic tenancy. CC §1945; *Linnard v Sonnenschein, supra*. On notice required for termination of a periodic tenancy, see §8.69. A tenant at will does not have a transferable interest and is terminated if the tenant attempts to assign his or her interest. *McLeran v Benton* (1887) 73 C 329, 14 P 879.

PRACTICE TIP: Tenant applicants may falsify their application in order to be approved. If the misrepresentation was material to the landlord's decision to accept, an unlawful detainer action may be filed after service of a 30-day notice to terminate the tenancy at will or, if the lease provides that falsification on the rental application constitutes a breach of lease, after the service of a 3-day notice to quit based on incurable breach. If the landlord chooses to use a 30-day notice to terminate the tenancy at will for false information in the tenant's application, it may be necessary to serve along with the notice, or contain in the notice, a notice of rescission under CC §1689.

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§1.11 D. Tenancy at Sufferance

A tenancy at sufferance is created when a tenant who entered the property lawfully continues to occupy the premises after expiration of the term without the owner's consent, *e.g.,* when a tenant holds over without the landlord's consent after expiration of a fixed-term lease (*Colyear v Tobriner* (1936) 7 C2d 735, 62 P2d 741) or when a tenant at will who has a right of first refusal to enter into a lease remains in possession of the premises without agreeing to execute a lease (*Vandenbergh v Davis* (1961) 190 CA2d 694, 12 CR 222). See *Gartlan v C. A. Hooper & Co.* (1918) 177 C 414, 170 P 1115; *Hull v Laugharn* (1934) 3 CA2d 310, 39 P2d 478.

NOTE: The status of a fixed-term tenant who holds over is less clear in a jurisdiction with eviction controls under a rent control ordinance. Such a tenancy will probably become a periodic tenancy rather than a tenancy at sufferance. See §7.54. Counsel should be sure to check the terms of applicable local ordinances in this regard.

A tenant at sufferance merely has bare possession of the property. Because he or she does not stand in privity to the landlord, such a tenant is not liable for rent, but may be liable for the reasonable rental value of the premises. *Colyear v Tobriner, supra*. The landlord may bring an unlawful detainer action against a tenant at sufferance under CCP §1161(1) without first serving a notice to quit (*Colyear v Tobriner, supra*; *Marquez-Luque v Marquez* (1987) 192 CA3d 1513, 1518, 238 CR 172), except perhaps in jurisdictions with rent control ordinances (see §§1.31, 7.54). The landlord may also bring an ejectment action without first serving a notice to quit (192 CA3d at 1518). If the landlord elects to treat the tenant's possession as rightful, however, the tenancy becomes a tenancy at will (see §1.10). *Shenson v Shenson* (1954) 124 CA2d 747, 269 P2d 170; *Cowell v Snyder* (1911) 15 CA 634, 115 P 961. A landlord who accepts rent from a tenant at sufferance is presumed to have elected to treat the tenancy as a periodic tenancy. CC §1945; *Shenson v Shenson, supra*. On notice and procedures required for termination of a periodic tenancy, see §8.69.

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§1.11A E. Trespassers

Trespass to property is defined as an unlawful interference with possession. *Staples v Hoefke* (1987) 189 CA3d 1397, 235 CR 165; Restatement (Second) of Torts §158 (1965). See California Real Property Remedies and Damages §1.17 (2d ed Cal CEB 2002). A person may gain entry to vacant property and take up residence, or a landlord may provide a key to a prospective tenant for viewing the premises and the person then moves in, in either event without the landlord's permission. The law is unsettled on whether some type of notice must be given to the unauthorized intruder before the commencement of an unlawful detainer action. It is advisable that a landlord first attempt getting law enforcement involved. If, as is usually the case, law enforcement considers it a "civil" matter and will not remove the trespasser, then two other courses of action may be taken: The trespasser may be served with a 30-day notice followed by an unlawful detainer action. Alternatively, the property owner may treat the entry as a type of tenancy at sufferance and commence an unlawful detainer without notice. An action in ejectment (see §9.11) or forcible entry and detainer (see CCP §§1159-1160) may also be available. For a general discussion regarding remedies available for trespass, see Real Property Remedies §§11.21-11.35.

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III. DRAFTING LANDLORD-TENANT AGREEMENT

§1.12 A. Option to Use Preprinted Forms

Many residential landlords use some sort of printed form for both fixed-term leases and month-to-month rental agreements. See, *e.g.,* §§1.81-1.82. For very simple tenancies, a printed form may be adequate to meet the needs of the parties. Owners of multi-unit buildings or owners of large numbers of rental properties often have their attorneys prepare custom-made forms to be printed and used for all the units. Even the owner of a few units should consider having an attorney draft a customized residential lease form. This is particularly important in a rent-controlled jurisdiction where special provisions might be required (see §1.31).

Many landlords use commercially printed forms produced by trade associations, other landlords, or printing companies. Some printed forms have been drafted to benefit the tenant, and might be proposed for use by an association of the tenants of a given apartment building (see §§5.33-5.42). Most printed forms in common use, however, contain provisions that primarily benefit the landlord.

In nonresidential tenancies, commercially printed forms are also available, but in many instances the leases are drafted by the attorney for the landlord and specific terms may be subject to negotiation. See, *e.g.,* lease forms in Office Leasing: Drafting and Negotiating the Lease (Cal CEB 1996).

Both the landlord and tenant should be cautious about automatically using a printed form to make their agreement. A printed form may contain provisions that are simply invalid (see §1.30) or do not meet the specific needs of the rental property or unit. For further discussion of the pros and cons of using printed lease forms, see §§4.17-4.19. Use of a printed form probably increases the likelihood that the agreement will be construed against the landlord as an adhesion contract. See *Wilson v San Francisco Sav. & Loan Ass'n* (1976) 62 CA3d 1, 132 CR 903 (deed of trust with impound provisions); *Spence v Omnibus Indus.* (1975) 44 CA3d 970, 119 CR 171 (home-remodeling contract); *Neal v State Farm Ins. Co.* (1961) 188 CA2d 690, 10 CR 781 (employment contract).

A printed form will make it more difficult for the tenant to negotiate for the inclusion of provisions more favorable to him or her. Many landlords will refuse to deviate from a printed form even if a provision is clearly illegal, or the tenant's proposal would be in the landlord's interest. The tenant should not hesitate, however, to suggest that certain provisions be deleted from a printed form. If a court later bars enforcement of such provisions (see §1.30), the landlord's refusal to delete them will not make the provisions valid. A custom-drafted agreement—whether oral, handwritten, or typed—offers a greater prospect for give-and-take by landlord and tenant in negotiating the terms of the agreement.

On the landlord's duty to provide the tenant with a copy of the signed lease or rental agreement within 15 days of its execution, see CC §1962, discussed in §1.21A.

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B. Written or Oral Agreement?

§1.13 1. Legal Requirements

An agreement is necessary to create a landlord-tenant relationship. See *Samuels v Ottinger* (1915) 169 C 209, 146 P 638; §1.1. The agreement need not be in writing to be enforceable; the existence of an agreement depends on the parties' intent, and no particular words or format are required. *Beckett v City of Paris Dry Goods Co.* (1939) 14 C2d 633, 96 P2d 122; *Timm v Brown* (1947) 78 CA2d 609, 178 P2d 10. Whether written or oral, the agreement must establish the identity of the parties, the rent and its manner of payment, the duration of the tenancy, and a reasonable description of the premises. *Beckett v City of Paris Dry Goods Co., supra; Frey v Corbin* (1948) 84 CA2d 536, 191 P2d 21.

An agreement for a fixed term tenancy (see §1.8) of more than one year is enforceable only if it is in writing. CC §§1091, 1624(a)(3); CCP §1971. See also CC §798.15 (rental agreement for mobilehome park tenancy must be in writing). A lease for a term of more than one year must be executed by the landlord to be enforceable at all. CC §1091; CCP §1971. If a lease for a term of more than one year is executed by the landlord's agent, the agent's authority must be in a writing signed by the landlord. CC §1624(a)(3). To be enforceable against the tenant, the lease must be executed by both the landlord, as grantor of the estate (CC §1091; CCP §1971), and the tenant, as the party to be charged (CC §1624(a)(3)). A lease not signed by the tenant may be enforceable if the landlord signed the lease and delivered it to the tenant for signature, and the tenant accepted it without comment and paid the rent. *Walker v Dorn* (1966) 240 CA2d 118, 49 CR 362.

A lease normally need not be recorded. An unrecorded lease is enforceable between the parties (CC §1217) and against any third party who acquires an interest in the property with notice of the leasehold interest (*Scheerer v Cuddy* (1890) 85 C 270, 24 P 713). The tenant's possession usually is sufficient to give notice to third parties of the tenant's unrecorded interest. CC §1214; *Scheerer v Cuddy, supra*; *Evans v Faught* (1965) 231 CA2d 698, 42 CR 133.

If the property is sold at a trustee's sale, any leasehold interest that is subordinate to the foreclosing deed of trust is extinguished and the new owner may commence eviction procedures under CCP §1161a. See §§8.60-8.61.

Some lease transactions are recorded. See Office Leasing: Drafting and Negotiating the Lease, chap 38 (Cal CEB 1996). A county recorder may accept for recordation a document entitled "memorandum of lease" that states that the parties have executed a certain unrecorded lease, describes various terms of the lease, is signed, and includes a certificate of acknowledgment by both parties. 87 Ops Cal Atty Gen 1 (2004).

PRACTICE TIP: A tenant with a favorable long-term lease, a lease with an option to purchase or other contingent interest, or a lease containing rights affecting co-tenants (*e.g.,* an exclusive clause in a lease for shopping center space) should consider recordation of the lease or a memorandum of the lease. The lease should be checked beforehand to ensure that it does not contain a clause prohibiting its recordation.

An oral lease for a term of one year or less is usually not avoided by the statute of frauds (CC §1624(a)(3)), but it must be in writing if it will take effect in the future and expire more than one year after its execution. *Wickson v Monarch Cycle Mfg. Co.* (1900) 128 C 156, 60 P 764. A tenant who enters under an unenforceable oral lease becomes either a tenant at will or a periodic tenant (see §§1.9-1.10). *Phelan v Anderson* (1897) 118 C 504, 50 P 685.

A landlord who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean for a tenancy longer than one month, must give the tenant a copy of the lease or rental agreement written in that language before the tenant signs, unless the tenant has provided his or her own interpreter. CC §1632(b)(3), (d), (i). If the landlord fails to comply with this requirement, the tenant may rescind the agreement. CC §1632(k).

On a landlord's general duty to provide a tenant with a copy of the signed lease or rental agreement within 15 days of its execution, see CC §1962, discussed in §1.21A.

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2. Advantages and Disadvantages

§1.14 a. For Landlord

It is almost always in the landlord's interest to prepare a tenancy agreement in writing, whether a fixed-term lease or a month-to-month rental agreement. Written agreements are especially important in rent-controlled jurisdictions. See §1.31. Specifying the terms of the agreement and the tenancy in writing may avoid ambiguity and prevent future disputes. A written agreement, together with written rules and regulations incorporated into it, facilitates control of tenant behavior in matters as diverse as use of the pool and spa, the storage of items on balconies or in common areas, parking, use of the parking area for washing and maintaining cars, and so on. A written agreement may also provide a basis for just-cause eviction of unwanted tenants, for managing intertenant relations, and for resolving disputes.

Whether a specially prepared or a preprinted form rental agreement is used, it is strongly recommended that the landlord and the tenant discuss its provisions, particularly those that amend local or state law or that impose responsibilities on the tenant. The tenant should be required, in particular, to initial those provisions that waive rights that the tenant might otherwise have without the agreement.

Residential landlords may wish to include a prohibition against assignment and subletting in the lease or rental agreement (see CC §1995.230), again particularly in rent-controlled jurisdictions (see §1.31). Such a prohibition must be included in the agreement. When the lease does not otherwise provide, a tenant has the right to transfer the leasehold interest, either by assignment (*Kassan v Stout* (1973) 9 C3d 39, 106 CR 783), or by sublease (*Chandler v Hart* (1911) 161 C 405, 119 P 516). See also *Little v Guadron* (1986) 187 CA3d Supp 1, 4, 232 CR 516. If the lease permits assignment and subletting, the landlord will be held to a standard of good faith and reasonableness in withholding consent to any assignment or subletting. CC §1995.260. See, *e.g.*, *Court House Plaza Co. v Goodenough* (2003) 106 CA4th 832, 131 CR2d 193, in which the court found that a party who took possession under a sublease and executed an assignment of the original lease, without the consent of the lessor, was neither an "assignee" nor a third party beneficiary to the original lease and therefore lacked standing to sue the lessor for alleged breach of contract, specific performance, and declaratory relief. On assignment and subletting, see §§1.54, 3.49-3.59A.

To benefit from the damages remedy provided by CC §1951.4 when the tenant breaches the lease and abandons the premises, the landlord must include a provision to that effect in the lease. Under CC §1951.4, the landlord may elect to continue the lease and enforce the right to recover rent as it becomes due for the term of the lease. For discussion of this remedy, see §8.15. For the CC §1951.4 remedy to be available, the lease must also afford the tenant the various rights to sublet specified in CC §1951.4(b)(1)-(3). See §8.15.

Unless the lease or rental agreement expressly provides for attorney fees, neither the landlord nor the tenant will be able to recover attorney fees for enforcing its terms. See CCP §1021; *Bank of America v Moore* (1937) 18 CA2d 522, 64 P2d 460. Although some of the essential terms of an oral lease can be proved from the parties' conduct, the existence of an oral attorney fee provision would be almost impossible to prove. Landlords may prefer a written lease because it permits inclusion of an attorney fees provision, but the courts will interpret a provision authorizing only the landlord to recover attorney fees for enforcing the lease or rental agreement as authorizing recovery of fees by the prevailing party in an action under the agreement. CC §1717(a).

PRACTICE TIP: Because most residential tenants have a better chance of collecting a judgment against the landlord than the landlord has of collecting a judgment against the tenant, the landlord's attorney should consider all relevant circumstances to determine whether an attorney fee provision should be included. See §4.42.

Other rental agreement provisions that must be specified in writing typically include the following:

- Specification of the purpose of the security deposit and how it is to be applied (see §1.48);
- Indemnification for personal injury or property damage caused by the tenant (see §1.47); and
- Provision for options to renew the lease, if applicable.

See §1.29.

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§1.15 b. For Tenant

It is often in the tenant's interest to obtain the security of a fixed-term occupancy by having the terms of the lease set forth in a written agreement. The agreement *must* be in writing if the term is for more than one year. CC §1624(a)(3). See §1.13.

Whether it benefits the tenant for the rental agreement to contain an attorney fee provision is unclear. On the one hand, even if the agreement provides that only the landlord may recover attorney fees on the tenant's breach, it must be interpreted reciprocally to permit an award to a tenant who prevails in an action brought by either party to enforce the lease. CC §1717(a). See §13.25. On the other hand, the landlord may not recover attorney fees in an unlawful detainer action if the lease does not provide for them. CCP §1021. The absence of such a provision probably frees the tenant to raise any available defenses, meritorious or not, knowing that he or she cannot become liable for the landlord's legal expenses.

In certain instances, particularly when covered by rent control ordinances that contain "just-cause" eviction limitations (see §§1.31, 7.54), the tenant may be better off without a written agreement. "Just cause" typically includes:

- Failure to pay rent;
- Breach of the lease;
- Nuisance;
- Illegal use of the premises;
- Withdrawal of the unit from the rental market;
- Conversion to condominiums;
- Demolition;
- Owner or relative occupancy;
- Major renovation; and
- Other causes enumerated in a particular rent control ordinance.

Under rent control, it is primarily the landlord who benefits from a written lease or rental agreement. The more conditions in the agreement, the more likely that the landlord will be able to evict an unwanted tenant for cause (see §1.31).

In contrast, an oral month-to-month agreement under a rent control ordinance gives the tenant essentially the security of a written lease, without a number of written lease covenants, breach of which may be cause for eviction. State law and the rent control ordinance will contain most of the protections necessary for the tenant, independent of the terms of the agreement. Other major advantages for the tenant under an oral agreement are that the tenant is free to use the premises for any reasonable purpose (see §1.28), may sublet or assign without permission (see §§1.54, 3.56), may have pets (see §1.62), and may repaint or reasonably alter the premises (see §1.60).

There are, however, some advantages for the tenant in securing a written lease for a term:

(1) The landlord cannot change any of the terms of the lease by serving a 30-day or 60-day notice;

(2) The landlord cannot use any of the discretionary eviction justifications (*e.g.,* owner or relative occupancy); and

(3) The tenant may obtain the relief from forfeiture remedy provided by CCP §1179 (see §§13.56-13.57).

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C. Requisites of Agreement

1. Parties

§1.16 a. Capacity to Enter Into Lease

All natural persons are capable of entering into leases, except minors, persons of unsound mind, and persons deprived of their civil rights. CC §1556. See also §1.37. For real property owned by a minor or an incompetent person, a lease may be executed by a court-appointed guardian or conservator. Prob C §§2550, 2553-2556. A minor emancipated under Fam C §§7000-7143 (Emancipation of Minors Law) may enter into a lease of real property. Fam C §7050(e)(3). A guardian or conservator may lease real property without court authorization when the rental value does not exceed $5000 per month and the term does not exceed two years, or when the tenancy is from month to month. Prob C §2555. Otherwise, court authorization is required. Prob C §§2550, 2553-2554.

The parties to a lease or rental agreement must be "capable of contracting" (CC §1550(1)), and their identities must be "ascertainable" (CC §1558). Accordingly, a lease or rental agreement should set forth the names of the parties, their legal status, and the nature of their interests in the property. See *Losson v Blodgett* (1934) 1 CA2d 13, 36 P2d 147; *Dodd v Pasch* (1907) 5 CA 686, 91 P 166.

On the benefits of including specific tenant information in the lease or rental agreement, see §1.21. On required disclosures under CC §§1962, 1962.5 regarding owner, building manager, agent for service of process, rent payment, and other information, see §§1.21A, 1.29. For sample lease or rental agreement provisions designating the parties and making the required disclosures, see §§1.37, 1.40, 1.76.

On the landlord's duty to provide the tenant with a copy of the signed lease or rental agreement within 15 days of its execution, see CC §1962, discussed in §1.21A.

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b. Execution

§1.17 (1) By Spouses

Both spouses must join in executing a lease of community real property for a term of longer than one year, except when the lease runs from one spouse to the other. Fam C §1102. A lease executed on or after January 1, 1975, is presumed to be valid if either spouse holds record title to the community real property and leases it to a tenant who takes the interest in good faith and without knowledge of the marriage relationship. Fam C §1102(c)(2). A lease of community real property executed before that date is presumed to be valid if the husband had record title and leased the property to a tenant acting in good faith and without knowledge of the marriage. Fam C §1102(c)(2).

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§1.18 (2) By Joint Tenants or Tenants in Common

If title to the property is held in joint tenancy or tenancy in common, all the owners should execute the lease, unless one of them has been designated an agent to act on behalf of the others. When one owner executes a lease with the other owners' knowledge, the owners ratify the lease if they fail to object. *Halsey v Robinson* (1942) 19 C2d 476, 122 P2d 11. Acceptance by the joint tenants or tenants in common of benefits under the lease also constitutes ratification of the lease. *Atlantic Oil Co. v County of Los Angeles* (1968) 69 C2d 585, 72 CR 886. One joint tenant or tenant in common may also confer his or her right of possession under the lease by conveying a lease to a third person. *Atlantic Oil Co. v County of Los Angeles, supra*; *Verdier v Verdier* (1957) 152 CA2d 348, 313 P2d 123. In such a situation, another owner cannot divest the lessee of the right of possession conferred by the lease. *Swartzbaugh v Sampson* (1936) 11 CA2d 451, 54 P2d 73. The single owner's lease, however, conveys only his or her interest, and cannot bind or prejudicially affect the interests of the other joint tenants or tenants in common. *Tenhet v Boswell* (1976) 18 C3d 150, 133 CR 10.

In *Rossetto v Barross* (2001) 90 CA4th Supp 1, 110 CR2d 255, the court found that tenants in common could create, by contract, a landlord/tenant relationship with one of the other tenants in common. The court held that the fact that one of the tenants in common had exclusive possession of the premises was a strong indicator of lessee status, thus entitling the remaining tenants in common to state a cause of action in unlawful detainer.

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§1.19 (3) By Corporations and Other Entities

In addition to natural persons, the following entities may enter into leases:

- corporations (Corp C §207(g));
- nonprofit corporations (Corp C §§5140(i), 7140(i), 9140(i));
- limited liability companies (Corp C §17003(e), (f));
- unincorporated benevolent and fraternal societies and associations, lodges, and labor organizations (Corp C §20001);
- medical associations (Corp C §21200);
- partnerships (Corp C §§16103, 16203, 16303);
- limited partnerships (Corp C §15503); and
- school districts (Ed C §81360).

The capacity of corporations, nonprofit corporations, and unincorporated associations to enter into leases is subject to limitations in the entities' articles of incorporation, bylaws, or regulations. Corp C §§207, 5140, 20001.

With the emergence in California of "corporate" housing projects, *i.e.,* premises leased to a corporation to house its corporate officers or employees, landlord attorneys should be aware of Corp C §313. Section 313 provides that a lease agreement that is executed by an "operational" officer (*i.e.,* chairman of the board, president, vice-president) *and* "financial" officer (*i.e.,* secretary, chief financial officer, assistant treasurer) is valid even if the person or persons signing the lease lacked authority to do so. This is so only if the landlord had no actual knowledge of the signatory's lack of authority.

In *Snukal v Flightways Mfg.* (2000) 23 C4th 754, 98 CR2d 1, the court held that a corporation will also be bound to a lease under Corp C §313 if the person signing the lease holds two corporate offices, as chairman of the board, president, or any vice-president and secretary, assistant secretary, chief financial officer, or assistant treasurer, even if that person signed the lease solely in the capacity of president.

The capacity of a limited liability company to enter into leases is subject to the limitations in its articles of organization pertaining to management. Corp C §§17150-17151, 17157.

When title is in the name of a partnership, a leasehold interest may be transferred as provided in Corp C §16302.

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§1.20 (4) By Agents

A lease need not be executed by the owner of the property or the actual tenant, but may be executed by an agent of either party. CC §2305. On appointment of agents, see CC §§2295-2296. Either the landlord or the tenant may authorize an agent to negotiate and execute a lease or to collect or pay rent for the leased premises. CC §§2304-2305: see *Holwick v Walker* (1935) 6 CA2d 669, 45 P2d 374. If one of the parties authorizes an attorney in fact to execute a lease or rental agreement, the attorney must sign the name of the principal to it, as well as his or her own name as attorney in fact. CC §1095. For discussion of problems on termination from use of an agent, see §8.71.

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§1.21 c. Listing All Tenants

When terminating the tenancy, landlords frequently encounter problems in determining which parties are occupying the premises and thus must be served with notices to quit and be named in an unlawful detainer action. See §13.70. Leases usually provide that the premises may be occupied only by those expressly named as tenants. In rent control jurisdictions, naming the actual tenants who are permitted to occupy the residence and providing that no other tenant may occupy the unit may assist the landlord in controlling revolving door tenancies. See §1.37. Listing the names of all tenants and tenant's children in the lease or rental agreement is vital in this regard. See §1.45. Many landlords also require the date of birth of all occupants to identify each occupant 18 years of age or older who should be named as a defendant in the event an unlawful detainer action is to be filed. In addition, the lease might specify that anyone not named as a tenant in the lease is a guest and limit guest occupancy to a certain number of days and a certain number of guests at any one time. (See the time limitations on guests in mobilehome tenancies under CC §798.34 (20 consecutive days or 30 days in a calendar year).) See §1.46. The landlord might also include a provision prohibiting the tenant's right to assign or sublet (see §§1.54, 3.49-3.59A). To avoid the unknown-tenant problem on termination, the landlord should require strict compliance with any clause conditioning assignment or subletting on first obtaining the landlord's written consent and, when prosecuting an unlawful detainer action, should use the prejudgment claim of right to possession procedure under CCP §415.46. See §§13.70-13.71. On the effect of tenant bankruptcy on lease assignment and restrictions on assignment, see §§3.59A, 14.35, 14.43, 14.49-14.52.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.21A d. Required Agent and Service of Process Information; Copy of Lease; CC §1962

§1.21A d. Required Agent and Service of Process Information; Copy of Lease; CC §1962

Civil Code §1962(a)(1) provides that the owner of one or more rental units must include, in the lease or rental agreement, the name, telephone number, and usual street address at which personal service may be effected on

- Each authorized building manager; and
- Each owner or person who is authorized to act for and on behalf of the owner for the purposes of service of process and of receiving and receipting notices and demands.

Civil Code §1962.5 provides an alternative for disclosing the written information required under CC §1962(a)(1). Instead of being inserted into the lease, the information may be

- Posted in a conspicuous spot in an elevator, if there be one; or
- Posted in at least two conspicuous places on the premises, if there be no elevator.

For a single-unit dwelling, such information may be disclosed by posting either in an elevator or in two conspicuous places on the property. CC §1962.5.

The lease or rental agreement must include the name of the person or entity to whom rent payments shall be made, and its address and telephone number, as well as the form or forms in which rental payments shall be made. CC §1962(a)(2)-(3). This information may not be disclosed by posting it on the property in lieu of stating it in the lease. If rent may be paid in person, the lease must state the usual days and hours that the owner or agent will be available to receive payments. CC §1962(a)(2)(A). At the owner's option, the lease may instead state either (CC §1962(a)(2)(B)):

- The account number of a financial institution into which the rent may be paid and the name and street address of that institution, which must be within five miles of the rental property; or
- The information necessary to establish an electronic transfer procedure for paying the rent.

The information and disclosures required by CC §1962 must be kept current and a new owner or manager must comply with its provisions within 15 days of succeeding the previous owner or manager. CC §1962(c).

The penalties for nondisclosure in violation of CC §1962 are that the party who enters into the lease or rental agreement is deemed the agent of each person that is the owner for the purpose of service of process and receiving and receipting notices and demands and the purpose of receiving rental payments. CC §1962(d). Payments may be made in cash, by check, by money order, or in any form previously accepted by the landlord's agent, unless the form of payment has been specified in the oral or rental agreement or the landlord has notified the tenant in writing that a particular form of payment is unacceptable. CC §1962(d).

WARNING: A landlord generally may not demand cash as the exclusive form of payment of rent or of a security deposit. CC §1947.3. A landlord may, however, require cash as the exclusive form of payment, for a period not to exceed 3 months, if the tenant previously has attempted to pay the landlord with a check drawn on insufficient funds or has stopped payment on a check for rent or security. To make a demand for cash payment, the landlord must give the tenant written notice and attach a copy of the dishonored check. CC §1947.3(a)(2).

Finally, CC §1962(f) provides that if the address disclosed by the landlord does not allow for personal delivery, then it shall be conclusively presumed that upon the mailing of rent or notice to the landlord at the address provided, the notice or rent is received by the landlord on the date posted, if the tenant can show proof of mailing to the name and address provided by the landlord.

For sample lease or rental agreement provisions designating the parties and making the required disclosures, see §§1.37, 1.40, 1.76.

The landlord must provide a copy of the lease or rental agreement to the tenant within 15 days of its execution. Thereafter, once each calendar year, the landlord must provide an additional copy upon the tenant's request. If the landlord does not have a copy of the lease or rental agreement, that landlord must furnish the tenant with a written statement stating that fact and disclose all required information about the manager, the agent for service of process,

rental payment, and form of payment. CC §1962(a)(4).

If the rental agreement is oral, within 15 days of the agreement, the landlord must provide the tenant with a written statement containing the required information. Landlord must provide that information once each calendar year if the tenant requests it. CC §1962(b).

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§1.22 2. Rent

A valid lease must be supported by mutual consideration; a lease that allows one party to withdraw without cause is unenforceable. See *Cox v Hollywood Film Enters.* (1952) 109 CA2d 320, 240 P2d 713. In the usual lease, mutual consideration is found in the landlord's implied covenant that the tenant will have quiet enjoyment of the premises (see §§3.5-3.7) and in the tenant's promise to pay rent. See *Blackman v Dalton's Auto & Furniture Loans* (1942) 51 CA2d 14, 124 P2d 123. The tenant's promise to repair the premises may be sufficient to create a binding lease even if no rent will be paid. See *Riner v Vernon* (1933) 132 CA 178, 22 P2d 255. For discussion of the pitfalls of "labor-for-rent" arrangements, see §4.31.

The lease or rental agreement should clearly specify the amount and manner of rent payment. See *Beckett v City of Paris Dry Goods Co.* (1939) 14 C2d 633, 96 P2d 122. On lease provisions regarding rent payments and agent information required in residential tenancies under CC §1962, see §1.21A. For sample lease or rental agreement provisions on rent payments, see §1.40. See also §§4.19, 4.30.

When determining the amount of rent, landlords frequently consider:

- rents charged for similar premises in the area;
- vacancy rate in the area;
- the return that the landlord expects for the property, factoring into that equation debt service, property and income taxes, insurance, and repair and maintenance expenses on the property;
- use to be made of the premises;
- length of the lease term; and
- any ceilings imposed on rents under a local rent control ordinance.

For further discussion of setting the rent, see §4.34.

Most residential and commercial leases provide that the tenant must pay the rent at the beginning of the period for which it is due. See §1.40. The rent is not payable in advance unless the lease so provides. CC §1947. Under most residential leases, the rent is a fixed sum, payable monthly. Commercial leases may specify a net rent or percentage rent and, if one of these is used, the lease should specify the manner of computing the rent. See Office Leasing: Drafting and Negotiating the Lease, chaps 11-12 (Cal CEB 1996).

WARNING: To impose a late charge for delayed rent payments, the landlord must provide for this in the lease or rental agreement. The landlord should exercise caution in this area, however, because the law concerning late charges is still unsettled. For discussion of late charges, see §§4.43A, 8.39-8.40. For examples of late charge provisions, see §§1.41, 1.80-1.82.

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3. Description of Premises

§1.23 a. Basic Parameters

The premises must be sufficiently described in the lease or rental agreement so that the location and extent of the property can be determined. *Beckett v City of Paris Dry Goods Co.* (1939) 14 C2d 633, 96 P2d 122. The description need not be the property's legal description; a description by unit number and street address will suffice for most rental property. *Baranov v Scudder* (1918) 177 C 458, 170 P 1122. See §1.37 for a lease or rental agreement provision identifying the property. When a tenant takes possession of premises with an uncertain description and pays rent, that conduct constitutes evidence of the parties' intent that the tenant lease the premises and permits enforcement of the lease. *Guttman v Berry* (1948) 83 CA2d 507, 189 P2d 41.

PRACTICE TIP: The landlord must ensure that the property address is spelled correctly and is complete (including apartment number or letter) in the lease or rental agreement. For example, is the street a Place, Avenue, Street, or Boulevard? Should it be followed by North, South, East, or West? When the attorney drafts an unlawful detainer complaint, this information is often obtained from the lease or rental agreement. The correct information is crucial to successful prosecution of the action and especially for execution of a writ of possession. The levying officer will not evict the occupants if there is any confusion or ambiguity concerning the address.

A lease or rental agreement also passes to the tenant, as part of the leasehold interest, all appurtenances that are reasonably necessary to the tenant's use and enjoyment of the premises. *Owsley v Hamner* (1951) 36 C2d 710, 227 P2d 263 (maintenance of adjacent patio and arcade necessary to enjoyment of lease of store); *Ng v Warren* (1947) 79 CA2d 54, 179 P2d 41 (driveway on adjoining lot necessary appurtenance for access to leased premises); *Mayer v Hazzard* (1935) 10 CA2d 1, 51 P2d 189 (maintenance of appurtenant entrance necessary for use of premises, although not only means of access); *Sierad v Lilly* (1962) 204 CA2d 770, 22 CR 580 (parking spaces in front of premises reasonably necessary for use of premises). But see *Froomer v Drollinger* (1962) 201 CA2d 90, 19 CR 891 (parking behind store not reasonably necessary when lease provided for other parking area). Although all reasonably necessary appurtenances are considered to be part of the leased premises, the lease should specify any additional areas that the tenant may use (*e.g.,* parking spaces, storage areas, patios) to avoid future disputes over the tenant's right to use these areas. See §1.38.

Many older buildings have fewer parking spaces than apartments. In this situation, the landlord can either adopt a "first come, first served" policy, or assign and limit the parking. Parking assignments, limitations, and exclusions should be set forth in the written agreement.

PRACTICE TIP: The attorney should review how an applicable rent control ordinance treats "services" or "base amenities." Parking, storage, and swimming pools fall into these categories. A landlord may not be able to withdraw these services unilaterally, or, if they are withdrawn, the landlord may be required to reduce the tenant's rent under a formula prescribed in the rent control ordinance.

Some appurtenances such as garages and storage areas may be subject to separate lease agreements and complicate the unlawful detainer process. Some levying officers require separate writs of possession for separate garages or storage areas if they are not included in the description of the property listed in the judgment for possession.

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b. Condition of the Premises

§1.24 (1) Joint Pre-Possession Inspection

The condition of the premises often becomes an issue when the tenancy is terminated. If the landlord seeks to terminate the tenancy for nonpayment of rent, the tenant may raise the affirmative defense that the landlord has breached the implied warranty of habitability. See §§3.16-3.48. When either the landlord or the tenant terminates the tenancy, the amount of the security deposit that the tenant may recover usually depends on the condition of the premises. In proving their cases on both of these issues, the landlord and tenant may need to refer to some objective statement of the condition of the premises at the beginning of the tenancy. For example, the tenant might use such a statement to demonstrate the falsity of the landlord's contention that he or she did not breach the warranty of habitability because the tenant caused the defects. Similarly, whether the landlord may apply the security deposit to correct various defects could turn on whether the defects existed at the start of the tenancy.

To ensure that these issues can be proved at a future date, the landlord and tenant should conduct a joint tour of the premises before the tenant takes possession, inspecting the premises for defects that may become material. The tenant can take this opportunity to note defective conditions and request that they be corrected before he or she takes possession. The parties should note the condition of major systems, appliances, and furnishings and both should sign and date the lists. For sample checklists to use for this purpose, see §§1.25-1.26. All items that may be the subject of dispute on termination of the tenancy should be inspected, *e.g.,* the general structure of the premises, plumbing, appliances and fixtures, water heater, water, heat, lighting, ventilation, wiring, electrical outlets, fire safety, cleanliness, and sanitation. On refundability of security deposits, see §§4.11, 4.28, 8.172-8.176. For additional drafting tips regarding deposits, see §§4.23-4.29. For requirements of pre-moveout inspections, see CC §1950.5(f), discussed in §§8.167, 8.172A.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.25 (2) Form: Move-In/Move-Out Itemized Statement (California Apartment Association Form 16.0)

§1.25 (2) Form: Move-In/Move-Out Itemized Statement (California Apartment Association Form 16.0)

MOVE-IN/MOVE-OUT ITEMIZED STATEMENT

Resident Name(s)		Initial Inspection Date	Initial Inspection by	Final Inspection Date	Final Inspection By
Address/Apt. #	City	State	Zip	Move in Date	Move out Date

The condition of these premises is clean, undamaged, in good working order and adequate for customary use unless otherwise noted hereon. Use codes and comments to describe exceptions. Cross out items not applicable.

CODES: **NCC** - Needs complete cleaning • **REP** - Replace • **SC** - Needs spot cleaning • **SP** - Needs spot painting
RPR - Needs repair • **PT** - Needs painting • **SCR** - Scratched • **CLN** - Clean • **NEW** – New

	Move-In Inspection	Initial Inspection (residents option)	Final Inspection
KITCHEN			
Ceiling			
Doors			
Walls			
Floors			
Hood/Filter			
Fan/Light			
Counter top			
Sink/Faucets			
Drains/Disposal			
Cabinet/Doors			
Shelves/Drawers			
Under sink			
Windows			
Screens			
Curtains/Blinds			
Electric fixtures			
Light bulbs			
STOVE/OVEN			
Stove-Outside			
Burners			
Drip pans			
Vent			
Timer/Controls			
Oven surfaces			
Oven racks			
Broiler pan			
Light			
REFRIGERATOR			
Inside (all parts)			
Outside			
DISHWASHER			
Outside/Controls			
Inside (all parts)			
LIVING ROOM			
Walls			
Ceiling			
Doors			
Windows			
Screens			
Drapes/Blinds			
Shades/_____			
Floor			
Closet			
Electric fixtures			
Light bulbs			
Fireplace			

Comments:

	Move-In Inspection	Initial Inspection (residents option)	Final Inspection
1st BATH			
Ceiling			
Walls/Tile			
Floors			
Cabinets			
Shelves			
Doors			
Mirror			
Tub/Shower			
Caulking			
Shower Dr/Tracks			
Basin			
Drains			
Faucets			
Counter tops			
Exhaust fan			
Bowl/Seat			
Towel racks			
Window			
Screen			
Electric fixtures			
Light bulbs			
2nd BATH			
Ceiling			
Walls/Tile			
Floors			
Cabinets			
Shelves			
Doors			
Mirror			
Tub/Shower			
Caulking			
Shower Dr/Track			
Basin			
Drains			
Faucets			
Counter tops			
Exhaust fan			
Bowl/Seat			
Towel racks			
Window			
Screen			
Electric fixtures			
Light bulbs			
DINING ROOM			
Walls			
Ceiling			
Drapes/Blinds			
Shades/_____			
Closet			
Doors			
Floor			
Windows			
Screens			
Electric fixtures			
Light bulbs			

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CODES: **NCC** - Needs complete cleaning • **REP** - Replace • **SC** - Needs spot cleaning • **SP** - Needs spot painting
RPR - Needs repair • **PT** - Needs painting • **SCR** - Scratched • **CLN** - Clean • **NEW** – New

	Move-In Inspection	Initial Inspection (residents option)	Final Inspection
1st BEDROOM			
Walls			
Ceiling			
Windows			
Screens			
Drapes/Blinds			
Shades/_____			
Doors			
Closet			
Floor			
Electric fixtures			
Light bulbs			
2nd BEDROOM			
Walls			
Ceiling			
Windows			
Screens			
Drapes/Blinds			
Shades/_____			
Doors			
Closet			
Floor			
Electric fixtures			
Light bulbs			
3rd BEDROOM			
Walls			
Ceiling			
Windows			
Screens			
Drapes/Blinds			
Shades/_____			
Doors			
Closet			
Floor			
Electric fixtures			
Light bulbs			

	Move-In Inspection	Initial Inspection (residents option)	Final Inspection
OTHER ROOM			
Walls			
Ceiling			
Closet/Cabinets			
Windows			
Curtain/Shade/Blind			
Screen			
Floor			
Door			
Electric fixtures			
Light bulbs			
FRONT PORCH			
Electric fixtures			
Light bulbs			
BACK PORCH			
Electric fixtures			
Light bulbs			
GARAGE/CARPORT			
Electric fixtures			
Light bulbs			
Remote/Opener			

Move-In Inspection:

Resident Date

Resident Date

Resident Date

Resident Date

Owner/Agent Date

Initial Inspection:

Owner/Agent Date

Final Inspection:

Owner/Agent Date

According to state law:

Any security shall be held by the landlord for the tenant who is party to the lease or agreement. The claim of a tenant to the security shall be prior to the claim of any creditor for the landlord. (Civil Code Section 1950.5(d)). According to Civil Code Section 1950.5(b), the security deposit may be used by the owner for any purpose, including, but not limited to, any of the following:

(1) The compensation of a landlord for a tenant's default in the payment rent.
(2) The repair of damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or by a guest or licensee of the tenant.
(3) The cleaning of the premises upon termination of the tenancy necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy. The amendments to this paragraph enacted by the act adding this sentence shall apply only to tenancies for which the tenant's right to occupy begins after January 1, 2003. (Amendment underlined)
(4) To remedy future defaults by the tenant in any obligation under this rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied thereto by the rental agreement.

From the time of the initial inspection until the termination of the tenancy, the tenant may remedy the deficiencies identified in the initial inspection, in a manner consistent with the rights and obligations of the parties under the rental agreement, in order to avoid deductions from the security deposit.

The law allows the Owner/Agent to use the security deposit for legal deductions itemized in this statement that are not corrected by the Resident prior to the termination of the tenancy or that were not identified due to the presence of the Residents' possessions during the time of the initial inspection. It also allows Owner/Agent to use the security deposit to correct any damages that occur to the unit/property between the time of the initial inspection and the termination of the tenancy.

An itemized statement will be sent to you within 21 calendar days after the Owner/Agent has regained possession of the premises.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.26 (3) Form: Furniture Inventory (California Apartment Association Form 16.1)

§1.26 (3) Form: Furniture Inventory (California Apartment Association Form 16.1)

FURNITURE INVENTORY

On _____ (date), the undersigned carefully inspected the furniture and furnishings in the premises located at:

_____, Unit # (if applicable)_____
(Street Address)

_____ , CA _____ .
(City) *(Zip)*

and unless indicated with any defect explained below, each item has been found:

a) To be undamaged and in good working order;
b) Adequate and appropriate for customary use; and,
c) Free of vermin and in clean and sanitary condition.

Furnishings received as follows (Codes):			**Location Symbols:**		
1 – Bent	8 – Gouged	15 – Rusty			
2 – Broken	9 – Holes	16 – Scratched	B – Bottom	Re – Rear	Se – Seat
3 – Burned	10 – Loose	17 – Soiled	Ba – Back	Rt – Right	Cu – Cushion
4 – Chipped	11 – Marred	18 – Stained	C – Corner	S – Side	D – Door
5 – Cracked	12 – Moth-eaten	19 – Torn	F – Front	T – Top	Dr – Drawer
6 – Dented	13 – Normal wear	20 - _____	Le – Left	Lg – Leg	V – Veneer
7 – Faded	14 – Rubbed	21 - _____			

Use the above codes to describe defects in condition (example: 4-C = chipped corner)

	Condition				Condition		
Item Name	Move-In Inspection	Initial Inspection*	Final Inspection*	Item Name	Move-In Inspection	Initial Inspection*	Final Inspection*

* From the date of the initial inspection until the termination of the tenancy, the tenant may remedy the deficiencies identified in the initial inspection, in a manner consistent with the rights and obligations of the parties under the Rental/Lease Agreement, in order to avoid deductions from the security deposit.

General comments: _____

_____

_____

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According to state law:

Any security shall be held by the landlord for the tenant who is party to the Rental/Lease Agreement. The claim of a tenant to the security shall be prior to the claim of any creditor for the landlord. (Civil Code Section 1950.5(d)).

According to Civil Code Section 1950.5(b), the security deposit may be used by the owner for any purpose, including, but not limited to, any of the following:

(1) The compensation of a landlord for a tenant's default in the payment of rent.
(2) The repair of damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or by a guest or licensee of the tenant.
(3) The cleaning of the premises upon termination of the tenancy necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy. The amendments to this paragraph enacted by the act adding this sentence shall apply only to tenancies for which the tenant's right to occupy begins after January 1, 2003. (Amendment underlined)
(4) To remedy future defaults by the tenant in any obligation under this rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied thereto by the rental agreement.

The law allows the Owner/Agent to use the security deposit for legal deductions itemized in this statement that are not corrected by the Resident prior to the termination of the tenancy or that were not identified due to the presence of the Residents' possessions during the time of the initial inspection. It also allows Owner/Agent to use the security deposit to correct any damages that occur to the unit/property between the time of the initial inspection and the termination of the tenancy.

A final itemized statement will be sent to you within 3 weeks (21 days) after the Owner/Agent has regained possession of the premises.

Resident acknowledges receipt of a copy hereof:

_____ *Date*	_____ *Resident*	_____ *Date*	_____ *Resident*
_____ *Date*	_____ *Resident*	_____ *Date*	_____ *Resident*
_____ *Date*	_____ *Owner/Agent*		

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.26A 4. Deposits, Screening Fees, Key Money

§1.26A 4. Deposits, Screening Fees, Key Money

The laws on security deposits, screening or application fees, and key money that can be levied by a landlord at the beginning of a tenancy vary greatly between residential and nonresidential tenancies. On residential tenancies, see CC §§1950.5-1950.6, discussed in §§1.30, 1.48-1.51, 4.23-4.29, 8.167-8.175. On nonresidential tenancies, see CC §§1950.7-1950.8, discussed in §§4.28, 4.29A, 8.167-8.175; see also Office Leasing: Drafting and Negotiating the Lease §§5.17, 9.1, 10.1, 13.3-13.9 (Cal CEB 1996).

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§1.27 5. Term

The term of the tenancy is the period for which the tenant may occupy the premises, and is one of the essential elements of a lease or rental agreement. See *Taylor v Terry* (1886) 71 C 46, 11 P 813. The landlord should specify the precise term of the tenancy to avoid ambiguity or undesired results. Because the term might not commence with execution of the lease, the landlord should identify the beginning and ending dates. If the term is not specified, certain statutory presumptions will dictate the term, and these presumptions may not comport with the parties' intent. Use of the word "term" in this context does not connote only a tenancy for a fixed term (or "estate for years"; see §1.8). Specification in the rental agreement of a month-to-month tenancy, or a tenancy for some other period, constitutes adequate specification of the term because a periodic tenancy is a tenancy for the period specified that is renewed for that period each time the tenant continues to occupy the premises and pay rent for yet another period (see §1.9).

NOTE: In *Roble Vista Assocs. v Bacon* (2002) 97 CA4th 335, 118 CR2d 295, the appellate court upheld a City of Palo Alto ordinance that requires landlords to offer all tenants leases of at least a one-year period. See §1.9.

When the tenant's occupancy is to begin on completion of construction of the rental premises, the adequacy of the statement of the term in the lease often becomes an issue. As a general rule, a statement that the term will commence on completion of the premises is adequate; actual completion of the premises removes any ambiguity. *City of Santa Cruz v MacGregor* (1960) 178 CA2d 45, 2 CR 727. The term begins on completion of construction under such a provision even if completion occurs well after the date originally contemplated by the parties. *Fanta v Maddex* (1926) 80 CA 513, 252 P 630; *Lang v Pacific Brewing & Malting Co.* (1919) 44 CA 618, 187 P 81. The rule against perpetuities applies to leasehold interests (*Haggerty v City of Oakland* (1958) 161 CA2d 407, 326 P2d 957), which, therefore, must vest within lives in being plus 21 years (CC §715), or within 30 years (CC §715). The rule against perpetuities is not violated by a lease provision that the lease will commence on completion of construction, because the courts will presume that the landlord was obligated to complete the premises within a reasonable time. *Wong v DiGrazia* (1963) 60 C2d 525, 35 CR 241.

When no term is specified in the lease or rental agreement, the term is determined in accordance with statutory presumptions. For residential tenancies, the period adopted for the payment of rent is presumed to be the term of the lease (*i.e.,* if the rent is paid monthly, then the tenancy is for one month). If there is no agreement concerning the frequency of rent payments, the tenancy is presumed to be monthly. CC §1944. For leases of agricultural or grazing property, the tenancy is presumed to be for one year. CC §1943. For leases of other kinds of property, the tenancy is presumed to be from month to month. CC §1943.

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§1.28 6. Use of Premises

The lease or rental agreement may include a provision specifying the permitted uses of the property. See §1.55. If the lease does not specify permissible uses or restrict changes in use, the tenant may use the premises for any lawful purpose that is not materially different from that for which the premises ordinarily are used or for which they were constructed. *Davidson v Goldstein* (1943) 58 CA2d Supp 909, 136 P2d 665; *Keating v Preston* (1940) 42 CA2d 110, 108 P2d 479. See discussion on Covenants Restricting Changes in Use in Commercial Tenancies, California Eviction Defense Manual §19.10 (2d ed Cal CEB 1993). See also Office Leasing: Drafting and Negotiating the Lease, chap 14 (Cal CEB 1996). Under CC §1930, when something is hired for a particular purpose, the hirer must not use it for any other purpose and is liable for any damages caused by the unauthorized use. Under CC §1941.2(a)(5), a residential tenant has an affirmative obligation to use the premises as an abode. See §1.48. Despite CC §1930, the courts usually do not interpret a covenant in commercial leases to use the premises for a particular purpose as limiting the tenant to that use of the property if there is no evidence that the parties intended the covenant to have that effect. *Lippman v Sears, Roebuck & Co.* (1955) 44 C2d 136, 280 P2d 775. Such a covenant may be interpreted to permit the tenant to use the premises for any reasonable purpose that is not expressly excluded by the terms of the lease. *Lippman v Sears, Roebuck & Co., supra*; *Eltinge & Graziado Dev. Co. v Childs* (1975) 49 CA3d 294, 122 CR 369.

Since 1982, residential tenants have had the absolute right to operate a small daycare business (six or fewer children) in their unit despite any lease provision, local ordinance, or zoning ordinance to the contrary. See Health & S C §1597.40. Effective in 1997, this law was amended to require the tenant to give 30 days' advance written notice of the tenant's intention to commence operating a small daycare business at the leased premises, and gave the landlord the right to increase the tenant's security deposit up to the maximum allowed by law. Health & S C §1597.40(d). Small daycare businesses are limited to six or fewer children unless the landlord agrees in writing to up to eight children. Health & S C §1597.44.

A tenant operating a daycare business out of a residential premise is required to have either (Health & S C §1597.531):

- liability insurance of at least $100,000 per occurrence and $300,000 total annual aggregate; or
- affidavits by all parents acknowledging the lack of insurance.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.29 7. Required Disclosures

§1.29 7. Required Disclosures

Federal and state law require that landlords make certain disclosures. Some disclosures must be made before the tenant enters into the rental agreement; others must be incorporated into the rental agreement, while still other notifications are required after the tenant enters into the rental agreement in the event of renovation or repair to the rental unit. Some of these disclosures apply to all tenancies; others are applicable only to residential units, and others are necessary only if a situation arises that triggers the disclosure law. See also chap 4.

Common-Area Utilities

If the landlord of a residential dwelling unit or his agent has knowledge that gas or electric service provided through the tenant's meter serves an area outside the tenant's unit, this condition must be disclosed explicitly before the rental agreement or lease is executed, and the landlord and tenant may then make a written agreement that the tenant will pay the extra cost, or make any other mutually agreeable written arrangement. CC §1940.9.

Carcinogenic Material

Under Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & S C §§25249.5-25249.13), a landlord with ten or more employees must disclose the existence of known carcinogenic material (*e.g.,* asbestos) to prospective tenants. Health & S C §25249.6.

Because this warning must be clear and reasonable, the best practice is to give a written disclosure statement to the prospective tenant before the rental agreement or lease is executed, and then to provide it again in the lease or rental agreement.

Lead Paint Warning Statement

The federal Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 USC §§4851-4856) and its implementing regulations (24 CFR pt 35 and 40 CFR pt 745, subpt F) apply to residential property built before 1978 (24 CFR §35.80). For further discussion, see §4.37. The Act imposes the following duties on owners, rental agents, and licensed real estate salespersons and brokers involved in the rental or leasing process of any residential property constructed before 1978:

(a) A tenant or prospective tenant must be provided with a written Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards (24 CFR §35.88). The disclosure must include all information on lead-based paint or hazards in the unit known by the owners or their agents, including the existence and location of inspection records and reports. 24 CFR §35.88; 40 CFR §745.107(a). All disclosures and acknowledgments must be in writing, certified for accuracy, and separately acknowledged by the tenant's signature. 24 CFR §35.92.

(b) The lease or rental agreement must contain as an attachment or within the agreement a Lead Warning Statement (24 CFR §35.88; see §§1.77, 4.37).

(c) The tenant must be provided with a federally approved pamphlet on lead poisoning prevention. The pamphlet "Protect Your Family From Lead In Your Home," or another approved publication that incorporates the pamphlet, must also be given to all existing tenants at the renewal of their lease or rental agreement. 24 CFR §35.88(a)(1). The pamphlet may be obtained from the Government Printing Office, or a copy ready for reproduction may be obtained from the National Lead Information Clearinghouse by calling (800) 424-LEAD.

(d) Real estate agents have a duty to inform landlords of their duty of disclosure and to ensure compliance. 24 CFR §35.94.

Effective June 1, 1999, Environmental Protection Agency regulations require residential landlords to give 7 days' written notice to residential tenants of the landlord's intent to renovate or repair pre-1978 rental housing if the repair involves disturbance of at least two square feet of lead-based product. The landlord is required to keep written record of the tenant's notice and acknowledgment for 3 years. If an outside contractor has been hired to do the work, the notification and record-keeping requirements are the responsibility of the contractor, not the landlord. Similar notification must be given if the work to be performed is in the common area and will likewise disturb at least two square feet of lead-based paint. 40 CFR §§745.80-745.88.

Effective March 6, 2001, the Environmental Protection Agency issued final regulations applicable to "target housing" and child-occupied facilities. 40 CFR §§745.61-745.65; 66 Fed Reg 1206. The regulations "support the implementation of regulations already promulgated, and others under development, which deal with worker training and certification, lead hazard disclosure in real estate transactions, requirements for lead cleanup under State authorities, lead hazard evaluation and control in Federally-owned housing prior to sale and housing receiving Federal assistance…." In addition, the regulations establish "residential lead dust cleanup levels and amendments to dust and soil sampling requirements" and provide guidance "to all owners and occupants of pre-1978 housing and child-occupied facilities" by defining scope, applicability, and all other important terms.

Manager; Agent for Service of Process; Place of Rent Payment; Form of Rent Payment

Under CC §§1962, 1962.5, all residential leases and rental agreements must disclose information about owners, building managers, agents for service of process, rent payments, and other information. Some information is required to be in the lease or rental agreement and other information must be either disclosed in the lease or posted in specified areas of the building. See §1.21A. For sample lease or rental agreement provisions designating the parties and making the required disclosures, see §§1.37, 1.40.

Automatic Renewal

An automatic renewal or extension provision is voidable by the tenant unless the statement that the lease contains an automatic renewal or extension provision is set forth in at least eight-point bold-face type immediately above the tenant's signature line. CC §1945.5.

Notice of Negative Credit Report

If a landlord intends to report a tenant's negative credit to a credit reporting agency, the landlord must disclose that intention to the tenant. CC §1785.26. The best place to make that disclosure is in the rental agreement and in any eviction notices. See, *e.g.*, §1.43. For additional disclosures that must be made in connection with obtaining consumer reports from credit reporting agencies and investigative reporting agencies, see §4.9.

Death of Tenant

Residential landlords are required to inform prospective tenants of any death (and the manner of death) occurring in a unit within the past three years. CC §1710.2(a). Landlords are *not,* however, to disclose that a previous occupant was afflicted with or died from AIDS. CC §1710.2. The landlord is not immunized from liability that may arise from an intentional misrepresentation in response to a direct inquiry concerning deaths on the property. CC §1710.2(d).

Proposed Demolition

A landlord of a residential dwelling unit who applies to a public agency for a permit to demolish that unit must give written notice to a prospective tenant of that fact before executing a rental agreement and to a current tenant before applying for the permit. CC §1940.6.

Location of Ordnance

A landlord of a residential dwelling unit who has actual knowledge that any former federal or state ordnance (*i.e.,* weapons and ammunition) is located in the neighborhood area must give written notice to a prospective tenant of that knowledge before executing a rental agreement. CC §1940.7.

"Megan's Law" Disclosure in Residential Leases

Under CC §2079.10a, the following language (in a minimum font size of 8 point) must be inserted in all residential leases made on or after July 1, 1999, and before September 1, 2005, to inform tenants of the database containing information about criminal sex offenders:

> Notice: The California Department of Justice, sheriff's departments, police departments serving jurisdictions of 200,000 or more, and many other local law enforcement authorities maintain for public access a database of the locations of persons required to register pursuant to paragraph (1) of subdivision (a) of Section 290.4 of the Penal Code. The database is updated on a quarterly basis and is a source of information about the presence of these individuals in any neighborhood. The Department of Justice also maintains a Sex Offender Identification Line through which inquiries about individuals may be made. This is a "900" telephone service. Callers must have specific information about individuals they are checking. Information regarding neighborhoods is not available through the "900" telephone service.

In all residential leases made on or after April 1, 2006, the following paragraph must be used:

> Notice: Pursuant to Section 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

In all residential leases made on or after September 1, 2005, and before April 1, 2006, the lease must contain one of the above notices.

Structural Pest Control Notice

Effective January 1, 2001, a landlord of a residential dwelling unit must give each new tenant who occupies the unit a copy of the notice provided by a registered structural pest control company under Bus & P C §8538, if the landlord has executed a contract for periodic pest control service for the premises (CC §1940.8). Landlords can obtain the required notice directly from their pest control provider.

Methamphetamine Contamination

Effective January 1, 2006, Health & S C §§25400.10-25400.47 established disclosure, remediation, and record-keeping obligations for a property owner (similar to those required by the former CC §1940.7.5) after the owner has been notified by a local health officer that the property is contaminated by methamphetamine.

For further discussion of these required disclosures, see California Real Property Sales Transactions chaps 2, 5, and 6 (4th ed Cal CEB 2007). See also chap 4 in this book.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.30 D. Prohibited Provisions

§1.30 D. Prohibited Provisions

Both the landlord and the tenant should be aware that certain provisions included in a lease or rental agreement are void and will not be enforced. Most of the prohibited provisions are purported waivers of various tenant rights. The most inclusive catalog of prohibited provisions is found in CC §1953, which provides that any provision in the lease or rental agreement of a dwelling is void as contrary to public policy if it modifies or waives any of the following rights of the tenant:

(1) *Rights and remedies under CC §1950.5*. That section limits the amount and handling of security deposits and requires the landlord to refund any unused portion of the security deposit. CC §1953(a)(1). Although advance waivers are prohibited by CC §1953, a tenant may waive the right to obtain certain documentation when the security deposit is refunded on termination of the tenancy. See CC §1950.5(g)(2)-(4), discussed in §§8.173C, 8.173E. On refundability of security deposits, see §§4.11, 4.28, 8.167-8.176. For additional drafting tips regarding deposits, see §§4.23-4.29.

(2) *Rights and remedies under CC §1954*. That section limits the landlord's right of entry onto the rented premises. CC §1953(a)(1). (On the landlord's right of entry, see §§1.66, 3.2-3.4.)

(3) *The right to assert a future cause of action against the landlord.* CC §1953(a)(2). Because this subsection applies only to causes of action that arise in the future, it apparently does not bar a rental agreement under which the tenant compromises and waives an existing cause of action. Possible future causes of action might include actions for damages for (a) breach of the warranty of habitability (see §§3.16-3.48), (b) forcible entry and detainer (see §§8.138-8.146), (c) wrongful eviction (see §8.150), and (d) personal injuries caused by defective conditions (see §§3.67-3.72).

(4) *The right to a notice or hearing required by law.* CC §1953(a)(3). Presumably, this subsection prohibits the tenant from waiving the right to service of legally required notice when the landlord terminates the tenancy (see §§8.22-8.54), or to eviction by legal process (see chap 9).

(5) *Procedural rights in litigation in any action involving the tenant's rights and obligations as a tenant.* CC §1953(a)(4). Thus, in an unlawful detainer action filed by the landlord, or in an affirmative action filed by the tenant against the landlord, the tenant cannot waive in advance the right, *e.g.,* to conduct discovery and to have a jury trial. This applies to an advance jury waiver in the form of an arbitration clause. See *Jaramillo v JH Real Estate Partners, Inc.* (2003) 111 CA4th 394, 3 CR3d 525 (arbitration clause in lease was both unconscionable and contract of adhesion despite public policy favoring arbitration as speedy and less expensive means of dispute resolution). (On procedural rights in unlawful detainer actions, see chap 7.)

(6) *The right to have the landlord exercise a duty of care to prevent personal injury or damage to personal property when that duty is imposed by law.* CC §1953(a)(5). (On landlord liability for personal injury or property damage, see §§3.67-3.72.)

(7) *Any statutory right.* These include any right other than the nonwaivable rights under CC §§1953(a) and 1954 (see above) and CC §§1942.1, 1942.5 (see below) unless the lease or rental agreement is presented to the tenant before he or she takes possession of the premises. CC §1953(b). This provision does not apply to a waiver in an agreement renewing the lease or rental agreement if the original lease or rental agreement contained the waiver. CC §1953(b).

Civil Code §1953 applies to leases and rental agreements executed on or after January 1, 1976. CC §1953(c). Despite this express limitation in the section, exculpatory clauses (see CC §1953(a)(5)) in residential leases executed before that date have been held to be invalid under CC §1668, which bars contracts that exempt one party from responsibility for certain willful or negligent acts. *Henrioulle v Marin Ventures, Inc.* (1978) 20 C3d 512, 143 CR 247.

Any provision in a residential lease or rental agreement is void if it modifies or waives the tenant's right to invoke the "repair-and-deduct" remedy for dilapidations rendering the premises untenantable (CC §§1941-1942). CC §1942.1. The parties may agree, however, that the tenant will make certain repairs in exchange for rent. CC §1942.1. On the repair-and-deduct remedy, see §§3.12-3.15. Similarly, the courts are likely to consider a provision to be void if it waives the tenant's rights under the implied warranty of habitability. See *Green v Superior Court* (1974) 10 C3d 616, 625 n9, 111 CR 704, 709 n9. On the implied warranty of habitability, see §§3.16-3.48.

A waiver of the tenant's right to assert the defense of retaliatory eviction (CC §1942.5) to an unlawful detainer action

brought by the landlord is void. CC §1942.5(d). On retaliatory eviction, see §§8.109-8.128. The landlord cannot escape liability in forcible entry and detainer actions for using "self-help" to evict the tenant by means of a provision permitting the landlord to reenter and relet the premises on the tenant's breach. *Jordan v Talbot* (1961) 55 C2d 597, 12 CR 488.

In addition to the protections afforded by CC §1953, practitioners should be aware that in 2005, the California Supreme Court ruled that contractual predispute jury trial waivers are invalid. See *Grafton Partners LP v Superior Court* (2005) 36 C4th 944, 32 CR3d 5. The court cited the California Constitution (Cal Const art I, §16), which states that in a civil action, the litigants may waive their right to a jury trial as prescribed by statute, and CCP §631, which prescribes only six means for waiving a jury trial. Because an agreement made before any dispute arising between the contracting parties is not one of the means authorized by §631, the court concluded that a predispute agreement to waive a jury trial is unenforceable. The court distinguished predispute arbitration and judicial reference agreements, which are enforceable because they "are specifically authorized by statute" and "represent an agreement to avoid the judicial forum altogether." 36 C4th at 955. In the wake of this decision, legislation is expected that will allow predispute waivers in commercial transactions. For further discussion, see California Real Estate Finance Practice: Strategies and Forms, chaps 3-4 (Cal CEB 2000).

A landlord may not demand that a tenant pay rent or a security deposit in cash unless the tenant has previously attempted to pay the landlord with a check drawn on insufficient funds or the tenant has instructed the drawee to stop payment on a check, draft, or order for the payment of money. Even then, the landlord may demand a cash rent payment or security deposit payment for no more than 3 months after the check bounces. CC §1947.3.

Most rent control ordinances make it illegal for landlords to insert lease provisions waiving tenants' rights under the ordinance.

PRACTICE TIPS:

- Landlords' attorneys should advise their clients that some district attorneys have prosecuted landlords who routinely include illegal provisions in their leases, especially those that designate a security deposit or portion of a security deposit as "nonrefundable."
- Tenant's counsel should be aware of Bus & P C §17200, under which a tenant who sustains monetary damage might file an action for *unfair business practices* against a landlord who routinely includes prohibited provisions in leases.

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§1.31 E. Special Considerations in Jurisdictions With Rent Control Ordinances

By specifying situations in which eviction is permissible, rent control ordinances in some California municipalities restrict the landlord's ability to evict a tenant. These ordinances make it much more difficult for a landlord to remove a tenant without cause than otherwise would be the case on expiration of a fixed-term lease (see §8.82) or on service of a 30-day notice of termination of a month-to-month tenancy (see §§8.69-8.80).

For landlords, the most important provisions in the lease or rental agreement may be those that limit the number of persons occupying the premises and that require tenants to specify their identities. A potential problem in an eviction-controlled city is the difficulty of locating and identifying all tenants in order to terminate the tenancy (see §§4.40, 13.70). In a tight rental market, many tenants find it necessary to share housing, and the landlord may discover that none of the occupants of the premises actually signed the original rental agreement. A related problem is that of the "guest" who remains after the tenant has vacated, even though the original tenant continues to pay the rent and claims to be the tenant.

To avoid these and related problems in evicting the current occupants (see §§7.53, 9.13-9.16), the landlord should include a provision in the lease limiting occupancy to the persons named in the lease, with any substitution or addition of tenants requiring the landlord's prior written approval (see §1.46). The date of birth of all occupants should also be requested in the lease document to ascertain who should properly be named in the event an unlawful detainer or other legal action is filed. All tenants should be required to execute the lease. The lease should provide that all cotenants are jointly and severally liable for all obligations under the lease (see §1.45). Finally, some sort of limitation should be placed on the presence of guests on the premises. Civil Code §798.34, which applies only to mobilehome tenancies, limits guest occupancy to 20 consecutive days or 30 days in a calendar year. See §1.46. A similar provision might be included in a residential rental agreement.

Most rent control ordinances permit eviction on the ground of the tenant's breach of a covenant of the lease. Some ordinances restrict "good cause" eviction to the breach of a material lease provision and require that the provision be "reasonable" and "legal." In an eviction-controlled jurisdiction, the landlord's interests are best served if the lease contains as many covenants as possible that, if breached by the tenant, could form the basis for an eviction action. The courts are likely to require that such a covenant be legal, and might require that it meet some reasonableness standard. The lease should also specify that the parties consider all covenants of the lease to be material and reasonable. See §§1.67, 4.22.

The following are provisions that the landlord might include in the lease:

(1) The tenant may not take in boarders, lodgers, or roommates without the landlord's prior written consent, which may not be withheld unreasonably (see §1.46);

(2) The tenant must maintain the premises in a safe and sanitary condition, and refrain from causing or permitting damage to, or defacing of, the premises (see §1.57);

(3) The tenant must dispose of all garbage and trash in a safe and sanitary manner (see §1.57);

(4) The tenant may not paint or wallpaper the premises without the landlord's prior written approval, or change or add to any lock or locking device, or refuse to provide the landlord with a key (see §§1.60, 1.66);

(5) The tenant may not use a waterbed without adequate waterbed insurance (see §1.63);

(6) The tenant may not engage in conduct that disturbs other tenants or neighbors and must obey restrictions on the hours of use of television, stereo, musical instruments, swimming pool, and hot tub (see §1.58);

(7) The tenant may not keep pets (*e.g.,* an absolute ban on pets or a "cats-only" policy) (see §1.62);

(8) The tenant may not repair, service, or change the oil of automobiles, motorcycles, any motor vehicle, or other heavy machinery on the premises (see §1.64);

(9) The tenant must comply with all laws, and with building rules and regulations (see §1.59);

(10) The tenant must restrict use of the premises to residential purposes only (see §1.55);

(11) The tenant may not use any common-area utilities or water;

(12) The tenant may not store any item in the common areas, or place plants on balconies or balcony railings;

(13) The tenant may not improperly install, maintain, or remove a satellite dish or antennae in violation of Federal Communications Commission Order 98-273; and

(14) The tenant must pay rent on time; if tenant habitually pays rent later than allowed by agreement (*i.e.*, tenant pays more than 7 days after the rent is due and/or tenders a check not honored by tenant's bank more than 3 times in any 12-month period), tenant breaches agreement and risks eviction).

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.32 F. Special Requirements for Government-Owned and Government-Subsidized Rental Housing

§1.32 F. Special Requirements for Government-Owned and Government-Subsidized Rental Housing

Special lease requirements apply to tenancies in housing that is either owned by a government entity (*e.g.,* a public housing authority), or subsidized by a government entity (usually the U.S. Department of Housing and Urban Development (HUD)). For further discussion of various public housing programs and subsidy issues, see §§2.6, 3.66A-3.66B, 6.71-6.91. On defending evictions from government-assisted housing, see California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993).

Sections 1.33-1.35 provide a brief overview of lease requirements in three federally funded housing programs: publicly owned housing, federally subsidized housing (still known as "FHA" subsidized programs because they were originally administered by the Federal Housing Administration), and Section 8 privately owned, publicly subsidized rental housing. These are the primary public housing programs that attorneys for landlords or tenants are likely to encounter. Counsel should be aware, however, that other state or local programs may impose particular lease requirements. Counsel should also be aware of the case of *Appel v Beyer* (1974) 39 CA3d Supp 7, 114 CR 336, in which the court found that evictions from certain properties in which the landlord receives tax credits or mortgage incentives from the government require a tenant to be terminated/evicted for "good cause." For public housing, attorneys who represent tenants may become involved in negotiations or litigation with local housing authorities. Attorneys who primarily represent residential landlords may need to learn the lease requirements of the Section 8 program because private landlords frequently make housing available for rental under this federally subsidized housing program.

PRACTICE TIP: Because HUD rules and regulations are subject to frequent change, counsel should contact the regional HUD office to determine the current regulations for the program in question. See Directory. Attorneys should be aware that the terms of the lease between a landlord and a Section 8 tenant may be negotiable (landlords are now permitted to use their own leases), although HUD approval may take additional time. For more detailed discussion of these programs and their legal requirements, see National Housing Law Project, HUD Housing Programs: Tenants' Rights (3d ed 2004).

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/ 1. Public Housing/§1.33 a. HUD Requirements Imposed on Public Housing Authority

1. Public Housing

§1.33 a. HUD Requirements Imposed on Public Housing Authority

Although often used in a broader sense, the term "public housing" refers to housing for low-income people that is supported by public funds and owned and administered by a local public housing authority established in California under Health & S C §§34200-34380. Local housing authorities receive much of their funding from the federal Department of Housing and Urban Development (HUD) under the revised United States Housing Act of 1937 (42 USC §§1437-1437z-7) and are subject to HUD regulations (see *Thorpe v Housing Auth.* (1969) 393 US 268, 280 n35, 21 L Ed 2d 474, 483, 89 S Ct 518).

Public housing authorities (PHAs) are required by 42 USC §1437d(*l*) to use leases that

- Have a term of 12 months and are automatically renewed except for noncompliance;
- Do not contain unreasonable terms and conditions;
- Contain certain provisions relating to evictions and to the authority's obligation to maintain the project in a decent, safe, and sanitary condition;
- Require the agency to give adequate written notice of termination of the lease; and
- Require that the agency not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause.

In addition, the leases must provide that the following conduct shall be cause for termination of tenancy (42 USC §1437d(*l*)):

- Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants;
- Any drug-related criminal activity on or off such premises engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control; or
- Tenant flight to avoid prosecution, or custody or confinement after conviction, or violation of a condition of probation or parole.

In *HUD v Rucker* (2002) 535 US 125, 152 L Ed 2d 258, 122 S Ct 1230, the United States Supreme Court struck down a Ninth Circuit Court of Appeals ruling regarding the "zero tolerance" policy for drug use in public housing. The case involved the interpretation of 42 USC §1437d(*l*)(6), which allows a PHA to terminate a tenancy for "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control."

The Ninth Circuit Court of Appeals had upheld the district court's issuance of a preliminary injunction against the eviction of the tenants and distinguished between "innocent" tenants (those who have "taken reasonable steps to prevent criminal drug activity from occurring but, for lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest") and "culpable" tenants (those who knew or should have known of drug activity).

The United States Supreme Court, in a unanimous decision (Justice Breyer recused himself), strongly disagreed with the Ninth Circuit Court of Appeals' interpretation of 42 USC §1437d(*l*)(6) and stated (152 L Ed 2d at 270):

> We hold that 'Congress has directly spoken to the precise question at issue' [Citation]… Section 1437d(*l*)(6) requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.

Thus, at least in public housing, a "zero tolerance" policy for drug-related activity by anyone under the control of the tenant, regardless of knowledge by the tenant of such activity, is constitutional.

HUD regulations give PHAs and assisted housing owners the tools "for adopting and implementing fair, effective, and

comprehensive policies for screening out program applicants" who engage in criminal activity and for evicting or terminating assistance to persons who engage in such activity. 66 Fed Reg 28776 (2001) (amending 24 CFR pts 5, 200, 247, 880, 882, 884, 891, 960, 966, 982).

Despite the holding in *Rucker* and federal regulations, which allow a PHA to adopt a no-grievance-hearing policy for criminal acts in public housing, in *Brown v Philadelphia Hous. Auth.* (ED Pa 2002) 237 F Supp 2d 567, the court upheld a consent decree entered into between public housing tenants and the local PHA, in which tenants were required to be afforded a grievance hearing, even if being evicted for drug crimes or other criminal activity.

See also *New York City Hous. Auth. v Grillasca* (Civ Ct 2007) 852 NYS2d 610 and *Long Branch Hous. Auth. v Villano* (NJ 2007) 933 A2d 607, in which the *Rucker* decision was further diluted. In *Grillasca*, a New York court held that the New York statute the PHA relied on for eviction of a tenant for drug possession required a showing that the subject apartment was "customarily or habitually" used for an illegal trade or business such as the sale of illegal drugs. In *Villano*, a New Jersey court remanded the case for further hearing, finding that the *Rucker* decision did not mandate eviction for all cases related to drugs, but vested the PHA with "discretion" under 24 CFR §966.4(*l*)(5)(vii)(B) to evict after looking at all the circumstances of a particular case. For further discussion of *Rucker*, see California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993).

WARNING: The United States Housing Act of 1937 (42 USC §1437-1437z-7) prevents a public housing agency from denying rental to, or terminating the tenancy of, a person who is or has been a victim of domestic violence, dating violence, or stalking. The agency may require an applicant or a tenant to provide a "certification" of his or her status as a victim. A public housing authority may still evict the victim if the agency can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the property. See 42 USC §1437d and §2.15A.

HUD does not require that public housing authorities use a specific lease form, but its regulations parallel the lease requirements of 42 USC §1437d(*l*). See 24 CFR §966.4. HUD regulations require a number of lease provisions, some of which are found in most leases, and many of which address the special needs of low-income tenants. Uniquely, public housing leases are required to contain a list of obligations to be met by the public housing authority as landlord. Under 24 CFR §966.4(e), a housing authority must do the following:

- Maintain the dwelling unit and project in a decent, safe, and sanitary condition.
- Comply with applicable building codes, housing codes, and HUD regulations that materially affect health and safety.
- Make necessary repairs to the premises.
- Keep project buildings and common areas in a clean and safe condition.
- Maintain in safe working order all electrical and mechanical systems and appliances supplied by the housing authority.
- Provide and maintain trash and garbage receptacles.
- Supply running water and reasonable amounts of heat and hot water, except when not required by law or when the generating device is individually metered and within the tenant's control.
- Notify the tenant of the specific grounds for any proposed adverse action by the housing authority (*e.g.,* a proposed lease termination, transfer of the tenant to another unit, or imposition of charges for maintenance and repair or for excess consumption of utilities), and of grievance hearing rights.

Because these obligations are considerably more detailed than those that exist under the implied warranty of habitability (see §§3.16-3.48) or local housing codes, they may be useful to the tenant's attorney in defending an unlawful detainer action or maintaining an affirmative suit against the housing authority.

HUD also prohibits the housing authority from including certain provisions in public housing leases. The following clauses are barred by 24 CFR §966.6:

- the tenant's confession of judgment in any lawsuit brought by the housing authority;
- the tenant's agreement that the housing authority may take and hold certain property of the tenant as a pledge for the tenant's performance;
- exculpatory clauses (see §3.69);

- the tenant's waiver of the right to the housing authority's service of a termination notice (see §§8.22-8.80 on notice required under state law);
- the tenant's waiver of legal proceedings before eviction (see chap 9);
- the tenant's waiver of his or her right to a jury trial;
- the tenant's waiver of the right to appeal judicial error or to file an equitable action to prevent execution of judgment; and
- the tenant's agreement to pay costs and attorney fees in a legal action by the housing authority regardless of the outcome.

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§1.34 b. Regulations Governing Tenant Conduct

HUD regulations require that a public housing lease set forth the following tenant obligations; the tenant must (24 CFR §966.4(f)):

(1) Refrain from assigning the tenant's rights under the lease or subletting the unit;

(2) Refrain from providing accommodations for boarders or lodgers;

(3) Use the unit only as a private dwelling for the tenant's family;

(4) Abide by necessary and reasonable housing authority regulations;

(5) Comply with tenant obligations in the building and housing codes that materially affect the tenants' health and safety;

(6) Maintain the premises in a clean and safe condition;

(7) Dispose of garbage and waste in a sanitary and safe manner;

(8) Use all electrical and mechanical appliances and facilities in a reasonable manner;

(9) Refrain from defacing or damaging any part of the premises;

(10) Pay reasonable charges (other than for normal wear and tear) for the repair of damage to the premises or common areas;

(11) Act in a manner that does not disturb the neighbors' peaceful enjoyment of the premises and that is conducive to maintaining the project in a decent, safe, and sanitary condition; and

(12) Refrain from illegal acts or other activities that impair the physical or social environment of the project.

See also §1.33.

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§1.35 2. FHA-Subsidized Rental Programs

Counsel may be called on to represent either the landlord or the tenant in a housing dispute under the federal Section 221(d)(3) and Section 236 programs. The Federal Housing Administration (FHA) was formed in 1934 to provide mortgage assistance to homebuyers under the National Housing Act (12 USC §§1701-1750g). In 1961, the FHA was given responsibility for administering §221(d)(3) of the Act (see 12 USC §1715*l*(d)(3)), under which private developers were encouraged to build and manage apartment buildings for low- and moderate-income people. Under the Section 221(d)(3) below-market interest rate (BMIR) program, tenants pay a controlled, "economic rent," based on a specified formula, and FHA (now HUD) pays the difference between the market rent and what the tenant pays.

In 1968, the Section 221(d)(3) program was effectively replaced by the Section 236 program, under which HUD pays a rent subsidy to the lender and charges eligible tenants a below-market rent based on a specified formula (see 12 USC §1715z-1). FHA was absorbed into HUD in 1965, but the Section 221(d)(3) and Section 236 programs are still commonly called "FHA"-subsidized programs. Most housing projects subsidized under §221(d)(3) and §236 of the National Housing Act receive project-based Section 8 assistance (as opposed to Section 8 Certificates), and thus tenants receive rent subsidies and eviction protections.

HUD has developed a lease form that any tenant who pays less than market rent under the Section 221(d)(3) and Section 236 programs must execute. See HUD, Occupancy Requirements of Subsidized Multifamily Housing Programs Handbook No. 4350.3, App 4-A (2004). This lease form also applies to projects subsidized or assisted under the following programs: Section 8 additional assistance, Section 8 property disposition, Section 8 new construction, and Section 8 substantial rehabilitation. See §1.36.

HUD has not adopted extensive regulations for leases in FHA projects, but HUD regulations do prohibit the eight lease clauses that are also prohibited in public housing leases under 24 CFR §966.6 (see §1.33). See 24 CFR §236.750. Counsel should contact the nearest HUD regional office to determine the current lease requirements. See Directory. A Congressional statute that prevented landlords from exercising their contractual rights to escape these restrictions by prepaying their FHA-insured loans after 20 years was held to be a "taking" in *Cinega Gardens v U.S.* (Fed Cir 2001) 265 F3d 1237.

NOTE: In *Topa Equities, Ltd. v City of Los Angeles* (9th Cir 2003) 342 F3d 1065, the Ninth Circuit Court of Appeals ruled that the Los Angeles Rent Stabilization Ordinance (LARSO) was not preempted by federal laws applicable to Section 236 housing. In *Topa,* the landlord was the owner of a Section 236 housing project and opted out of the program after the end of its contract with the government. The court held that LARSO was not expressly preempted by federal law nor was it preempted because of excessive conflict with the federal scheme. Thus, the landlord must adhere to the requirements of the local ordinance and not increase rents to market levels until units are vacated.

On evictions from federally assisted housing, see California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993).

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.36 3. Section 8 Programs

§1.36 3. Section 8 Programs

The Section 8 programs are currently the primary vehicle for the federal government's participation in providing low-income housing. The term "Section 8" refers to §8 of the revised United States Housing Act of 1937 (42 USC §§1437-1437z-7), which was added by the Housing and Community Development Act of 1974 as 42 USC §1437f. (The various Section 8 programs are identified and discussed in §§2.16-2.17.) For further discussion, see California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993).

Under some Section 8 housing programs (*e.g.*, the certificate and voucher programs; see §§2.16-2.17), low-income tenants find housing that is currently available on the housing market from private landlords. If an eligible Section 8 tenant cannot find housing within a city or town that has an organized public housing authority, the housing authority may contract for such housing outside the borders of the local jurisdiction. *Williams v Hanover Hous. Auth.* (D Mass 1994) 871 F Supp 527.

The landlord enters into a housing provider agreement with the local housing authority to participate in the Section 8 program. See 42 USC §1437f. The tenant becomes certified or receives a voucher for housing assistance, and the local housing authority inspects the property. The landlord receives a payment equal to the market rental rate, the tenant paying a percentage of his or her income directly to the landlord as "rent," and the housing authority paying the landlord a "rental assistance payment." See 42 USC §1437f(c)(3). The rental assistance payment is not rent. *Savett v Davis* (1994) 29 CA4th Supp 13, 34 CR2d 550. This distinction is important because acceptance of the rental assistance payment from the housing authority, after expiration of a notice to pay or a notice to perform or quit that was served on the tenant, does not trigger a *waiver and estoppel* defense to an unlawful detainer action, and it does not reinstate the tenancy.

Landlords of Section 8 existing housing may adopt their own lease forms, although leases must:

- be approved by the housing authority;
- include an addendum required by HUD; and
- contain all provisions required by HUD and none of the prohibited provisions.

See 24 CFR §982.308.

The required lease addendum must be obtained from HUD or the local housing authority, and is no longer printed verbatim as an appendix to 24 CFR pt 882. The lease addendum typically includes the following provisions and others that HUD may adopt:

- housing assistance payments (HAP) contract;
- conflict with other provisions of lease;
- term of lease;
- rent;
- security deposit;
- utilities and appliances;
- maintenance and services;
- termination of tenancy;
- nondiscrimination;
- notices;
- amendment of lease;
- termination of lease by tenant;
- effective date of lease; and
- prohibited lease provisions.

WARNING: The United States Housing Act of 1937 (42 USC §§1437-1437z-7) prevents a landlord operating under a low-income housing assistance voucher program from denying rental to, or terminating the tenancy of, a person who is or has been a victim of domestic violence, dating violence, or stalking. The applicant or tenant may be

required to provide a certification of his or her status as a victim of domestic violence and/or stalking. However, a landlord may evict a victim of domestic violence or stalking if the landlord can demonstrate an actual and imminent threat to other tenants or those employed at, or providing service to, the property. 42 USC §1437f. See also 42 USC §1437d (applying same prohibitions to public housing agencies).

For many years, the term of a Section 8 certificate or voucher housing lease had no specified expiration date; it continued until the tenant terminated it in accordance with the lease, the contract with the housing authority was terminated, or the landlord terminated the lease for cause (*i.e.,* serious and repeated violations of the lease; violation of applicable federal, state, or local law; or other good cause). Currently, most leases are issued with a one-year initial term, subject to renewal. Families receiving Section 8 assistance must have their eligibility recertified annually.

A criticism of the Section 8 subsidy program was the so-called "endless lease" problem. As cause is required to terminate a tenancy under this program, participating lessees could successfully argue that "cause" was required whenever the lessor desired to terminate the tenancy, even on expiration of the lease term. Recognizing this chilling effect on the industry, given the dynamics of the residential market and the unwillingness of lessors to enter into what many considered an indenture, Congress passed the Quality Housing and Work Responsibility Act of 1998 (QHWRA) (Pub L 105-276, Title V, §§514, 549(a)(2), 112 Stat 2461, amending 42 USC §§1437f(o) and 1437f(d)(1)(B), respectively), which permanently eliminated the so-called endless lease provision. Except as otherwise provided by state or local law, a lessor participating in the Section 8 tenant-based (*i.e.*, "voucher" or "certificate") assistance programs may refuse to renew the tenancy without cause at the end of the initial lease term. It is significant to note that this amendment does not affect new construction (project-based), moderate rehabilitation, or other funding programs. See §2.17.

The amendment further entitles a lessor to terminate the tenancy without cause at the end of a successive definite term. If the lease provides for an automatic renewal on a month-to-month basis after the initial term expires, for example, the lessor may terminate the lease without cause, but only at the end of the term, *i.e.,* at the end of each month, effective the end of the following month. Termination during the month could only be accomplished if the notice stated cause and complied with all other prerequisites contained within the termination provisions of the lease, consistent with the procedures found in the Code of Federal Regulations (CFR). Assuming continued occupancy after the first year, the lessor should further note that if there is no month-to-month holdover provision in the lease, and the entitlement of the tenant is for an indefinite term, termination for cause is required.

It is notable that trial courts have not uniformly acted upon this amendment; some have enforced the lessor's entitlement and some have indulged defense arguments that the contractual cause requirements are separate and distinct from the legislative limitations imposed by the amendment. The amendment did not address retroactivity. Tenant advocates assert that the entitlement to refuse to renew a lease without cause was not in place when the lease was executed and that the cause requirements in leases entered into before a statutory amendment cannot be invalidated by that amendment, whether the lease term is for successive one-year terms or for an unspecified term. Lessors' advocates argue that (a) the lease could not exist but for subsidy pursuant to the enabling legislation, hence a "separate existence" divides a house against itself, and (b) the amendment clarifies existing law more than changes it, in that all leases commence and expire by their own terms.

The supreme court ruled in *Wasatch Prop. Mgmt. v Degrate* (2005) 35 C4th 1111, 29 CR3d 262 that when a landlord terminates or fails to renew a Section 8 contract, a tenant is entitled to, under CC §1954.535, a 90-day notice of termination. The 90-day notice is required regardless of whether the property is under rent control. The court did not explicitly rule on the propriety of a landlord using an "endless lease" (no-cause) notice, but implicitly condoned the use of such a notice by finding that the tenant was entitled to have such a notice be a 90-day notice.

PRACTICE TIP: In the aftermath of the *Wasatch* opinion, practitioners should advise landlords to give a 90-day notice of termination whenever a landlord is either opting out of the Section 8 Program or serving an "endless lease" (no-cause) notice.

See also *Apartment Ass'n, Inc. v City of Los Angeles* (2006) 136 CA4th 119, 38 CR3d 575 (CC §1954.535 preempts city ordinance that prohibited a landlord, after termination or nonrenewal of a Section 8 housing contract, from ever charging the tenant more than the tenant's portion of the rent).

In addition to the existing housing program, HUD also administers the following types of programs under Section 8:

- newly constructed housing (24 CFR pt 880);
- substantially rehabilitated housing (24 CFR pt 881);
- moderately rehabilitated housing (24 CFR §§882.401-882.516);
- state Housing Agency programs (24 CFR pt 883);
- rural rental housing (24 CFR pt 884);
- housing loan programs for the elderly and handicapped (24 CFR pt 885); and
- additional assistance for HUD-insured and HUD-held mortgages and property disposition for HUD-owned property (24 CFR pt 886).

For discussion of these programs, see National Housing Law Project, HUD Housing Programs: Tenants' Rights, chap 1 (3d ed 2004). See also California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993).

Under the moderately rehabilitated housing program (see 24 CFR §§882.401-882.516), the local housing authority must assist the landlord in preparing the lease, if necessary. The lease must (a) be for a term of at least one year (see 24 CFR §882.403(d)), (b) contain the provisions required by HUD and none of the prohibited provisions, and (c) include the termination procedures required by 24 CFR §882.511. The extent of the landlord's ability to refuse to renew the lease without good cause, and to withdraw from its Section 8 contract with the housing authority, is not entirely clear. See §6.91; National Housing Law Project, Tenants' Rights §§14.4.2.3, 15.4.3.3.

For tenancies under the Section 8 new construction, substantial rehabilitation, additional assistance, and property disposition programs, landlords must use the lease form set forth in HUD, Occupancy Requirements of Subsidized Multifamily Housing Programs Handbook No. 4350.3, App 4-A (2004). See discussion in National Housing Law Project, Tenants' Rights §§10.1, 10.5, 10.5.2.

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IV. BASIC RESIDENTIAL LEASE OR RENTAL AGREEMENT

§1.37 A. Form: Parties

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§1.37-1.79.

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1.37-1 Alternative: owner executes agreement

This _ _[*lease/rental agreement*]_ _ is entered into on _ _[*date*]_ _, between _ _[*name of owner*]_ _, _ _[*nature of entity, e.g., a corporation, partnership, husband and wife*]_ _, whose address and telephone number are _ _[*street address & tel. no. of owner*]_ _ ("Landlord"), and _ _[*name of tenant*]_ _, _ _[*nature of entity, e.g., a corporation, partnership, husband and wife*]_ _ ("Tenant"). The tenant(s) named in this agreement _ _[*is/are*]_ _ the only permitted tenants. Rent will not be accepted from any person not named as an original tenant.

1.37-2 Alternative: agent of owner executes agreement

This _ _[*lease/rental agreement*]_ _ is entered into on _ _[*date*]_ _, between _ _[*name of owner*]_ _, _ _[*nature of entity, e.g., a corporation, partnership, husband and wife*]_ _ ("Landlord"), and _ _[*name of tenant*]_ _, _ _[*nature of entity, e.g., a corporation, partnership, husband and wife*]_ _ ("Tenant"). Landlord has authorized _ _[*name of owner's agent*]_ _, _ _[*nature of entity, e.g., a corporation, partnership, husband and wife*]_ _, whose address and telephone number are _ _[*street address & tel. no. of owner's agent*]_ _ ("Landlord's Agent"), to enter into this agreement with Tenant and to act on Landlord's behalf as provided under this agreement. The tenant(s) named in this agreement _ _[*is/are*]_ _ the only permitted tenants. Rent will not be accepted from any person not named as an original tenant.

Comment: This clause serves to identify the names of all the parties to the lease or rental agreement, and their capacities. For comment on clause restricting tenancy to persons named in lease, see Comment in §1.54. This clause also satisfies some of the disclosure requirements of CC §1962(a)(1) as to owners or their agents who execute the agreement. See clauses in §§1.40, 1.76 for further required disclosures. For discussion of a party's capacity to enter into and execute leases and property contracts generally, see §1.16 and California Real Property Sales Transactions §§4.14-4.28 (4th ed Cal CEB 2007). If an agent, trustee, or representative executes the lease on behalf of a party, that fact and the extent of the agent's authority (*e.g.*, agent for service of process; see §1.76) should be specified. On execution of the lease or rental agreement by an agent of a party, see §1.79.

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§1.38 B. Form: Description of Premises

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§1.37-1.79.

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1.38-1 Description of premises

Landlord agrees to rent to Tenant the premises commonly known as _ _[*address and apartment number*]_ _, in _ _[*city*]_ _, California ("the premises"). The premises also include the following: _ _[*Specify other portions of the property that Tenant may occupy*]_ _.

Comment: A description of the premises by street address and unit number is usually sufficient; the property's legal description is not required. See §1.23. A clause describing the premises typically designates the entire rental space, including any space separate from the living quarters that is included in the unit (*e.g.,* parking spaces, storage areas, patio). If necessary, a map may be attached to the lease to identify the additional space.

The tenancy may include "additional services," *i.e.,* something other than the premises and the base amenities, such as parking space, when parking is not provided to every tenant; a storage locker; or a locked garage. In a rent-controlled jurisdiction, the landlord should prepare a written "additional services" contract that describes these services and their location. This contract should state that the service is optional and is not a part of the base amenity package. The landlord is then entitled to charge the tenant an additional amount for this service above and beyond the base rent and, depending on the particular ordinance, may not be subject to limitations on the charge for the service and be able to terminate the service under the terms of the additional service contract. Depending on the ordinance, it may be that the tenant cannot be evicted for breach of the additional service contract; the only remedy may be to terminate the service and to file a civil action for damages.

Leases should be carefully drafted to clarify whether the amenity, *i.e.,* parking spaces, is a part of the premises rented or a service that can be unilaterally terminated by the landlord.

PRACTICE TIP: The landlord's attorney should review the applicable rent control ordinance for definitions of *base rent, base amenities, services,* and *additional services contract*. It is important to the landlord that this additional service not be construed as a service to which the tenant is entitled simply by reason of occupancy or one in which the tenant has a vested right. See *301 Ocean Ave. Corp. v Santa Monica Rent Control Bd.* (1991) 228 CA3d 1548, 279 CR 636. For further discussion, see §7.39.

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§1.39 C. Form: Deposit on Execution of Agreement

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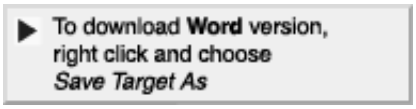

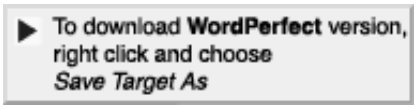

1.39-1 Deposit on execution of agreement

Landlord acknowledges receipt of the sum of $_ _[*amount*]_ _ as a deposit pending Landlord's approval of this _ _[*lease/rental agreement*]_ _. Landlord has _ _[*e.g., 15*]_ _ days to approve this _ _[*lease/rental agreement*]_ _, and will refund the entire deposit to Tenant if acceptance is not made within that time. If Landlord accepts this _ _[*lease/rental agreement*]_ _, the deposit will be applied to _ _[*e.g., the first month's rent, security deposit*]_ _.

Comment: In some circumstances, this clause may benefit both parties. Under it, the landlord holds the premises for the tenant for a fixed period in exchange for a monetary deposit. This gives the landlord an opportunity to check the tenant's financial status and references (see §2.3) and assures the tenant that the landlord will refund the deposit if the rental application is not approved. Civil Code §1950.5 probably requires return of the deposit in any case (see §§4.11, 4.28, 8.172-8.176). Another practice is to have the holding deposit agreement be a separate contract signed by both the applicant and the landlord so there is no confusion regarding the holding deposit being misconstrued as a security deposit. (The California Apartment Association has a holding deposit form titled "Offer to Rent.") Under this arrangement, the landlord agrees to hold the rental unit off the market during the time it takes to process the rental application. If the applicant is accepted and refuses to execute the lease, the deposit is forfeited as consideration for holding the premises off the market.

It is common for many leases to contain a provision allowing the landlord to retain all or a portion of the "holding deposit" in the event the application is approved and the prospective tenant changes his or her mind or obtains other housing. The landlord's claim is that the rental unit was taken off the market on the applicant's behalf and that the landlord is entitled to damages if the approved applicant fails to execute the lease within a certain time. Landlord advocates will argue that this is an agreement between the owner or manager and the applicant, not a tenant, so that security deposit laws do not apply. But see §§4.23, 4.26, 4.28, 8.168, 8.172A-8.174, discussing expansion of the term "security" effective January 1, 2003, and tenant's right to refund of deposit. For additional drafting tips and strategies regarding deposits, see §§4.23-4.29.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/ D. Rent/§1.40 1. Form: Monthly Amount; Manner of Payment

D. Rent

§1.40 1. Form: Monthly Amount; Manner of Payment

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§1.37-1.79.

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1.40-1 Monthly amount; manner of payment

Tenant will pay $_ _[*dollar amount*]_ _ rent per month, in advance, on the _ _[*e.g., first*]_ _ day of each month to_ _[*Landlord/Landlord's Agent*]_ _, whose address and telephone number are _ _[*street address & tel. no. of Landlord/Landlord's Agent*]_ _. Payments made in person may be delivered to _ _[*Landlord/Landlord's Agent*]_ _ between the hours of _ _[*specify acceptable times of day during which payment will be received*]_ _, on the following days of the week _ _[*specify days on which payment will be received*]_ _.

Acceptable method of payment: [ ] Personal Check; [ ] Cashier's Check; [ ] Money Order; [ ] EFT/Credit (see landlord/landlord's agent for details).

Comment: To avoid future disputes, the lease should specify the day of the month on which the rent is due, the manner of payment, and the address where the rent must be personally delivered or mailed. This clause satisfies the disclosure requirements of CC §1962(a)(2)(A), (3). See §§1.21A-1.22. On providing in the lease for rent payment by bank deposit or electronic funds transfer, see CC §1962(a)(2)(B). Although rent is usually due on the first of the month, it will not legally be due in advance unless the lease so provides. CC §1947. If a tenant takes possession in the middle of a month, the rent may be made payable on that date in each succeeding month, or prorated for the first month. Providing that the rent must be paid by mail could raise problems for both the landlord and the tenant. For discussion of the manner and time of payment, see §§4.30-4.31.

NOTE: A landlord may not demand that a tenant pay rent or security deposit payments in cash unless the tenant has previously attempted to pay the landlord with a check drawn on insufficient funds or has instructed the drawee to stop payment on a check. Even then, the landlord may only demand a cash rent payment or security deposit payment for no more than 3 months after a check bounces. CC §1947.3.

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§1.41 2. Form: Late Charges

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1.41-1 Alternative: fixed amount

Tenant agrees to pay a late charge of $_ _[*specify amount, e.g., 50 dollars*]_ _, if the rent is not received _ _[*by the*_ _[*specify*]_ _ *day of the month/within* _ _[*number*]_ _ *days of its due date*]_ _. Tenant and Landlord agree that Landlord will sustain damage on account of any late payment of rent, including but not limited to added accounting, administrative, and management expenses and costs, but that it will be impracticable and extremely difficult to specify the actual amount of such damage. The parties agree that this late charge represents a fair and reasonable estimate of the damages that Landlord will incur by reason of the late payment of rent. Tenant bears the risk of loss or delay of any payment made by mail.

This late charge, which shall be considered to be "additional rent," does not establish a grace period; Landlord may serve a Three-Day Notice to Pay Rent or Quit if rent is not paid on its due date.

1.41-2 Alternative: percentage of rent due

Tenant agrees to pay a late charge of _ _[_ _[*e.g., 5*]_ _ *percent of monthly rent then in effect and due*]_ _ if rent is not received within _ _[*e.g., 5*]_ _ calendar days of its due date. Tenant and Landlord agree that Landlord will sustain damage on account of any late payment of rent, including but not limited to added accounting, administrative, and management expenses and costs, but that it will be impracticable and extremely difficult to specify the actual amount of such damage. The parties agree that this late charge represents a fair and reasonable estimate of the damages that Landlord will incur by reason of the late payment of rent. Tenant bears the risk of loss or delay of any payment made by mail.

This late charge, which shall be considered to be "additional rent," does not establish a grace period; Landlord may serve a Three-Day Notice to Pay Rent or Quit if rent is not paid on its due date.

Comment: This clause is intended for the benefit of the landlord. Although not technically "rent," a late charge may be demanded along with overdue rent in a 3-day notice to pay rent or quit (see §8.35). *Canal-Randolph Anaheim, Inc. v Wilkoski* (1978) 78 CA3d 477, 144 CR 474. The courts are likely to permit a late charge that is reasonably related to the cost of the delay to the landlord. If the charge is not reasonable, however, it may be held to be an invalid penalty. See CC §1671(c)-(d), and the authorities in §§4.43A, 8.39-8.40.

PRACTICE TIP: With respect to items other than interest and late charges, the landlord might avoid the problem that only rent may be demanded in the 3-day notice by drafting the rental agreement to provide that other items (*e.g.,* tax assessments, common-area maintenance charges, insurance) will be considered "rent." See *Folberg v Clara G.R. Kinney Co.* (1980) 104 CA3d 136, 141, 163 CR 426.

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§1.42 3. Form: Rent Check Returned for Insufficient Funds

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1.42-1 Rent check returned for insufficient funds

Tenant agrees to pay a service charge of $_ _[*amount*]_ _ if Tenant's bank returns a rent check for insufficient funds or Tenant instructs the bank to stop payment of said funds. If the bank returns Tenant's check, Landlord may serve written notice to Tenant that the next rental payments, for a period of up to three (3) months, shall be in cash. In addition, Landlord may serve, in accordance with Civil Code §827, a 30-day written notice that all future payments must be in the form of electronic funds transfer, cashier's check, or money order.

Comment: This clause complies with the requirements of CC §1947.3, which went into effect on January 1, 2005. See §§1.30, 1.40. Another way to deal with returned checks is simply to make the tenant liable for all bank charges incurred by the landlord as a result of the returned check, including all charges for returned checks of the landlord as a direct result of the return of the tenant's check. This avoids the penalty problem associated with fixed late charges. See *Perdue v Crocker Nat'l Bank* (1985) 38 C3d 913, 216 CR 345, concerning bounced-check charges and the need to comply not only with liquidated damages statutes, but also with the covenant of good faith and fair dealing concerning the setting of amounts of those charges.

For further discussion of the problem of returned checks, see §4.30.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.43 4. Form: Notice That Failure to Pay Rent on Time May Be Reported to Credit Record Agencies

§1.43 4. Form: Notice That Failure to Pay Rent on Time May Be Reported to Credit Record Agencies

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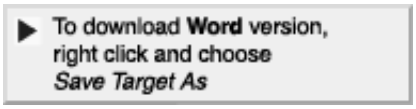

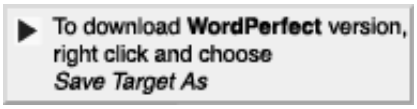

1.43-1 Notice that failure to pay rent on time may be reported to credit record agencies

As required by law, Tenant is hereby notified that a negative credit report reflecting on Tenant's credit record may be submitted to a credit reporting agency if Tenant fails to fulfill the terms of credit obligations by failing to pay rent on time.

Comment: Landlords must notify tenants that negative credit information may be submitted to a credit reporting agency if the tenant fails to fulfill the terms of the tenancy. CC §1785.26. See §1.29. This provision should comply with the notice requirement of CC §1785.26(b)-(c). The notice need not be included in the agreement, but if it is not, it must be sent to the tenant no later than 30 days after the negative information has been submitted to the credit agency. CC §1785.26(c). Landlords should be cautious about making a negative credit report on a tenant who withholds rent to enforce the warranty of habitability. The landlord could arguably incur tort liability to the tenant in this situation. A tenant has the right to register disagreement with the information reported by the landlord to the credit agency. See §2.9. For further discussion, see §§4.9, 13.75.

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§1.44 E. Form: Term

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1.44-1 Alternative: Fixed-term tenancy

The term of this lease will commence on _ _[*date*]_ _, and continue until _ _[*date*]_ _. If Tenant holds over after expiration of the term, and Landlord accepts rent from _ _[*him/her*]_ _ at the above-specified monthly rent, the tenancy will then continue on a month-to-month basis.

Comment: This clause merely states existing law, but spelling out the law may benefit both parties. On the advantages and disadvantages of a fixed-term tenancy, see §§1.8, 4.20. In jurisdictions with rent control ordinances, the length of the lease term may not be significant because the landlord probably will not be able to remove the tenant on expiration of the term, except for just cause. See §§1.8, 7.54. Further, some rent control ordinances require not only that a landlord have a specified permissible cause to evict, but also that written notice to that effect be given to the tenant. See §7.54. It is always advisable for the landlord to give a "notice of nonrenewal" to the tenant before filing the action, even though no notice to vacate or notice of termination is required by state procedural law before a landlord evicts a holdover tenant after expiration of a fixed-term lease.

NOTE: Some local ordinances require residential rental agreements to have a minimum, fixed term. See, *e.g.*, *Roble Vista Assocs. v Bacon* (2002) 97 CA4th 335, 118 CR2d 295 (appellate court upheld Palo Alto ordinance that requires landlords to offer all tenants leases of at least one-year period).

1.44-2 Alternative: Month-to-month tenancy

The term of this rental agreement will commence on _ _[*date*]_ _, and will continue on a month-to-month basis until terminated after either party gives _ _[*e.g., 30 or 60*]_ _ days' written notice to the other party or other notice provided by law.

Comment: A month-to-month tenancy is terminated in most instances by the landlord's or the tenant's service of a 30-day or 60-day notice, unless, in a commercial lease, the parties agree that the tenancy may be terminated by shorter notice, as long as the notice period is at least 7 days before the expiration of the term. See CC §§1946 and 1946.1. See §8.69. On the advantages and disadvantages of month-to-month tenancies, see §§1.9, 4.20. Under a rent control ordinance, a month-to-month tenancy may have advantages over a fixed-term tenancy for the tenant. Most rent control ordinances provide that a landlord may terminate a tenancy only for just cause (see §§1.9, 7.54); a tenant, however, may still terminate a month-to-month tenancy on service of 30 days' notice.

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F. Occupants

§1.45 1. Form: Identification; Joint Liability

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1.45-1 Identification; joint liability

The premises will be occupied only by the following named persons, each of whom has executed this _ _[*lease/rental agreement*]_ _**:** _ _[*Specify occupants who will execute lease or rental agreement*]_ _ _ _[*and by* _ _[*number of children*]_ _ *minor children, who need not execute this* _ _[*lease/rental agreement*]_ _]_ _**. Each such occupant is an original occupant and is entitled to the benefit of any local rent control ordinance, if applicable.**

This agreement is between Landlord and each named Tenant, individually and severally. The named Tenant(s) _ _[*is/are*]_ _ **jointly and severally responsible for performance of** _ _[*his/her/their*]_ _ **obligations under this** _ _[*lease/rental agreement*]_ _**, including the payment of rent.**

Comment: This clause gives the landlord some protection against the addition of unwanted tenants and the problem of identifying the current tenants when the landlord wishes to terminate the tenancy. See §§1.21, 13.70. See also CCP §§1174.25, 1174.3 and *Arrieta v Mahon* (1982) 31 C3d 381, 182 CR 770. If the lease or rental agreement contains a provision limiting the tenants to the named occupants, any person remaining on the premises after the named occupants have vacated may be evicted. In a non-rent-controlled jurisdiction, the landlord may evict an unknown occupant who is not named in the rental agreement without notice. See §13.70.

In a rent-controlled jurisdiction, the landlord may be required to serve a 3-day notice to quit on the basis that such a person is an unauthorized subtenant in possession of the premises at the termination of the tenancy. The practitioner must check the rent control ordinance to ensure that the unnamed occupant is evicted for one of the authorized reasons, to determine whether the unnamed occupant has achieved the status of a tenant and is thus subject to a "just-cause" eviction requirement, and to ascertain whether the rent control ordinance specifies a procedure for objecting to the presence of new occupants. Practitioners should also advise landlords not to accept rent from unnamed occupants. See §§1.31, 7.25.

PRACTICE TIP: In some circumstances, this clause may not be sufficient to prevent creation of a tenancy by consent. Under some rent or eviction control ordinances, the only way to limit occupancy and avoid creating additional tenancies is to object to the presence of the new occupants and to accept no further rent from the authorized tenants to avoid a waiver and estoppel defense.

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§1.46 2. Form: Guests, Boarders, Lodgers, and Roommates

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1.46-1 Guests, boarders, lodgers, and roommates

Tenant may have guests on the premises for not more than _ _[*e.g., 15*]_ _ consecutive days or _ _[*e.g., 30*]_ _ days in a calendar year, and no more than _ _[*e.g., two*]_ _ guests at any one time. Tenant may not take in any boarders, lodgers, or roommates without Landlord's prior written consent, which shall not unreasonably be withheld. Any guest whose stay exceeds the specified limits, or any boarder, lodger, or roommate to whom Landlord has not consented, is not a tenant of the premises, and will be subject to eviction by Landlord under legal process without prior service of notice to quit or other termination notice.

Comment: Some provision limiting guests is necessary to prevent abuse of the provision limiting occupancy, a particularly important consideration in rent-controlled jurisdictions. See §1.31. Although CC §798.34 applies only to mobilehome tenancies, it may be of some guidance to residential landlords; it limits guest occupancy to 20 consecutive days or 30 days in a calendar year. Depending on the size of the unit and the number of occupants, the landlord might want to limit guests more strictly (*e.g.,* by specifying that no more than one guest be allowed on the premises at one time), or to limit severely the number of days that a guest may reside on the premises. Note that the validity under state law of the last sentence in the clause has not been tested in any reported case. Moreover, that provision may conflict with a local rent control ordinance. If in doubt, counsel should not rely on the clause, but make sure that all occupants are served with notice anyway, before filing an unlawful detainer action.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.47 G. Form: Indemnification of Landlord

§1.47 G. Form: Indemnification of Landlord

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1.47-1 Indemnification of landlord

Tenant(s) _ _[*agree/agrees*]_ _ to indemnify Landlord for any liability arising before termination of this _ _[*lease/rental agreement*]_ _ for personal injuries or property damage caused by the negligent, willful, or intentional conduct of Tenant(s), _ _[*and/or*]_ _ _ _[*his/her/their*]_ _ guests or invitees. This indemnification agreement does not waive Landlord's duty of care to prevent personal injury or property damage when that duty is imposed by law.

Comment: This clause is intended to cover allocation of tort liability between the landlord and tenant. Because the scope of the landlord's liability for personal injuries and property damage has expanded in recent years (see §§3.67-3.72), the landlord must be extremely cautious in this area, particularly with regard to obtaining adequate insurance coverage. See Sullivan, *Landlord Liability Insurance: Why an Old Lease May Need to Learn New Tricks,* 26 Cal Real Prop J 22 (Vol 26, No. 2, 2008). Although not purporting to waive the landlord's duty of care (a waiver that would probably be ineffective in any event), the provision entitles the landlord to seek indemnification for any liability incurred because of the tenant's lack of care.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/ H. Deposits; Screening Fees/ 1. Security Deposit/§1.48 a. Form: Amount and Terms of Security Deposit

H. Deposits; Screening Fees

1. Security Deposit

§1.48 a. Form: Amount and Terms of Security Deposit

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1.48-1 Amount and terms of security deposit

Tenant will deposit with Landlord _ _[*the sum of $*_ _[*amount*]_ _]_ _ _ _[*as the last month's rent/as a deposit against the monthly rental in effect in the last month of the* _ _[*lease/rental agreement*]_ _]_ _ **and the sum of $**_ _[*amount*]_ _ **as a security deposit. Landlord will hold the security deposit for the faithful performance by Tenant of** _ _[*his/her*]_ _ **obligations under this** _ _[*lease/rental agreement*]_ _**, including payment of rent, repair of damages to the premises, exclusive of ordinary wear and tear, caused by Tenant or Tenant's guest or licensee, and cleaning of the premises on termination of the tenancy, and to remedy any default in Tenant's obligation under the** _ _[*lease/rental agreement*]_ _ **to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear. Within three weeks after Tenant has vacated the premises, Landlord will furnish** _ _[*him/her*]_ _ **with an itemized written statement of the basis for, and amount of, the security received and its expenditure (or good faith estimate as allowed by law), including all supporting documentation required by law, and will return any remaining portion of the security deposit to Tenant.**

No trust relationship between Landlord and Tenant is created on account of the security deposit and Landlord may commingle the deposit with other funds of Landlord.

1.48-2 Optional addition to 1.48-1: Move-out inspection

Tenant agrees to participate in a move-out inspection with Landlord at the time of vacating. If Tenant fails or refuses to participate in a move-out inspection, Landlord's written inspection report will be conclusively presumed to be correct.

NOTE: The above provision is in addition to, and does not replace, the initial inspection requirements of CC §1950.5(f)(1). See §§4.28A, 4.51, 8.172B.

Comment: Form 1.48-1 follows the requirements of CC §1950.5, which regulates security deposits on residential property. See §§4.23, 4.26, 4.28, 8.168, 8.172A-8.174 discussing expansion of the term "security" effective January 1, 2003, and tenant's right to refund of deposit. For additional drafting tips and strategies regarding deposits, see §§4.23-4.29. For comprehensive discussion of security deposit law, extensively amended in both 2002 and 2003, see §§8.167-8.176. The total amount of security demanded for a residential tenancy includes any amounts demanded for the last month's rent, and may not exceed 2 months' rent for unfurnished units or 3 months' rent for furnished units. CC §1950.5(c). Other sums demanded such as deposits for keys or garage-door openers are also included within CC §1950.5's definition of security deposit. See §8.168. A landlord may not demand that a tenant pay a security deposit payment in cash unless the tenant has previously attempted to pay the landlord with a check drawn on insufficient funds or the tenant has instructed the drawee to stop payment on a check, draft, or order for the payment of money. Even then, the landlord may only demand a cash security deposit payment for 3 months following a tenant's attempt to pay with a check on insufficient funds or following the tenant's instruction to stop payment on the funds. CC §1947.3.

Section 1950.5(m) has rendered nonrefundable security deposits illegal. See §8.175. Any purported advance waiver by the tenant of his or her rights under CC §1950.5 is void. CC §1953(a)(1). See §1.30. But on termination of the tenancy, a tenant may waive the right to obtain certain documentation regarding deductions from the security deposit

when the deposit is refunded. See CC §1950.5(g)(2)-(4), discussed in §§8.173C, 8.173E.

Many landlords call the security deposit "last month's rent" or divide the security deposit into "last month's rent" and "security deposit." Any money demanded from a residential tenant other than the first month's rent will probably be held to be a "security deposit" except for a screening fee charged under CC §1950.6 (see §1.51).

PRACTICE TIP: Landlords: To prevent disputes over the disposition and application of the security deposit, a landlord should not denominate any portion of the security deposit for a specific purpose. For example, if a portion is called "last month's rent," the tenant may believe that he or she does not have to pay the last month's rent because it has been prepaid. If the rent had been raised during the term of the tenancy, the "last month's rent" paid in advance would be less than the amount due, and the landlord would be forced either to litigate the issue or to accept the lesser amount.

A requirement in the lease or rental agreement that the tenant participate in a move-out inspection with the landlord (Form 1.48-2) may avoid disputes concerning proper application of the security deposit. A notice of the opportunity to have a move-out inspection before the tenant vacates is mandated by CC §1950.5(f). See §§4.28, 8.172A. Also, a recital in a rental agreement that the premises were in good condition at the inception of the tenancy and were to be maintained in that condition has some weight in supporting a landlord's claim to expenses for cleaning. See *Bauman v Islay Inv.* (1973) 30 CA3d 752, 756, 106 CR 889.

Under some rent control ordinances, the landlord must place the security deposit in an interest-bearing account for the tenant's benefit. The landlord is not required to do so, however, under state law generally applicable to security deposits. See CC §1950.5. When a local ordinance requires the landlord to accumulate interest on the deposit and affords alternative methods for paying it to the tenant (*e.g.,* landlord must pay the amount of interest to tenant at end of first full year of occupancy, or credit it against rent, and yearly thereafter), the landlord should specify the method for such payment in the rental agreement. In *Action Apartment Ass'n v Santa Monica Rent Control Bd.* (2001) 94 CA4th 587, 114 CR2d 412, a group of landlords sued to invalidate a provision of the local rent control ordinance requiring a landlord to pay interest on a tenant's security deposit at the rate of 3 percent regardless of the prevailing bank interest rates. The Second Appellate District held that the ordinance was an unconstitutional "taking" of their property and that it did not further the legitimate purposes of rent control. But see *Small Prop. Owners v City & County of San Francisco* (2006) 141 CA4th 1388, 47 CR3d 121.

PRACTICE TIPS: Tenant: A tenant should not sign a lease or rental agreement with a "received in good condition and repair" statement unless the tenant has taken the time to inspect the premises thoroughly. A tenant should make a list of any obvious defects at the inception of the tenancy or before executing the rental agreement, and should obtain the landlord's written acknowledgment of these conditions.

Tenants' attorneys should advise their clients to take photos or to conduct a walk-through with a witness, or both, before vacating the premises to preserve proof of the property's condition.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.49 b. Form: Provision for Maintaining Security Deposit by Multiple Tenants

§1.49 b. Form: Provision for Maintaining Security Deposit by Multiple Tenants

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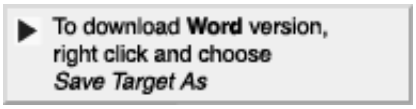

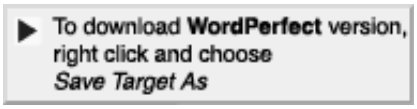

1.49-1 Alternative: Vacating tenant refunded proportionately; remaining occupants replenish original deposit

If one or more Tenants vacates and receives a proportionate refund (less lawful deductions) of the deposit, the remaining Tenants will immediately on demand by Landlord replace the portion of the deposit refunded to or otherwise accounted to the departing individual. The remaining Tenants will not have the right to contest the amount of any deductions assessed against the departing Tenants.

1.49-2 Alternative: No portion of deposit refunded until final occupant vacates

At the sole and exclusive option of the landlord, the security deposit shall not be returned nor an accounting be due until the last of the named occupants vacates the premises. Any tenant vacating the premises shall receive a reimbursement for his or her share of the security deposit from the tenants remaining in possession of the premises.

Comment: When one member of a group of tenants departs, that member generally demands a return of his or her proportionate share of the security deposit, unless an incoming member reimburses the departing member and succeeds to the departing member's share of the deposit. A refund to a departing tenant depletes the amount available to the landlord to secure the return of the premises at the end of the occupancy in reasonably good condition or to pay for cleaning and repairs as needed. The second alternative above protects the landlord in that case. The first alternative might be prohibited by some rent control ordinances.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.50 c. Form: Replenishment and Increase of Deposit

§1.50 c. Form: Replenishment and Increase of Deposit

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1.50-1 Replenishment and increase of deposit

If all or any portion of Tenant's security deposit is properly applied by Landlord during the term of this _ _[*lease/rental agreement*]_ _ to make necessary repairs to the premises, Landlord may demand that Tenant replenish the full amount so applied. Tenant's failure to replenish such amount within _ _[*e.g., 3, 10, or 30 days*]_ _ after written demand by Landlord will constitute a material breach of this _ _[*lease/rental agreement*]_ _. Landlord's written demand for replenishment will include an itemized statement describing the disposition of the security.

At any time during the term of this _ _[*lease/rental agreement*]_ _ and after 30 days' prior written notice to Tenant, Landlord may increase the security deposit to the maximum amount then permitted by law. Tenant's failure to deposit such increase in accordance with Landlord's notice will constitute a material breach of this _ _[*lease/rental agreement*]_ _.

Comment: The purpose of the first paragraph in this provision is to permit the landlord to insist that the tenant replenish any part of the security deposit properly applied under law by the landlord during the tenancy (rather than upon termination). See §4.27. The purpose of the second provision is to permit the landlord to increase the security deposit when the rent is increased. Under CC §1950.5, the total security demanded by the landlord may not exceed two months' rent for unfurnished units and three months' rent for furnished units. See §§4.24, 8.169. See also *People v Tannenbaum* (1994) 23 CA4th Supp 6, 29 CR2d 534, in which a landlord was held to have violated a local rent control provision by demanding a deposit increase that exceeded the allowable maximum.

WARNING: Attorneys for landlords should be aware, however, that the validity of the foregoing provisions has not been tested in the courts. Civil Code §1950.5 could be interpreted as prohibiting the landlord from demanding any security at any time other than the inception of the tenancy. Furthermore, in rent-controlled jurisdictions, replenishment of or increase in the deposit might constitute an unlawful rent increase. See §§4.27, 7.33.

PRACTICE TIP: Attorneys in rent-controlled jurisdictions should check the applicable ordinance and not generalize from one ordinance to another. For example, one might preclude raising a security deposit after the tenancy's inception, but another might permit the landlord to raise the security deposit on an annual basis by the same percentage as the allowable rent increase.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.51 2. Form: Nonrefundable Applicant Screening Fee

§1.51 2. Form: Nonrefundable Applicant Screening Fee

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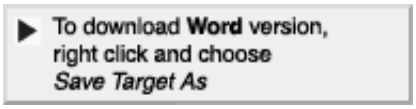

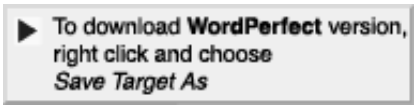

1.51-1 Nonrefundable applicant screening fee

Any "screening fee" charged to process tenant's rental application is nonrefundable, and has not and will not be credited to tenant's security deposit or deemed to be a security deposit.

Comment: Under CC §1950.6, a landlord may charge an applicant for a residential rental a nonrefundable "screening fee" to cover the cost of obtaining information about the applicant. This information may include personal reference checks, credit reports, and tenant screening reports, and may include other information as well. CC §1950.6(a). For discussion, see §4.11.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/ I. Condition of Premises/§1.52 1. Form: Landlord's Duty to Maintain Premises

I. Condition of Premises

§1.52 1. Form: Landlord's Duty to Maintain Premises

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1.52-1 Landlord's duty to maintain premises

Landlord will provide and maintain the premises, including common areas, in a decent, safe, and sanitary condition, and will comply with all state and local laws, ordinances, and regulations concerning the condition of the dwelling units.

Comment: The California standard is that the premises be in a "tenantable condition." CC §1941.1. This provision uses the more specific federal decent, safe, and sanitary standard. See 42 USC §1437d(l). See also §1.24.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.53 2. Form: Statement of Condition of Premises

§1.53 2. Form: Statement of Condition of Premises

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1.53-1 Alternative: Joint inspection of premises

Landlord and Tenant have jointly inspected the premises and noted the condition of the premises and of all fixtures, appliances, and furnishings. Attached is an itemized statement of that inspection, including all deficiencies noted and corrective action to be taken, if any. Except as noted in the statement, Tenant agrees that the premises, fixtures, appliances, and furnishings are in satisfactory condition.

1.53-2 Alternative: Landlord's itemization

The rented premises include the following fixtures, furnishings, and appliances: _ _[*specify*]**_ _. The fixtures, furnishings, and appliances are in good condition except for the following defects, which Landlord agrees to repair as indicated: _ _**[*Specify defects and dates by which Landlord agrees to repair or replace fixtures, furnishings, or appliances*]**_ _.**

Comment: The best way to avoid future disputes over the condition of the premises is to provide in the lease or rental agreement for a joint inspection of the premises by the landlord and tenant. The parties can inspect the premises together, noting the condition of all major fixtures and appliances, paint, carpet, window treatments, and listing any actions that the landlord promises to make to remedy the deficiencies. Such an inspection protects both the landlord and tenant from disputes over who is responsible for deteriorated conditions on the premises. See §1.24 for discussion of inspection procedures. See §§1.25-1.26 for sample inspection checklists.

The less comprehensive alternative is for the lease to list all fixtures, furnishings, and appliances on the premises, noting any that are defective. This provision can benefit the landlord by having the tenant agree to the condition of the premises without a full-fledged inspection.

If the tenant is less than diligent, attentive, and informed these provisions may be a pitfall; the tenant may be held responsible for a preexisting condition.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.54 J. Form: Assignment and Subletting

§1.54 J. Form: Assignment and Subletting

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1.54-1 Alternative: Assignment by tenant prohibited

Tenant may not assign _ _[*his/her*]_ _ interests under this _ _[*lease/rental agreement*]_ _ or sublet any portion of the premises.

1.54-2 Alternative: Assignment by tenant subject to landlord's consent

Tenant may not assign _ _[*his/her*]_ _ interests under this _ _[*lease/rental agreement*]_ _ or sublet any portion of the premises, without Landlord's prior written consent, which may not be unreasonably withheld.

Comment: A residential landlord may place an absolute restriction on assignment and subletting in the lease or rental agreement. CC §§1995.210, 1995.230. The parties should be aware that there are consequences to an absolute prohibition of subleasing both under state law (see CC §1995.230) and under some rent control enactments (see, e.g., San Francisco Residential Rent Stabilization and Arbitration Board Rules and Regulations §§6.14, 6.15A-6.15B, 6.15D. If a lease requires the landlord's consent to an assignment or subletting, the restriction must be construed to provide that the landlord's consent may not be unreasonably withheld. CC §1995.260. This statutory rule follows case law that preceded its enactment. See *Kendall v Ernest Pestana, Inc.* (1985) 40 C3d 488, 220 CR 818. See also San Francisco Residential Rent Stabilization and Arbitration Board Rules and Regulations §6.15B, codifying *Kendall* rule for residential tenancies. For discussion of assignment and subletting, see §§3.49-3.59, 3.75, 7.28.

When the lease does not provide otherwise, a tenant has the right to transfer the leasehold interest, either by assignment (*Kassan v Stout* (1973) 9 C3d 39, 106 CR 783) or by sublease (*Chandler v Hart* (1911) 161 C 405, 119 P 516). See also *Little v Guadron* (1986) 187 CA3d Supp 1, 4, 232 CR 516.

For assignment and subletting that violates a covenant of the lease, the landlord may terminate the tenancy by serving a 3-day notice not phrased "in the alternative," *i.e.,* a 3-day notice to quit. Without sufficient proof of an actual sublet or assignment, it is prudent to serve a 3-day notice in the alternative, allowing the tenant to remove the unauthorized occupant. CCP §1161(4). See §§8.54-8.55. For further discussion of assignment and subletting, see §§3.49-3.59A, 14.35. For discussion of rules pertaining to limitations of a commercial landlord's ability to restrict the transfer of a tenant's interest in a lease, including the effect of bankruptcy law, see §§14.43, 14.49-14.52 and California Eviction Defense Manual §19.9 (2d ed Cal CEB 1993).

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§1.55 K. Form: Use of Premises

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1.55-1 Use of premises

The premises are rented to Tenant for residential purposes only, and may not be used by Tenant for any other purpose.

Comment: In a residential tenancy, the landlord should include a clause limiting the tenancy to residential use even though CC §1941.2(a)(5) codifies such use as a tenant's "affirmative obligation." The lease or rental agreement should also specify any other permitted uses of the premises. The landlord's failure to specify the use of the premises may entitle the tenant to use them for any lawful purpose that is not materially different from the purpose for which the premises are normally used. See §1.28. The landlord may also want to prohibit certain specific uses of the premises, such as operating a mail-order business or repairing automobiles. See §1.64.

PRACTICE TIP: The landlord should be aware of uses permitted by local ordinances such as zoning codes, and of the permitted use of the premises (*e.g.,* a single family house; a duplex; a mixed use such as one store and one apartment). Landlords cannot prohibit use of residential premises as a "Family Day Care Home." Health & S C §1597.40. For discussion on covenants restricting changes in use for commercial tenancies, see California Eviction Defense Manual §19.10 (2d ed Cal CEB 1993).

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.56 L. Form: Utilities

§1.56 L. Form: Utilities

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1.56-1 Utilities

Tenant shall pay all utilities, service charges, and costs related to occupancy of the premises, except for _ _[*specify, e.g., garbage collection, sewer*]_ _, which Landlord will pay. The following utility services are individually metered for Tenant's unit and Tenant shall contact each local utility company directly to arrange and pay for service: _ _[*specify, e.g., gas, electricity*]_ _. The following utility services to the Tenant will be billed by the landlord or its billing company based on either a submeter or an allocation formula: _ _[*specify, e.g., gas, electricity, water, sewer*]_ _. The amount owing for utility services billed by the landlord or its billing company is considered additional rent under this agreement, and nonpayment of any such bill within 14 days of the billing date shall constitute a default in the payment of rent. The amount of the bill is subject to applicable government rules, regulations, and guidelines and the rules of the utility providing the service to Landlord. _ _[*The third party billing company that will calculate, send, and receive payment for Tenant's utility bills is _ _[name & address of billing company*]_ _]_ _.

Comment: During the last several years, submetering and allocation of utilities have become an extremely important factor in the operation of many apartment complexes in California. When a landlord is billed directly by the local utility, the landlord will subsequently bill the tenants for that utility through the use of a submeter or an allocation formula. The actual billing is frequently performed by a third party billing provider. See §§4.41A-4.41E. The landlord may only exercise certain remedies, such as eviction, if the covenant to pay such utility charges is express. *Keating v Preston* (1940) 42 CA2d 110, 118, 108 P2d 479.

Note that one utility charge might be billed by the landlord using a submeter and another billed using the allocation method. Under an allocation method, tenants are charged based on a variety of formulas from the number of occupants, bathrooms, square footage, or other factors. This process is known as the ratio utility billing system (RUBS). Tenant advocates claim that this process is illegal without a submeter in place. The California Public Utilities Commission (CPUC) investigated this matter (Investigation No. 98-12-012) and issued a decision in May 2001 concluding that it has limited jurisdiction over mobilehome parks on this issue. See CPUC Final Decision D01-05-058, available online at http://www.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/7183.htm. (A draft decision, published in Summer 2000, recommended several legislative responses. See CPUC Agenda Decision (Investigation No. 98-12-012; 8/3/00), available online at http://www.cpuc.ca.gov/PUBLISHED/AGENDA_DECISION/2114.htm.)

1.56-2 Optional addition to 1.56-1: Submeter billing method

A _ _[*water/gas/electric*]_ _ submeter will measure the Tenant's _ _[*water/gas/electricity*]_ _ usage and the _ _[*Landlord/third party billing company*]_ _ will bill Tenant based on this usage.

1.56-3 Optional addition to 1.56-1: Allocation billing method

The _ _[*Landlord/third party billing company*]_ _ will bill Tenant a percentage of the Landlord's actual _ _[*e.g., water and sewer*]_ _ costs based on the following formula: The square footage of the Tenant's apartment divided by the square footage of all apartments in the complex multiplied by the Landlord's _ _[*e.g., water and sewer*]_ _ bills. _ _[*Use alternate descriptions for other RUBS formulas*]_ _.

1.56-4 Optional addition to 1.56-1: Hot-water ratio billing method

A water submeter will measure the Tenant's hot water usage and the _ _[*Landlord/third party billing company*]_ _ will bill Tenant based on the following formula: The hot water usage of the Tenant divided by the hot water usage of all Tenants at the Property multiplied by the Landlord's water and sewer bills.

Comment: Landlords and third party billing companies use a wide variety of allocation formulas and billing methods; therefore, it is important to obtain this information prior to drafting the lease so that the language accurately reflects precisely how the tenant will be billed.

1.56-5 Optional addition to 1.56-1: Security deposit withholding

Upon termination or expiration of the lease, unpaid utility bills may be deducted from Tenant's security deposit.

Comment: A landlord seeking to collect unpaid utility bills may choose to deduct unpaid utility charges from the security deposit. Under CC §1950.5(b), the security deposit may be "used for any purpose" including tenant defaults "in the payment of rent." See §§4.23, 4.26. See also form 1.56-1.

1.56-6 Optional addition to 1.56-1: Remedies

The failure of Tenant to make payment in full in a timely manner for utilities is a substantial and material breach entitling Landlord to pursue any and all legal remedies available under this Lease or applicable laws.

Comment: A landlord seeking to evict a tenant for nonpayment of utilities is permitted to do so under CCP §1161(3) as a failure of the tenant to perform a condition or covenant of the rental agreement. As some ordinances limit the right to evict to "substantial" breaches of "material" terms, this type of provision may be useful in arguing the substantiality and materiality of the failure to make utility payments. On the materiality requirements of §1161(3), see §8.48.

1.56-7 Optional addition to 1.56-1: Fees

As part of each monthly utility bill, Tenant shall pay an administrative fee in the amount of $_ _[*dollar amount*]_ _, which is used to cover administrative and billing expenses. Tenant agrees to pay a one-time account set-up fee in the amount of $_ _[*dollar amount*]_ _. This fee shall be included on Tenant's first bill. Tenant agrees to pay a one-time account processing fee in the amount of $_ _[*dollar amount*]_ _ when Tenant vacates the Unit. This fee shall be included on Tenant's final utility bill.

Comment: A landlord billing under a gas or electric submetering program may only charge the specific amounts authorized by Pub Util C §739.5 and the tariffs of the providing utility. See §§4.41D-4.41E.

1.56-8 Optional addition to 1.56-1: Limitation of liability

Landlord shall not be liable for any losses or damages that result from outages, interruptions, or fluctuations in utilities provided to Tenant's unit, unless such loss or damage was the direct result of the willful conduct or negligence of Landlord or Landlord's employees. Tenant hereby releases Landlord from any and all such claims arising from or relating to such outages, interruptions, or fluctuations. Tenant hereby waives any and all claims for offset, rent reduction, or diminished value of the apartment due to such outages, interruptions, or fluctuations.

Comment: On the enforceability of tenant waivers of liability and other legal rights, including the implied warranty of habitability, see CC §§1668, 1953(a)(2), (5), discussed in §§1.30, 4.39.

1.56-9 Optional addition to 1.56-1: Tampering

Tenant agrees not to disturb, terminate, interrupt, tamper with, adjust, or disconnect any utility service or submetering system or device. Violation of this section is a material and substantial breach of the Lease and shall entitle Landlord to all available remedies under the Lease or applicable laws.

1.56-10 Optional addition to 1.56-1: Estimation

Tenant agrees to allow Landlord to estimate consumption if the Tenant's submeter is broken or otherwise does not transmit a meter reading.

Comment: If a submeter is damaged or cannot be read, the common practice among billing companies is to estimate

for some period of time; consent to this practice should be obtained in advance from the tenant.

1.56-11 Optional addition to 1.56-1: No waiver/receiving rent

Landlord's receipt of rent with knowledge of Tenant's failure to pay utility charges does not waive Landlord's right to enforce any covenant of this lease.

Comment: Acceptance of rent by a landlord that has full knowledge of the failure to pay utility bills may constitute a waiver of the breach, thereby precluding the landlord from terminating the tenancy. The landlord may avoid the waiver issue by entering into a written agreement with the tenant specifying that accepting rent payments is not a waiver of the breach of failing to pay utility charges. See §8.49.

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M. Tenant Obligations and Restrictions

§1.57 1. Form: Tenant's Obligation to Maintain and Protect Landlord's Property

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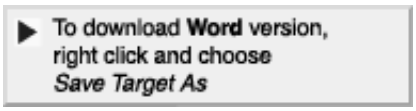

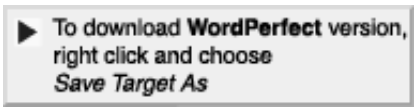

1.57-1 Tenant's obligation to maintain and protect landlord's property

Tenant agrees to perform the following obligations:

1. To keep the premises as clean and sanitary as their condition permits;

2. To dispose of all rubbish, garbage, and other waste in a clean and sanitary manner;

3. To use and operate properly all electrical, gas, and plumbing fixtures and pipes, and to keep them as clean and sanitary as their condition permits;

4. To refrain from willfully or wantonly destroying, defacing, damaging, impairing, or removing any part of the premises or the facilities, equipment, or appurtenances, or permitting any person on the premises to commit such acts; and

5. To occupy the premises as _ _[*his/her*]_ _ abode, utilizing designated portions of the premises for living, sleeping, cooking, and dining purposes.

Comment: This comprehensive provision includes a number of tenant obligations derived from CC §1941.2.

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§1.58 2. Form: Tenant's Obligations to Refrain from Disturbance, Unlawful Conduct, and Waste

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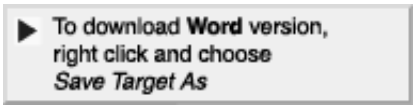

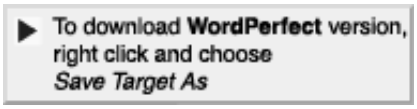

1.58-1 Tenant's obligations to refrain from disturbance, unlawful conduct, and waste

Tenant may not disturb, annoy, endanger, or interfere with other tenants of the building or occupants of neighboring buildings. Tenant may not use the premises for any unlawful purpose, violate any law or ordinance, or permit waste or nuisance on the premises.

1.58-2 Optional addition to 1.58-1: Limitations on sound equipment

Tenant may not play _ _[*his/her*]**_ _ television, stereo, radio, any other amplified electrical device, or any musical instrument that may disturb other tenants, between _ _**[*e.g., 10:30*]**_ _ p.m. and _ _**[*e.g., 8:30*]**_ _ a.m., unless Tenant uses earphones.**

1.58-3 Optional addition to 1.58-1: Rugs

Tenant will be responsible for placing rugs on the floors of the following rooms of the premises: _ _[*Specify*]**_ _.**

Comment: This standard clause protects the rights of other tenants and enables the landlord to terminate the tenancy of a troublesome tenant. Note that for waste (provided the lease expressly prohibits waste) or nuisance, the landlord may terminate the tenancy on 3 days' notice not phrased "in the alternative," *i.e.,* a 3-day notice to quit. CCP §1161(4). See §§8.54-8.55.

NOTE: For purposes of CCP §1161, which defines "unlawful detainer," a person who sells a controlled substance or unlawfully possesses or uses weapons or ammunition on the premises, or uses the premises for those purposes, is considered to have committed a nuisance. CCP §1161(4). See §4.44.

For other standards of conduct covered by this provision, termination is governed by CCP §1161(3). If the tenant can cure such conduct, the landlord might be required to give notice phrased in the alternative (*e.g.,* either cure the conduct, or quit the premises).

Some landlords find it advisable to require that tenants in upstairs units keep rugs on the floors as a means of reducing complaints from the tenants below about noise.

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§1.59 3. Form: Tenant's Obligation to Comply With Rules and Regulations

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1.59-1 Tenant's obligation to comply with rules and regulations

Tenant agrees to comply with the building rules and regulations, a copy of which is attached to this _ _[*lease/rental agreement*]_ _ and incorporated by reference. Landlord may amend or modify the rules and regulations by serving a copy of the amendments or modifications on Tenant 30 days before their effective date.

Comment: Some landlords issue rules covering problems that commonly arise in particular buildings or complexes. Under this clause, the tenant's breach of the rules becomes a breach of the lease or rental agreement, entitling the landlord to terminate the tenancy if the tenant fails to cure the breach after appropriate notice. This provision may be particularly important for landlords in rent-controlled jurisdictions. See §1.31.

PRACTICE TIP: In nonrent-controlled jurisdictions, most terms or conditions of a month-to-month agreement (except rent increases and terminations; see §§3.65-3.65B, 8.69) may be changed on 30 days' notice. See *Wilcox v Anderson* (1978) 84 CA3d 593, 148 CR 773, in which a 30-day notice was used to delete an option to purchase. In most rent-controlled jurisdictions, any term of a month-to-month agreement may be changed except for provisions specifically covered by the ordinance, and in some the landlord may reduce or terminate services, as long as the rent is reduced according to specified formulas.

WARNING: The San Francisco Residential Rent Stabilization and Arbitration Ordinance requires a landlord to have just cause to remove or sever certain housing services such as parking and/or storage from a tenancy. If the parties dispute a certain item, a court will determine whether just cause exists to sever and/or remove that item. Either party may then petition the rent board to determine the amount of the corresponding rent reduction. See §7.54.

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§1.60 4. Form: Conditions Governing Tenant Repairs and Alterations

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§1.37-1.79.

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1.60-1 Conditions governing tenant repairs and alterations

Before making any repairs to defective conditions on the premises, Tenant must first notify Landlord of the need for such repairs and allow a reasonable time for Landlord to arrange for the necessary repairs. If Landlord does not act within _ _[*e.g., 30 days*]_ _, Tenant may have the repairs made and may deduct their cost from up to one month's rent.

Tenant may not make alterations to the premises by _ _[*e.g., removing or adding walls, windows, paint, wallpapering, electrical wiring, plumbing fixtures, or tile*]_ _ without first obtaining Landlord's written consent, which may not be unreasonably withheld.

On completion, any such repairs or alterations become part of the premises.

Comment: This provision gives the landlord a reasonable opportunity (usually 30 days) to make repairs relating to the habitability of the premises before the tenant can use the "repair-and-deduct" remedy (CC §§1941-1942; see §§3.12-3.15). A landlord who makes the necessary repairs controls both the quality and cost. If the landlord does not correct defects that affect habitability within a reasonable time, the tenant may deduct the cost of such repairs up to one month's rent. CC §1942(a)-(b). For alterations to the premises, landlords usually prefer to maintain control over the removal of lead-based paint or other hazardous material, the color and type of paint or wallpaper, or the quality and nature of any other alterations that the tenant wishes to make. The tenant's failure to obtain the landlord's consent would constitute a breach of the lease, entitling the landlord to terminate the tenancy.

Civil Code §1942(b) provides that, if a tenant acts to repair and deduct after the 30th day following notice, he or she is rebuttably presumed to have acted after a reasonable time. The statute also provides that a tenant may repair and deduct after shorter notice "if all the circumstances require shorter notice."

Civil Code §1942(a) specifies that the remedy provided by the statute (*i.e.,* repairing and deducting from rent when the landlord fails to repair within a reasonable time) is not available to the tenant more than twice in any 12-month period. See §3.16 for further discussion.

The above provisions do not prevent a tenant from resorting to the rent-withholding remedy approved for breach of the implied warranty of habitability in *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704. See §3.8. Moreover, the tenant need not provide notice to the landlord before initiating rent withholding if the landlord is, in fact, aware that a defect exists. *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707 (court left open question of whether landlord's knowledge of defect is prerequisite to right to withhold rent). Generally, a tenant may not waive rights of habitability, even regarding defects known in advance by the tenant. See §3.23.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.61 5. Form: Tenant Agreement to Maintain Premises as Consideration for Rental

§1.61 5. Form: Tenant Agreement to Maintain Premises as Consideration for Rental

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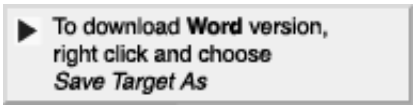

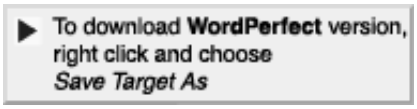

1.61-1 Tenant agreement to maintain premises as consideration for rental

Tenant agrees that, as part of the consideration paid for use and occupancy of the premises, Tenant will perform the following items of improvement, repair, and maintenance: _ _[*Specify*]_ _.

Landlord and Tenant agree to the following arrangements concerning the provision of necessary tools and materials to enable Tenant to carry out the work: _ _[*Specify*]_ _.

Tenant acknowledges that the specified items are within Tenant's capacity and experience and were specifically agreed on after due negotiation with Landlord.

Comment: Civil Code §1942.1 provides that a tenant's waiver of rights to the landlord's maintenance of tenantable conditions is void as contrary to public policy, except under a specific agreement that the tenant "improve, repair or maintain all or stipulated portions of the dwelling as part of the consideration for rental." Such arrangements often break down, with serious consequences for the landlord. See §4.31 for further discussion. In the absence of specific language showing that a true exchange at arm's length was the basis for the arrangement, a "maintenance-for-rent" arrangement might be found unenforceable as an attempt by the landlord to avoid responsibility for required maintenance and repair.

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§1.62 6. Form: Pets

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1.62-1 Pets

Without Landlord's written consent, Tenant may keep no animals on or about the premises _ _[*, except, e.g., small birds, a cat*]**_ _.**

Comment: Most landlords prefer to place some limitations on the pets that the tenant may keep on the premises. Pets may cause property damage and even subject the landlord to liability for personal injury damages to a tenant or a third party (see §§3.67-3.72). Some landlords are willing to permit small pets such as birds or cats.

A landlord cannot refuse to rent to a blind or otherwise disabled person, or persons licensed to train guide dogs, on the ground that the person must be accompanied by a guide dog, signal dog, or service dog. CC §§54.1(b), 54.2(b). A landlord may, however, establish terms and conditions in the lease or rental agreement that reasonably regulate the presence of such dogs. No public agency that owns and operates rental housing or landlord who is participating in a HUD subsidized program may prohibit the keeping of up to two pets by an elderly person or person requiring supportive services in the housing accommodations. Health & S C §19901.

Both federal and state fair housing laws require landlords to make reasonable accommodations when such accommodations are necessary to afford a disabled tenant equal rights to use and enjoy the property. 42 USC §3604(f)(3)(B); Govt C §12927; CC §54.1(b)(3)(B). Fair housing enforcing agencies and courts have consistently ruled that allowing assistive animals (including companion animals) for disabled tenants is a reasonable accommodation. See, *e.g., Auburn Woods I Homeowners Ass'n v FEHC* (2004) 121 CA4th 1578, 18 CR3d 669 and 24 CFR §100.204. A landlord is prohibited from charging any kind of fee as a condition of granting such an accommodation, which means no pet deposit, pet rent, or other additional fee may be charged. See *Joint Statement of the Department of Housing and Urban Development and the Department of Justice Reasonable Accommodations Under the Fair Housing Act (#11)*; see also *HUD v Purkett* (HUD ALJ 1990) 09-89-1495-1. Additionally, normal pet restrictions (such as type, size and/or breed restrictions) may not be applied. See 24 CFR §100.204. The tenant may, however, be required to sign reasonable rules of conduct for the animal. CC §54.1(b)(6)(B). If the tenant's disability and need for the animal are not obvious, the landlord may request written verification from the tenant's health care provider or other credible party that: a) the tenant meets the California definition of disability; and b) the animal is related to, and needed because of, the disability. See *Joint Statement of the Department of Housing and Urban Development and the Department of Justice Reasonable Accommodations Under the Fair Housing Act (#18)*. For further discussion on reasonable accommodation, see §§2.26-2.27C, 2.60.

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§1.63 7. Form: Waterbeds

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§1.37-1.79.

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1.63-1 Waterbeds

Tenant may install and maintain a waterbed on the premises only in compliance with all of the following requirements:

Before installation, Tenant will furnish Landlord with a valid waterbed insurance policy or certificate of insurance for property damage. The policy will be issued by a company licensed to do business in California and possessing a Bests Insurance Report rating of "B" or higher. The policy will be maintained in full force and effect until the waterbed is permanently removed from the premises. The policy will be written for no less than $100,000 of coverage, and will cover, up to its policy limits, replacement value of all property damage, including loss of use, incurred by Landlord and caused by or arising out of the ownership, maintenance, use, or removal of the waterbed on the premises only, except for any damage caused intentionally or at the direction of the insured, or for any damage caused by or resulting from fire. Landlord may require Tenant to produce evidence of insurance at any time. The carrier will give Landlord notice of cancellation or nonrenewal 10 days before such action.

The waterbed will conform to the pounds-per-square-foot weight limitation and placement as dictated by the floor load capacity of the residential structure. The weight will be distributed on a pedestal or frame that is substantially the dimensions of the mattress itself.

Tenant will install, maintain, and remove the waterbed, including, but not limited to, the mattress and frame, according to standard methods of installation, maintenance, and removal as prescribed by the manufacturer, retailer, or state law, whichever provides the highest degree of safety. Tenant will notify Landlord in writing of the intent to install, remove, or move the waterbed. The notice will be delivered at least 24 hours before the installation, removal, or movement. Landlord may be present at the time of installation, removal, or movement at Landlord's option. If the waterbed is installed or moved by any person other than Tenant, Tenant will deliver to Landlord a written installation receipt stating the installer's name, address, and business affiliation when appropriate.

Any new waterbed installation will conform to Landlord's reasonable structural specifications for placement within the rented premises and be consistent with floor capacity of Tenant's rental unit.

Tenant will comply with the minimum component specification list prescribed by the manufacturer, retailer, or state law, whichever provides the highest degree of safety.

The waterbed will comply with the rules and regulations governing the quality of bedding construction promulgated by the Bureau of Home Furnishings under Business and Professions Code section 19155 and will display a label declaring compliance with those rules and regulations.

Subject to the notice requirements set forth in this agreement, Landlord will have the right to inspect the waterbed installation on completion, and periodically thereafter, to ensure its conformity with the requirements set forth in this provision. If installation or maintenance is not in conformity with these requirements, Landlord may serve Tenant with a written notice of breach of this agreement. Landlord may give Tenant 3 days either to bring the installation into conformity with these requirements or to remove the waterbed, unless there is an immediate danger to the structure, in which case there will be immediate corrective action.

If Tenant chooses to install a waterbed in accordance with these provisions, Tenant's security deposit will be increased in an amount equal to one half of one month's rent.

Comment: Civil Code §1940.5 prohibits landlords from refusing to rent to a tenant solely on the basis of the tenant's possession of a waterbed or other bedding with liquid filling material, provided that the tenant meets the requirements of that section, which are incorporated in this provision.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.64 8. Form: No Automobile Repair

§1.64 8. Form: No Automobile Repair

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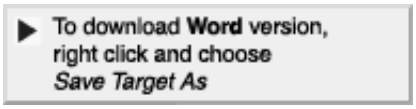

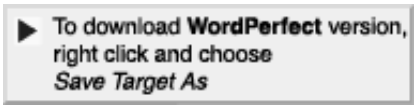

1.64-1 No automobile repair

Tenant may not repair automobiles, motorcycles, other motor vehicles, or any other heavy machinery, anywhere in the parking area, garage, or driveway, or on any other portion of the property.

Comment: Tenants who repair automobiles or other equipment on the premises may create an eyesore, make noise, or cause damage to the premises. Including a provision that prohibits these activities gives the landlord a potential basis for eviction for a tenant's material breach of the lease. This provision is especially important in a rent-controlled jurisdiction (see §1.31).

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.65 N. Form: Tenant's Death or Disability

§1.65 N. Form: Tenant's Death or Disability

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1.65-1 Alternative: Death or removal due to disability of tenant of unit *not* subject to vacancy control

Tenant may not cause this rental agreement to be assigned, either voluntarily or involuntarily. If no cotenant or subtenant previously approved by Landlord in writing remains in the premises after Tenant's death, this rental agreement shall be considered terminated and the premises voluntarily vacated 30 days after the death of Tenant. Any representative of Tenant's estate in possession of the premises during the 30-day period following Tenant's death shall not be considered to be a subtenant approved by Landlord. Any payment of rent during and for the 30-day period shall be considered to be made on behalf of decedent or _ _[*his/her*]_ _ estate and shall not create a new tenancy.

Should Landlord permit possession of the premises by Tenant's estate or representative or any other person after expiration of the 30th day following Tenant's death, the rent for possession of the premises shall be the maximum amount of rent for the premises that landlord is permitted to charge under applicable law. If that amount is the full fair market rent, then Landlord shall have the right to unilaterally determine that amount. The tenancy will also terminate if Tenant fails to occupy the premises for 30 consecutive days on account of Tenant's disability and no cotenant or subtenant previously approved by Landlord in writing remains in the premises after expiration of the 30-day period.

If there is no authorized representative of Tenant and Tenant dies or becomes so disabled that Tenant can no longer reside, and ceases to reside, in the premises, Tenant hereby authorizes Landlord to enter the premises, to pack Tenant's belongings and personal property, to remove the property from the premises, and to store it. The disposition of said property shall be governed either by Tenant, Tenant's authorized representative, the authorized representative of Tenant's estate, or the provisions of the Civil Code. Landlord shall not be liable for any loss of, or damage to, Tenant's property not caused by Landlord's gross negligence or willful and bad faith conduct, nor shall Landlord be liable in any way to Tenant for entering the premises, taking possession and control of Tenant's property, and removing it.

1.65-2 Alternative: Death or removal due to disability of tenant of unit subject to vacancy control

Tenant may not cause this rental agreement to be assigned, either voluntarily or involuntarily. If no cotenant or subtenant previously approved by Landlord in writing remains in the premises after Tenant's death or removal due to disability, this rental agreement shall be considered terminated and the premises voluntarily vacated 30 days after the death of Tenant. Any representative of Tenant's estate in possession of the premises during the 30-day period following Tenant's death shall not be considered to be a subtenant approved by Landlord. Any payment of rent during and for the 30-day period shall be considered to be made on behalf of decedent or _ _[*his/her*]_ _ estate and shall not create a new tenancy.

Comment: The issue of whether the death of a tenant terminates a month-to-month tenancy was addressed in *Miller & Desatnik Mgmt. Co. v Bullock* (1990) 221 CA3d Supp 13, 270 CR 600, a case of first impression. The court interpreted the language of CC §1934 to mean that the death of a tenant in a month-to-month tenancy terminates the tenancy effective 30 days following the tenant's last payment of rent before death. The court then held that a relative who moved into the rental unit after the death without the knowledge or consent of the landlord was not entitled to protection under the local rent control charter amendment. Although the *Miller* decision should provide some comfort to property owners, landlords should add provisions such as the above to their rental agreements to avoid any uncertainty concerning this issue. For further discussion, see §§7.72, 8.4.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.66 O. Form: Landlord's Entry on Premises; Notice

§1.66 O. Form: Landlord's Entry on Premises; Notice

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1.66-1 Landlord's entry on premises; notice

On not less than 24 hours' advance written notice, or as otherwise required by law, Tenant must make the premises available, at a time acceptable to Tenant during normal business hours _ _[*e.g., 8 a.m. to 6 p.m., Monday through Saturday*]**_ _, for entry by Landlord or _ _**[*his/her*]**_ _ agent for the purpose of:**

1. Making necessary or agreed-on repairs, decorations, alterations, or improvements;

2. Supplying necessary or agreed-on services;

3. Showing the premises to prospective or actual purchasers, mortgagees, tenants, workers, or contractors, or to make an inspection pursuant to CC §1950.5(f); or

4. Conducting any activity required or permitted by court order.

In the event of an emergency, or if Tenant is present and consents to entry at the time of entry, or after Tenant has abandoned or surrendered the premises, Landlord or _ _[*his/her*]**_ _ agent may enter the premises without giving Tenant prior notice.**

1.66-2 Optional addition to 1.66-1: Changing locks

_ _[*Landlord/Landlord's agent*]**_ _ currently has a key to the premises. Tenant may not change the lock or add a lock without Landlord's prior written consent, and without furnishing to _ _**[*Landlord/Landlord's agent*]**_ _ a key to the changed or added lock.**

Comment: The first paragraph in this clause sets forth some of the requirements of CC §1954 concerning the landlord's right of entry. See full discussion of statutory notice requirements and drafting tips in §§3.2-3.4, 4.43. The landlord might wish to alter the permissible hours of entry to suit his or her particular needs, but CC §1954 specifies that the right of entry applies only during normal business hours unless the tenant consents at the time of entry. On limitations on waiver, see §§1.30, 4.43. Section 1954 also requires that the landlord give written notice of entry in many cases. The notice may be personally delivered to the tenant, left with a person of suitable age and discretion at the premises, or posted on, near, or under the usual entry door of the premises in a manner that a reasonable person would find the notice. The statutory 24 hours is presumed reasonable notice in the absence of evidence to the contrary. If the landlord elects to mail the notice to the tenant, then the landlord should give the tenant 6 days' prior notice to have the benefit of the statutory presumption of reasonable notice by mail.

The notice should include the date, approximate time, and purpose of the entry. For a sample notice, see §3.3A.

The advance notice need not be given if there is an emergency, the tenant is present and consents to entry at the time of entry, or the tenant has abandoned or surrendered the premises. The statute states no other guidelines for when the landlord may enter on less than 24 hours' notice. The landlord may not use the right of entry to harass the tenant. On the remedies available to either landlord or tenant if the other refuses to cooperate, see §3.4.

The optional paragraph is intended to deal with the problem that arises when a tenant decides to change the locks, either to keep the landlord out or for other reasons. The landlord must have a key to the premises for emergencies and in case the tenant vacates. Without this provision, a court might hold that the tenant's failure or refusal to furnish the landlord with a key does not constitute a material breach of the lease. A problem arises for the tenant when the

landlord abuses the right of entry. On the remedies available to a tenant who wishes to remain in the premises on such an occasion, see §§3.4, 8.150A, explaining CC §1940.2(a) and other remedies.

WARNING: A common mistake that landlords make is to give a notice to the tenant that the landlord will enter to "inspect" the premises. But CC §1954 *does not* give the landlord a right to "inspect" the premises. Exceptions to this rule include certain federally subsidized and tax credit programs that mandate periodic inspections of the premises.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/ P. Breach of Covenant/§1.67 1. Form: Covenants Are Material and Reasonable

P. Breach of Covenant

§1.67 1. Form: Covenants Are Material and Reasonable

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1.67-1 Covenants are material and reasonable

The parties consider each and every term, covenant, and provision of this _ _[*lease/rental agreement*]_ _ to be material and reasonable.

Comment: The lease or rental agreement should include this clause because some rent control ordinances provide that a violation of a material covenant is a permissible ground for eviction. Under such an ordinance, a dispute could arise about whether the breach on which the landlord seeks to base an eviction is a breach of a material covenant. This provision may prevent that problem. See §§1.31, 4.22.

A rent control ordinance may also require that termination be based only on a covenant that is lawful, reasonable, or both. To overcome this problem, this clause states that the parties consider all the terms of the lease or rental agreement to be reasonable. A court is unlikely, however, to hold binding a statement in the lease that the parties consider the terms to be lawful.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.68 2. Form: Consequences of Tenant's Breach; Service of Notice

§1.68 2. Form: Consequences of Tenant's Breach; Service of Notice

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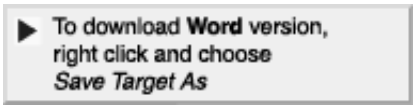

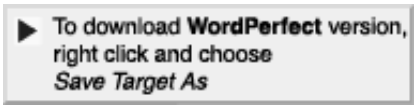

1.68-1 Consequences of tenant's breach; service of notice

For any breach of a covenant or condition of this _ _[*lease/rental agreement*]_ _, Landlord may, at _ _[*his/her*]_ _ option, serve a 3-day notice (1) specifying the nature of the breach, and (2) demanding that Tenant cure the breach if the breach can be cured. The notice may further declare that, if Tenant fails to cure a curable breach within the 3-day period or if the breach is not curable, the tenancy is terminated and Tenant forfeits all rights under this _ _[*lease/rental agreement*]_ _.

Comment: This clause merely restates the requirements in CCP §1161(3)-(4) for the landlord's termination of the tenancy for a breach of the lease or rental agreement. See §§8.46-8.54. Inclusion is probably unnecessary but may benefit the landlord by spelling out the consequences of the tenant's breach of a covenant of the lease or rental agreement.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.69 Q. Form: Misrepresentation in Tenant's Application

§1.69 Q. Form: Misrepresentation in Tenant's Application

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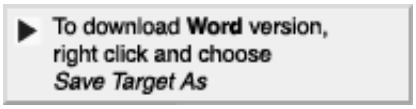

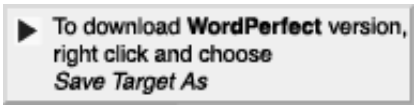

1.69-1 Misrepresentation in tenant's application

Tenant's rental application _ _[*, date of application,/on the reverse side of this* _ _[*lease/rental agreement*]_ _]_ _ **is hereby incorporated in and made a part of this** _ _[*lease/rental agreement*]_ _**. Any material misrepresentation or omission made by Tenant in the application will constitute a material breach of this** _ _[*lease/rental agreement*]_ _**.**

Comment: Many landlords now insist that tenants complete an application, and they select tenants on the basis of the information in those applications, especially information pertaining to the tenant's ability to pay the rent. Under this clause, the landlord would be able to evict the tenant if it later becomes known that the tenant provided false information in the rental application.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.70 R. Form: Malicious Holding Over; Statutory Damages

§1.70 R. Form: Malicious Holding Over; Statutory Damages

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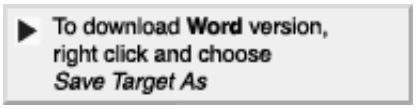

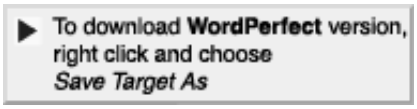

1.70-1 Malicious holding over; statutory damages

If Tenant maliciously remains in possession of the premises after expiration of the tenancy, or on termination of the tenancy, Landlord may recover statutory damages of up to $600, in addition to rent due and any other actual damages.

Comment: This clause restates CCP §1174(b); its inclusion may benefit landlords by spelling out to tenants their liability for damages under the statute.

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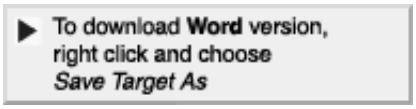

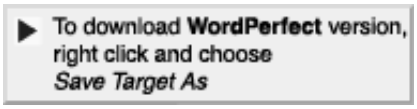

1.71-1 Personal property remaining on premises

After Tenant vacates the premises, either by expiration of the term or on termination of the tenancy, Landlord must give the notices required by law concerning disposition of any personal property of Tenant that remains on the premises. Tenant is responsible for all reasonable costs of storing such personal property. The property will be released to Tenant or its rightful owner only after Tenant or the rightful owner pays to landlord the reasonable costs of storage within the time required by law.

Comment: Disposition of the tenant's personal property remaining on the premises is governed by CC §§1980-1991. CCP §1174(e)-(m). For discussion of the operation of these provisions, see §§8.154-8.161. Note that the landlord may charge only the reasonable cost of storing the property as a condition of the return of the property. CC §1983(b). The landlord may not attempt to recover back rent or other charges (even if reduced to judgment) as a condition to return of the tenant's property. See *Love v Keays* (1971) 6 C3d 339, 98 CR 811; *Gray v Whitmore* (1971) 17 CA3d 1, 94 CR 904.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.72 T. Form: Possession of Premises

§1.72 T. Form: Possession of Premises

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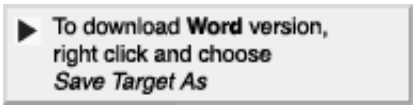

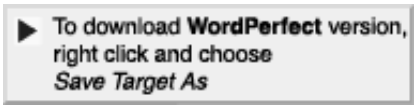

1.72-1 Possession of premises

If Landlord is unable to deliver possession of the premises to Tenant at the commencement of the term specified in this _ _[*lease/rental agreement*]_ _, Landlord will not be liable for any damage caused thereby, nor will this _ _[*lease/rental agreement*]_ _ be void or voidable. Landlord will take reasonable steps to obtain possession of the premises from previous tenants or occupants. Tenant will not be liable for any rent, however, until the date that possession is actually delivered. Tenant may terminate this _ _[*lease/rental agreement*]_ _ if Landlord fails to deliver possession of the premises within _ _[*e.g., 30*]_ _ days of commencement of the specified term.

Comment: This clause addresses the problem that arises when the landlord cannot deliver possession of the premises, either because the previous tenant refuses to vacate, or because necessary work on the premises is not complete. A tenant with any bargaining power might balk at the inclusion of such a provision precluding recovery of damages for a delay in receiving possession of the premises. In any case, the tenant should be permitted to withdraw from the agreement if the landlord does not deliver possession within a reasonably short time after the term was to commence.

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§1.73 U. Form: Tenant's Termination for Cause Under Fixed-Term Lease

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1.73-1 Tenant's termination for cause under fixed-term lease

On service of 30 days' written notice, Tenant may, for good cause, terminate this lease and vacate the premises. Good cause for termination, which must be specified in the notice, means circumstances beyond Tenant's control that force _ _[*him/her*]_ _ to vacate the premises, including but not limited to entry on active duty with U.S. military services and employment in another community.

Comment: This clause permits the tenant to terminate a fixed-term lease when circumstances arise that are essentially beyond the tenant's control and relate to the tenant's ability to continue to reside in that community.

NOTE: Many leases contain what has become known as a "military clause." This is especially true in communities with a large military presence where landlords desire to attract military clientele. In December 2003, the Servicemembers Civil Relief Act (SCRA) was enacted into law by the federal government (50 USC App §§501-596) (Pub L 108-189, 117 Stat 2835). It supersedes the previous Soldiers' and Sailors' Civil Relief Act of 1940. It applies to all military servicemembers and their dependents, whether they entered military service before or after signing a lease agreement. The law allows a servicemember to terminate a lease agreement on 30 days' written notice, along with a copy of orders showing that the servicemember is going to be deployed for a period of over 90 days or has received a permanent change of duty station. The servicemember is then liable for rental payments from the date notice is given by the servicemember up to the next rental due date, plus 30 days. 50 USC App §535. Under California law, a landlord may collect only 45 days' worth of rent when a lease is terminated due to military service. Mil & V C §409(b). Because the amount of rent for which a servicemember is liable when terminating a lease under the SCRA is sometimes more stringent than the typical "military clause" contained in most lease agreements, landlord attorneys should make their clients aware of the SCRA.

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§1.74 V. Form: Attorney Fees

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1.74-1 Attorney fees

In any legal action brought by either party to enforce the terms of this _ _[*lease/rental agreement*]_ _, the prevailing party is entitled to all costs incurred in connection with such an action, including reasonable attorney fees.

Comment: Attorney fees are not recoverable in an action to enforce the terms of the lease or rental agreement unless expressly provided for in the lease or agreement. CCP §1021. If the agreement contains an attorney fee clause, however worded, it must be interpreted reciprocally to permit either party who prevails to recover attorney fees. CC §1717. Counsel involved in negotiating a lease with an attorney fee clause should be familiar with *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830, discussed in §13.27.

An attorney fee clause might deter some tenants from conducting an extensive defense to an unlawful detainer action, knowing that they will be liable for the landlord's attorney fees if they lose. Judgment-proof tenants, however, may not be deterred by such a threat. See §4.42. Moreover, inclusion of such a clause opens the door for a prevailing tenant's recovery of attorney fees from the landlord. For discussion of these and other issues, see §§13.25-13.33C. See also California Attorney Fee Awards (2d ed Cal CEB 1994).

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§1.75 W. Form: No Waiver

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§1.37-1.79.

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1.75-1 No waiver

Waiver by either party of a breach of any covenant of this _ _[*lease/rental agreement*]_ _ will not constitute a continuing waiver of any subsequent breach. Landlord's receipt of rent with knowledge of Tenant's violation of a covenant does not waive Landlord's right to enforce any covenant of this _ _[*lease/rental agreement*]_ _. No waiver by either party of a provision of this _ _[*lease/rental agreement*]_ _ will be considered to have been made unless expressed in writing and signed by all parties.

Comment: This clause is designed to preclude a claim of waiver or estoppel by either party following the other party's breach. The second sentence is intended to allow the landlord to continue to collect rent while demanding that the tenant remedy a violation. In some instances, the landlord's acceptance of rent probably constitutes a waiver of the breach. For example, the landlord's acceptance of rent may waive the right to object to nonpayment of rent (see §§8.43-8.45), and acceptance after service of a 30-day notice to terminate a month-to-month tenancy may waive the notice (see §8.75) if the rent covers any time after expiration of the notice.

Although the courts will give effect to a lease provision that acceptance of rent does not waive a breach, the landlord may be estopped from relying on the provision if his or her conduct leads the tenant to believe that strict compliance with the lease covenant in question would not be required. See *Salton Community Servs. Dist. v Southard* (1967) 256 CA2d 526, 531, 64 CR 246. See discussion of waiver and estoppel in §8.49.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.76 X. Form: Service of Notices

§1.76 X. Form: Service of Notices

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§1.37-1.79.

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1.76-1 Alternative: Service of notices—no manager of premises

For the purpose of service of process and service of notices and demands, Tenant's address is _ _[*address of* _ _[*premises/other residence*]_ _]_ _**.**

Notices, demands, and service of process for Landlord may be served on _ _[*Landlord/Landlord's Agent/other person authorized to accept service on Landlord's behalf*]_ _ **at the following street address and telephone number:** _ _[*specify*]_ _**.**

Comment: Several trial courts have interpreted CCP §1162 to mean that a landlord has to attempt service of notices to a tenant at his or her place of employment before utilizing the post and mail method of service. Such an interpretation may render the above lease provision meaningless.

1.76-2 Alternative: Service of notices—premises has manager

For the purpose of service of process and service of notices and demands, Tenant's address is _ _[*address of* _ _[*premises/other residence*]_ _]_ _**.**

Notices, demands, and service of process for Landlord may be served on _ _[*Landlord/ Landlord's Agent/manager/other person authorized to accept service on Landlord's behalf*]_ _ **at the following street address and telephone number:** _ _[*specify*]_ _**.**

_ _[*Name of manager*]_ _ **is the person authorized to manage the premises, and** _ _[*his/her*]_ _ **usual street address and telephone number is:** _ _[*specify*]_ _**.**

Comment: The second and third paragraphs are required by CC §1962(a)(1) for a lease or rental agreement of a dwelling structure containing one or more units. If a person is authorized to manage the premises, his or her name, address, and telephone number must also be included in the lease or rental agreement. CC §1962(a)(1). If this information is not included in the agreement, it must be posted on the premises in the elevator or another conspicuous place. CC §1962.5. The clause that governs the manner of payment of rent and the address for payment is in §1.40.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.77 Y. Form: Lead Disclosure

§1.77 Y. Form: Lead Disclosure

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1.77-1 Lead disclosure

_ _[*Check if following statement applies*]_ _ **Lead Disclosure: If checked, the Premises were built before 1978 and the following must be completed by the landlord, tenant, and real estate agent, if any.**

LEAD WARNING STATEMENT

Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting housing built before 1978 landlords must disclose the presence of known lead-based paint and/or lead-based paint or other lead-based hazards in the dwelling. Tenants must also receive a federally approved pamphlet on lead poisoning prevention.

LANDLORD'S DISCLOSURE

_ _[*Initial to show accord*]_ _ **Landlord has no knowledge of lead-based paint and/or lead-based paint hazards in the Premises. Landlord has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the premises.**

REAL ESTATE AGENT'S ACKNOWLEDGMENT

_ _[*Initial to show accord*]_ _ **Real Estate Agent has informed the landlord of the landlord's obligations under 42 USC §4852d and is aware of his/her responsibility to ensure compliance.**

OWNER'S AND AGENT'S ACKNOWLEDGMENT

The following parties/agents have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and correct.

Landlord: __[*signature of landlord*]__**; Dated:** _ _[*date*]_ _
Real Estate Agent: __[*signature of agent*]__**; Dated:** _ _[*date*]_ _

TENANT'S ACKNOWLEDGMENT

Tenant has received the above-stated Lead Warning Statement and Landlord's Disclosure and has received the pamphlet "Protect Your Family from Lead in Your Home." Tenant further certifies, to the best of Tenant's knowledge, that this statement is true and correct.

Tenant: __[*signature of tenant*]__**; Dated:** _ _[*date*]_ _

Comment: Most of the time this disclosure form is an addendum or attachment to the rental agreement or lease because it must be separately signed and acknowledged. Some owners do not want their names known to their tenants because they have employed property managers to represent the ownership interests. Therefore, lead disclosure requirements might be satisfied by having the real estate agents acknowledge that they have informed the landlords of their lead-based paint hazard responsibilities and have knowledgeable representatives of the landlords sign the disclosure acknowledgments that are given to the tenants. The California Association of Realtors Form FLD-11: Lead-Based Paint and Lead-Based Paint Hazards Disclosure also may be used. For discussion of disclosure requirements,

see §§1.29, 4.37.

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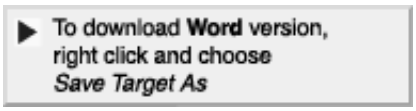
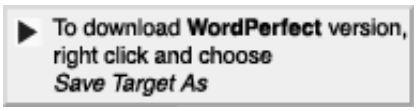
Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/ Z. Concluding Paragraphs/§1.78 1. Form: Entire Agreement

Z. Concluding Paragraphs

§1.78 1. Form: Entire Agreement

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§1.37-1.79.





1.78-1 Entire agreement

This _ _[*lease/rental agreement*]_ _ contains all of the agreements of the parties _ _[*except* _ _[*specify*]_ _]_ _ and cannot be amended or modified except by written agreement.

Comment: This clause is designed to prevent either party from later claiming rights under other agreements between the parties. Although CC §1625 provides that execution of a written contract supersedes all stipulations that preceded it, this clause emphasizes that the parties intend that the lease or rental agreement is fully integrated and includes all agreements between them. If there are side agreements, they may be stated under the optional provision for exceptions.

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§1.79 2. Form: Signatures

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§1.37-1.79.

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1.79-1 Signatures

__[*Signature of Landlord*]__

_ _[*Typed name of Landlord*]_ _

__[*Signature of Tenant*]__

_ _[*Typed name of Tenant*]_ _

__[*Signature of Owner's Agent*]__
_ _[*Typed name of Owner's Agent*]_ _

__[*Signature of Tenant*]__
_ _[*Typed name of Tenant*]_ _

Comment: Any written lease or rental agreement should be executed by the parties. A lease with a term longer than one year must be in writing and must be signed by the parties. CC §§1091, 1624; CCP §1971. If a lease or rental agreement with a term longer than one year is signed by an agent, the agent's written authority must be signed by the principal. CC §1624(a)(3). A party's signature may be handwritten, typed, printed, or stamped, and consist of his or her full name or initials, as long as it is intended as the execution. *Weiner v Mullaney* (1943) 59 CA2d 620, 140 P2d 704. (On the need for a lease or rental agreement to be in writing, see §1.13.) For further discussion, see California Real Property Sales Transactions §§4.71-4.75 (4th ed Cal CEB 2007).

The persons executing the lease or rental agreement should indicate their capacities (*e.g.,* husband and wife, joint tenants) and any entities that they represent (*e.g.,* a corporation, a partnership) in connection with their signatures and typed names, and should use the appropriate introductory clause alternative in §1.37. For corporate and partnership signature blocks, see Office Leasing: Drafting and Negotiating the Lease, chap 39 (Cal CEB 1996).

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§1.80 V. SAMPLE RESIDENTIAL LEASES AND RENTAL AGREEMENTS

Sample residential lease and rental agreement forms are set forth in §§1.81-1.84 to provide illustrations of printed forms drafted from different perspectives. Their inclusion here is meant to be illustrative, and CEB takes no position on their respective merits. As discussed in §1.12, sound practice usually calls for custom drafting, even of residential leases, and the form lease provisions in §§1.37-1.79 are intended to assist the attorney in tailoring a lease to the client's needs. The California Apartment Association (CAA), the National Housing Law Project, the California Association of Realtors, and Professional Publishing are to be commended for their cooperation in permitting reproduction of their form leases. See also CAA's sample inspection checklists in §§1.25-1.26.

The California Apartment Association is a statewide association of owners of rental real property. It publishes forms for many commonly encountered landlord-tenant situations, in addition to the form leases reprinted in §§1.81-1.82. See, *e.g.,* the inspection checklist in §1.25. The various forms published by CAA are drafted primarily to benefit its membership, which consists of apartment owners. For information on how to receive CAA forms, apartment owners may contact CAA at its statewide headquarters. See the Directory for address and phone numbers.

The National Housing Law Project was established in 1968 to provide back-up assistance to legal services attorneys on issues relating to publicly assisted and privately owned housing, including all aspects of landlord-tenant law. It primarily focuses on publicly subsidized housing matters rather than private ones, and also publishes books and periodicals of interest to attorneys active in the housing field. See, *e.g.,* National Housing Law Project, HUD Housing Programs: Tenants' Rights (3d ed 2004). Attorneys interested in information from the Project may view its web page or contact it at the address listed in the Directory. See Directory also for the web and mailing addresses of the California Association of Realtors and the Professional Publishing organization, whose respective preprinted leases are reproduced in §§1.83-1.84.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.81 A. Form: Rental Agreement (Month-to-Month) (California Apartment Association Form 2.0)

§1.81 A. Form: Rental Agreement (Month-to-Month) (California Apartment Association Form 2.0)

RENTAL AGREEMENT (Month-to-Month)

THIS AGREEMENT is made and entered into this _____ day of _____, _____ between
(Day) *(Month)* *(Year)*

_____"Owner/Agent", whose address and phone
(Name of Owner/Agent)

number are _____,
(Address and Telephone of Owner/Agent)

and _____ "Resident."

THE PARTIES AGREE AS FOLLOWS:

1. **RENTAL UNIT:** Subject to the terms and conditions of this Agreement, Owner rents to Resident and Resident rents from Owner, for residential use only,

   the premises located at: _____, Unit # (if applicable),_____
   (Street Address)
   _____CA, _____
   (City) *(Zip)*

   on a month-to-month term.

2. **RENT:** Rent is due in advance on the _____ day of each and every month, at $_____ per month, beginning on

   _____, payable at _____. Payments made in person may be
   (Date) *(Address where payments should be delivered)*

   delivered to Owner/Agent between the hours of _____ and _____ on the following days of the week:
   ❒ Monday ❒ Tuesday ❒ Wednesday ❒Thursday ❒ Friday ❒ Saturday ❒ Sunday

   ❒ Other _____

   Acceptable methods of payment:
   ❒ Personal Check ❒ Cashier's Check ❒ Money Order ❒ EFT/Credit (see Owner/Agent for details) and ❒ Cash

   If rent is paid after the _____ of the month, there will be a late charge of $_____ assessed. The parties agree that this late fee is presumed to be the amount of damage sustained by late payment of rent. It would be impracticable or extremely difficult to fix the actual damage. This sum represents a reasonable endeavor by the Owner/Agent to estimate fair average compensation for any loss that may be sustained as a result of late payment of rent. Pursuant to California law, if Resident passes a check on insufficient funds, Resident will be liable to Owner/Agent for the amount of the check and a service charge of $ _____, not to exceed $25 for the first check passed on insufficient funds, and $35 for each subsequent check passed on insufficient funds.

3. **SECURITY DEPOSIT:** Resident shall deposit with Owner/Agent, as a security deposit, the sum of $_____
   ❒prior to taking possession of the unit _____or ❒ no later than _____.
   Resident shall not use the security deposit to pay any month's rent. Owner/Agent may withhold from the security deposit only such amounts as are reasonably necessary to remedy Resident defaults including, but not limited to, the following:
   (a) defaults in the payment of rent,
   (b) to repair damages to the premises caused by Resident, exclusive of ordinary wear and tear, and/or
   (c) to clean the premises, if necessary, upon termination of the tenancy in order to return the unit to the same level of cleanliness it was in at the inception of the tenancy, and/or
   (d) to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear.

   No later than 21 calendar days after Owner/Agent has regained possession of the premises, Owner/Agent shall return any remaining portion of such security deposit to Resident.

4. **UTILITIES:** Resident shall pay for all utilities, services and charges, if any, made payable by or predicated upon occupancy of Resident, **except:** _____

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5. **CASH PAYMENT**: The Owner/Agent may demand or require cash as the exclusive form of payment of rent or deposit of security if the tenant has previously attempted to pay the Owner/Agent with a check drawn on insufficient funds or the tenant has instructed the drawee to stop payment on a check, draft, or order for the payment of money. If the Owner/Agent chooses to demand or require cash payment under these circumstances, the Owner/Agent shall give the Resident a written notice stating that the payment instrument was dishonored and informing the Resident that the Resident shall pay in cash for a period determined by Owner/Agent, not to exceed three months, and attach a copy of the dishonored instrument to the notice.

6. **TERMINATION:** Except as prohibited by law, this Agreement may be terminated by Resident after service upon the Owner/Agent of a written 30-day notice of termination of tenancy. Except as prohibited by law, this Agreement may be terminated by the Owner/Agent by service upon the Resident of a written 60-day notice of termination of tenancy. However, Civil Code Section 1946.1 provides that "if any tenant or resident has resided in the dwelling for less than one year", the Owner/Agent may terminate this Agreement by service upon the Resident of a written 30-day notice. Any holding over thereafter shall result in Resident being liable to Owner/Agent for daily rental damages equal to the current fair rental value of the unit, divided by 30.

7. **OCCUPANTS:** Premises shall be occupied only by the following named person(s):

_____	_____	_____	_____
Name	*Birthdate*	*Name*	*Birthdate*
_____	_____	_____	_____
Name	*Birthdate*	*Name*	*Birthdate*

8. **PROHIBITIONS:** Without Owner/Agent's prior written permission as an addendum to this Agreement, no pets, no waterbeds or _____ shall be kept or allowed in or about the premises.

9. **QUIET ENJOYMENT:** Resident shall not violate any criminal or civil law, ordinance or statute in the use and occupancy of the premises, commit waste or nuisance, annoy, molest or interfere with any other Resident or neighbor. Any such action may result in the immediate termination of this Agreement as provided herein and by law.

10. **REPAIRS AND ALTERATIONS:** Except as provided by law, no repairs, decorating or alterations shall be done by Resident without Owner/ Agent's prior written consent. Resident shall notify Owner/Agent in writing of any repairs or alterations contemplated. Decorations include, but are not limited to, painting and wallpapering. Resident shall hold Owner/Agent harmless and indemnify Owner/Agent as to any mechanics lien recordation or proceeding caused by Resident. Resident may not make any alterations to cable or telephone inside wiring (such as may occur when changing telecommunications providers or adding phone lines) without prior written consent of the Owner/Agent. The notice shall include the name, address, and telephone number of any new telecommunication provider. Resident agrees to pay all costs resulting from the alteration and agrees to pay to the Owner/Agent any costs associated with restoring the inside wiring to the condition at the time of move-in, except for reasonable wear and tear.

11. **ACCEPTANCE OF PREMISES:** Resident has inspected the premises, furnishings and equipment, and has found them to be satisfactory. All plumbing, heating and electrical systems are operative and deemed satisfactory.

12. **CARE, CLEANING, MAINTENANCE AND INSURANCE:** Resident agrees to leave the premises in the same condition as it was received, subject to normal wear and tear. Except as prohibited by law, Resident shall keep the premises and furniture, furnishings and appliances, and fixtures, which are rented for Resident's exclusive use, in good order and condition. Upon move-out, Resident agrees to return the unit to the same level of cleanliness it was in at the inception of the tenancy. Resident ❒ is ❒ is not (check one) responsible for the upkeep of the yard and landscaping. Resident shall pay Owner/Agent for costs to repair, replace or rebuild any portion of the premises damaged by the Resident, Resident's guests or invitees. Resident's property is not insured by Owner/Agent. Resident is not a co-insured and is expressly excluded from any insurance policy held by Owner/Agent which is now in effect or becomes effective during the term of this Agreement.

13. **WAIVER OF BREACH:** The waiver of either party of any breach shall not be construed to be a continuing waiver of any subsequent breach. The receipt by Owner/Agent of the rent with the knowledge of any violation of a covenant or condition hereto shall not be deemed a waiver of such breach. No waiver by either party of the provisions herein shall be deemed to have been made unless expressed in writing and signed by all parties to this Rental Agreement.

14. **JOINT AND SEVERAL LIABILITY:** The undersigned Resident(s), whether or not in actual possession of the premises, are jointly and severally liable for all obligations under this Rental Agreement, and shall indemnify Owner/Agent for liability arising prior to the termination of the Rental Agreement for personal injuries or property damage caused or permitted by Resident(s), their guests and invitees. This does not waive "Owner/ Agent's duty of care" to prevent personal injury or property damage where that duty is imposed by law.

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15. **ENTRY:** California law allows Owner/Agent or his/her employee(s) to enter the premises for certain purposes during normal business hours. The Owner/Agent will provide written notice to the Resident prior to the entry of the dwelling unit whenever required by state law. (Civil Code Section 1954.) Resident's non-compliance with Owner/Agent's lawful request for entry is a material breach of this Agreement that may be cause for immediate termination as provided herein and by law.

16. **SUBLETTING AND ASSIGNMENT:** No portion of the premises shall be sublet nor this Agreement assigned. Any attempted subletting or assignment by Resident shall, at the election of Owner/Agent, be an irremediable breach of this Agreement and cause for immediate termination as provided herein and by law.

17. **SALE OF PROPERTY:** In the event of the sale or refinance of the property: If Owner/Agent presents to Resident a "Resident's Certification of Terms - Estoppel Certification," or other similar Estoppel Certification form, Resident agrees to execute and deliver the certificate acknowledging that this Agreement is unmodified and in full force and effect, or in full force and effect as modified with the consent of Owner/Agent, and stating the modifications, within ten (10) days of written notice. Failure to comply shall be deemed Resident's acknowledgement that the certificate as submitted by Owner/Agent is true and correct and may be relied upon by any lender or purchaser.

18. **SMOKE DETECTION DEVICE:** The premises are equipped with a functioning smoke detection device(s), and Resident shall be responsible for testing the device weekly and immediately reporting any problems, maintenance or need for repairs to Owner/Agent. If battery operated, Resident is responsible for changing the detector's battery as necessary. Owner/Agent shall have a right to enter the premises to check and maintain the smoke detection device as provided by law.

19. **NOTICE:** Pursuant to Section 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

20. **ADDENDA:** By initialing as provided, Resident acknowledges receipt of the following applicable addenda, as indicated, copies of which are attached hereto, and are incorporated as part of this Agreement.

____Resident Policies Addendum	____Smoke Detector Addendum	____C C & Rs
____Move-In/Move-Out Itemization	____Pet Addendum	____Drug Free Housing Addendum
____Pest Control Notice Addendum	____Asbestos Addendum	____Proposition 65 Brochure
____Satellite Addendum	____Lead Disclosure Addendum	____Other: _____
____Pool Rules Addendum	____Mold Notification Addendum	____Other: _____

21. **ENTIRE AGREEMENT:** This Agreement, which includes all attachments referred to above, constitutes the entire Agreement between the parties and cannot be modified except in writing and signed by all parties, except as permitted by applicable law. Neither Owner/Agent, nor any agent or employee of Owner/Agent has made any representations or promises other than those set forth herein.

22. **CREDIT REPORTS:** A negative credit report reflecting on your credit history may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations. Resident expressly authorizes Owner/Agent (including a collection agency) to obtain Resident's consumer credit report, which Owner/Agent may use if attempting to collect past due rent payments, late fees, or other charges from Resident, both during the term of the Agreement and thereafter.

23. **ATTORNEYS' FEES:** If any legal action or proceeding is brought by either party to enforce any part of this Agreement, the prevailing party shall recover, in addition to all other relief, reasonable attorneys' fees and court costs, unless one of the following two boxes is checked:
❒ the prevailing party shall recover, in addition to all other relief, attorneys' fees not to exceed $_____, plus court costs.
or
❒ each party shall be responsible for their own attorneys' fees and court costs.

The undersigned Resident(s) acknowledge(s) having read and understood the foregoing, and receipt of a duplicate original.

_____	_____	_____	_____
Date	*Resident*	*Date*	*Resident*
_____	_____	_____	_____
Date	*Resident*	*Date*	*Resident*
_____	_____		
Date	*Owner/Agent*		

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.82 B. Form: Lease Agreement (California Apartment Association Form 2.1)

§1.82 B. Form: Lease Agreement (California Apartment Association Form 2.1)

LEASE AGREEMENT

THIS AGREEMENT is made and entered into this _____ day of _____, _____ between
(Day) *(Month)* *(Year)*

_____"Owner/Agent", whose address and phone
(Name of Owner/Agent)

number are _____,
(Address and Telephone of Owner/Agent)

and _____ "Resident."

THE PARTIES AGREE AS FOLLOWS:

1. **RENTAL UNIT:** Subject to the terms and conditions of this Agreement, Owner rents to Resident and Resident rents from Owner, for residential use only,

   the premises located at: _____, Unit # (if applicable)_____,
   (Street Address)

   _____CA, _____
   (City) *(Zip)*

2. **RENT:** Rent is due in advance on the _____ day of each and every month, at $_____ per month, beginning on

   _____, payable at _____. Payments made in person may be
   (Date) *(Address where payments should be delivered)*

   delivered to Owner/Agent between the hours of _____ and _____ on the following days of the week:
   ❒ Monday ❒ Tuesday ❒ Wednesday ❒Thursday ❒ Friday ❒ Saturday ❒ Sunday
   ❒ Other _____

   Acceptable methods of payment:
   ❒ Personal Check ❒ Cashier's Check ❒ Money Order ❒ EFT/Credit (see Owner/Agent for details) and ❒ Cash

   If rent is paid after the _____ of the month, there will be a late charge of $_____ assessed. The parties agree that this late fee is presumed to be the amount of damage sustained by late payment of rent. It would be impracticable or extremely difficult to fix the actual damage. This sum represents a reasonable endeavor by the Owner/Agent to estimate fair average compensation for any loss that may be sustained as a result of late payment of rent. Pursuant to California law, if Resident passes a check on insufficient funds, Resident will be liable to Owner/Agent for the amount of the check and a service charge of $ _____, not to exceed $25 for the first check passed on insufficient funds, and $35 for each subsequent check passed on insufficient funds.

3. **SECURITY DEPOSIT:** Resident shall deposit with Owner/Agent, as a security deposit, the sum of $_____
   ❒ prior to taking possession of the unit **or** ❒ no later than _____ (check one).

   Resident shall not use the security deposit to pay any month's rent. Owner/Agent may withhold from the security deposit only such amounts as are reasonably necessary to remedy Resident defaults including, but not limited to, the following:
   (a) defaults in the payment of rent,
   (b) to repair damages to the premises caused by Resident, exclusive of ordinary wear and tear, and/or
   (c) to clean the premises, if necessary, upon termination of the tenancy in order to return the unit to the same level of cleanliness it was in at the inception of the tenancy, and/or
   (d) to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear.
   No later than 21 calendar days after Owner/Agent has regained possession of the premises, Owner/Agent shall return any remaining portion of such security deposit to Resident.

4. **TERM:** The term of this Agreement is for _____, beginning on _____ and ending on _____ , at which time this
   (Term) *(Date)* *(Date)*
   Lease shall terminate without further notice. Any holding over thereafter shall result in Resident being liable to Owner/Agent for daily rental damages equal to the current market value of the unit, divided by 30. A "month-to-month" tenancy subject to the terms and conditions of this agreement shall be created only if Owner/Agent accepts rent from Resident thereafter, and if so accepted, tenancy may be terminated by Resident after service upon the Owner/Agent of a written 30-day Notice of Termination. Except as prohibited by law, that month-to-month tenancy may be terminated by the Owner/Agent by service upon the Resident of a written 60-day notice of termination of tenancy. However, Civil Code Section 1946.1 provides that "if any tenant or resident has resided in the dwelling for less than one year", the Owner/Agent may terminate the tenancy by service upon the Resident of a written 30-day notice.

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5. **UTILITIES:** Resident shall pay for all utilities, services and charges, if any, made payable by or predicated upon occupancy of Resident, **except**: _____

6. **CASH PAYMENT**: The Owner/Agent may demand or require cash as the exclusive form of payment of rent or deposit of security if the tenant has previously attempted to pay the Owner/Agent with a check drawn on insufficient funds or the tenant has instructed the drawee to stop payment on a check, draft, or order for the payment of money. If the Owner/Agent chooses to demand or require cash payment under these circumstances, the Owner/Agent shall give the Resident a written notice stating that the payment instrument was dishonored and informing the Resident that the Resident shall pay in cash for a period determined by Owner/Agent, not to exceed three months, and attach a copy of the dishonored instrument to the notice.

7. **OCCUPANTS:** Premises shall be occupied only by the following named person(s):

Name	*Birthdate*	*Name*	*Birthdate*
Name	*Birthdate*	*Name*	*Birthdate*

8. **PROHIBITIONS:** Without Owner/Agent's prior written permission as an addendum to this Agreement, no pets, no waterbeds or _____ shall be kept or allowed in or about the premises.

9. **QUIET ENJOYMENT:** Resident shall not violate any criminal or civil law, ordinance or statute in the use and occupancy of the premises, commit waste or nuisance, annoy, molest or interfere with any other Resident or neighbor. Any such action may result in the immediate termination of this Agreement as provided herein and by law.

10. **REPAIRS AND ALTERATIONS:** Except as provided by law, no repairs, decorating or alterations shall be done by Resident without Owner/ Agent's prior written consent. Resident shall notify Owner/Agent in writing of any repairs or alterations contemplated. Decorations include, but are not limited to, painting and wallpapering. Resident shall hold Owner/Agent harmless and indemnify Owner/Agent as to any mechanics lien recordation or proceeding caused by Resident. Resident may not make any alterations to cable or telephone inside wiring (such as may occur when changing telecommunications providers or adding phone lines) without prior written consent of the Owner/Agent. The notice shall include the name, address, and telephone number of any new telecommunication provider. Resident agrees to pay all costs resulting from the alteration and agrees to pay to the Owner/Agent any costs associated with restoring the inside wiring to the condition at the time of move-in, except for reasonable wear and tear.

11. **ACCEPTANCE OF PREMISES:** Resident has inspected the premises, furnishings and equipment, and has found them to be satisfactory. All plumbing, heating and electrical systems are operative and deemed satisfactory.

12. **CARE, CLEANING, MAINTENANCE AND INSURANCE:** Resident agrees to leave the premises in the same condition as it was received, subject to normal wear and tear. Except as prohibited by law, Resident shall keep the premises and furniture, furnishings and appliances, and fixtures, which are rented for Resident's exclusive use, in good order and condition. Upon move-out, Resident agrees to return the unit to the same level of cleanliness it was in at the inception of the tenancy. Resident ❒ is ❒ is not (check one) responsible for the upkeep of the yard and landscaping. Resident shall pay Owner/Agent for costs to repair, replace or rebuild any portion of the premises damaged by the Resident, Resident's guests or invitees. Resident's property is not insured by Owner/Agent. Resident is not a co-insured and is expressly excluded from any insurance policy held by Owner/Agent which is now in effect or becomes effective during the term of this Agreement.

13. **WAIVER OF BREACH:** The waiver of either party of any breach shall not be construed to be a continuing waiver of any subsequent breach. The receipt by Owner/Agent of the rent with the knowledge of any violation of a covenant or condition hereto shall not be deemed a waiver of such breach. No waiver by either party of the provisions herein shall be deemed to have been made unless expressed in writing and signed by all parties to this Rental Agreement.

14. **JOINT AND SEVERAL LIABILITY:** The undersigned Resident(s), whether or not in actual possession of the premises, are jointly and severally liable for all obligations under this Rental Agreement, and shall indemnify Owner/Agent for liability arising prior to the termination of the Rental Agreement for personal injuries or property damage caused or permitted by Resident(s), their guests and invitees. This does not waive "Owner/Agent's duty of care" to prevent personal injury or property damage where that duty is imposed by law.

15. **ENTRY:** California law allows Owner/Agent or his/her employee(s) to enter the premises for certain purposes during normal business hours. The Owner/Agent will provide written notice to the Resident prior to the entry of the dwelling unit whenever required by state law. (Civil Code Section 1954.) Resident's non-compliance with Owner/Agent's lawful request for entry is a material breach of this Agreement that may be cause for immediate termination as provided herein and by law.

16. **SUBLETTING AND ASSIGNMENT:** No portion of the premises shall be sublet nor this Agreement assigned. Any attempted

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subletting or assignment by Resident shall, at the election of Owner/Agent, be an irremediable breach of this Agreement and cause for immediate termination as provided herein and by law.

17. **BREACH OF LEASE:** In the event that Resident breaches this Lease Agreement, Owner/Agent shall be allowed at Owner/Agent's discretion, but not by way of limitation, to exercise any or all remedies provided Owner/Agent by California Civil Code Section 1951.2 and 1951.4. Damages Owner/Agent "may recover" include the worth at the time of the award of the amount by which the unpaid rent for the balance of the term after the time of award, or for any shorter period of time specified in the Lease Agreement, exceeds the amount of such rental loss for the same period that the Resident proves could be reasonably avoided.

18. **SALE OF PROPERTY:** In the event of the sale or refinance of the property: If Owner/Agent presents to Resident a "Resident's Certification of Terms - Estoppel Certification," or other similar Estoppel Certification form, Resident agrees to execute and deliver the certificate acknowledging that this Agreement is unmodified and in full force and effect, or in full force and effect as modified with the consent of Owner/Agent, and stating the modifications, within ten (10) days of written notice. Failure to comply shall be deemed Resident's acknowledgement that the certificate as submitted by Owner/Agent is true and correct and may be relied upon by any lender or purchaser.

19. **SMOKE DETECTION DEVICE:** The premises are equipped with a functioning smoke detection device(s), and Resident shall be responsible for testing the device weekly and immediately reporting any problems, maintenance or need for repairs to Owner/Agent. If battery operated, Resident is responsible for changing the detector's battery as necessary. Owner/Agent shall have a right to enter the premises to check and maintain the smoke detection device as provided by law.

20. **NOTICE:** Pursuant to Section 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

21. **ADDENDA:** By initialing as provided, Resident acknowledges receipt of the following applicable addenda, as indicated, copies of which are attached hereto, and are incorporated as part of this Agreement.

____Resident Policies Addendum	____Smoke Detector Addendum	____C C & Rs
____Move-In/Move-Out Itemization	____Pet Addendum	____Drug Free Housing Addendum
____Pest Control Notice Addendum	____Asbestos Addendum	____Proposition 65 Brochure
____Satellite Addendum	____Lead Disclosure Addendum	____Other: _____
____Pool Rules Addendum	____Mold Notification Addendum	____Other: _____

22. **ENTIRE AGREEMENT:** This Agreement, which includes all attachments referred to above, constitutes the entire Agreement between the parties and cannot be modified except in writing and signed by all parties, except as permitted by applicable law. Neither Owner/Agent, nor any agent or employee of Owner/Agent has made any representations or promises other than those set forth herein.

23. **CREDIT REPORTS:** A negative credit report reflecting on your credit history may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations. Resident expressly authorizes Owner/Agent (including a collection agency) to obtain Resident's consumer credit report, which Owner/Agent may use if attempting to collect past due rent payments, late fees, or other charges from Resident, both during the term of the Agreement and thereafter.

24. **ATTORNEYS' FEES:** If any legal action or proceeding is brought by either party to enforce any part of this Agreement, the prevailing party shall recover, in addition to all other relief, reasonable attorneys' fees and court costs, unless one of the following two boxes is checked:
❒ the prevailing party shall recover, in addition to all other relief, attorneys' fees not to exceed $_____, plus court costs.
Or ❒ each party shall be responsible for their own attorneys' fees and court costs.

The undersigned Resident(s) acknowledge(s) having read and understood the foregoing, and receipt of a duplicate original.

_____	_____	_____	_____
Date	*Resident*	*Date*	*Resident*
_____	_____	_____	_____
Date	*Resident*	*Date*	*Resident*
_____	_____		
Date	*Owner/Agent*		

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ADDENDUM TO RENTAL AGREEMENT OR LEASE

THIS ADDENDUM is entered into this _____ day of _____ (month), _____ (year),

by and between _____, "Owner/Agent"

and _____, "Resident".

IN CONSIDERATION OF THEIR MUTUAL PROMISES OWNER AND RESIDENT AGREE AS FOLLOWS:

1. **Resident is renting from Owner/Agent the premises located at:**

_____, Unit # (if applicable) _____
(Street Address)

_____, CA _____.
(City) *(Zip)*

2. **This Addendum shall be and is incorporated into the Rental Agreement /Lease between Owner/Agent and Resident.**

_____

_____

_____

_____

_____

_____

_____

_____

This addendum to be effective as of _____(date).

_____	_____
Date	***Resident***
_____	_____
Date	***Resident***
_____	_____
Date	***Owner/Agent***

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.82A C. Form: Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (California Apartment Association Form LEAD1)

§1.82A C. Form: Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (California Apartment Association Form LEAD1)

TARGET HOUSING RENTAL/LEASE AGREEMENT ADDENDUM
DISCLOSURE OF INFORMATION ON
LEAD-BASED PAINT AND LEAD-BASED PAINT HAZARDS

Resident is renting from Owner/Agent the premises located at:

_____, Unit # (if applicable)_____
(Street Address)

_____ , CA _____ .
(City) *(Zip)*

Lead Warning Statement
Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not taken care of properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, landlords must disclose the presence of known lead-based paint and lead-based paint hazards in the dwelling. Tenants must also receive a Federally approved pamphlet on lead poisoning prevention. **NOTE: The existence of lead on the rental property is not, by itself, cause for termination of the tenancy. (Public Law 102-550 sec. 1018(c))**

Owner's Disclosure or Agent* acting on behalf of Owner (initial)

____ (a) Presence of lead-based paint or lead-based paint hazards (check one below):

___Known lead-based paint and/or lead-based paint hazards are present in the housing (explain).

_____

___Owner has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

____ (b) Records and reports available to the Owner (check one below):

_____Owner has provided the lessee with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below).

_____Owner has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Agent's* Acknowledgment (initial)
*The term Agent is defined as any party who enters into a contract with the Owner, including anyone who enters into a contract with a representative of the Owner for the purpose of leasing housing. An on-site resident manager may act as the Agent if authorized to do so by either the Owner or the property management company.

____ (c) Agent has informed the Owner of his/her obligations under 42 U.S.C. 4852d, and the Agent is aware of his/her responsibility to ensure compliance.

Lessee's Acknowledgment (initial)

____ (d) Lessee has received copies of all information listed above.

____ (e) Lessee has received the pamphlet *Protect Your Family from Lead in Your Home*.

Certification of Accuracy
The following parties have reviewed the information above and certify, to the best of their knowledge, that the information provided by the signatory is true and accurate.

_____	_____	_____	_____
Date	*Resident*	*Date*	*Resident*
_____	_____	_____	_____
Date	*Resident*	*Date*	*Resident*
_____	_____		
Date	*Owner/Agent*		

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.83 D. Forms: Residential Lease or Month-to-Month Rental Agreement (CAR Form LR-14); Lease/Rental Commission Agreement (CAR Form LCA-6)

§1.83 D. Forms: Residential Lease or Month-to-Month Rental Agreement (CAR Form LR-14); Lease/Rental Commission Agreement (CAR Form LCA-6)

CALIFORNIA ASSOCIATION OF REALTORS®

RESIDENTIAL LEASE OR MONTH-TO-MONTH RENTAL AGREEMENT

(C.A.R. Form LR, Revised 1/06)

_____ ("Landlord") and
_____ ("Tenant") agree as follows:

1. **PROPERTY:**
   A. Landlord rents to Tenant and Tenant rents from Landlord, the real property and improvements described as: _____
   _____ ("Premises").
   B. The Premises are for the sole use as a personal residence by the following named person(s) **only:** _____
   _____.
   C. The following personal property, maintained pursuant to paragraph 11, is included: _____
   _____ or ☐ (if checked) the personal property on the attached addendum.
2. **TERM:** The term begins on (date) _____ ("Commencement Date"), **(Check A or B):**
   ☐ **A. Month-to-Month:** and continues as a month-to-month tenancy. Tenant may terminate the tenancy by giving written notice at least 30 days prior to the intended termination date. Landlord may terminate the tenancy by giving written notice as provided by law. Such notices may be given on any date.
   ☐ **B. Lease:** and shall terminate on (date) _____ at _____ ☐ AM/☐ PM. Tenant shall vacate the Premises upon termination of the Agreement, unless: **(i)** Landlord and Tenant have extended this agreement in writing or signed a new agreement; **(ii)** mandated by local rent control law; or **(iii)** Landlord accepts Rent from Tenant (other than past due Rent), in which case a month-to-month tenancy shall be created which either party may terminate as specified in paragraph 2A. Rent shall be at a rate agreed to by Landlord and Tenant, or as allowed by law. All other terms and conditions of this Agreement shall remain in full force and effect.
3. **RENT:** "Rent" shall mean all monetary obligations of Tenant to Landlord under the terms of the Agreement, except security deposit.
   A. Tenant agrees to pay $ _____ per month for the term of the Agreement.
   B. Rent is payable in advance on the **1st** (or ☐ _____) **day** of each calendar month, and is delinquent on the next day.
   C. If Commencement Date falls on any day other than the day Rent is payable under paragraph 3B, and Tenant has paid one full month's Rent in advance of Commencement Date, Rent for the second calendar month shall be prorated based on a 30-day period.
   D. PAYMENT: Rent shall be paid by ☐ personal check, ☐ money order, ☐ cashier's check, or ☐ other _____, to (name) _____ (phone) _____ at (address) _____, (or at any other location subsequently specified by Landlord in writing to Tenant) between the hours of _____ and _____ on the following days _____. If any payment is returned for non-sufficient funds ("NSF") or because tenant stops payment, then, after that: (i) Landlord may, in writing, require Tenant to pay Rent in cash for three months and (ii) all future Rent shall be paid by ☐ money order or ☐ cashier's check.
4. **SECURITY DEPOSIT:**
   A. Tenant agrees to pay $ _____ as a security deposit. Security deposit will be ☐ transferred to and held by the Owner of the Premises, or ☐ held in Owner's Broker's trust account.
   B. All or any portion of the security deposit may be used, as reasonably necessary, to: **(i)** cure Tenant's default in payment of Rent (which includes Late Charges, NSF fees or other sums due); **(ii)** repair damage, excluding ordinary wear and tear, caused by Tenant or by a guest or licensee of Tenant; **(iii)** clean Premises, if necessary, upon termination of the tenancy; and **(iv)** replace or return personal property or appurtenances. **SECURITY DEPOSIT SHALL NOT BE USED BY TENANT IN LIEU OF PAYMENT OF LAST MONTH'S RENT.** If all or any portion of the security deposit is used during the tenancy, Tenant agrees to reinstate the total security deposit within five days after written notice is delivered to Tenant. Within 21 days after Tenant vacates the Premises, Landlord shall: **(1)** furnish Tenant an itemized statement indicating the amount of any security deposit received and the basis for its disposition and supporting documentation as required by California Civil Code § 1950.5(g); and **(2)** return any remaining portion of the security deposit to Tenant.
   C. **Security deposit will not be returned until all Tenants have vacated the Premises and all keys returned. Any security deposit returned by check shall be made out to all Tenants named on this Agreement, or as subsequently modified.**
   D. No interest will be paid on security deposit unless required by local law.
   E. If the security deposit is held by Owner, Tenant agrees not to hold Broker responsible for its return. If the security deposit is held in Owner's Broker's trust account, **and** Broker's authority is terminated before expiration of this Agreement, **and** security deposit is released to someone other than Tenant, **then** Broker shall notify Tenant, in writing, where and to whom security deposit has been released. Once Tenant has been provided such notice, Tenant agrees not to hold Broker responsible for the security deposit.
5. **MOVE-IN COSTS RECEIVED/DUE:** Move-in funds made payable to _____ shall be paid by ☐ personal check, ☐ money order, or ☐ cashier's check.

Category	Total Due	Payment Received	Balance Due	Date Due
Rent from _____ to _____ (date)				
*Security Deposit				
Other _____				
Other _____				
Total				

*The maximum amount Landlord may receive as security deposit, however designated, cannot exceed two months' Rent for unfurnished premises, or three months' Rent for furnished premises.

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Tenant's Initials (_____)(_____)
Landlord's Initials (_____)(_____)

Reviewed by _____ Date _____

EQUAL HOUSING OPPORTUNITY

6. LATE CHARGE; RETURNED CHECKS:

A. Tenant acknowledges either late payment of Rent or issuance of a returned check may cause Landlord to incur costs and expenses, the exact amounts of which are extremely difficult and impractical to determine. These costs may include, but are not limited to, processing, enforcement and accounting expenses, and late charges imposed on Landlord. If any installment of Rent due from Tenant is not received by Landlord within **5 (or** ☐ _____**) calendar days** after the date due, or if a check is returned, Tenant shall pay to Landlord, respectively, an additional sum of $ _____ or _____% of the Rent due as a Late Charge and $25.00 as a NSF fee for the first returned check and $35.00 as a NSF fee for each additional returned check, either or both of which shall be deemed additional Rent.

B. Landlord and Tenant agree that these charges represent a fair and reasonable estimate of the costs Landlord may incur by reason of Tenant's late or NSF payment. Any Late Charge or NSF fee due shall be paid with the current installment of Rent. Landlord's acceptance of any Late Charge or NSF fee shall not constitute a waiver as to any default of Tenant. Landlord's right to collect a Late Charge or NSF fee shall not be deemed an extension of the date Rent is due under paragraph 3 or prevent Landlord from exercising any other rights and remedies under this Agreement and as provided by law.

7. PARKING: (Check A or B)

☐ **A.** Parking is permitted as follows: _____

_____.

The right to parking ☐ is ☐ is not included in the Rent charged pursuant to paragraph 3. If not included in the Rent, the parking rental fee shall be an additional $ _____ per month. Parking space(s) are to be used for parking properly licensed and operable motor vehicles, except for trailers, boats, campers, buses or trucks (other than pick-up trucks). Tenant shall park in assigned space(s) only. Parking space(s) are to be kept clean. Vehicles leaking oil, gas or other motor vehicle fluids shall not be parked on the Premises. Mechanical work or storage of inoperable vehicles is not permitted in parking space(s) or elsewhere on the Premises.

OR ☐ **B.** Parking is not permitted on the Premises.

8. STORAGE: (Check A or B)

☐ **A.** Storage is permitted as follows: _____

The right to storage space ☐ is ☐ is not included in the Rent charged pursuant to paragraph 3. If not included in the Rent, storage space fee shall be an additional $ _____ per month. Tenant shall store only personal property Tenant owns, and shall not store property claimed by another or in which another has any right, title or interest. Tenant shall not store any improperly packaged food or perishable goods, flammable materials, explosives, hazardous waste or other inherently dangerous material, or illegal substances.

OR ☐ **B.** Storage is not permitted on the Premises.

9. UTILITIES: Tenant agrees to pay for all utilities and services, and the following charges: _____ except _____, which shall be paid for by Landlord. If any utilities are not separately metered, Tenant shall pay Tenant's proportional share, as reasonably determined and directed by Landlord. If utilities are separately metered, Tenant shall place utilities in Tenant's name as of the Commencement Date. Landlord is only responsible for installing and maintaining one usable telephone jack and one telephone line to the Premises. Tenant shall pay any cost for conversion from existing utilities service provider.

10. CONDITION OF PREMISES: Tenant has examined Premises and, if any, all furniture, furnishings, appliances, landscaping and fixtures, including smoke detector(s).

(Check all that apply:)

☐ **A.** Tenant acknowledges these items are clean and in operable condition, with the following exceptions: _____

_____.

☐ **B.** Tenant's acknowledgment of the condition of these items is contained in an attached statement of condition (C.A.R. Form MIMO).

☐ **C.** Tenant will provide Landlord a list of items that are damaged or not in operable condition within **3 (or** ☐ _____**) days** after Commencement Date, not as a contingency of this Agreement but rather as an acknowledgment of the condition of the Premises.

☐ **D.** Other: _____.

11. MAINTENANCE:

A. Tenant shall properly use, operate and safeguard Premises, including if applicable, any landscaping, furniture, furnishings and appliances, and all mechanical, electrical, gas and plumbing fixtures, and keep them and the Premises clean, sanitary and well ventilated. Tenant shall be responsible for checking and maintaining all smoke detectors and any additional phone lines beyond the one line and jack that Landlord shall provide and maintain. Tenant shall immediately notify Landlord, in writing, of any problem, malfunction or damage. Tenant shall be charged for all repairs or replacements caused by Tenant, pets, guests or licensees of Tenant, excluding ordinary wear and tear. Tenant shall be charged for all damage to Premises as a result of failure to report a problem in a timely manner. Tenant shall be charged for repair of drain blockages or stoppages, unless caused by defective plumbing parts or tree roots invading sewer lines.

B. ☐ Landlord ☐ Tenant shall water the garden, landscaping, trees and shrubs, except: _____

_____.

C. ☐ Landlord ☐ Tenant shall maintain the garden, landscaping, trees and shrubs, except: _____

_____.

D. ☐ Landlord ☐ Tenant shall maintain _____.

E. Tenant's failure to maintain any item for which Tenant is responsible shall give Landlord the right to hire someone to perform such maintenance and charge Tenant to cover the cost of such maintenance.

F. The following items of personal property are included in the Premises without warranty and Landlord will not maintain, repair or replace them: _____.

Tenant's Initials (_____)(_____)

Landlord's Initials (_____)(_____)

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Reviewed by _____ Date _____

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12. **NEIGHBORHOOD CONDITIONS:** Tenant is advised to satisfy him or herself as to neighborhood or area conditions, including schools, proximity and adequacy of law enforcement, crime statistics, proximity of registered felons or offenders, fire protection, other governmental services, availability, adequacy and cost of any speed-wired, wireless internet connections or other telecommunications or other technology services and installations, proximity to commercial, industrial or agricultural activities, existing and proposed transportation, construction and development that may affect noise, view, or traffic, airport noise, noise or odor from any source, wild and domestic animals, other nuisances, hazards, or circumstances, cemeteries, facilities and condition of common areas, conditions and influences of significance to certain cultures and/or religions, and personal needs, requirements and preferences of Tenant.
13. **PETS:** Unless otherwise provided in California Civil Code § 54.2, no animal or pet shall be kept on or about the Premises without Landlord's prior written consent, except: _____.
14. **RULES/REGULATIONS:**
    A. Tenant agrees to comply with all Landlord rules and regulations that are at any time posted on the Premises or delivered to Tenant. Tenant shall not, and shall ensure that guests and licensees of Tenant shall not, disturb, annoy, endanger or interfere with other tenants of the building or neighbors, or use the Premises for any unlawful purposes, including, but not limited to, using, manufacturing, selling, storing or transporting illicit drugs or other contraband, or violate any law or ordinance, or commit a waste or nuisance on or about the Premises.
    B. **(If applicable, check one)**
    ☐ **1.** Landlord shall provide Tenant with a copy of the rules and regulations within _____ days or _____.
    OR ☐ **2.** Tenant has been provided with, and acknowledges receipt of, a copy of the rules and regulations.
15. ☐ (If checked) **CONDOMINIUM;PLANNED UNIT DEVELOPMENT:**
    A. The Premises is a unit in a condominium, planned unit development, common interest subdivision or other development governed by a homeowners' association ("HOA"). The name of the HOA is _____. Tenant agrees to comply with all HOA covenants, conditions and restrictions, bylaws, rules and regulations and decisions. Landlord shall provide Tenant copies of rules and regulations, if any. Tenant shall reimburse Landlord for any fines or charges imposed by HOA or other authorities, due to any violation by Tenant, or the guests or licensees of Tenant.
    B. **(Check one)**
    ☐ **1.** Landlord shall provide Tenant with a copy of the HOA rules and regulations within _____ days or _____.
    OR ☐ **2.** Tenant has been provided with, and acknowledges receipt of, a copy of the HOA rules and regulations.
16. **ALTERATIONS; REPAIRS:** Unless otherwise specified by law or paragraph 27C, without Landlord's prior written consent, **(i)** Tenant shall not make any repairs, alterations or improvements in or about the Premises including: painting, wallpapering, adding or changing locks, installing antenna or satellite dish(es), placing signs, displays or exhibits, or using screws, fastening devices, large nails or adhesive materials; **(ii)** Landlord shall not be responsible for the costs of alterations or repairs made by Tenant; **(iii)** Tenant shall not deduct from Rent the costs of any repairs, alterations or improvements; and **(iv)** any deduction made by Tenant shall be considered unpaid Rent.
17. **KEYS; LOCKS:**
    A. Tenant acknowledges receipt of (or Tenant will receive ☐ prior to the Commencement Date, or ☐ _____):
    ☐ _____ key(s) to Premises, ☐ _____ remote control device(s) for garage door/gate opener(s),
    ☐ _____ key(s) to mailbox, ☐ _____,
    ☐ _____ key(s) to common area(s), ☐ _____.
    B. Tenant acknowledges that locks to the Premises ☐ have, ☐ have not, been re-keyed.
    C. If Tenant re-keys existing locks or opening devices, Tenant shall immediately deliver copies of all keys to Landlord. Tenant shall pay all costs and charges related to loss of any keys or opening devices. Tenant may not remove locks, even if installed by Tenant.
18. **ENTRY:**
    A. Tenant shall make Premises available to Landlord or Landlord's representative for the purpose of entering to make necessary or agreed repairs, decorations, alterations, or improvements, or to supply necessary or agreed services, or to show Premises to prospective or actual purchasers, tenants, mortgagees, lenders, appraisers, or contractors.
    B. Landlord and Tenant agree that 24-hour written notice shall be reasonable and sufficient notice, except as follows. 48-hour written notice is required to conduct an inspection of the Premises prior to the Tenant moving out, unless the Tenant waives the right to such notice. Notice may be given orally to show the Premises to actual or prospective purchasers provided Tenant has been notified in writing within 120 days preceding the oral notice that the Premises are for sale and that oral notice may be given to show the Premises. No notice is required: **(i)** to enter in case of an emergency; **(ii)** if the Tenant is present and consents at the time of entry or **(iii)** if the Tenant has abandoned or surrendered the Premises. No written notice is required if Landlord and Tenant orally agree to an entry for agreed services or repairs if the date and time of entry are within one week of the oral agreement.
    C. ☐ (If checked) Tenant authorizes the use of a keysafe/lockbox to allow entry into the Premises and agrees to sign a keysafe/lockbox addendum (C.A.R. Form KLA).
19. **SIGNS:** Tenant authorizes Landlord to place FOR SALE/LEASE signs on the Premises.
20. **ASSIGNMENT; SUBLETTING:** Tenant shall not sublet all or any part of Premises, or assign or transfer this Agreement or any interest in it, without Landlord's prior written consent. Unless such consent is obtained, any assignment, transfer or subletting of Premises or this Agreement or tenancy, by voluntary act of Tenant, operation of law or otherwise, shall, at the option of Landlord, terminate this Agreement. Any proposed assignee, transferee or sublessee shall submit to Landlord an application and credit information for Landlord's approval and, if approved, sign a separate written agreement with Landlord and Tenant. Landlord's consent to any one assignment, transfer or sublease, shall not be construed as consent to any subsequent assignment, transfer or sublease and does not release Tenant of Tenant's obligations under this Agreement.

Tenant's Initials (_____)(_____)
Landlord's Initials (_____)(_____)
Reviewed by _____ Date _____

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21. **JOINT AND INDIVIDUAL OBLIGATIONS:** If there is more than one Tenant, each one shall be individually and completely responsible for the performance of all obligations of Tenant under this Agreement, jointly with every other Tenant, and individually, whether or not in possession.
22. ☐ **LEAD-BASED PAINT (If checked):** Premises was constructed prior to 1978. In accordance with federal law, Landlord gives and Tenant acknowledges receipt of the disclosures on the attached form (C.A.R. Form FLD) and a federally approved lead pamphlet.
23. ☐ **MILITARY ORDNANCE DISCLOSURE:** (If applicable and known to Landlord) Premises is located within one mile of an area once used for military training, and may contain potentially explosive munitions.
24. ☐ **PERIODIC PEST CONTROL:** Landlord has entered into a contract for periodic pest control treatment of the Premises and shall give Tenant a copy of the notice originally given to Landlord by the pest control company.
25. ☐ **METHAMPHETAMINE CONTAMINATION:** Prior to signing this Agreement, Landlord has given Tenant a notice that a health official has issued an order prohibiting occupancy of the property because of methamphetamine contamination. A copy of the notice and order are attached.
26. **DATABASE DISCLOSURE:** Notice: Pursuant to Section 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides. (Neither Landlord nor Brokers, if any, are required to check this website. If Tenant wants further information, Tenant should obtain information directly from this website.)
27. **POSSESSION:**
    A. Tenant is not in possession of the premises. If Landlord is unable to deliver possession of Premises on Commencement Date, such Date shall be extended to the date on which possession is made available to Tenant. If Landlord is unable to deliver possession within **5 (or** ☐ _____**) calendar days** after agreed Commencement Date, Tenant may terminate this Agreement by giving written notice to Landlord, and shall be refunded all Rent and security deposit paid. Possession is deemed terminated when Tenant has returned all keys to the Premises to Landlord.
    B. ☐ Tenant is already in possession of the Premises.
28. **TENANT'S OBLIGATIONS UPON VACATING PREMISES:**
    A. Upon termination of the Agreement, Tenant shall: **(i)** give Landlord all copies of all keys or opening devices to Premises, including any common areas; **(ii)** vacate and surrender Premises to Landlord, empty of all persons; **(iii)** vacate any/all parking and/or storage space; **(iv)** clean and deliver Premises, as specified in paragraph C below, to Landlord in the same condition as referenced in paragraph 10; **(v)** remove all debris; **(vi)** give written notice to Landlord of Tenant's forwarding address; and **(vii)** _____
    B. All alterations/improvements made by or caused to be made by Tenant, with or without Landlord's consent, become the property of Landlord upon termination. Landlord may charge Tenant for restoration of the Premises to the condition it was in prior to any alterations/improvements.
    C. **Right to Pre-Move-Out Inspection and Repairs as follows: (i)** After giving or receiving notice of termination of a tenancy (C.A.R. Form NTT), or before the end of a lease, Tenant has the right to request that an inspection of the Premises take place prior to termination of the lease or rental (C.A.R. Form NRI). If Tenant requests such an inspection, Tenant shall be given an opportunity to remedy identified deficiencies prior to termination, consistent with the terms of this Agreement. **(ii)** Any repairs or alterations made to the Premises as a result of this inspection (collectively, "Repairs") shall be made at Tenant's expense. Repairs may be performed by Tenant or through others, who have adequate insurance and licenses and are approved by Landlord. The work shall comply with applicable law, including governmental permit, inspection and approval requirements. Repairs shall be performed in a good, skillful manner with materials of quality and appearance comparable to existing materials. It is understood that exact restoration of appearance or cosmetic items following all Repairs may not be possible. **(iii)** Tenant shall: **(a)** obtain receipts for Repairs performed by others; **(b)** prepare a written statement indicating the Repairs performed by Tenant and the date of such Repairs; and **(c)** provide copies of receipts and statements to Landlord prior to termination. Paragraph 28C does not apply when the tenancy is terminated pursuant to California Code of Civil Procedure § 1161(2), (3) or (4).
29. **BREACH OF CONTRACT; EARLY TERMINATION:** In addition to any obligations established by paragraph 28, in the event of termination by Tenant prior to completion of the original term of the Agreement, Tenant shall also be responsible for lost Rent, rental commissions, advertising expenses and painting costs necessary to ready Premises for re-rental. Landlord may withhold any such amounts from Tenant's security deposit.
30. **TEMPORARY RELOCATION:** Subject to local law, Tenant agrees, upon demand of Landlord, to temporarily vacate Premises for a reasonable period, to allow for fumigation (or other methods) to control wood destroying pests or organisms, or other repairs to Premises. Tenant agrees to comply with all instructions and requirements necessary to prepare Premises to accommodate pest control, fumigation or other work, including bagging or storage of food and medicine, and removal of perishables and valuables. Tenant shall only be entitled to a credit of Rent equal to the per diem Rent for the period of time Tenant is required to vacate Premises.
31. **DAMAGE TO PREMISES:** If, by no fault of Tenant, Premises are totally or partially damaged or destroyed by fire, earthquake, accident or other casualty that render Premises totally or partially uninhabitable, either Landlord or Tenant may terminate this Agreement by giving the other written notice. Rent shall be abated as of the date Premises become totally or partially uninhabitable. The abated amount shall be the current monthly Rent prorated on a 30-day period. If the Agreement is not terminated, Landlord shall promptly repair the damage, and Rent shall be reduced based on the extent to which the damage interferes with Tenant's reasonable use of Premises. If damage occurs as a result of an act of Tenant or Tenant's guests, only Landlord shall have the right of termination, and no reduction in Rent shall be made.
32. **INSURANCE:** Tenant's or guest's personal property and vehicles are not insured by Landlord, manager or, if applicable, HOA, against loss or damage due to fire, theft, vandalism, rain, water, criminal or negligent acts of others, or any other cause. **Tenant is advised to carry Tenant's own insurance (renter's insurance) to protect Tenant from any such loss or damage.** Tenant shall comply with any requirement imposed on Tenant by Landlord's insurer to avoid: **(i)** an increase in Landlord's insurance premium (or Tenant shall pay for the increase in premium); or **(ii)** loss of insurance.

Tenant's Initials (_____)(_____)
Landlord's Initials (_____)(_____)

Reviewed by _____ Date _____

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33. **WATERBEDS:** Tenant shall not use or have waterbeds on the Premises unless: **(i)** Tenant obtains a valid waterbed insurance policy; **(ii)** Tenant increases the security deposit in an amount equal to one-half of one month's Rent; and **(iii)** the bed conforms to the floor load capacity of Premises.
34. **WAIVER:** The waiver of any breach shall not be construed as a continuing waiver of the same or any subsequent breach.
35. **NOTICE:** Notices may be served at the following address, or at any other location subsequently designated:
Landlord: _____ Tenant: _____
36. **TENANT ESTOPPEL CERTIFICATE:** Tenant shall execute and return a tenant estoppel certificate delivered to Tenant by Landlord or Landlord's agent within 3 days after its receipt. Failure to comply with this requirement shall be deemed Tenant's acknowledgment that the tenant estoppel certificate is true and correct, and may be relied upon by a lender or purchaser.
37. **TENANT REPRESENTATIONS; CREDIT:** Tenant warrants that all statements in Tenant's rental application are accurate. Tenant authorizes Landlord and Broker(s) to obtain Tenant's credit report periodically during the tenancy in connection with the modification or enforcement of this Agreement. Landlord may cancel this Agreement: **(i)** before occupancy begins; **(ii)** upon disapproval of the credit report(s); or **(iii)** at any time, upon discovering that information in Tenant's application is false. A negative credit report reflecting on Tenant's record may be submitted to a credit reporting agency if Tenant fails to fulfill the terms of payment and other obligations under this Agreement.
38. **MEDIATION:**
    A. Consistent with paragraphs B and C below, Landlord and Tenant agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to court action. Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action.
    B. The following matters are excluded from mediation: **(i)** an unlawful detainer action; **(ii)** the filing or enforcement of a mechanic's lien; and **(iii)** any matter within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the mediation provision.
    C. Landlord and Tenant agree to mediate disputes or claims involving Listing Agent, Leasing Agent or property manager ("Broker"), provided Broker shall have agreed to such mediation prior to, or within a reasonable time after, the dispute or claim is presented to such Broker. Any election by Broker to participate in mediation shall not result in Broker being deemed a party to this Agreement.
39. **ATTORNEY FEES:** In any action or proceeding arising out of this Agreement, the prevailing party between Landlord and Tenant shall be entitled to reasonable attorney fees and costs, except as provided in paragraph 30A.
40. **C.A.R. FORM:** C.A.R. Form means the specific form referenced or another comparable form agreed to by the parties.
41. **OTHER TERMS AND CONDITIONS;SUPPLEMENTS:** ☐ Interpreter/Translator Agreement (C.A.R. Form ITA); ☐ Keysafe/Lockbox Addendum (C.A.R. Form KLA); ☐ Lead-Based Paint and Lead-Based Paint Hazards Disclosure (C.A.R. Form FLD)

The following ATTACHED supplements are incorporated in this Agreement: _____

42. **TIME OF ESSENCE; ENTIRE CONTRACT; CHANGES:** Time is of the essence. All understandings between the parties incorporated in this Agreement. Its terms are intended by the parties as a final, complete and exclusive expression of their Agreement with respect to its subject matter, and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. If any provision of this Agreement is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. Neither this Agreement nor any provision in it may be extended, amended, modified, altered or changed except in writing. This Agreement is subject to California landlord-tenant law and shall incorporate all changes required by amendment or successors to such law. This Agreement and any supplement, addendum or modification, including any copy, may be signed in two or more counterparts, all of which shall constitute one and the same writing.
43. **AGENCY:**
    A. **CONFIRMATION:** The following agency relationship(s) are hereby confirmed for this transaction:
    Listing Agent: (Print firm name) _____ is the agent of (check one): ☐ the Landlord exclusively; or ☐ both the Landlord and Tenant.
    Leasing Agent: (Print firm name) _____ (if not same as Listing Agent) is the agent of (check one): ☐ the Tenant exclusively; or ☐ the Landlord exclusively; or ☐ both the Tenant and Landlord.
    B. **DISCLOSURE:** ☐ (If checked): The term of this lease exceeds one year. A disclosure regarding real estate agency relationships (C.A.R. Form AD) has been provided to Landlord and Tenant, who each acknowledge its receipt.
44. ☐ **TENANT COMPENSATION TO BROKER:** Upon execution of this Agreement, Tenant agrees to pay compensation to Broker as specified in a separate written agreement between Tenant and Broker.
45. ☐ **INTERPRETER/TRANSLATOR:** The terms of this Agreement have been interpreted for Tenant into the following language: _____. Landlord and Tenant acknowledge receipt of the attached interpretor/translator agreement (C.A.R. Form ITA).

Tenant's Initials (_____)(_____)
Landlord's Initials (_____)(_____)

Reviewed by _____ Date _____

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Premises: _____ Date: _____

46. **FOREIGN LANGUAGE NEGOTIATION:** If this Agreement has been negotiated by Landlord and Tenant primarily in Spanish, Chinese, Tagalog, Korean or Vietnamese. Pursuant to the California Civil Code Tenant shall be provided a translation of this Agreement inthe language used for the negotiation.
47. **OWNER COMPENSATION TO BROKER:** Upon execution of this Agreement, Owner agrees to pay compensation to Broker as specified in a separate written agreement between Owner and Broker (C.A.R. Form LCA).
48. **RECEIPT**: If specified in paragraph 5, Landlord or Broker, acknowledges receipt of move-in funds.

Landlord and Tenant acknowledge and agree Brokers: **(a)** do not guarantee the condition of the Premises; **(b)** cannot verify representations made by others; **(c)** cannot provide legal or tax advice; **(d)** will not provide other advice or information that exceeds the knowledge, education or experience required to obtain a real estate license. Furthermore, if Brokers are not also acting as Landlord in this Agreement, Brokers: **(e)** do not decide what rental rate a Tenant should pay or Landlord should accept; and **(f)** do not decide upon the length or other terms of tenancy. Landlord and Tenant agree that they will seek legal, tax, insurance and other desired assistance from appropriate professionals.

Tenant agrees to rent the premises on the above terms and conditions.

Tenant _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ E-mail _____
Tenant _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ E-mail _____

☐ **GUARANTEE:** In consideration of the execution of this Agreement by and between Landlord and Tenant and for valuable consideration, receipt of which is hereby acknowledged, the undersigned ("Guarantor") does hereby: **(i)** guarantee unconditionally to Landlord and Landlord's agents, successors and assigns, the prompt payment of Rent or other sums that become due pursuant to this Agreement, including any and all court costs and attorney fees included in enforcing the Agreement; **(ii)** consent to any changes, modifications or alterations of any term in this Agreement agreed to by Landlord and Tenant; and **(iii)** waive any right to require Landlord and/or Landlord's agents to proceed against Tenant for any default occurring under this Agreement before seeking to enforce this Guarantee.

Guarantor (Print Name) _____
Guarantor _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ E-mail _____

Landlord agrees to rent the premises on the above terms and conditions.

Landlord _____ Landlord _____
Address _____
Telephone _____ Fax _____ E-mail _____

REAL ESTATE BROKERS:

A. Real estate brokers who are not also Landlord under the Agreement are not parties to the Agreement between Landlord and Tenant.
B. Agency relationships are confirmed in paragraph 43.
C. **COOPERATING BROKER COMPENSATION:** Listing Broker agrees to pay Cooperating Broker (Leasing Firm) and Cooperating Broker agrees to accept: **(i)** the amount specified in the MLS, provided Cooperating Broker is a Participant of the MLS in which the Property is offered for sale or a reciprocal MLS; or **(ii)** ☐ (if checked) the amount specified in a separate written agreement between Listing Broker and Cooperating Broker.

Real Estate Broker (Listing Firm) _____ DRE Lic. # _____
By (Agent) _____ DRE Lic. # _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ E-mail _____

Real Estate Broker (Leasing Firm) _____ DRE Lic. # _____
By (Agent) _____ DRE Lic. # _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ E-mail _____

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Reviewed by _____ Date _____

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LEASE/RENTAL COMMISSION AGREEMENT

THIS IS INTENDED TO BE A LEGALLY BINDING CONTRACT — READ IT CAREFULLY.

CALIFORNIA ASSOCIATION OF REALTORS® (C.A.R.) STANDARD FORM

COMPENSATION:

Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between the Landlord/Tenant/Principal and Broker.

For services in arranging this tenancy, I agree to pay to _____, Broker(s), compensation equal to _____

_____.

Broker(s) may retain said compensation from any first monies (advance rentals and security deposits) collected by Broker(s) from the tenant(s). If the Lease or Rental Agreement is extended or renewed, or the tenant holds over in possession beyond the initial period (collectively, "extension period"), I agree to pay to Broker(s) additional compensation equal to _____

_____,

within 5 days of the commencement of each such extension period. If the tenant(s) directly or indirectly acquires, or enters into an agreement to acquire, title to the Property or any part of it, whether by sale, exchange, or otherwise, during the term of the tenancy or any extension period, I agree to pay to Broker(s) compensation equal to _____ percent of the selling price or total consideration in said transfer, whichever is greater. Said sum shall be payable upon close of escrow, or if there is no escrow then upon tenant(s)'s direct or indirect acquisition of any legal or equitable interest in the Property. If there is more than one Landlord, by my signature below I agree and represent that I am authorized to obligate all or both of us and that the other Landlord(s) and I shall be jointly and individually responsible for payment of the sums due as above.

The undersigned has read and acknowledges receipt of a copy of this Agreement and agrees to pay compensation as stated above.

Date: _____ Telephone _____ LANDLORD/TENANT/PRINCIPAL _____

Address _____ LANDLORD/TENANT/PRINCIPAL _____

Real Estate Broker(s) agree(s) to the foregoing.

Broker _____ By _____ Date _____

Broker _____ By _____ Date _____

THIS STANDARDIZED DOCUMENT HAS BEEN APPROVED BY THE CALIFORNIA ASSOCIATION OF REALTORS® (C.A.R.) IN FORM ONLY. NO REPRESENTATION IS MADE AS TO THE APPROVAL OF THE FORM OF ANY SUPPLEMENTS NOT CURRENTLY PUBLISHED BY C.A.R. OR THE LEGAL VALIDITY OR ADEQUACY OF ANY PROVISION IN ANY SPECIFIC TRANSACTION. IT SHOULD NOT BE USED WITH EXTENSIVE RIDERS OR ADDITIONS.

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FORM LCA-6

OFFICE USE ONLY

Reviewed by Broker or Designee _____

Date _____

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MO-FEB-95

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.84 E. Form: Residential Lease-Rental Agreement and Deposit Receipt (Professional Publishing Form 105)

§1.84 E. Form: Residential Lease-Rental Agreement and Deposit Receipt (Professional Publishing Form 105)

RESIDENTIAL LEASE-RENTAL AGREEMENT AND DEPOSIT RECEIPT

AGENCY RELATIONSHIP CONFIRMATION. The following agency relationship is hereby confirmed for this transaction and supersedes any prior agency election (If no agency relationship insert "NONE"):

LISTING AGENT: _____ is the agent of (check one):
(Print Firm Name)
☐ **the Owner exclusively; or** ☐ **both the Tenant and the Owner.**

LEASING AGENT: _____ (if not the same as the Listing Agent) is the agent of (check one):
(Print Firm Name)
☐ **the Tenant exclusively; or** ☐ **the Owner exclusively; or** ☐ **both the Tenant and the Owner.**

Note: This confirmation DOES NOT take the place of the AGENCY DISCLOSURE form (such as P.P. Form 110.42 CAL) required by law if the term exceeds one year.

RECEIVED FROM _____, hereinafter referred to as Tenant, the sum of $_____ (_____ dollars), evidenced by _____, as a deposit. Upon acceptance of this Agreement, the Owner of the premises, will apply the deposit as follows:

	TOTAL	RECEIVED	BALANCE DUE PRIOR TO OCCUPANCY
Rent for the period from _____ to _____.	$_____	$_____	$_____
Security deposit (not applicable toward last month's rent)	$_____	$_____	$_____
Other _____	$_____	$_____	$_____
TOTAL	$_____	$_____	$_____

In the event this Agreement is not accepted by the Owner, within _____ **days**, the total deposit received will be refunded.

Tenant offers to rent from the Owner the premises located in the City of _____, County of _____, State of California, commonly known as _____, upon the following **terms and conditions:**

DRAFT

1. **TERM.** The term will commence on _____, and continue **(check one of the two following alternatives):**
☐ LEASE until _____, for a total rent of $_____ (_____ dollars).
☐ RENTAL on a month-to-month basis until either party terminates this Agreement by giving the other party written notice as required by law.

2. **RENT.** Rent will be $_____, per month, payable in advance by personal check, cashier's check, cash or money order, on the _____ day of each calendar month to Owner or his or her authorized agent, by mail or personal delivery to the following address: _____
or at such other place as may be designated by Owner in writing from time to time. Payment by personal delivery may be made (check one): ☐ Monday through Friday, 9:00 a.m. to 5:00 p.m., or ☐ at the following times: _____. In the event rent is not received by Owner in full **within** ____ **days** after due date, Tenant agrees that it would be impracticable or extremely difficult to fix the actual damages to Owner caused by that failure, and Tenant agrees to pay a **late charge** of $_____. Tenant further agrees to pay $ 25.00 for each dishonored bank check. All late fees and returned check fees will be considered additional rent. The late charge period is not a grace period, and Owner is entitled to make written demand for any rent if not paid when due and to collect interest thereon. Any unpaid balance including late charges, will bear interest at 10% per annum, or the maximum rate allowed by law, whichever is less.

3. **MULTIPLE OCCUPANCY.** It is expressly understood that this Agreement is between the Owner and each signatory jointly and severally. Each signatory will be responsible for timely payment of rent and performance of all other provisions of this Agreement.

4. **UTILITIES.** Tenant will be responsible for the payment of all utilities and services, except: _____, which will be paid by Owner.

5. **USE.** The premises will be used exclusively as a residence for no more than _____ persons. Guests staying more than a total of _____ days in a calendar year without written consent of Owner will constitute a violation of this Agreement. Tenant shall park operable automobiles in assigned spaces only. Trailers, boats, campers, and inoperable vehicles are not allowed without the written consent of Owner. Tenant may not repair motor vehicles on the leased premises.

6. **ANIMALS.** No animals will be brought on the premises without the prior consent of the Owner; except _____.

7. **RULES AND REGULATIONS.** In the event that the premises is a portion of a building containing more than one unit, or is located in a common interest development, Tenant agrees to abide by all applicable rules, whether adopted before or after the date of this Agreement, including rules with respect to noise, odors, disposal of refuse, animals, parking, and use of common areas. Tenant will

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pay any penalties , including attorney fees, imposed by homeowners' association for violations by tenant or tenant's guests.

8. **ORDINANCES AND STATUTES.** Tenant will comply with all statutes, ordinances, and requirements of all municipal, state and federal authorities now in force, or which may later be in force, regarding the use of the premises. Tenant will not use the premises for any unlawful purpose including, but not limited to, using, storing or selling prohibited drugs. If the premises are located in a rent control area, the Tenant should contact the Rent and Arbitration Board for his or her legal rights.
9. **ASSIGNMENT AND SUBLETTING.** Tenant will not assign this Agreement or sublet any portion of the premises without prior written consent of the Owner.
10. **MAINTENANCE, REPAIRS, OR ALTERATIONS.** Tenant acknowledges that, unless the Owner is notified immediately upon occupancy, the premises, including the furniture, furnishings and appliances, including all electrical, gas and plumbing fixtures, are in good working order and repair. Tenant will keep the premises in a clean and sanitary condition, and will immediately notify Owner of any damage to the premises or its contents, or any inoperable equipment or appliances. Tenant will surrender the premises, at termination, in as good condition as received, normal wear and tear excepted. Tenant will be responsible for any damage, repairs or replacements, caused by Tenant's negligence and that of the tenant's family, invitees, and guests, except ordinary wear and tear. Verification of the working order and the maintenance of the smoke detector is the responsibility of the Tenant. Tenant will not commit any waste upon the premises, or any nuisance or act which may disturb the quiet enjoyment of any neighbors. Tenant will not paint, paper or otherwise redecorate or make alterations to the premises without the prior written consent of the Owner. Tenant will irrigate and maintain any surrounding grounds, including lawns and shrubbery, if they are for the Tenant's exclusive use. **It is understood that Owner's insurance does not cover Tenant's personal property.**
11. **INVENTORY.** Any furnishings and/or equipment to be furnished by Owner will be listed in a special inventory. The inventory will be signed by both Tenant and Owner concurrently with this Lease. Tenant will keep the furnishings and equipment in good condition and repair, and will be responsible for any damage to them other than normal wear and tear. Tenant acknowledges receipt of _____ sets of keys, _____ garage door openers, other: _____
12. **DAMAGES TO PREMISES.** If the premises are damaged by fire or from any other cause which renders the premises untenantable, either party will have the right to terminate this Agreement as of the date on which the damage occurs. Written notice of termination will be given to the other party **within fifteen (15) days after occurrence** of such damage. Should such damage or destruction occur as the result of the negligence of Tenant, or his or her invitees, then only the Owner will have the right to terminate. Should this right be exercised by either Owner or Tenant, rent for the current month will be prorated between the parties as of the date the damage occurred. Any prepaid rent and unused security deposit will be refunded to Tenant. If this Agreement is not terminated, Owner will promptly repair the premises and there will be a proportionate reduction of rent until the premises are repaired and ready for Tenant's occupancy. The proportionate reduction will be based on the extent which repairs interfere with Tenant's reasonable use of the premises.
13. **ENTRY AND INSPECTION.** Owner and Owner's agents will have the right to enter the premises: (a) in case of emergency; (b) to make necessary or agreed repairs, decorations, alterations, improvements, supply necessary or agreed services, show the premises to prospective or actual purchasers, lenders, tenants, workers, or contractors; (c) when tenant has abandoned or surrendered the premises. Except under (a) and (c), entry may be made only during normal business hours, and with at least 24 hours prior written notice to Tenant including the date, approximate time, and purpose of entry.

    If the purpose of the entry is to exhibit the dwelling unit to prospective or actual purchasers, the notice may be given orally, in person or by telephone, if the owner or his or her agent has notified the tenant in writing within 120 days of the oral notice that the property is for sale. At the time of entry, the Owner or agent shall leave written evidence of the entry inside the unit.
14. **INDEMNIFICATION.** Owner will not be liable for any damage or injury to Tenant, or any other person, or to any property, occurring on the premises, or in common areas, unless such damage is the legal result of the negligence or willful misconduct of Owner, his or her agents, or employees. Tenant agrees to hold Owner harmless from any claims for damages, no matter how caused, except for injury or damages caused by negligence or willful misconduct of Owner, his or her agents or employees.
15. **PHYSICAL POSSESSION.** If Owner is unable to deliver possession of the premises at the commencement date set forth above, Owner will not be liable for any damage caused, nor will this Agreement be void or voidable, but Tenant will not be liable for any rent until possession is delivered. Tenant may terminate this Agreement if possession is not delivered **within** _____ **days** of the commencement of the term in Item 1.
16. **DEFAULT.** If Tenant fails to pay rent when due, or perform any provision of this Agreement, after not less than **three (3) days written notice** of such default given in the manner required by law, the Owner, at his or her option, may terminate all rights of Tenant, unless Tenant, within said time, cures such default. If Tenant abandons or vacates the property while in default of the payment of rent, Owner may consider any property left on the premises to be abandoned and may dispose of the same in any manner allowed by law. In the event the Owner reasonably believes that such abandoned property has no value, it may be discarded. All property on the premises will be subject to a lien for the benefit of Owner securing the payment of all sums due, to the maximum extent allowed by law.

    In the event of a default by Tenant, Owner may elect to: (a) continue the lease in effect and enforce all his rights and remedies, including the right to recover the rent as it becomes due, provided that Owner's consent to assignment or subletting by the Tenant will not be unreasonably withheld; or (b) at any time, terminate all of Tenant's rights and recover from Tenant all damages he or she may incur by reason of the breach of the lease, including the cost of recovering the premises, and including the worth at the time of such termination, or at the time of an award if suit be instituted to enforce this provision, of the amount by which the unpaid rent for the balance of the term exceeds the amount of such rental loss which the Tenant proves could be reasonably avoided.

Tenant [_____] [_____] [_____] [_____] has read this page.

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17. **SECURITY.** The security deposit will secure the performance of Tenant's obligations. Owner may, but will not be obligated to, apply all portions of said deposit on account of Tenant's obligations. Any balance remaining will be returned to Tenant, together with an accounting of any disbursements, **21 calendar days** after the Tenant has vacated the premises, or earlier if required by law. Tenant will not have the right to apply the security deposit in payment of the last month's rent. No interest will be paid to Tenant on account of the security deposit, unless required by local ordinance.

18. **WAIVER.** Failure of Owner to enforce any provision of this Agreement will not be deemed a waiver. The acceptance of rent by Owner will not waive his or her right to enforce any provision of this Agreement.

19. **NOTICES.** Unless otherwise provided, any notice which either party may give or is required to give, must be in writing, may be given personally or by mailing the same, postage prepaid, to Tenant at the premises or to Owner or Owner's authorized agent at the address shown in the signature block or at such other places as may be designated by the parties from time to time. Notice will be deemed effective three (3) days after mailing, or on personal delivery, or when receipt is acknowledged in writing.

20. **HOLDING OVER.** Any holding over after expiration of this Agreement, with the consent of Owner, will be a month-to-month tenancy at a monthly rent of $_____ payable in advance and otherwise subject to the terms of this Agreement and local ordinance, as applicable, until either party terminates the tenancy by giving the other party thirty (30) days (or longer if required by law) written notice.

21. **TIME.** Time is of the essence of this Agreement.

22. **ATTORNEY'S FEES.** In any action or proceeding involving a dispute between Tenant and Owner arising out of the execution of this Agreement, whether for tort or for breach of contract, and whether or not brought to trial or final judgment, the prevailing party will be entitled to receive from the other party a reasonable attorney's, expert witness fees, and costs to be determined by the court or arbitrator(s).

23. **SUBROGATION.** To the maximum extent permitted by insurance policies which may be owned by the parties, Lessor and Lessee waive any and all rights of subrogation against each other which might otherwise exist.

24. **FAIR HOUSING.** Owner and Tenant understand that state and federal housing laws prohibit discrimination in the sale, rental, appraisal, financing or advertising of housing on the basis of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, age, mental or physical disability.

25. **ADDITIONAL TERMS AND CONDITIONS:**

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

DRAFT

26. ☐ This unit is subject to rent control and the agency responsible to adjudicate claims is: _____

27. **ENTIRE AGREEMENT.** The foregoing constitutes the entire agreement between the parties and may be modified only in writing signed by all parties. This Agreement and any modifications, including any photocopy or facsimile, may be signed in one or more counterparts, each of which will be deemed an original and all of which taken together will constitute one and the same instrument. The following addenda, if checked, have been made a part of this Agreement before the parties' execution:

☐ Addendum _____ : Lead-Based Paint Disclosure (Required by Law for Rental Property Built Prior to 1978)
☐ Addendum _____ : Regarding Mold Contamination and Agreement to Maintain Premises
☐ Addendum _____ : _____
☐ Addendum _____ : _____

NOTICE: Pursuant to Section 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at http://www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

Tenant [_____] [_____] [_____] [_____] has read this page.

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Print

Property Address _____

Tenant _____ (Signature)

_____ (Please Print Name)

Date _____ Telephone _____

Address _____

_____

Email _____

Tenant _____ (Signature)

_____ (Please Print Name)

Date _____ Telephone _____

Address _____

_____

Email _____

Tenant _____ (Signature)

_____ (Please Print Name)

Date _____ Telephone _____

Address _____

_____

Email _____

Tenant _____ (Signature)

_____ (Please Print Name)

Date _____ Telephone _____

Address _____

_____

Email _____

DRAFT

The undersigned Owner accepts the foregoing offer and agrees to lease the premises on the terms and conditions set forth above.

Owner _____ (Signature of Owner or Authorized Agent)

_____ (Please Print Name)

Date _____

Telephone _____ Fax _____

Address _____

_____

Email _____

Owner _____ (Signature)

_____ (Please Print Name)

Date _____

Telephone _____ Fax _____

Address _____

_____

Email _____

Receipt for deposit acknowledged by _____ Date _____

Tenant acknowledges receipt of a copy of the accepted lease on (date) _____

[_____] [_____] [_____] [_____]
initials

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Print

Property Address _____

COMMISSION AGREEMENT ON LEASE

NOTICE: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between the owner and broker.

The Owner agrees to pay to _____, the Broker in this transaction, compensation equal to $_____ for services rendered. Owner authorizes Broker to deduct said sum from the deposit received from Tenant.

In the event the Lease is extended for a definite period of time or on a month-to-month basis after expiration of the original term, Owner will pay to Broker an additional commission of _____% of the total rental for the extended period. This commission will be due and payable at the commencement of the extended period if for a fixed term, or if on a month-to-month basis, at the termination of Tenant's occupancy or one year, whichever is earlier.

In any action for commission, the prevailing party will be entitled to reasonable attorney fees.

Owner _____ Date _____

Owner _____ Date _____

DRAFT

COMMISSION AGREEMENT ON SALE

NOTICE: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between the owner and broker.

If a sale or exchange of the real property subject to this lease is made to the Tenant or any member of Tenant's family during the term of the lease, or any extension of the term, or within 180 days after termination of occupancy, Owner agrees to pay Broker named above a commission of _____% of the sale price or exchange value; provided, however, that in order for the commission to be payable, said sale or exchange must occur on or before (date) _____. This Agreement will not limit any other rights of the Broker provided for in any listing or other agreement which may be in effect between Owner and Broker.

In any action for commission, the prevailing party will be entitled to reasonable attorney fees.

Owner _____ Date _____

Owner _____ Date _____

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Comment: Note that this form does not include a notice of negative credit report (see CC §1785.26), so no later than 30 days after submitting a negative credit report, the landlord must send separate notice to the tenant. See §§1.29, 1.43.

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Source: Real Property/California Landlord-Tenant Practice/1 Creating the Tenancy/§1.85 F. Form: Lease Agreement (National Housing Law Project Standard Form Lease (California)) [Deleted]

§1.85 F. Form: Lease Agreement (National Housing Law Project Standard Form Lease (California)) [Deleted]

This form has been deleted in its entirety because it is outdated and the entity providing it has no new edition.

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2

Fair Housing Considerations

James Morales
Michael Rawson
Susan M. Saylor
Paul E. Smith

I. IMPACT OF FAIR HOUSING LAWS ON LANDLORDS' CHOICE OF TENANTS
- A. Practitioner's Responsibility to Know Applicable Law §2.1
- B. Overview of Applicable Law §2.2

II. SCREENING PROSPECTIVE TENANTS
- A. Landlord's Objectives §2.3
- B. Legal Constraints in Applying Screening Factors §2.4
  - 1. Selection Standards Must Not Have Disparate Impact on Protected Classes §2.5
  - 2. Were Permissible Factors Used to Reject Applicant? §2.6

III. SELECTION CRITERIA AND REASONABLE ACCOMMODATIONS §2.7
- A. Tenant Character and Safety Issues §2.8
- B. Ability to Pay Rent
  - 1. Credit and Income Information §2.9
  - 2. Minimum Income Requirements §2.9A
  - 3. Source of Income Protections §2.9B
  - 4. Income and Marital Status §2.9C
  - 5. Income and Disability §2.9D
- C. Subjective Criteria Should Be Avoided §2.10
- D. Special Criteria Applicable to Public and Subsidized Housing §2.11
  - 1. Some Immigrants Barred From Subsidized Housing §2.12
  - 2. Authority to Select Tenants §2.13
    - a. By Public Housing Authority
      - (1) Specific Selection Criteria and Preferences §2.14
      - (2) Residency Preferences §2.14A
      - (3) Checking Criminal Background of Applicants; Controlled Substances, Alcohol Abuse §2.15
      - (4) Denial of Admission Based on Status as Domestic Violence Victim Prohibited §2.15A
    - b. Private Landlord and Housing Authority: §8 Housing Choice Voucher Programs
      - (1) Applicant Eligibility Determined by Public Housing Authority §2.16
      - (2) Private Landlord's Discretion in Tenant Selection §2.17
    - c. Under State or Federally Subsidized Programs §2.18
    - d. Under State and Federal Tax Credit Programs §2.18A
- E. Prohibited Selection Factors §2.19
- F. Protected Categories
  - 1. Summary; Authorizing Legislation §2.20
  - 2. Protected Categories Created by Unruh Act's Arbitrary Discrimination Proscription §2.21
  - 3. Familial Status Protections §2.22
    - a. Statutory Definitions §2.23
    - b. Effect of Occupancy Standards §2.24
    - c. Senior Housing Exceptions §2.25
      - (1) Fair Housing Act (Federal) Exemptions §2.25A
      - (2) California (State) Exemptions §2.25B
      - (3) Application of State vs. Federal Exemptions §2.25C
  - 4. Protections for Persons With Disabilities
    - a. Impairments Covered by Statutory Definitions; Proscribed Inquiries by Prospective Landlords §2.26
    - b. Reasonable Accommodations and Modifications §2.27
      - (1) Reasonable Accommodations §2.27A
      - (2) Reasonable Modifications §2.27B
      - (3) Accessibility §2.27C
      - (4) Accommodation and Modification Request Procedures; Interactive Process §2.27D

c. Attorney Fees §2.27E
5. Gender Protections §2.27F
a. Sex Harassment §2.27G
b. Domestic Violence Discrimination §2.27H

IV. CHART: GUIDE TO FAIR HOUSING AND ANTIDISCRIMINATION LAWS §2.28

V. FEDERAL ANTIDISCRIMINATION AND FAIR HOUSING LAWS §2.29
A. Fair Housing Act
1. Scope
a. Application, Protections, and Requirements §2.30
b. Exemption §2.31
2. Enforcement §2.32
a. Administrative Action
(1) Preparing and Filing Complaint
(a) Filing With HUD §2.33
(b) Filing With USDA §2.33A
(2) Form: Housing Discrimination Complaint (HUD 903.1) §2.34
(3) Response to Complaint §2.35
(4) Investigation and Conciliation of Dispute §2.36
(5) Issuance of a Charge or Dismissal §2.37
(6) Charge Issued: Election of Civil Action; Administrative Hearing §2.38
b. Civil Action Under 42 USC §3613 §2.39
c. U.S. Attorney General "Pattern-or-Practice" Action §2.40
B. Civil Rights Act of 1866
1. Application §2.41
a. No State Action Requirement §2.42
b. The Protected Classes §2.43
2. Enforcement
a. Litigating Claims Under the Act §2.44
b. Remedies
(1) Damages §2.45
(2) Injunctive Relief §2.46
(3) Attorney Fees §2.47

VI. CALIFORNIA ANTIDISCRIMINATION AND FAIR HOUSING LAWS §2.48
A. California Fair Employment and Housing Act
1. Scope §2.49
2. Prohibited Forms of Housing Discrimination §2.50
3. Enforcement §2.51
a. Administrative Relief
(1) Filing Administrative Complaint §2.52
(2) DFEH Action on Complaint §2.53
(3) Conciliation or Mediation §2.54
(4) Prosecution of Complaint If DFEH Finds Reasonable Cause §2.55
b. Civil Action §2.56
B. Unruh Civil Rights Act §2.57
1. Application §2.58
2. Enforcement and Remedies §2.59
C. Equal Access Requirements for Persons With Disabilities §2.60

VII. PROSECUTION OF A RENTAL DISCRIMINATION CASE
A. Establishing Illegal Discrimination §2.61
1. Overt Discrimination §2.62
2. Disparate Treatment §2.63
3. Mixed Motives §2.64
4. Disparate Impact §2.65
B. Use of Testers §2.66
C. Standing §2.67
D. Owner's Responsibility for Agent's Discriminatory Acts §2.68
E. Statute of Limitations §2.69

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I. IMPACT OF FAIR HOUSING LAWS ON LANDLORDS' CHOICE OF TENANTS

§2.1 A. Practitioner's Responsibility to Know Applicable Law

Attorneys practicing landlord-tenant law must be familiar with the various federal, state, and local fair housing laws. Fair housing laws are the most significant limitation on a landlord's discretion in selecting tenants. They require landlords not only to avoid intentional discrimination against certain classes but also to use selection criteria that do not unduly burden (*i.e.,* have a disparate impact on) members of protected classes. Under California fair housing law, for example, a landlord may be required to justify criteria that apply equally to all applicants and have some legitimate purpose, but that disproportionately exclude tenants on the basis of certain designated factors, such as race, color, national origin, ancestry, source of income, sexual orientation, religion, sex (including gender identity, appearance and behavior), marital status, familial status, age, disability, or medical condition. See Govt C §§12921(b), 12926(p), 12955.8; Pen C §422.56(c) (defining "gender"). On disparate impact analysis under federal law, see §§2.5, 2.65.

A knowledge of fair housing laws is essential to enable a landlord to select good tenants without knowingly or unknowingly violating the law. A landlord has a legitimate interest in selecting tenants who will pay the rent on time, will not damage the premises, and will not disturb other tenants. The landlord's attorney must be able to advise the client on factors and procedures that may be used to achieve these ends without violating any antidiscrimination laws. From the standpoint of the tenant's attorney, knowledge of these laws is important to providing effective representation, particularly in a tight rental housing market, where the landlord may consider certain groups to be undesirable, such as families with children. Tenants can use fair housing laws to limit a landlord's arbitrary selection criteria and to enhance their own potential for gaining access to housing.

If in doubt about a selection policy or practice, contact a local fair housing counseling and enforcement agency such as the HUD Office of Fair Housing and Equal Opportunity (FHEO) or the California Department of Fair Employment and Housing (DFEH). See Directory for information on how to contact these agencies.

While recipients are not required to do so, many cities have chosen to be served by a local agency that investigates complaints of housing discrimination and provides counseling and mediation services. Although the counselors at these agencies are usually not attorneys and should not be relied on as the final word, they generally do an excellent job of staying up-to-date on the fairly frequent statutory, regulatory, and case law changes in state and federal antidiscrimination laws. These agencies are often the first entities contacted by tenant applicants who believe they have been victims of discrimination. To find the agency that serves a particular area, contact the local government housing and community development office or planning department.

This chapter provides practitioners with an overview of fair housing laws that affect the tenant selection process. Several other publications that provide an extensive analysis of fair housing law include Schwemm, Housing Discrimination: Law and Litigation (2001) and Relman, Housing Discrimination Practice Manual (2006).

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§2.2 B. Overview of Applicable Law

Various federal, state, and local antidiscrimination laws bar discrimination on a number of specific grounds including race, color, national origin, ancestry, sexual orientation, religion, sex (including gender identity, appearance and behavior), marital status, familial status, source of income, age, disability, or medical condition. See *e.g.,* Govt C §§12926(p), 12955; Pen C §422.56. Some antidiscrimination laws prohibit any arbitrary discrimination. The general rule is that the law providing the greatest protection to a class controls over other laws. See 42 USC §3615; Govt C §12955.6.

Fair housing laws prohibit not only discriminatory refusals to rent, but also discriminatory rental terms and conditions, advertising, and statements regarding the availability of housing. In some contexts, fair housing law requires landlords to do more than merely refrain from discrimination. For example, a landlord may be required to assume reasonable financial burdens to accommodate disabled residents. See *Jankowski Lee & Assocs. v Cisneros* (7th Cir 1996) 91 F3d 891, cited with approval in *U.S. v California Mobile Home Park Mgmt. Co.* (9th Cir 1997) 107 F3d 1374, 1381. A reasonable accommodation can also include alteration of administrative polices to accommodate a disabled individual's inability to generate income. *Giebeler v M & B Assocs.* (9th Cir 2003) 343 F3d 1143 (cosigner on lease).

Violations may result in severe consequences. Under the federal Fair Housing Amendments Act of 1988 (42 USC §§3610-3612) and amendments to the California Fair Employment and Housing Act (FEHA) (see Govt C §§12955.1-12955.6, 12989-12989.3), government investigation of complaints of housing discrimination and prosecution of meritorious claims are a real possibility. If the government prosecutes the claim, it is at no expense to the complainant. Fair housing laws authorize the courts to issue injunctions and to award compensatory and punitive damages and attorney fees to the aggrieved party. Finally, fair housing protections extend to individuals who are not themselves the objects of discrimination. *Trafficante v Metropolitan Life Ins. Co.* (1972) 409 US 205, 34 L Ed 2d 415, 93 S Ct 364 (white tenants had standing to challenge landlord's racially discriminatory selection criteria because of their interest in living in integrated housing). Moreover, violations of the federal Americans With Disabilities Act of 1990 (42 USC §§12101-12213) constitute a violation of the Unruh Civil Rights Act (CC §51).

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II. SCREENING PROSPECTIVE TENANTS

§2.3 A. Landlord's Objectives

Among several applicants for a rental vacancy, a landlord wants to select the one who appears most likely to pay the rent on time and least likely to damage the premises or disturb other tenants. To avoid future problems in terminating the tenancy, landlords want to select wisely among applicants. Thus, the landlord must establish procedures for screening tenants without risking charges of illegal discrimination.

Essential questions in evaluating an applicant's ability to meet specified tenancy requirements include:

(1) Will the applicant pay rent and other charges under the lease in a timely manner?

(2) Will the applicant take care of the premises?

(3) Will the applicant avoid interfering with the rights and enjoyment of property by others and avoid damaging the property of others?

(4) Will the applicant comply with necessary and reasonable rules of the landlord and comply with health and safety codes?

PRACTICE TIP: An obvious approach to answering these questions is to check the applicant's housing history over the past three-to-five years. An applicant's conduct more than five years ago is not as reliable a predictor of future conduct as more recent conduct.

To assess an applicant's minimal qualifications to meet essential tenancy obligations objectively a landlord may use factors such as the following when choosing a tenant:

- credit standing;
- employment history, with care to provide for equal treatment of applicants who have other sources of income, or who cannot work because of a disability;
- amount (but not source) of income;
- personal references;
- rental history; and
- past bad conduct relevant to reasonable belief applicant may be direct threat to health or safety of current tenants or neighboring property (in public or subsidized housing; see §§2.14-2.15).

As explained in §2.5, however, the fact that the landlord applies selection factors uniformly to all applicants does not guarantee compliance with fair housing law if less stringent criteria could be used to assess the applicant's ability to meet his or her tenancy obligations.

PRACTICE TIP: Landlords would be well advised to establish a uniform screening procedure. For example, a landlord may require all applicants to complete a standard rental application form providing credit information, employment history, references, and rental history (see form in §4.7).

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.4 B. Legal Constraints in Applying Screening Factors

§2.4 B. Legal Constraints in Applying Screening Factors

Screening criteria should relate to legitimate landlord objectives. See §2.3. Failure to apply screening criteria in a justifiable and consistent manner to an applicant who is a member of a protected group may result in exposure to liability under either disparate treatment or disparate impact theories. See §2.63. Failure to follow established procedures may constitute evidence of illegal discrimination. *Seaton v Sky Realty Co.* (7th Cir 1974) 491 F2d 634, 636. In addition, persons with disabilities may request reasonable accommodations in the screening process if necessary to afford them equal opportunity to use and enjoy a dwelling. 42 USC §3604(f)(3)(B); Govt C §12927; CC §54.1(b)(3)(B). See §§2.27-2.27E.

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§2.5 1. Selection Standards Must Not Have Disparate Impact on Protected Classes

Fair housing laws prohibit application of a uniform and objective standard for selecting tenants if the standard excludes a disproportionate number of members of a protected class *and* the landlord does not have a business necessity for using it. *NAACP v The Town of Huntington* (2d Cir 1988) 844 F2d 926, 938; *U.S. v Black Jack* (8th Cir 1974) 508 F2d 1179, 1184; *Sisemore v Master Fin., Inc.* (2007) 151 CA4th 1386, 60 CR3d 719 (plaintiff stated claim for disparate impact on basis of sex and familial status after being denied loan to purchase home she intended to use for home day care operation). But see *Community House, Inc. v City of Boise* (9th Cir 2007) 490 F3d 1041, 1050, citing *International Union v Johnson Controls* (1991) 499 US 187, 204-206, 113 L Ed 2d 158, 111 S Ct 1196 (housing provider may present evidence of legitimate safety concern that justifies discrimination that is not based on stereotypes). See also 24 CFR §1.4(b)(2)(i) (HUD regulations declaring disparate treatment and disparate impact illegal); Govt C §12955.8(b).

Fair housing law borrowed the principle typically referred to as "disparate impact" or "discriminatory effect," from employment discrimination law. A classic example, in the employment context, is the use of height and weight requirements to select applicants for law enforcement positions. Uniform application of these objective requirements operates to exclude a significantly higher percentage of women than of men. In *Dothard v Rawlinson* (1977) 433 US 321, 53 L Ed 2d 786, 97 S Ct 2720, the U.S. Supreme Court invalidated such requirements because the employer failed to show that height and weight standards objectively and accurately assessed job-related characteristics.

Courts have applied the principle of disparate impact consistently in the fair housing area. In *Sisemore v Master Fin., Inc., supra,* the plaintiffs stated a prima facie case for violation of the California Fair Employment and Housing Act (Govt C §§12900-12996) by pleading that a lender's policy against making loans for home day care providers had a disparate impact on women and families with children. *Sisemore*, 151 CA4th at 1417. In *Betsey v Turtle Creek Assocs.* (4th Cir 1984) 736 F2d 983, 988, the court ruled that a landlord's adults-only policy had a racially discriminatory effect that could be justified only if the property owner "prove[d] a business necessity sufficiently compelling to justify the challenged practice." In *Bronson v Crestwood Lake Section 1 Holding Corp.* (SD NY 1989) 724 F Supp 148, the court held that a landlord's refusal to consider applicants whose income was not at least three times the rent, or who received federal Section 8 housing assistance, had a discriminatory effect on African-American and Hispanic applicants. In issuing a preliminary injunction against the triple income and Section 8 policies, the court rejected the landlord's assertion that the policies were necessary to insure payment of rent. See also §2.17. In *Bishop v Pecsok* (ND Ohio 1976) 431 F Supp 34, 36, the landlord explained that he had rejected an African-American after applying criteria that applicants be graduate students and "have a certain financial status so as to be clearly capable of paying the rent." The court noted that these objective criteria violated the Fair Housing Act because the landlord could not establish that his criteria reasonably measured whether an applicant would be a "successful tenant." 431 F Supp at 37. In *Vance v Bakas* (ND Cal, Mar. 1, 2006, No. C-05-3385) 2006 US Dist Lexis 11183, the landlord informed the plaintiffs they would not be allowed to rent the property for the operation of a home day care business. The court found that plaintiffs stated a claim for disparate impact on the basis of familial status and gender under the federal Fair Housing Act (FHA) (42 USC §§3601-3631) and the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996).

Although the California Supreme Court has generally rejected disparate impact analysis in fair housing cases brought under the Unruh Civil Rights Act (CC §51) (see *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 1160, 278 CR 614), both the federal FHA and the California FEHA clearly prohibit unjustified housing practices that have a discriminatory effect on a protected class. For discussion of the Unruh Act, see §2.57.

Some courts consider evidence of discriminatory intent in disparate impact cases. Compare *NAACP v The Town of Huntington* (2d Cir 1988) 844 F2d 926, 935 (intent is not considered in analysis) with *Metro. Hous. Dev. Corp. v Village of Arlington Heights* (7th Cir 1977) 558 F2d 1283 (intent is part of four-part weighing test to determine if conduct resulting in disparate impact violated FHA; proof of intent may not be necessary if other factors are strong enough to justify relief). In *Arlington Heights,* the court observed that the equitable argument for relief under the FHA is stronger when the plaintiff shows that the defendant purposefully discriminated against members of minority groups, and the

absence of evidence of discriminatory intent may be a factor weighing against relief under the Act. 558 F2d at 1292.

Another issue in disparate impact cases has been the court's standard of review in evaluating the reasons for the challenged policy, *i.e.,* how strong must the landlord's evidence be to justify the policy. See, *e.g., Keith v Volpe* (9th Cir 1988) 858 F2d 467. Although some debate over this issue still exists in the federal courts (see, *e.g., Mountain Side Mobile Estates v Secretary of HUD* (10th Cir 1995) 56 F3d 1243 (rejecting compelling necessity test in favor of standard requiring that the policy have a manifest relationship to housing in question), the California legislature in 1993 resolved the issue definitively in cases arising under the state FEHA.

Under California law, a landlord's selection criteria that have a discriminatory effect must be "necessary to the operation of the business and effectively carry out the significant business need it is alleged to serve." Govt C §12955.8(b). Moreover, a court must consider "whether or not there are feasible alternatives that would equally well or better accomplish the purpose advanced with a less discriminatory effect." Govt C §12955.8(b)(1).

The importance of disparate impact analysis to the landlord's selection criteria cannot be overstated. Although use of disparate impact to challenge a policy is generally limited to members of a protected class, the doctrine's implications extend beyond a landlord's treatment of particular classes. Because many criteria—particularly those that relate to creditworthiness and income—may have a racially discriminatory effect, a landlord must be careful to choose criteria that he or she can justify as necessary. See *Bronson v Crestwood Lake Section 1 Holding Corp.* (SD NY 1989) 724 F Supp 148. See also *Sisemore v Master Fin., Inc.* (2007) 151 CA4th 1386, 60 CR3d 719 (plaintiff stated claim for disparate impact on basis of sex and familial status after being denied loan to purchase home to use for home day care operation).

PRACTICE TIP: If other criteria measure an applicant's ability to meet his or her tenancy obligations, and have less of an impact on protected classes, a landlord should use those criteria. The bottom line is that a landlord should use factors that measure minimal requirements for tenancy accurately and should not use excessively stringent criteria that screen out applicants who would be good tenants.

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§2.6 2. Were Permissible Factors Used to Reject Applicant?

Even when a landlord adopts permissible factors in selecting tenants (see §2.5), a court may scrutinize whether the landlord actually relied on the factors he or she claims to have considered in rejecting an applicant who is a member of a protected class. Under the decision in *Bush v Kaim* (ND Ohio 1969) 297 F Supp 151, 163, a court may ask the following questions when making this determination:

(a) Did the landlord request information concerning selection factors from the plaintiff and other applicants?

(b) Did the landlord secure such information from other sources?

(c) Did the landlord request the information from the plaintiff and other applicants while selecting a tenant?

(d) Did the landlord make any attempt to check the accuracy of the information?

(e) Did the landlord perform this check while he or she was deciding to whom to rent?

(f) Did other applicants have better ratings in these areas than the plaintiff?

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§2.7 III. SELECTION CRITERIA AND REASONABLE ACCOMMODATIONS

Fair housing laws play an important role in a landlord's choice of particular selection criteria. See §§2.8-2.27H. Landlords typically have an interest in applying uniform and objective criteria to lessen their administrative burdens. Consistent application of uniform and objective criteria also provides a landlord some measure of protection from legal challenges to the selection process, although there are major exceptions to this principle.

Landlords follow a number of different practices in selecting tenants, varying from an informal meeting with the prospective tenant when the premises are shown, to an extensive credit and reference check. With the exception of publicly subsidized housing projects (see §§2.11-2.18), no laws require that landlords use any particular tenant selection procedure.

Before the tenancy begins or during a tenancy, the applicant or tenant may ask the landlord to make a reasonable accommodation under applicable fair housing criteria. See §§2.26-2.27E. See also §§2.9D, 2.21, 2.25A, 2.30, 2.50, 2.60.

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§2.8 A. Tenant Character and Safety Issues

Landlords may wish to establish selection criteria concerning the tenant's general character, but this inquiry is fraught with risk because of the potential for class-based discrimination, arbitrary decisions, and invasions of privacy. On the other hand, case law has established that landlords have some duty to protect the public and other tenants from foreseeable harms from a tenant that could have been prevented. See §3.72; *Rosales v Stewart* (1980) 113 CA3d 130, 169 CR 660 (child killed by bullet fired from adjoining premises; parents stated cause of action by alleging that perpetrator's landlord knew of tenant's dangerous propensities before renewing lease). See also the federal law and regulations authorizing owners of public or subsidized housing to inquire about an applicant's prior bad or criminal conduct relevant to the reasonable belief that the applicant may threaten the health or safety of other tenants or neighbors, discussed in §§2.14-2.15.

Case law has not, however, established a landlord's duty to acquire information from applicants, such as gang membership, criminal background, or drug abuse, to protect other tenants from possible harm. Recent cases suggest the California courts have moved to lessen the responsibility of landlords for the safety of the tenants. See, *e.g.*, *Castaneda v Olsher* (2007) 41 C4th 1205, 63 CR3d 99; *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 107 CR2d 617; *Peterson v Superior Court* (1995) 10 C4th 1185, 43 CR2d 836. Nonetheless, if a landlord knows (or is put on notice) that a tenant subject to eviction or enforcement of contractual obligations is causing injuries to other tenants, then the landlord must take action to avoid those injuries. See *Barber v Chang* (2007) 151 CA4th 1456, 60 CR3d 760; *Madhani v Cooper* (2003) 106 CA4th 412, 130 CR2d 778; *Rosales v Stewart* (1980) 113 CA3d 130, 169 CR 660; *Uccello v Laudenslayer* (1975) 44 CA3d 504, 118 CR 741. This theory has been extended under the Civil Rights Act of 1866 (42 USC §§1981, 1982) to a landlord who failed to act against white tenants in the complex who racially harassed a black tenant. *Bradley v Carydale Enters.* (ED Va 1989) 730 F Supp 709.

PRACTICE TIP: Predicting a person's conduct based on previous acts is difficult. Tenant advocates argue that potential tort liability is a weak justification for a landlord to make intrusive and broad inquiries about an applicant's criminal record or general character unless the inquiry is authorized by and conforms to a specific law (see, *e.g.,* §§2.14-2.15). Landlords, however, may be very concerned about the safety of all residents, not just from a legal point of view, but for business and social reasons. Advising a landlord client, therefore, requires the consideration of numerous factors, including potential tort liability, antidiscrimination laws, and the Constitution.

California's constitutional right to privacy (Cal Const, art I, §1) protects persons from being required to disclose personal information if they have a reasonable expectation of privacy, the invasion of privacy is serious, and countervailing interests do not justify the disclosure. *Hill v National Collegiate Athletic Ass'n* (1994) 7 C4th 1, 26 CR2d 834. See also *Loder v City of Glendale* (1997) 14 C4th 846, 59 CR2d 696.

While fair housing laws prohibit landlords from using selection criteria that have a disparate impact on protected classes, when the landlord lacks a business necessity for using such criteria (see §2.5), denial of admission and termination of tenancy based on specifically-defined types of criminal background is authorized for HUD-assisted housing (24 CFR §5.854; 24 CFR §5.856), public housing (42 USC §1437d(*l*)(6); 24 CFR §960.204; 24 CFR §966.4(*l*)(5)), and tenant-based Section 8 (24 CFR §982.307(a)(3)(iv); 24 CFR §982.310(c)). These regulations were upheld by the Supreme Court in *U.S. Dep't of Hous. & Urban Dev. v Rucker* (2002) 535 US 125, 152 L Ed 2d 258, 122 S Ct 1230 (lack of knowledge of criminal conduct not defense to public housing eviction; statute and regulations are constitutional). Landlords should limit any inquiries about an applicant's background to recent criminal convictions or behavior that directly relate to tenancy obligations. Compare *Orloff v Los Angeles Turf Club* (1951) 36 C2d 734, 227 P2d 449 (excluding from racetrack person with immoral reputation for acts committed more than 6 years ago violated civil rights), with *Lowe v City of Commerce* (1997) 59 CA4th 1075, 69 CR2d 356 (ejecting from casino person who was actively harassing employees and customers did not violate civil rights).

The federal Fair Housing Act provides that a landlord is not required to rent to disabled applicants "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial

physical damage to the property of others." 42 USC §3604(f)(9). Congress intended that a landlord be able to reject an applicant under §3604(f)(9) only "[i]f the landlord determines, by objective evidence that is sufficiently recent as to be credible, and not from unsubstantiated references, that the applicant would pose" a threat. H Rep No. 100-711, 100th Cong, 2d Sess (1988), reprinted in 1988 US Code Cong & Ad News 2191. Accordingly, an objective, narrowly focused, and uniformly applied inquiry about the threat posed by *all applicants* to the property or to other tenants' health and safety is probably permissible because it relates to essential tenancy obligations.

WARNING: Balancing of interests between applicants and affected tenants requires careful evaluation. Even if a landlord has assessed an applicant as a physical threat under permissible standards, the landlord may have an obligation to make a reasonable accommodation to an applicant with a disability. See §§2.27-2.27E.

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B. Ability to Pay Rent

§2.9 1. Credit and Income Information

The tenant's ability to pay rent is central to the landlord's legitimate interest in renting units on the private housing market. A landlord may establish procedures to evaluate an applicant's ability to pay rent. 59 Ops Cal Atty Gen 223 (1976). A landlord, however, may not use an applicant's source of income as a basis to deny tenancy. See §2.9B. See also *Bush v Kaim* (ND Ohio 1969) 297 F Supp 151, 162. Such procedures generally require the prospective tenant to complete a standard application form that provides information regarding the tenant's employment, past rental history, and references. The application may also require credit information, including sources of income, living expenses, and current and long-term liabilities. See CC §1940.3(c)(2). The information should be sufficiently detailed to enable the landlord to evaluate it and verify its accuracy. It also should authorize the landlord to check references, and to verify the information independently. See rental application form in §4.10.

A landlord may subscribe to a credit reporting agency to verify the applicant's credit status or consult an agency that tracks unlawful detainer actions in the courts to verify the applicant's rental history. A number of organizations provide these services to landlords and many of them are able to track unlawful detainer actions statewide. However, no consumer reporting agency may produce or furnish a consumer report containing unlawful detainer actions if the tenant was the prevailing party or when the action is resolved by settlement agreement. See CC §1786.18.

When using services that report unlawful detainer actions to assess rent payment ability, however, a landlord should not consider a listed action unless the plaintiff was the prevailing party. See CC §§1785.13, 1786.18. Although courts have held unconstitutional (as a violation of free speech) CC §1785.13's prohibition against a credit agency *reporting* unlawful detainer actions unless the landlord is the prevailing party (see *U.D. Registry, Inc. v State* (2006) 144 CA4th 405, 429, 50 CR3d 647; *U.D. Registry, Inc. v State* (1995) 34 CA4th 107, 40 CR2d 228), another decision held this type of noncommercial speech is not without limitations and a tenant may clarify inaccurate or incomplete information reported by an unlawful detainer registry (see *Schoendorf v U.D. Registry, Inc.* (2002) 97 CA4th 227, 118 CR2d 313). Therefore, a landlord considering a prospective tenant should investigate to determine which party prevailed in the reported action. See §§4.9, 13.75. For further discussion on the effect of an unlawful detainer judgment on consumer credit reporting, see California Eviction Defense Manual §26.38 (2d ed Cal CEB 1993).

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§2.9A 2. Minimum Income Requirements

A landlord may establish certain minimum income requirements, but they must be tailored carefully to the applicant's actual qualifications for tenancy. Courts have split on use of rent-to-income ratios that preclude renting to a tenant whose rent would exceed a designated percentage of his or her monthly income. In *Bronson v Crestwood Lake Section 1 Holding Corp.* (SD NY 1989) 724 F Supp 148, the court invalidated a triple income requirement under the federal Fair Housing Act because of its racially discriminatory effect. On the other hand, in *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 278 CR 614, the California Supreme Court upheld, under the Unruh Civil Rights Act (CC §51), the same type of triple income requirement that the *Bronson* court had rejected. The message to landlords from this conflicting case law is that they use stringent rent-to-income ratios at their peril. This is particularly true in light of the amendments to state fair housing law, enacted after the *Harris* decision, that place a heavy burden on landlords to justify facially neutral policies that have a discriminatory effect. Govt C §12955.8.

Essentially, it is unlawful, where there is a government rent subsidy, to use a financial or income standard in assessing eligibility that is not based on the portion of rent to be paid by the tenant. Govt C §12955(o). In other words, if the landlord used a three-times-the-amount-of-rent standard for income, and the rent was $600 per month, an applicant who paid only 50 percent of the total monthly rent would need to receive $900 per month in income to qualify.

Whatever standards a landlord establishes, they must be applied in a uniform and nondiscriminatory manner. See *U.S. v Reddoch* (5th Cir 1972) 467 F2d 897 (African-American applicant subjected to credit-check ruse); *Hall v Freitas* (ND Cal 1972) 343 F Supp 1099 (African-American applicants subjected to more stringent background check). A landlord must be careful to avoid establishing arbitrary financial standards because of disparate impact analysis, which requires that a landlord establish a significant justification for policies that have a discriminatory effect on a protected class (see §2.5). Such a standard may also violate the Unruh Civil Rights Act's prohibition against arbitrary discrimination. See §2.58.

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§2.9B 3. Source of Income Protections

The California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) expressly prohibits a landlord from using *source* of income as a basis for rejecting a prospective tenant. Govt C §12955. See *Vance v Bakas* (ND Cal, Mar. 1, 2006, No. C-05-3385) 2006 US Dist Lexis 11183 (plaintiff stated claim for source of income discrimination in violation of Govt C §12955(a) when landlord refused to rent after being informed that plaintiff intended to operate licensed home day care on premises). Moreover, a landlord's refusal to consider certain applicants because of their source of income may state a claim under the federal Fair Housing Act. See *Gilligan v Jamco Dev. Corp.* (9th Cir 1997) 108 F3d 246 (exclusion of applicants receiving public benefits for dependent children states claim of familial status discrimination). Under California law, source of income "means lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant." For the purposes of §12955, the landlord is not considered a representative of a tenant. Govt C §12955(p)(1). The statute provides that it is not discriminatory to make a written or oral inquiry concerning "the level or source of income." Govt C §12955(p)(2). See §2.19.

It is unclear from the statute's wording whether the law applies to certain Section 8 Housing Choice Voucher programs in which the rental assistance payments are made directly to the landlord. Some communities have adopted local ordinances that prohibit certain forms of discrimination against existing, and sometimes potential, tenants holding Section 8 certificates or vouchers or other kinds of tenant-based rental assistance. See, *e.g.*, Corte Madera Mun C §5.30.020; San Francisco Police C §3304(a)(5); East Palo Alto Mun C §14.16.010; Los Angeles Rent Stabilization Ordinance §151.04(b). Some state courts have ruled that state and local laws prohibiting source of income discrimination also prohibit discrimination against tenants with housing assistance such as Section 8. See, *e.g., Commission on Human Rights & Opportunities v Sullivan* (Conn 2008) 939 A2d 541; *Montgomery County v Glenmont Hills Assocs.* (Md App 2007) 936 A2d 325; *DiLiddo v Oxford St. Realty, Inc.* (Mass 2007) 876 NE2d 421.

PRACTICE TIP: Because the state law is unclear (and local laws may vary), before rejecting a tenant based on the offer of Section 8 Housing Choice Voucher assistance (1) consider the social purpose of the Section 8 program: to provide housing opportunities for less fortunate households who may live or work in the community, and (2) check for local ordinances prohibiting discrimination against tenants with rental assistance.

The Seventh Circuit has held that a landlord's refusal to accept a Section 8 Housing Choice Voucher does not violate the source of income discrimination restrictions of the Equal Credit Opportunity Act (ECOA) 15 USC §1691, finding that a residential lease is not a credit transaction within the meaning of the ECOA. *Laramore v Ritchie Realty Mgmt. Co.* (7th Cir 2005) 397 F3d 544.

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§2.9C 4. Income and Marital Status

A landlord may not use marital status as a basis for applying different financial standards. The Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) also makes it unlawful to use a financial or income standard that fails to treat the *aggregate income* of persons proposing to reside together on the same basis as the aggregate income of married persons. Govt C §12955(n). In *Hess v FEHC* (1982) 138 CA3d 232, 187 CR 712, the landlord required each member of an unmarried couple to satisfy the financial standards separately; if the couple had been married, only one of them would have been required to satisfy the standards. The court of appeal held that this practice violated FEHA because it discriminated on the basis of marital status. Govt C §12955. See §2.50. The landlord's ability to use married couples' community property to satisfy any unpaid rent claims did not justify the differential treatment of unmarried couples. The landlord could achieve the same financial protection by requiring each member of an unmarried couple to assume personal liability for the rent.

The Unruh Act (CC §51) also prohibits discrimination based on marital status, including discrimination against same sex couples and registered domestic partners. *Koebke v Bernardo Heights Country Club* (2005) 36 C4th 824, 31 CR3d 565. See also *Smith v FEHC* (1996) 12 C4th 1143, 51 CR2d 700 (under Govt C §12955, landlord cannot use religious belief that unmarried cohabitation is sin as basis to refuse to rent apartment to unmarried couple; see §2.50) and *Atkisson v Kern County Hous. Auth.* (1976) 59 CA3d 89, 130 CR 375 (housing may not be denied to cohabiting single person or family group solely because unmarried or unrelated by blood or adoption).

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§2.9D 5. Income and Disability

A state statute protects persons with disabilities from the imposition of income requirements. A landlord may not refuse to rent to a person with a disability merely because he or she is partially or wholly dependent on the income of a spouse, unless the spouse is not a party to the rental agreement. CC §54.1(b)(7). See §2.26. A landlord may, however, consider the aggregate financial status of a disabled person and his or her spouse. CC §54.1(b)(7).

In *Giebeler v M & B Assocs.* (9th Cir 2003) 343 F3d 1143, the court held that allowing family members to cosign a lease guaranteeing rent payment by a disabled person unable to work was a reasonable accommodation of the tenant's inability to meet the landlord's income requirements. But see *Bell v Tower Mgmt. Servs.* (D NJ, July 15, 2008, No. 07-CV-5305) 2008 US Dist Lexis 53514 (reasonable accommodations case must establish nexus between accommodations being requested and necessity for providing handicapped individuals equal opportunity to use and enjoy housing; in order to establish need to waive minimum income requirement or that waiver would directly ameliorate disability, plaintiff must plead she could have met income requirement before onset of disability caused her to be unable to work); *Sutton v Freedom Square, Ltd.* (ED Mich, Oct. 15, 2008, No. 07-14897) 2008 US Dist Lexis 81600 (disabled rental applicant's request to waive minimum credit standard was unreasonable because it constituted fundamental alteration of landlord's business).

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§2.10 C. Subjective Criteria Should Be Avoided

A landlord's use of valid, objective selection factors applied in a uniform and nondiscriminatory manner is the best means of avoiding challenges to a tenant-selection procedure. Landlords should apply subjective factors cautiously. Although federal civil rights statutes, as well as the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), prohibit discrimination against particular classes, California's Unruh Civil Rights Act (CC §51) prohibits all arbitrary discrimination. Thus, although some forms of discrimination do not violate federal statutes or the FEHA, arbitrary application of subjective factors may violate the Unruh Act. See *In re Cox* (1970) 3 C3d 205, 90 CR 24, in which the court held that the refusal to admit a person to a shopping center because of his long hair and unconventional dress was a violation of the Unruh Act. See §2.58.

Furthermore, a court will scrutinize a landlord's use of subjective factors closely to determine whether the landlord used them to cover illegal discrimination. See *Stevens v Dobs, Inc.* (4th Cir 1973) 483 F2d 82, in which the refusal to rent to an African-American applicant because of his alleged "offensive odor" was held to be a subterfuge for racial discrimination. A landlord should not rely solely on subjective factors in the tenant-selection process. The absence of objective criteria itself can be important evidence supporting a finding of racial discrimination. *U.S. v Real Estate Dev. Corp.* (ND Miss 1972) 347 F Supp 776, 782.

Nevertheless, in a few narrow contexts, courts have upheld landlords' use of subjective factors, provided that they do not disguise illegal discrimination. For example, a landlord may reject an applicant simply because he or she does not like the applicant, without violating federal civil rights statutes. *Bush v Kaim* (ND Ohio 1969) 297 F Supp 151, 163. Similarly, in *Normal v St. Louis Concrete Pipe Co.* (ED Mo 1978) 447 F Supp 624, the court held that a landlord did not wrongfully discriminate by denying an African-American couple's rental application because of their persistent, harassing, and rude demands that the landlord act on their application before completion of regular credit verification procedures.

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§2.11 D. Special Criteria Applicable to Public and Subsidized Housing

Publicly subsidized projects differ from private housing in terms of the factors that landlords may use in selecting tenants. Although fair housing laws apply to publicly subsidized projects, public housing authorities and private, subsidized landlords are subject to additional restrictions on tenant selection. See §§2.12-2.18. For an excellent discussion of tenant-selection criteria in publicly assisted or subsidized projects, see National Housing Law Project, HUD Housing Programs: Tenants' Rights (3d ed 2004).

WARNING: Many of the regulations and guidelines applicable to the selection of tenants for federally or state subsidized public or subsidized housing may have been temporarily suspended or modified to accommodate people displaced by Hurricane Katrina. Landlords of subsidized units, including units subsidized under state and federal tax credit programs (see §2.18A), should check with the appropriate regulating agency (*i.e.*, HUD, HCD, or the local housing authority) to find out if any changes are in effect.

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§2.12 1. Some Immigrants Barred From Subsidized Housing

The Quality Housing and Work Responsibility Act of 1998 (QHWRA) amended 42 USC §1436a by repealing the language granting discretion to public housing authorities to ignore the immigration status of housing assistance applicants. See Pub L 105-276, Title V, §592, 112 Stat 2461. Before the amendment, housing authorities were required to verify status but allowed to ignore the results. The amendment effectively permits the housing authorities to choose not to take any steps to verify immigration status, but, if they do, they may grant assistance only to those who qualify under the amendment.

Only citizens, nationals, and six categories of immigrants are eligible to receive housing assistance. Nevertheless, the statute permits applicant families in which one or more persons is a citizen or eligible immigrant to receive prorated assistance even though ineligible immigrants live in the household. See 42 USC §1436a, 24 CFR §5.500, and 24 CFR §983.4.

Some of the regulations on immigrants' access to public and subsidized housing in light of QHWRA and the Use of Assisted Housing by Aliens Act of 1996, Title V, Subtitle E of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub L 104-208, §§571-577, 110 Stat 3009-684—3009-688) have been revised and some have not. See generally 24 CFR pt 5, subpt E and pt 401, subpt E; for regulations applicable to certain housing programs, see 24 CFR §§236.765, 880.504, 880.603, 882.514, 882.515, 882.808, 884.214, 884.223, 886.121, 886.124 and 886.321.

For certain housing subsidized under state programs that it administers, the state Department of Housing and Community Development (HCD) has adopted regulations that place restrictions against renting to immigrants who are not citizens or "qualified aliens." See 25 Cal Code Regs §§6935-6939.4. The stated purpose for the regulations is to implement the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (Pub L 104-193, 110 Stat 2104). See 8 USC §1621. However, housing owned or sponsored by nonprofit charitable organizations is exempt from these regulations. 25 Cal Code Regs §§6935.4, 6939(a). And when only state subsidies are involved, the regulations are invalid to the extent they require landlords to inquire about or obtain documents regarding a tenant's or prospective tenant's immigration or citizenship status. CC §1940.3. The California Housing Finance Agency (CHFA) has promulgated similar regulations for the subsidized housing programs that it administers. See, *e.g.,* 25 Cal Code Regs §§12001-12108. If a housing complex is funded under both HCD and CHFA programs, the regulations governing HCD programs prevail over those of CHFA. 25 Cal Code Regs §12104(b).

WARNING: Enforcement of the HCD regulations was permanently enjoined. See *Mercy Charities v Department of Hous. & Community Dev.* (SF Super Ct, Aug. 9, 1999, No. 305541) (order granting peremptory writ of mandate). The Department subsequently issued a formal notice that it will not enforce these regulations under the order. HCD Administrative Notice: Monitoring & Management 00-02, Suspension of HCD Enforcement of Applicant Verification Regulation, August 16, 2000. (This notice is available from HCD; see Directory.)

Because commentators also contend that the CHFA regulations are vague and overly broad, the regulations may undergo numerous challenges based on, among other things, the equal protection clause of the federal constitution and antidiscrimination statutes. Consequently, until the issues are resolved through the Administrative Procedures Act process and the courts, landlords of state-subsidized housing should first contact CHFA before excluding immigrant tenants or checking immigration status, unless otherwise notified that they are required to do so.

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§2.13 2. Authority to Select Tenants

The authority to select tenants for publicly subsidized housing depends on the type of project or program:

- If a public housing authority owns the units (or leases them from the owner), it assumes responsibility for selecting the tenants. See §2.14.
- Under the Section 8 Housing Choice Voucher programs, private housing providers own the units, but public assistance pays part of the tenants' rent. In these programs, the housing authority determines the tenants' eligibility for assistance, but the private owner selects the tenants. See §2.17. "Section 8" refers to §8 of the revised United States Housing Act of 1937 (42 USC §§1437-1437aaa-8). It was added by the Housing and Community Development Act of 1974 as 42 USC §1437f. See §1.36.
- When a private landlord has an agreement with HUD, the State of California, or a local government under which the government entity provides mortgage insurance or housing assistance to the landlord, the public housing authority is not involved in selecting tenants. Instead, the contract between the landlord and HUD and the government entity regulations govern the landlord's tenant-selection process. See §2.18.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/ a. By Public Housing Authority/§2.14 (1) Specific Selection Criteria and Preferences

a. By Public Housing Authority

§2.14 (1) Specific Selection Criteria and Preferences

All public housing authorities must now adopt five-year Public Housing Agency Plans (PHA Plans) that, among other things, must include the housing authority's policy on admissions. 42 USC §1437c-1; 24 CFR pt 903. The housing authority must also prepare and submit to the Department of Housing and Urban Development (HUD) an Annual Plan that includes a statement describing policies that govern tenant eligibility, selection, and admissions. 24 CFR §903.7. Housing authorities must certify in their PHA Plans that the housing authority's policies and practices affirmatively further fair housing. 24 CFR §903.7(o). Consequently, in addition to the statutory and regulatory parameters described below, the PHA Plan and the Annual Plan provide important information regarding permissible selection criteria.

When it selects tenants for units that it owns, a public housing authority must apply criteria that

- are "reasonably related to individual attributes and behavior of an applicant and shall not be related to those which may be imputed to a particular group or category of persons of which an applicant may be a member" (24 CFR §960.203(a));
- conform to federal, state, and local fair housing laws; and
- do "not automatically deny admission to a particular group or category of otherwise eligible applicants (*e.g.,* unwed mothers or families with children born out of wedlock)" (*Ressler v Pierce* (9th Cir 1982) 692 F2d 1212, 1218).

See generally 24 CFR §§960.202-960.208. The housing authority may apply other criteria, including preferences. Under the Quality Housing and Work Responsibility Act of 1998 (QHWRA) (Pub L 105-276, 112 Stat 2518, 2547), any preferences established must be based on local needs and priorities established in consideration of information obtained in the public comment process for preparation of the local Public Housing Agency Plan and Consolidated Plan. 42 USC §1437d(c)(4); 24 CFR §960.206(a). Housing authorities must also avoid any preferences that would have a disparate impact on the classes of persons protected by the state and federal fair housing laws unless it is "necessary to achieve an important purpose sufficiently compelling to override the discriminatory effect." Govt C §12955.8. Housing authorities may be required periodically to collect data on their terminations of tenancies and housing assistance to identified protected classes. See, *e.g*., Health & S C §34328.1(c). See also §§2.5, 2.65; *Langlois v Abington Hous. Auth.* (D Mass 2002) 234 F Supp 2d 33, 68 (24 CFR §5.105(a) provides that residency preferences may be adopted or implemented only in accordance with fair housing and other nondiscrimination laws). HUD Notice PIH 2005-5(HA) permits housing authorities to provide preferences or an admission set aside for families with a disabled person.

WARNING: HUD allowed PHAs and federally subsidized landlords to create special temporary preferences for people displaced by Hurricane Katrina. These may remain in effect at some PHAs and in some other subsidized housing.

HUD regulations also permit preferences for persons with disabilities (24 CFR §960.206(b)(3)), victims of domestic violence (24 CFR §960.206(b)(4)), and single persons who are elderly, displaced, homeless, or disabled (24 CFR §960.206(b)(5)).

When applicants are equally qualified under criteria meeting these standards, a housing authority is required to select among them by some reasonable means, including chronological order of application. 24 CFR §960.202(a)(2)(iv); *Ressler v Pierce, supra*; *Holmes v New York City Hous. Auth.* (2d Cir 1968) 398 F2d 262. However, QHWRA authorizes housing authorities to use separate "site based" waiting lists in many situations, rather than one centralized, housing-authority-wide waiting list. 42 USC §1437d(r). Authorities may skip over a household on a waiting list if necessary to achieve a "deconcentration of poverty and income-mixing." 42 USC §1437n(a)(3).

Title 24 CFR pt 903, subpt A provides that a PHA may adopt admissions criteria in its PHA Plan to decrease the "concentration of poverty" in complexes in which the income of existing residents falls below a certain income range. Among other things, a PHA may establish a preference for admission of working families or skip a family on the waiting list to reach another family in an effort to further the goals of the PHA's deconcentration policy. 24 CFR §903.2.

However, these criteria must not have the purpose or effect of denying or delaying admission to persons protected by the fair housing laws. 24 CFR §903.2(d); see also 24 CFR §960.206(b)(1)(iii) and discussion above.

HUD authorizes housing authorities to preclude "admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on the residents or the project environment." 24 CFR §960.202(a)(2)(iii). Specifically, under 24 CFR §960.203(c), the housing authority may consider an applicant's:

- past performance in meeting financial obligations, especially rent;
- "record of disturbance of neighbors, destruction of property, or living or housekeeping habits at prior residences which may adversely affect the health, safety or welfare of other tenants"; and
- "history of criminal activity involving crimes of physical violence to persons or property which would adversely affect the health, safety or welfare of other tenants."

It is significant that the housing authority must also consider mitigating evidence about an applicant who has an unfavorable tenant history. This evidence (including the seriousness of the offense) includes "the time, nature, and extent of the applicant's conduct [and] factors which might indicate a reasonable probability of favorable future conduct." 24 CFR §960.203(d). Furthermore, a housing authority may not summarily reject an applicant because the applicant owes rent for a prior tenancy. The applicant is entitled to a hearing to determine whether there are legitimate defenses to the rent claim or changed circumstances affecting the applicant's ability to pay rent. *Neddo v Housing Auth.* (ED Wis 1971) 335 F Supp 1397.

The QHWRA grants the right to all public housing authority tenants to have one or more pets, subject to reasonable requirements that may include requiring payment of a nominal fee and pet deposit and restrictions or prohibitions based on number, size, or dangerousness of the pets. 42 USC §1437z-3; 24 CFR §§5.350-5.380.

If a housing authority has acted in any way to discriminate, then an action may be maintained under the Fair Housing Act (race, color, national origin, sex, religion, familial status, disability), Title VI of the Civil Rights Act of 1964 (federally-assisted programs discriminating based on race, color, or national origin), the Americans With Disabilities Act, Title II, Subtitle A (state or local government discriminating activities against the disabled), or Section 504 of the Rehabilitation Act of 1973 (federally-assisted programs discriminating against the disabled). In addition, the Fair Housing Act requires HUD and recipients of HUD funds not only to not discriminate but also to affirmatively further fair housing and seek open housing including through regional and metropolitan remedies. 42 USC §3608(e)(5); *Trafficante v Metropolitan Life Ins. Co.* (1972) 409 US 205, 34 L Ed 2d 415, 93 S Ct 364; see also *Hills v Gautreaux* (1976) 425 US 284, 47 L Ed 2d 792, 96 S Ct 1538.

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§2.14A (2) Residency Preferences

Residency preferences must not "have the purpose or effect of delaying or otherwise denying admission to the program" based on the protected classes. 24 CFR §960.206(b)(1)(iii). Local residency preferences or "working family" preferences may violate the federal Fair Housing Act if they would disproportionately exclude racial or ethnic minorities. *Comer v Cisneros* (2d Cir 1994) 37 F3d 775, 793. See also *Langlois v Abington Hous. Auth.* (1st Cir 2000) 207 F3d 43 (injunction against residency preferences upheld for some local housing authorities and vacated for others); *Davis v New York City Hous. Auth.* (2d Cir 2002) 278 F3d 64 (injunction against working family preferences). HUD regulations permit preferences for working families (24 CFR §960.206(b)(2)), but under *Davis*, such preferences must not violate the fair housing laws.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.15 (3) Checking Criminal Background of Applicants; Controlled Substances, Alcohol Abuse

§2.15 (3) Checking Criminal Background of Applicants; Controlled Substances, Alcohol Abuse

Congress has provided housing authorities with additional powers to obtain information about the criminal background of applicants and to prohibit occupancy by persons who illegally use a controlled substance. Under the Quality Housing and Work Responsibility Act of 1998 (QHWRA) (Pub L 105-276, 112 Stat 2518, 2634), the National Crime Information Center, police departments, and other law enforcement agencies must, on request, provide information to public housing agencies concerning the "criminal conviction records" of adult applicants for, or tenants of, public housing. A law enforcement agency may provide information on the conviction of a juvenile only to the extent that applicable state, local, or tribal law will permit. 42 USC §1437d(q). Finally, the housing authority must also ensure that any criminal records it receives are:

- Kept confidential;
- Not disclosed to any person unless an officer, employee, or authorized agent of the authority, with a job-related need to have access to the information; and
- Destroyed once the purpose for which the record was requested has been accomplished.

42 USC §1437d(q)(4), (5). The law provides, however, that "[b]efore an adverse action is taken with regard to assistance under this title on the basis of a criminal record, the public housing agency shall provide the tenant or applicant with a copy of the criminal record and an opportunity to dispute the accuracy and relevancy of that record." 42 USC §1437d(q)(2).

The QHWRA further provides that housing authorities may require applicants to sign releases allowing the authority to receive information from drug treatment facilities, but only regarding whether the applicant is currently illegally using a controlled substance. The authority may only ask applicants to sign the release if it requires all applicants to sign; it may only request information from treatment facilities if it makes requests for all applicants who have criminal records or all applicants with a tenant history of property destruction, violence, or interference with the peaceful enjoyment of the premises of another tenant. 42 USC §1437d(t)(3).

A tenant who has been evicted from federally assisted housing for drug-related criminal activity during the previous 3 years is ineligible to live in public housing unless the tenant has successfully completed a rehabilitation program approved by the housing agency. 42 USC §13661(a). Persons who the authority determines to be illegal drug users or alcohol abusers or who exhibit a pattern of illegal use or abuse are also ineligible; however, the authority may consider whether the person has been rehabilitated or is enrolled in a supervised rehabilitation program and is no longer an illegal user or abuser. 42 USC §13661(b). If a housing authority determines that a member of the applicant household "is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents," the authority may exclude the household. 42 USC §13661(c). If an applicant engaged in such activity prior to a reasonable period of time preceding admissions determination, the authority may require the applicant to submit sufficient evidence to determine that the applicant has not engaged in any criminal activity during the reasonable period. 42 USC §13661(c)(2). See also 24 CFR §960.204(a)(3), which expressly requires the PHA to establish standards to permanently prohibit admission if any household member has ever been convicted of drug-related criminal activity for the production or manufacture of methamphetamine on the premises of federally assisted housing.

The provisions of QHWRA also require housing agencies to exclude all households that include a registered sex offender. The PHA must conduct background checks on all applicants. An applicant household denied admission must be afforded the opportunity to dispute the accuracy and relevance of the information. See 42 USC §13663. This federal law overrides state law prohibitions against the release of information to a public housing agency concerning whether an applicant is subject to a lifetime registration requirement. 83 Ops Cal Atty Gen 143 (2000).

On a public housing agency's right to evict a tenant because of a household member's, guest's, or employee's drug-related activity, see *HUD v Rucker* (2002) 535 US 125, 152 L Ed 2d 258, 122 S Ct 1230, holding that 42 USC

§1437d(*l*)(6) permits housing authorities, in their discretion, to evict tenants for drug-related activity of household members or guests regardless of whether the tenant knew or should have known of the activity. See also *Matter of Yancey v New York City Hous. Auth.* (Sup Ct 2009) 879 NYS2d 661 (reversed eviction order on finding that hearing officer mistakenly believed that termination of tenancy was required under facts and that officer had no discretionary power under regulations and *Rucker* decision). But see *Stevens v Housing Auth. of S. Bend* (ND Ind, July 22, 2008, No. 3:08-CV-51) 2008 US Dist Lexis 55935 (distinguishing *Rucker* and finding that criminal activity outside unit by persons who were not residents, guests, or under tenant's control is not grounds for eviction). See also extensive discussion of this issue in California Eviction Defense Manual §§18.17A, 18.18 (2d ed Cal CEB 1993).

A housing authority may bring an action to vacate a longstanding consent decree based on changes to HUD law, regulations, and circulars. See *Brown v Philadelphia Hous. Auth*. (ED Pa 2002) 237 F Supp 2d 567, 573, rev'd (3d Cir 2003) 350 F3d 338. In *Brown,* the lower court held that there were no statutory or regulatory changes that rendered the consent decree inequitable, and that the housing authority had failed to demonstrate any conflict between the consent decree and current federal law and regulations. The court of appeal reversed, holding that there need not be a conflict to justify vacating a consent decree.

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§2.15A (4) Denial of Admission Based on Status as Domestic Violence Victim Prohibited

As long as an applicant is otherwise qualified for admission, public housing authorities are expressly prohibited from denying admissions because the applicant is a victim of domestic violence, dating violence, or stalking. 42 USC §1437d(c)(3). See also 42 USC §1437c-1(d)(13).

The PHA or the landlord may request an individual to certify, on a HUD-approved form, that the individual is a victim of domestic violence and that any incidents in question are of actual or threatened abuse. The individual must provide certification within 14 days of the request and must include the name of the abuser. The applicant may satisfy this certification requirement by (1) providing documentation signed by a staff member of a victim service provider, an attorney, or a medical professional from whom the victim sought assistance, or (2) producing police or court records. All information provided must be kept confidential. 42 USC §1437d(u). PHAs must also provide notice to tenant applicants of their rights under these laws, including the right to confidentiality. 42 USC §1437d(u)(2)(B).

For further discussion of laws protecting victims of domestic violence, see §2.27H.

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b. Private Landlord and Housing Authority: §8 Housing Choice Voucher Programs

§2.16 (1) Applicant Eligibility Determined by Public Housing Authority

HUD's Section 8 housing programs (42 USC §1437f) place restrictions on tenant selection that affect both the private landlord and the public housing authority. Under this program, the responsibility for selecting tenants is divided between the public housing authority and the private landlord. The housing authority determines the tenants' eligibility for Section 8 assistance and issues a voucher. The amount of rental assistance provided is calculated by subtracting the amount of adjusted income that the tenants will pay for rent from the rent established by the landlord. Landlords may charge market rent; the housing authority does not set the maximum rent for a particular unit. See 42 USC §1437f(c). The tenants must pay at least 30 percent of their monthly adjusted income, but no less than the minimum rent established by the housing authority (up to $50) directly to the landlord. (Tenants on the Section 8 voucher program can be required to pay up to 40 percent of their monthly income if they rent a unit with a rent higher than the HUD fair market rent standard for the area. 42 USC §1437f(o)(2), (3).) The housing authority pays the balance of the rent to the landlord. 42 USC §§1437a(a), 1437f(c)(3). Because the housing authority does not guarantee the tenants' direct rental obligations, landlords of Section 8 units have legitimate concerns about the tenants' ability to pay the tenant's share of the Section 8 rent. See §2.9B.

For further discussion, see §1.36. See also California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993).

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.17 (2) Private Landlord's Discretion in Tenant Selection

§2.17 (2) Private Landlord's Discretion in Tenant Selection

Because the Section 8 voucher programs depend so heavily on the participation of the private sector, HUD has adopted a relatively hands-off approach to regulating landlords' exercise of discretion in selecting tenants. Procedural protections for tenants in such housing govern eligibility determinations by the housing authority, and do not regulate the tenant-selection practices of private landlords. Consistent with this approach, Congress amended some aspects of the Section 8 program. For example, Congress repealed the so-called "Take One, Take All" provisions of §8(f) of the United States Housing Act of 1937 (42 USC §1437f(t)). This provision had prohibited landlords who accepted one Section 8 tenant from discriminating against subsequent tenants because of their status as rental subsidy holders. See Pub L 105-276, §554, 112 Stat 2518, 2610; see also 42 USC §1437f(d)(1), amended by Pub L 104-99, §402(d), 110 Stat 41 (providing that selection of tenants shall be owner's function subject to annual contributions contract between HUD and local agency). However, a housing authority may now require an owner to use any local preferences in the selection of tenants that the housing authority has adopted under its Public Housing Agency Plan. 42 USC §1437f(d)(1); see §2.14. In addition, as with housing authorities, any residency preference must not have the purpose or effect of delaying or denying acceptance of tenants based on the classes protected by the Fair Housing Act. 24 CFR §§5.410(i), 982.207(b). Similarly, under the same regulation, persons with disabilities must be afforded the same preference as working households.

WARNING: HUD allowed some federally subsidized landlords to create special temporary preferences for people displaced by Hurricane Katrina. These may still remain in effect in some subsidized housing buildings.

The California Fair Employment and Housing Act's prohibition of discrimination based on source of income may prohibit landlords from rejecting prospective tenants on the basis of their having federal Section 8 voucher assistance. See Martinez, *The Case for Applying California's Source of Income Anti-Discrimination Statute to Section 8 Tenants*, 31 Hous L Bull 147 (National Housing Law Project, June 2001). Some communities have adopted local ordinances that prohibit certain forms of discrimination against existing or prospective tenants who hold Section 8 vouchers. See §2.9B. Several courts have held that such laws are not preempted by the federal Section 8 statute (42 USC §1437(f)). See, *e.g., Rosario v Diagonal Realty* (2007) 840 NYS2d 748, 872 NE2d 860; *Timkovsky v 56 Bennett, LLC* (Sup Ct 2009) 881 NYS2d 823.

With respect to denial of admission for criminal activity and alcohol abuse, HUD issued final regulations in question and answer format. 24 CFR §§5.850-5.861. These regulations apply to all federally assisted housing except public housing, including housing assisted under the Section 8 voucher programs. The regulations permit the landlord to consider all relevant circumstances when screening tenants, but only in accordance with the landlords' established admission standards. The landlord may require an applicant or tenant to exclude a "culpable" household member, but may first consider whether the household member "is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully." 24 CFR §5.852(b).

A landlord *must* deny admission to an applicant for 3 years after the date of the eviction if any household member has been evicted from federally assisted housing for drug-related criminal activity *unless* the person has successfully completed an approved supervised drug rehabilitation program or the culpable household member is no longer a member of the household. 24 CFR §5.854(a). A landlord must also establish standards that prohibit admission of a household if any household member is currently using an illegal drug or if past drug use may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. 24 CFR §5.854(b). A landlord *may* deny admission for drug-related or violent criminal activity or other criminal activity that would threaten the health or safety of the PHA or owner or any agent or contractor who is involved in housing operations. 24 CFR §5.855(a).

Like PHAs (see §2.15A), private landlords are prohibited from denying admission to prospective Section 8 voucher tenants based on the applicant being a victim of domestic violence, dating violence, or stalking if the applicant is otherwise qualified for admission. 42 USC §1437f(c). Also like PHAs, landlords may require applicants to provide information, which must be kept confidential, documenting that the persons were abused. 42 USC §1437f(ee).

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§2.18 c. Under State or Federally Subsidized Programs

In addition to the Section 8 voucher programs (see §§2.16-2.17), Congress created a Section 8 substantial rehabilitation program and new construction programs. See 42 USC §1437f(b)(2). Congress subsequently repealed these programs, but retained program requirements for existing projects. Under these programs, HUD entered into a direct agreement with the developer; the public housing authority was not involved. Any restrictions on private landlords' methods of tenant selection arise as a result of this agreement and applicable regulations. Other privately owned, federally subsidized housing, such as housing subsidized under the Section 221d and 236 programs are also administered by a direct agreement between HUD and the private property owner without the involvement of a public housing authority. For regulations under these programs, see 24 CFR pts 221, 236. Although no new Section 221d or 236 projects will be undertaken in the future, a number of projects controlled by HUD agreements currently exist in California. The same is true for Section 8 new construction and substantial rehabilitation projects.

Owners and managers of housing subsidized by the United States Department of Agriculture (USDA), in addition to the classes of persons protected by the Fair Housing Act, may not discriminate against persons on the basis of *marital status, sexual orientation, or receipt of public assistance*. 7 CFR §15d.

Generally, no project owner or PHA that owns or manages a project for the elderly or persons with disabilities may prohibit or prevent any tenant from owning common household pets or restrict or discriminate against any person in connection with admission to, or continued occupancy of, housing because of the ownership of common household pets or the presence of pets in the unit. 24 CFR §5.309.

California also has many programs that subsidize the development or rehabilitation of affordable housing. See generally 25 Cal Code Regs §§6900-6999 (governing programs administered by the state Department of Housing and Community Development (HCD)) and 25 Cal Code Regs §§10001-19400 (governing programs administered by the California Housing Finance Agency (CHFA)). Privately owned affordable housing projects funded with these subsidies often also receive federal subsidies, including subsidies from the Section 8 voucher programs. Therefore, it is possible that both federal and state regulations will apply to the tenant selection process. Moreover, some local governments have their own housing subsidy programs that are likely to have specific tenant selection criteria and discrimination protections.

Along with federal, state, and local regulations, most government subsidized housing will also be subject to a "regulatory agreement" between the governmental entity (or entities) providing the funding and the developer/owner of the housing. These agreements generally incorporate by reference the antidiscrimination protections in the applicable law or regulations, but they may also include additional selection criteria and discrimination protections.

PRACTICE TIP: The use of tenant selection preferences by private owners (including nonprofit corporations) of subsidized housing requires careful consideration and analysis of the possible impact on persons protected by the fair housing laws. Sometimes, either in an effort to better effectuate the purpose of a particular type of subsidized housing or at the behest of a local government providing the subsidy, an owner will institute a facially neutral preference that could have a discriminatory impact on protected classes. The most common type of preference that could cross the line are residency preferences or preferences for employed persons. Such preferences must be justified by a business necessity that cannot be achieved by less discriminatory means. See discussion in §2.14.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.18A d. Under State and Federal Tax Credit Programs

§2.18A d. Under State and Federal Tax Credit Programs

Over the last decade, many affordable-housing developments have been financed with state and federal "tax credits." Under these programs, investors in affordable-housing projects receive a credit applicable to their federal and state income taxes in exchange for investing in housing reserved for and affordable to lower income households. Owners of these developments are expressly prohibited from discriminating against protected classes in the operation and management of the housing. See 26 CFR §1.42-9(a). They must also certify compliance with the terms of the low income housing commitment, which includes a provision prohibiting an owner from refusing to rent to tenants with Section 8 vouchers. 26 CFR §1.42-5(c)(1)(v), (xi). State housing agencies—in California, the California Tax Credit Allocation Committee (TCAC)—must review the certifications for compliance. 26 CFR §1.42-5(c)(2); 4 Cal Code Regs §§10300-10358.

The federal departments of Housing and Urban Development, Justice, and Treasury entered into a Memorandum of Understanding on August 11, 2000, to improve oversight and compliance with these nondiscrimination requirements. The memorandum establishes procedures and standards for coordination of the investigation of cases of discrimination. See http://www.hud.gov/offices/fheo/lihtcmou.cfm.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.19 E. Prohibited Selection Factors

§2.19 E. Prohibited Selection Factors

Federal and state fair housing laws prohibit use of certain factors in selecting tenants:

- race;
- color;
- religion;
- national origin or ancestry;
- sex (including pregnancy, childbirth, gender identity and gender-related appearance and behavior);
- marital status;
- disability (see §§2.26-2.27E);
- familial status (see §§2.22-2.25);
- age;
- source of income;
- sexual orientation;
- medical condition;
- victim of domestic violence (see §§2.15A, 2.27H); and
- immigration or citizenship documentation or status.

See §§2.20, 2.30, 2.43, 2.49, 2.57-2.58, 2.60.

In California, local ordinances may prohibit housing discrimination on other grounds as well, although state law may preempt any local regulation of housing discrimination. Govt C §12993(c). See §2.48.

Communities may not adopt ordinances requiring landlords to screen tenant households for legal residency status or make it a crime to rent to households with members lacking documentation of legal residency. CC §1940.3. The Legislature adopted §1940.3 in response to the adoption of such an ordinance by the City of Escondido and consideration of similar anti-immigrant ordinances by other California cities. The court issued a temporary restraining order enjoining the Escondido ordinance, expressing serious concerns that the ordinance may violate the supremacy and due process clauses. *Garret v City of Escondido* (SD Cal 2006) 465 F Supp 2d 1043. The District Court in Pennsylvania permanently enjoined a similar ordinance. *Lozano v City of Hazelton* (MD Pa 2007) 496 F Supp 2d 477. The Northern District of Texas did the same. See *Villas at Parkside Partners v City of Farmers Branch* (ND Tex 2008) 577 F Supp 2d 858.

Similarly, local ordinances and policies that deliberately target protected immigrant classes by prohibiting overcrowding in rental housing and by promoting excessive and selective enforcement of building codes against owners that rent to immigrants may be challenged under 11 USC §1983. See *Young Apartments v Town of Juniper* (11th Cir 2008) 529 F3d 1027.

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F. Protected Categories

§2.20 1. Summary; Authorizing Legislation

The following list includes most of the categories that are protected from landlord discrimination in selecting prospective tenants. The list is not complete because, as noted in §2.21, the Unruh Act covers arbitrary discrimination in general and thus protects an indefinite multitude of classes. The list includes references to federal and state laws and to sections in this chapter where these laws are discussed in detail. For a ready reference to the applicable fair housing laws, see the chart in §2.28.

Race:

- Civil Rights Act of 1866 (42 USC §§1981-1982; see §§2.41-2.47);
- Fair Housing Act (42 USC §§3601-3631; see §§2.30-2.40);
- California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996; see §§2.49-2.56); and
- Unruh Civil Rights Act (CC §51; see §§2.57-2.59).

Sex, Religion, National Origin, or Familial Status:

- Fair Housing Act (42 USC §§3601-3631; see §§2.30-2.40);
- California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996; see §§2.49-2.56);
- Unruh Civil Rights Act (CC §51; see §§2.57-2.59); and
- Civil Code §1940.3 (immigration and citizenship status; see §§2.12 and 2.19).

Disability:

- Fair Housing Act (42 USC §§3601-3631; see §§2.30-2.40);
- Americans With Disabilities Act (42 USC §§12101-12213; 28 CFR §35);
- Section 504 of the Rehabilitation Act of 1973 (29 USC §794; 24 CFR §8);
- California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996; see §§2.49-2.56);
- Unruh Civil Rights Act (CC §51; see §§2.57-2.59); and
- Civil Code §§54.1-55 (see §2.60).

Marital Status, Ancestry, Sexual Orientation, Gender Identity, Gender Related Appearance and Behavior, or Source of Income:

- California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996; see §§2.49-2.56) and
- Unruh Civil Rights Act (CC §51; see §§2.57-2.59).

Age and Medical Condition:

- Unruh Civil Rights Act (CC §51); CC §51.2 (see §§2.22, 2.57-2.59).

In addition, discrimination is expressly prohibited against a person who is *perceived* to be a member of a protected class specified in the Act. CC §51.5. This also includes protection against discrimination for a person who is associated with a person who has or is perceived to have any of those characteristics. CC §51.5.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.21 2. Protected Categories Created by Unruh Act's Arbitrary Discrimination Proscription

§2.21 2. Protected Categories Created by Unruh Act's Arbitrary Discrimination Proscription

The Unruh Civil Rights Act (CC §51), which prohibits discrimination in a wide variety of businesses, including rental housing, is unique among fair housing laws. It is significant that its listing of protected classes is merely illustrative of the persons who receive protection from its prohibition against arbitrary discrimination. The listed classes are construed as illustrative rather than restrictive. See uncodified declarations of the legislature in Stats 2005, ch 420, §2; *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 180 CR 496. While the scope of the Unruh Act's non-enumerated (arbitrary) classes was limited by the cases of *Gatto v County of Sonoma* (2002) 98 CA4th 744, 756, 120 CR2d 550 and *Hessians Motorcycle Club v J.C. Flanagans* (2001) 86 CA4th 833, 103 CR2d 552, more recently courts have been receptive to construing Unruh more expansively. See *Koebke v Bernardo Heights Country Club* (2005) 36 C4th 824, 31 CR3d 565 (marital status discrimination by country club); *Butler v Adoption Media, LLC* (ND Cal 2007) 486 F Supp 2d 1022, (marital status, sexual orientation, and sex); *Sisemore v Master Fin., Inc.* (2007) 151 CA4th 1386, 1405, 60 CR3d 719 (occupational status of home day care provider).

The Act prohibits all arbitrary discrimination against persons by a business establishment. See §§2.57-2.58. Accordingly, the Act covers housing discrimination on the basis of sexual orientation, physical appearance, and other factors that the California Supreme Court has vaguely described as "personal characteristics." *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 1160, 278 CR 614. It does not, however, cover discrimination on the basis of "economic characteristics" (52 C3d at 1160), although the court has indicated that characteristics related to economic status such as occupation and receipt of welfare are covered (*Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 736, 180 CR 496).

In November 2009, as urgency legislation, California amended the Unruh Act to provide that any discount or other benefit "offered to or conferred on a consumer or prospective consumer by a business because the consumer or prospective consumer has suffered the loss or reduction of employment or reduction of wages" will not be considered arbitrary discrimination under the Act. CC §51.13.

Significantly, the Unruh Act covers only intentional discrimination against individuals; unlike the federal and state fair housing laws, it does not prohibit facially neutral policies that unduly burden a particular group. *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 1172, 278 CR 614. Moreover, the Act does not absolutely prohibit discrimination; it prohibits only arbitrary or unreasonable discrimination. This weaker standard of review is irrelevant for the classes protected under the federal and state fair housing laws because those laws supersede the Unruh Act. See 42 USC §3615; Govt C §12955.6. For classes covered only by the Unruh Act, a standard of reasonableness suggests that the landlord may argue that overt discrimination is permissible in some circumstances, provided there is a statutory or regulatory basis indicating a societal interest in the practice. *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 743, 180 CR 496. See *Sargoy v Resolution Trust Corp.* (1992) 8 CA4th 1039, 10 CR2d 889 (financial institution's preferential treatment of older persons did not violate Unruh Act because of societal interest in assisting senior citizens). The landlord must still meet a significant burden, however, to justify the discrimination. Moreover, if discrimination that is permissible under the Unruh Act violates the federal Fair Housing Act or the state FEHA, those statutes will control. A violation of the Americans With Disabilities Act of 1990 (ADA) (42 USC §§12101-12213) (see §2.26) constitutes a violation of the Unruh Act. CC §51(f). Consequently, the California Supreme Court and the Ninth Circuit held that a plaintiff alleging discrimination based on disability under CC §51 need not prove intent, because the ADA requires only a showing that the plaintiff was denied full and equal accommodations as a result of the landlord's failure to accommodate the disability. See *Munson v Del Taco, Inc.* (2009) 46 C4th 661, 94 CR3d 685; *Lentini v California Ctr. for the Arts* (9th Cir 2004) 370 F3d 837, 847; *Presta v Peninsula Corridor Joint Powers Bd.* (ND Cal 1998) 16 F Supp 2d 1134. *Munson* did not follow *Gunther v Lin* (2006) 144 CA4th 223, 50 CR3d 317, which had held that a showing of intentional discrimination is necessary to obtain monetary damages.

PRACTICE TIP: Pleading a violation of the ADA requires the cause of action to be asserted specifically under the Unruh Act. See, *e.g., Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602 (allowed complaint requesting abatement of public nuisance created by owner's failure to limit secondhand smoke in outdoor common

areas to survive demurrer, but rejected cause of action under ADA; no specific facts were alleged concerning whether tenant requested (or landlord refused) reasonable accommodations, and court cited federal authority concluding that ADA does not apply to apartments and condominiums).

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§2.22 3. Familial Status Protections

Expansion of fair housing law to prohibit discrimination on the basis of familial status has significantly increased landlords' potential liability for tenant selection. The Fair Housing Amendments Act of 1988 (Pub L 100-430, 102 Stat 1619) strengthened civil and administrative enforcement in housing discrimination cases and extended fair housing protections to families with children. The California Fair Employment and Housing Act was subsequently amended to conform to federal law. Stats 1993, ch 1277; Stats 1992, ch 182; see Govt C §§12955.1-12955.9; 12989-12989.3.

NOTE: Although federal and state law has prohibited familial status discrimination for many years, a national survey found that only 38 percent of the respondents were aware that refusing to rent to families with children was illegal. See 30 Hous & Dev Rep 811 (April 29, 2002). This survey suggests that lawyers representing either landlords or tenants may have an important role in educating their clients about the law.

In general, families receive the same protections as the "traditional" classes, such as race and sex. See 54 Fed Reg 3235-3236. Case law and evidentiary standards that developed in other fair housing cases are relevant to cases involving families with children, as well as to persons with disabilities (see §2.26).

Although the landlord may perceive that there are legitimate safety issues that apply to present or prospective minor residents, landlords must comply with applicable housing and building codes and statutory maintenance requirements. By doing so, the premises are considered safe for all persons, including minors and persons with disabilities. See 54 Fed Reg 3236-3237; 134 Cong Rec 19,887-88 (1988). Consequently, HUD has rejected an "unsafe for children" exemption or similarly broad limitations on civil rights protections for children based on safety. *HUD v Edelstein* (HUD ALJ 1991) 05-90-0821-1; *HUD v Davis* (HUD ALJ 1992) 10-90-0023-1 (no reasonable cause determination issued when policy at issue was to require children to be accompanied by adult at any one of three swimming pools, which was justified as reasonable limitation on actual potential danger to children); *HUD v Guglielmi* (HUD ALJ 1990) 02-89-0450-1 (rule excluding children from utility building that contained water pumps, shutoff valves, and electrical units, unless accompanied by parents, was not discriminatory); *HUD v Murphy* (HUD ALJ 1990) 02-89-0202-1 (rule prohibiting children between ages of 14 and 18 from using pool or clubhouse without adult were legitimate rules to maintain safety).

PRACTICE TIP: In practical terms, those standards can enable landlords to determine whether they are discriminating against families with children or the disabled by substituting race for any reference to children or persons with disabilities. For example, just as the law prohibits landlords from maintaining separate swimming pools based on race, it prohibits separate pools for children. See, *e.g., U.S. v Plaza Mobile Estates* (CD Cal 2003) 273 F Supp 2d 1084. On the other hand, fair housing law provides significant exceptions that may both expand and limit the rights of these particular classes, *e.g.,* senior housing may discriminate against families with children. See §2.25.

Landlords may not deny a unit to a family with children because conditions at the housing are unsafe. *Fair Hous. Congress v Weber* (CD Cal 1997) 993 F Supp 1286 (apartment rule prohibiting children from playing in building's common areas and policy of not renting second-floor balcony apartments to families with small children); *U.S. v Grishman* (D Me 1993) 818 F Supp 21 (landlord's belief that property's physical characteristics would impose serious and real danger to young children); *HUD v Bucha* (HUD ALJ 1993) 09-91-1384-1 (manager's concern about danger posed by steep stairs did not justify refusal to rent apartment to mother with two children).

Segregating or steering tenants to different sections of a complex or to different common facilities on the basis of familial status constitutes a violation of the Fair Housing Act (FHA). *Llanos v Estate of Coehlo* (ED Cal 1998) 24 F Supp 2d 1052, 1058 (summary judgment denied because of factual dispute about whether landlord truly denied rights or merely offered alternative location in which to live); *Drenik v Ohanesian* (ED Cal, Aug. 15, 2006, No. 05-209) 2006 US Dist Lexis 60870 (landlord refused to rent second-floor units to families with children); *U.S. v Plaza Mobile Estates* (CD Cal 2003) 273 F Supp 2d 1084 (overly restrictive rules and limiting children's use of common facilities to certain times of day held to violate FHA); 24 CFR §100.70(a) (unlawful to restrict choices in a development); 24 CFR

§100.70(c)(4) (unlawful steering practice includes assigning any person to particular section of community, neighborhood, or development or to particular floor of building because of protected characteristic).

Landlords cannot impose rules that act to unreasonably limit children's ability to play. The court in *U.S. v M. Westland Co.* (HUD ALJ 1994) CV 93-4141, Fair Housing-Fair Lending ¶15,941, addressed a variety of rules, applicable both to children and to all persons, imposing the standard that the rules must be the least restrictive means to accomplish a legitimate purpose. The court ruled that outright prohibitions of children in areas with billiards or shuffleboard, in the clubhouse, or in common areas was unjustified; requirements for adult supervision of minors in the pool area or "always" was also unjustified; requirements for adult supervision in the jacuzzi and while riding a bicycle were reasonable.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.23 a. Statutory Definitions

§2.23 a. Statutory Definitions

Both federal and state housing laws prohibit discrimination on the basis of "familial status." The federal Fair Housing Act (42 USC §§3601-3631) defines familial status as "one or more individuals (who have not attained the age of 18 years) being domiciled with … a parent or another person having legal custody of such individual or individuals; or … the designee of such parent or other person having such custody, with the written permission of such parent or other person." 42 USC §3602(k). The Act also specifies that "familial status includes pregnant women and persons "in the process of securing legal custody" of a child. 42 USC §3602(k). The California Fair Employment and Housing Act (Govt C §§12900-12996) contains a similar definition. Govt C §12955.2.

Notably, this definition does not protect all families from discrimination, but only those that meet the definition of "familial status." By way of contrast, fair housing law protects all races from discrimination. The restrictive nature of the definition may give landlords some leeway to discriminate *in favor* of families with children because households without children are not protected by these definitions. The Unruh Civil Rights Act (CC §51) would require that any discrimination in favor of families with children be reasonable. See §2.57.

Fair housing law protects virtually all households living with children. The vast majority of children live with a parent, someone having legal custody, or the designee of such persons. In *Gorski v Troy* (7th Cir 1991) 929 F2d 1183, the court ruled that a landlord's refusal to allow a couple to add a foster care child to their household violated the Fair Housing Act. The court explained that the Act covers a child welfare agency's proposed placement of a child in a foster care home because the agency was legal custodian of the child and had designated the foster care parents. Under this analysis, group homes for children are also included within the definition of "familial status."

Protections also extend to families with children who are guests of housing facility residents, even if the residents do not have children themselves. HUD Title VIII regulations extend protections to persons injured by decisions about their guests who may be members of any of the protected classes under the Fair Housing Act. 24 CFR §100.65(b)(4) (prohibits discrimination limiting use of privileges, services, or facilities based on protected status of "an owner, tenant or a person associated with him or her"); 24 CFR §100.60(b)(5) (prohibits evictions due to protected status of tenant or "guest").

These regulations do not distinguish among the protected categories. Therefore, guest standing is not limited only to race cases, and can be extended also to familial status, disability, or the other protected categories. Even though the regulations only refer to evictions or disparate terms and conditions, they arguably apply equally to denials of admission and retaliation. Guest standing, therefore, should apply to minors and their families who are clients or guests of residents providing family home day care services, whose exclusion by landlords, homeowner associations, or zoning authorities would be direct discrimination. See the following race cases extending civil rights protection to the resident hosts (who may not have a protected status) and the guests with the protected status: *Woods-Drake v Lundy* (5th Cir 1982) 667 F2d 1198; *Olzman v Lake Hills Swim Club, Inc.* (2d Cir 1974) 495 F2d 1333 (Civil Rights Act of 1866: discriminatory guest policies for nonprivate clubs or other amenities associated with housing; restrictive rule imposed upon application to bring in black guests violation of the Civil Rights Acts of 1866, 1871, and 1964 (42 USC §§1981, 1982, and 2000a-2000a-6)). See *Lane v Cole* (ED Pa 2000) 88 F Supp 2d 402; *Bills v Hodges* (4th Cir 1980) 628 F2d 844, 845 n1; *U.S. v L & H Land Corp.* (SD Fla 1976) 407 F Supp 576, 580.

The Fair Housing Act also imposes a prohibition on statements or notices that "tenants could not entertain black guests." *Tillman v Wheaton-Haven Recreation Ass'n* (1973) 410 US 431, 35 L Ed 2d 403, 93 S Ct 1090 (whites-only policy of swimming pool association applied to residents in local area and members seeking to use pool with black guests violated 42 USC §1982 (Civil Rights Act of 1866), 42 USC §1981 (Civil Rights Act of 1870), and Title II of Civil Rights Act of 1964 (42 USC §2000a(e)). Notice that in none of these cases did the guests reside in the subject dwellings.

In general, HUD regulations under the Fair Housing Act provide a good description of particular housing practices that constitute discrimination on the basis of familial status. Prohibited practices include charging higher rents or security deposits, steering to certain units, and limiting access to facilities because of the presence of children in the household. 24 CFR §§100.50-100.90.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.24 b. Effect of Occupancy Standards

§2.24 b. Effect of Occupancy Standards

One of the most controversial areas in fair housing is *occupancy standards*, *i.e.,* a landlord's restrictions on the number of occupants in a unit. Occupancy standards have become associated with familial status because families with children are by definition more likely than childless households to be large families. Occupancy standards also affect other protected classes, however, such as Latino and Asian households, which are more likely to contain multigenerational, extended families.

The U.S. Supreme Court stated that fair housing law absolutely protects governmental restrictions on occupancy if they are designed to protect the health and safety of residents, are applied uniformly, and are based on a unit's size. *City of Edmonds v Oxford House, Inc.* (1995) 514 US 725, 131 L Ed 2d 801, 810, 115 S Ct 1776. California's adoption of §503 of the Uniform Housing Code as a maximum occupancy standard meets this test. Health & S C §§17922, 17958.5; 25 Cal Code Regs §32.

The legality of a private, nongovernmental occupancy standard that is not intentionally used to limit families with children depends on the landlord's justification for the standard, a test that raises the issue of "disparate impact" (see §§2.5, 2.65). Explicit limitations on the number of children, as opposed to the number of persons, violate fair housing laws. See *Sams v U.S. Dep't of Hous. & Urban Dev.* (4th Cir 1996) 76 F3d 375 (affirmance of HUD decision without a published opinion; refusal to rent to family with "too many children" because large families were destructive and needed supervision held invalid). Occupancy standards that include restrictions based on the age or sex of the children are also violative.

A landlord's intentional use of facially neutral occupancy standards to limit the number of families with children, if proved, unquestionably violates fair housing law. *U.S. v Badgett* (8th Cir 1992) 976 F2d 1176. See also *Fair Hous. Council v Ayres* (CD Cal 1994) 855 F Supp 315 (landlord's occupancy restriction of two persons per unit had disparate impact on families with children and thus discriminated on basis of familial status). But see *Maki v Laakko* (6th Cir 1996) 88 F3d 361 (rent increase based on number of occupants on premises, when added persons were children, was not intentional discrimination and did not violate familial status protections).

For purposes of HUD investigations, Congress attached a rider to the Quality Housing and Work Responsibility Act of 1998, adopting a 1991 HUD policy, known as the Keating II Memo, that set forth numerous factors to be considered including the history of the restriction and the size and configuration of the bedrooms and units. Pub L 105-276, §589, 112 Stat 2518, 2651. HUD issued this policy as a "Notice of Statement of Policy" (see 63 Fed Reg 70257 (1998)).

In *Pfaff v HUD* (9th Cir 1996) 88 F3d 739, applying the Fair Housing Act (FHA), the court upheld an occupancy standard of four persons in a two bedroom house because it met HUD's test that a standard must be carefully examined "to determine whether it operates unreasonably to limit or exclude families with children." 88 F3d at 748. This test is applied on a case-by-case basis. The *Pfaff* court expressly rejected the more stringent "business necessity" standard that is used in other disparate impact cases. 88 F3d at 747.

WARNING: *Pfaff* bases its reasoning on the FHA provisions concerning "reasonable local, State, or Federal restrictions" on numbers of occupants (42 USC §3607(b)(1)), as addressed in *City of Edmonds v Oxford House, Inc, supra*. But the situation in *Pfaff* concerned private standards imposed by owners who were a married couple and not a government. This puts the precedential value of this decision into doubt as it is inconsistent with the plain meaning of the FHA and with how the Supreme Court treated this section of the FHA in *Edmonds*.

California law requires that an occupancy standard meet this more stringent test, *i.e.,* that the standard "is necessary to the operation of the business and effectively carries out the significant business need it is alleged to serve." Govt C §12955.8. California law governs occupancy standards for cases that arise in California, because it provides greater rights to a protected class. 42 USC §3615; see §2.5. California landlords should therefore be prepared to provide objective evidence in support of an occupancy standard's necessity. Such evidence may include proof that the infrastructure limits occupancy. *Mountain Side Mobile Estates v Secretary of HUD* (10th Cir 1995) 56 F3d 1243 (limitations of mobilehome park's sewage system); *Snyder v Barry Realty, Inc.* (ND Ill 1996) 953 F Supp 217 (general

concern about housing more than four persons in a three-bedroom apartment is insufficient absent demonstrated business necessity); *U.S. v Weiss* (D Nev 1994) 847 F Supp 819 (limitations of hot water system). But see *U.S. v Lepore* (MD Pa 1991) 816 F Supp 1011 (limitations of mobilehome park's septic tank did not justify occupancy restrictions because of existence of alternatives).

Other occupancy concerns a landlord may have that are "necessary to the operation of the business" may include the size and configuration of bedrooms, extraordinary wear and tear, increased expenses for utilities paid by the landlord, and parking restrictions.

California fair housing agencies no longer refuse to investigate cases where the occupancy standard challenged allowed at least two persons per bedroom plus one additional occupant, and will examine each claim on a case-by-case basis.

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§2.25 c. Senior Housing Exceptions

Senior housing developments may exclude families with children or underage persons if the development meets federal and state exemptions. 42 USC §3607(b)(2); Govt C §12955.9; CC §§51.2-51.4. The federal Fair Housing Act's requirements for Housing for Older Persons (HOP) apply to all senior housing in California. For private rental units, the Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) imposes additional requirements on "housing for older persons" by incorporating standards of CC §§51.2-51.4 for "senior citizen housing developments." Govt C §12955.9(b)(2). Mobilehome parks, however, qualify as senior housing by complying with the federal requirements for HOP. Govt C §12955.9(b)(3); CC §798.76.

The private landlord (other than a mobilehome park owner) seeking to limit rental units to senior citizens must follow both the federal HOP requirements and the standards of CC §§51.2-51.4. To the extent that these two laws conflict, the landlord must comply with those aspects of the law that define senior housing more stringently. This rule of construction is the result of federal and state provisions mandating that protected classes (*i.e.*, families with children) receive the greatest protections under the law. 42 USC §3615; Govt C §12955.6. Moreover, as an exception to fair housing law, senior housing must be narrowly construed to preserve the law's purpose in prohibiting discrimination. *Gibson v County of Riverside* (CD Cal 2002) 181 F Supp 2d 1057.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.25A (1) Fair Housing Act (Federal) Exemptions

§2.25A (1) Fair Housing Act (Federal) Exemptions

The federal Fair Housing Act (FHA) (42 USC §§3601-3631) establishes three categories of Housing for Older Persons (HOP):

- Housing provided under any state or federal program that the HUD Secretary determines is specifically designed and operated to assist elderly persons, as defined in the state or federal program (see 42 USC §3607(b)(2)(A); 24 CFR §100.302) (note that the Secretary has not allowed any HUD funded project to claim this exemption);
- Housing intended for, and solely occupied by, persons 62 years of age or older (see 42 USC §3607(b)(2)(B); 24 CFR §100.303) (underage persons may reside in the housing if they are employees of the housing development or they provide necessary assistance to the senior as a reasonable accommodation); and
- Housing intended and operated for occupancy by persons 55 years of age or older ("55 and over housing") (see 42 USC §2607(b)(2)(C); 24 CFR §100.304).

To qualify for this last exception, the housing provider must ensure that 80 percent of the total number of occupied units have at least one person who is 55 or older, must publish and adhere to policies and procedures demonstrating its intent to provide housing for older persons, and must routinely and reliably verify the age of occupants. 24 CFR §§100.305-100.307. Prior to 1995, federal law required that 55 and over housing have significant facilities and services for older adults, but Congress repealed that requirement in the Housing for Older Persons Act of 1995 (Pub L 104-76, 109 Stat 787).

The HOP exemption is an affirmative defense to a charge of familial status discrimination. The party asserting the exemption has the burden of persuasion. *Gibson v County of Riverside* (CD Cal 2002) 181 F Supp 2d 1057. The FHA provides a limited immunity from monetary liability for persons who reasonably believe, in good faith, that they were complying with the exemption requirements. 42 USC 3607(b)(5); 24 CFR §100.308.

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§2.25B (2) California (State) Exemptions

The California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) also exempts "housing for older persons" (HOP). It applies the federal HOP exemptions to mobilehome parks, Govt C §12955.9(b)(3), and uses the federal language for certain elderly housing provided under state or federal programs. 42 USC §3607(b)(2)(A); Govt C §12955.9(b)(1). In addition, it incorporates the senior housing standards found in CC §§51.2-51.12. Govt C §12955.9(b)(3). These standards apply in addition to the FHA's HOP requirements.

The senior housing development's "covenants, conditions,… restrictions, and other documents or written policy" must contain the age limitations, which may be either 55 or 62 years of age or older. CC §51.3(c). Housing for persons 55 and over must have at least 35 units except in Riverside County, where the minimum number of units is 20. CC §§51.3(b)(4) and 51.11(b)(4). This means that owners of smaller buildings (having less than 35 units) may only use a 62 and older age limitation. Given that the state occupancy limitations for underage residents in senior housing (as described below) are more permissive than the federal exemption for 62 and older housing (which allows no underage residents), the small building owner must follow the federal exemption for 62 and older housing. 42 USC §3607; 24 CFR §100.303.

At a minimum, occupancy limitations must require that "the persons commencing any occupancy of a dwelling unit include a senior citizen who intends to reside in the unit as his or her primary residence on a permanent basis." A housing provider may impose more restrictive occupancy limitations, but they "shall not be more exclusive" than one person in each unit being a senior citizen and other persons in the same unit being "a qualified permanent resident, a permitted health care resident, or a person under 55 years of age whose occupancy is permitted" because that underage person previously resided in or used the unit prior to 1985 (or 1990 under certain conditions). See CC §§51.3(h) and 51.4(b).

"Qualified permanent residents" are defined as persons who resided with the senior citizen "prior to the death, hospitalization, or other prolonged absence of, or the dissolution of marriage with, the senior occupant" and who are "45 years of age or older, or… a spouse, cohabitant, or person providing primary physical or economic support to the qualifying resident or senior citizen…." CC §51.3(b)(2). They are also certain persons with disabilities who need to live "with the senior citizen or other qualified permanent resident because of the disabling condition, illness or injury." CC §51.3(b)(3). Qualified permanent residents generally have the right to remain in the unit even though the senior citizen with whom they lived leaves the unit. CC §51.3(e). Those who have a disability and relied on the now absent senior citizen for assistance may be asked to leave if their disabling condition ends or if it continues but they pose a "significant threat to the health or safety others." CC §51.3(b)(3)(A)-(B).

Certain applications of CC §51.3 may result in inconsistencies with the federal HOP requirements. If the number of units containing underage residents (those under 55 years of age) exceeds 20 percent of all occupied units, then the housing development does not meet the HOP standard that 80 percent of the total number of occupied units have at least one person who is 55 or older. Given that CC §51.3 confers a right on certain underage persons to remain in a unit after a senior citizen leaves, the housing development may not qualify for an exemption as the number of units without a senior occupant, as defined, increases. Consequently, the development would have to become available to persons of all ages.

Unlike federal law, state law also requires that senior housing be "designed to meet the physical and social needs of senior citizens." CC §51.2(a). The design requirement does not apply to (1) developments constructed prior to February 8, 1982, and (2) developments located in Riverside County. CC §51.2(a), (c). The Unruh Act also provides a list of design features that "shall be presumed" to meet the design requirement for senior housing constructed on or after January 1, 2001. CC §51.2(d).

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.25C (3) Application of State vs. Federal Exemptions

§2.25C (3) Application of State vs. Federal Exemptions

Civil Code §51.2 provides that housing specially designed "to meet the physical and social needs of senior citizens" be established and preserved under the terms of CC §51.3, unless otherwise preempted "by the prohibition in the federal Fair Housing Amendments Act of 1988 (Pub L 100-430, 102 Stat 1619) and implementing regulations against discrimination on the basis of familial status." CC §51.2(a). See also Govt C §12955.9(b)(2), cited in §2.25B. In other words, California requires application of the most restrictive senior housing exceptions under federal and state law in order to further the policy of protecting families with children from discrimination.

EXAMPLE 1: California law requires that to qualify as a "senior citizen housing development" for persons 55 years or older, the development must have at least the designated minimum number of units. CC §§51.3(b)(4), 51.11(b)(4). Otherwise, the senior housing provider must use an age limit of 62 years or older. Because federal law does not place any size requirements on housing that uses an age limit of 55 years, California law applies to require a minimum number of units in housing for persons 55 years and older.

EXAMPLE 2: Since 1985, California law has required that senior housing contain specific accommodations "designed to meet the physical and social needs of senior citizens." CC §51.2; *Bliler v Covenant Control Comm.* (1988) 205 CA3d 18, 24, 252 CR 50. Federal law no longer requires any significant facilities or services in housing for older adults. See 42 USC §3607(b)(2)(C). To determine if a development for persons 62 years and older or 55 years and older qualifies as senior housing, California law applies and requires special design.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/ 4. Protections for Persons With Disabilities/§2.26 a. Impairments Covered by Statutory Definitions; Proscribed Inquiries by Prospective Landlords

4. Protections for Persons With Disabilities

§2.26 a. Impairments Covered by Statutory Definitions; Proscribed Inquiries by Prospective Landlords

The federal Fair Housing Amendments Act of 1988 (Pub L 100-430, 102 Stat 1619) added "handicap" as a protected class. See 42 USC §3604(f). Under 42 USC §3602(h), the definition of "handicap" is:

> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
> (2) a record of having such an impairment, or
> (3) [being] regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance.

This broad definition is based on long-standing federal law protecting the civil rights of persons with disabilities under the Rehabilitation Act of 1973 (29 USC §794) (Pub L 93-112, Title V, §504). It is also virtually identical to the definition of "handicap" in the Americans With Disabilities Act of 1990 (ADA). 42 USC §12102(2). Under the ADA regulations, major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 CFR §1630.2(i).

In 2008, Congress amended the ADA to require the courts to determine whether an individual is disabled "without regard to the ameliorative effects of mitigation measures," excepting eyeglasses or contact lenses. ADA Amendments Act of 2008 (ADAAA) (Pub L 110-325, §3(4)(E), 122 Stat 3553). The ADAAA did not change the language defining "disability." Therefore, no change should be implied in the policy of construing these statutes in a consistent manner.

The ADAAA superseded decisional law, including *Sutton v United Air Lines, Inc.* (1999) 527 US 471, 144 L Ed 2d 450, 119 S Ct 2139, and similar rulings in *Albertson's, Inc. v Kirkingburg* (1999) 527 US 555, 144 L Ed 2d 518, 119 S Ct 2162; *Toyota v Williams* (2002) 534 US 184, 151 L Ed 2d 615, 122 S Ct 681. The ADAAA clarified congressional intent on existing language in the ADA, whereas the Supreme Court had previously limited protections to disabled persons in opinions interpreting the ADA. These decisions began to be used as analogous precedent in Fair Housing Act (FHA) and section 504 cases, and the ADAAA specifically overturned the ADA decisions of *Toyota* and *Sutton* and codified language intended to clarify the meaning of "disability" under ADA. See Pub L 110-325, §2, 122 Stat 3553.

Important provisions of the ADAAA include the following:

- A bright line standard of 6 months is used to determine whether the duration of a condition renders it permanent (42 USC §12102(3)(B));
- Working is considered a major life activity (MLA) along with a number of additional MLAs (42 USC §12102(2)(A));
- Conditions that are episodic or in remission are to be considered as if active (42 USC §12102(4)(D)); and
- Disability status is to be construed without regard to the effects of mitigating measures such as medication, equipment, or prosthetics (but not eyeglasses or contact lenses) (42 USC §12102(4)(E)) (see also *Kemppainen v Aransas County Detention Ctr.* (SD Tex, June 23, 2009, No. C-08-194) 2009 US Dist Lexis 52914).

The three primary fair housing statutes that address disability (the FHA, 42 USC §§3601-3631 (virtually all housing); §504 of the Rehabilitation Act of 1973 (29 USC §794) (federally funded projects); and the Americans With Disabilities Act (ADA), Title II, Subtitle A, 42 USC §§12131-12134 (state and local government activities)) and the many regulations and cases interpreting these statutes concerning accommodation or modification requirements are interrelated in a unique manner. The FHA provisions concerning disability were intended by Congress to be interpreted in a manner consistent with Rehabilitation Act of 1973 §504. *HUD v Dedham Hous. Auth.* (HUD ALJ 1992) 01-90-0424-1; *HUD v Ocean Sands, Inc.* (HUD ALJ 1993) 04-90-0231-1; H Rep No. 100-711, reprinted in 1988 US Code Cong & Ad News 2186 (referencing *Southeastern Community College v Davis* (1979) 442 US 397, 60 L Ed 2d 980, 99 S Ct 2361). The ADA extends the section 504 discrimination prohibitions to state and local governments and adopts the general prohibitions of discrimination established under §504. The FHA and the ADA are both to be interpreted in a manner that is consistent with §504. 42 USC §12201(a) (ADA does not "apply a lesser standard" than that found in §504); *Bragdon*

v *Abbott* (1998) 524 US 624, 631, 141 L Ed 2d 540, 553, 118 S Ct 2196 (ADA is to be "construed in accordance with pre-existing regulatory interpretations," referring to §504 and the FHA); 28 CFR §35.

Both the California Fair Employment and Housing Act (FEHA) and the Civil Code explicitly prohibit housing discrimination on the basis of a person's disability. Govt C §12955; CC §54.1(b). In 2000, the California legislature struck the definition of disability in the housing section of the FEHA (Govt C §12955.3) and incorporated the language of Govt C §12926 in both the FEHA and Civil Code. It also clarified that this definition of "disability" has a "broader coverage" than the federal law. Govt C §12926.1. Most significantly, protected disabilities under state law include those that simply cause a limitation (rather than federal law's more stringent *substantial* limitation) on *a major life activity*. Govt C §§12926(i), (k), (*l*), 12926.1(c). Additionally, the FEHA does not consider mitigating measures (such as medications, assistive devices, or reasonable accommodations) in determining whether a physical or mental impairment limits a major life activity. Govt C §12926(k)(1)(B). See *Colmenares v Braemar Country Club, Inc.* (2003) 29 C4th 1019, 130 CR2d 662. The effect of this broad definition is that a potentially large segment of the population falls within the FEHA's protected class of persons with disabilities.

The federal regulations provide a nonexhaustive listing of the various physical or mental impairments covered by the definition. 24 CFR §100.201. The definition includes protections for persons who take drugs legally and persons who once were, but are no longer, illegal drug users. See §2.17. See also *U.S. v Southern Mgmt. Corp.* (4th Cir 1992) 955 F2d 914.

The protections of the Fair Housing Act (FHA) (42 USC §§3601-3631) for persons with disabilities provide an important exception: A landlord is not required to rent to people "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 USC §3604(f)(9). This safe harbor applies only if an interactive process indicates that a reasonable accommodation is not possible. See *Roe v Sugar River Mills Assocs.* (D NH 1993) 820 F Supp 636; *Roe v Housing Auth. of the City of Boulder* (D Colo 1995) 909 F Supp 814. Notably, FEHA does not contain a similar exception, and, in spite of the federal exception, a landlord still has an obligation, as described in §2.27 below, to make a reasonable accommodation to a person with a disability.

Because all the substantive prohibitions of federal and state fair housing law are available to persons with disabilities, landlords cannot exclude or otherwise discriminate against applicants because they have disabilities. For example, requiring persons with certain disabilities to purchase liability insurance because of unfounded fears that they may cause injury to themselves or others constitutes intentional discrimination on the basis of disability. *HUD v Twinbrook Village Apartments* (HUD ALJ 2001) 02-00-0256-8; *HUD v Country Manor Apartments* (HUD ALJ 2001) 05-98-1649-8. See Directory for website containing HUD ALJ decisions.

In general, landlords *cannot ask applicants* about whether they have a disability or about the nature of the disability. 24 CFR §100.202(c); HUD Notice PIH 2003-31 (HA) (11/26/03); HUD Notice PIH 2006-13 (HA). For example, a landlord may not ask whether a person with a disability is capable of living independently. *Cason v Rochester Hous. Auth.* (WD NY 1990) 748 F Supp 1002. Landlords may ask *all* applicants, however, about their ability to meet the obligations of tenancy, their qualifications for housing reserved for persons with disabilities, their qualifications for a priority available to persons with disabilities, their conviction of the illegal manufacture or distribution of a controlled substance, and their current use of controlled substances. 24 CFR §100.202(c)(1)-(5); *LaFlamme v New Horizons, Inc.* (D Conn 2009) 605 F Supp 2d 378 (facility for severely disabled violated FHA when it drew distinctions on basis of severity of disability in admissions eligibility criteria, required extensive medical information for review by panel of disabled tenants and staff, and refused to allow plaintiff to resume residency after week in medical facility).

The housing provider may ask for information from the disabled person when the nexus between a disabled person's accommodation request and a disability is not apparent. See *Magee v Boston Land Co.* (2d Cir 2004) 90 Fed Appx 560 (unpublished opinion) (person with disability failed to provide medical or other trustworthy documentation to establish that his disability required requested accommodation); *Roe v Sugar River Mills Assocs.* (D NH 1993) 820 F Supp 636 (under FHA, accommodation must be attempted or must not be possible before eviction can occur when plaintiff did not ask for accommodation); *Roe v Housing Auth. of the City of Boulder* (D Colo 1995) 909 F Supp 814 (citing *Sugar River Mills* with approval and applying rationale under FHA). See §§2.27-2.27E regarding accommodations.

California privacy rights, however, may further limit the scope of inquiries permitted under federal law. See generally *Hill v National Collegiate Athletic Ass'n* (1994) 7 C4th 1, 26 CR2d 834 (right to privacy recognized where there is a

legally protected privacy interest, a reasonable expectation of privacy, and a serious invasion of privacy). See also *Loder v City of Glendale* (1997) 14 C4th 846, 59 CR2d 696.

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§2.27 b. Reasonable Accommodations and Modifications

A person's disability is a relevant factor for the landlord to consider when the applicant or tenant requests that the landlord make a reasonable accommodation under otherwise valid selection or fair housing criteria. Under both federal and state fair housing law, a landlord must make "reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford [a person with a disability] equal opportunity to use and enjoy a dwelling." 42 USC §3604(f)(3)(B); Govt C §12927; CC §54.1(b)(3)(B). In 2004, the U.S. Department of Justice and the Department of Housing and Urban Development issued a joint statement regarding the rights and responsibilities of housing providers and persons with disabilities relating to the reasonable accommodations requirements of the Fair Housing Act (FHA) (42 USC §§3601-3631). See Joint Statement of the Department of Housing and Urban Development and the Department of Justice—*Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004). See http://www.hud.gov/offices/fheo/library/huddojstatement.pdf.

On March 5, 2008, the U.S. Department of Justice and HUD issued a joint statement regarding reasonable modifications under the Fair Housing Act. See Joint Statement of the Department of Housing and Urban Development and the Department of Justice—*Reasonable Modifications Under the Fair Housing Act* (Mar. 5, 2008), online at http://www.hud.gov/utilities/intercept.cfm?/offices/fheo/disabilities/reasonable_modifications_mar08.pdf.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.27A (1) Reasonable Accommodations

§2.27A (1) Reasonable Accommodations

Under a "reasonable accommodation" requirement, a landlord must do something more than treat tenants with a disability equally. It imposes a duty on landlords to reasonably accommodate the needs of handicapped tenants. An accommodation request occurs when:

- The tenant is disabled (see §2.26);
- There is a request or notice of a need for accommodation;
- There is a nexus between the request and the tenant's disability; and
- The request is reasonable.

An accommodation request is generally required for the denial to be actionable. *Frazier v City of Grand Lodge, Michigan* (WD Mich 2001) FH-FL ¶16,502; *HUD v Dutra* (HUD ALJ 1996) 09-93-1753-8. See Directory for website containing HUD ALJ decisions. However, an accommodation request is not required where the respondent has previously communicated that any such request would be a "futile gesture." *International Bhd. of Teamsters v U.S.* (1977) 431 US 324, 52 L Ed 2d 396, 97 S Ct 1843; *Norris v Allied* (9th Cir 1996) 948 F Supp 1418, aff'd sub nom *Norris v Sysco Corp.* (1999) 191 F3d 1043. A request also may not be needed where the respondent is on notice that the complainant is disabled and that they may need an accommodation to address known adverse housing conditions. In this case the housing provider is obligated to initiate "an interactive process" to determine what accommodation might be needed. This recent development in the law has vast implications.

The housing provider may need to inquire whether a disabled tenant needs an accommodation. In *School Bd. of Nassau County v Arline* (1987) 480 US 273, 94 L Ed 2d 307, 107 S Ct 1123, the employee never requested an accommodation before the school district attempted to terminate her as a teacher because she had communicable tuberculosis. Nonetheless, the Supreme Court ruled that in order for employers to escape liability, they have "an affirmative obligation to make a reasonable accommodation." 480 US at 288 n19.

To establish the necessary nexus between the accommodation and the disability, the Fair Housing Act requires that the accommodation "may be necessary" to provide the disabled person equal opportunity to use and enjoy a dwelling. 42 USC §3604(f)(3)(B). The standard for determining if a request is necessary was addressed in *U.S. v California Mobile Home Park Mgmt. Co.* (9th Cir 1997) 107 F3d 1374, where a disabled tenant requested as an accommodation a waiver of $1.50 per day or $25 per month guest parking fees for her home health care aide. The Ninth Circuit ruled that to establish that an accommodation request "may be necessary" the disabled person must show that the denial of accommodation "caused the denial of her use and enjoyment of her dwelling." 107 F3d at 1380.

Until recently, courts uniformly held that the policy must affect the disabled differently than the nondisabled. That was changed, however, in *U.S. Airways, Inc. v Barnett* (2002) 535 US 391, 152 L Ed 2d 589, 122 S Ct 1516, which established that the policy that is the subject of the accommodation request does not have to adversely affect only disabled persons but can also pose a barrier to those who are presently not disabled. In the case of *Barnett*, after developing a disability an airline baggage handler requested to be transferred to a less physically demanding position contrary to a seniority policy for such transfers.

In *Giebeler v M & B Assocs.* (9th Cir 2003) 343 F3d 1143, the court ruled that a disabled person who had limited financial resources due to disability had a right to request as an accommodation that the landlord accept a co-signer, despite the existing rule that co-signers were not accepted. The court pointed out that since the disabled person was in financial straights because of the disability, the financial barrier was "on its face" related to his disability and constituted an acceptable basis for an accommodation request of a no co-signer policy that affected disabled and nondisabled alike. The court cited, among other cases, the Supreme Court's opinion in *Barnett*, which held that barriers to a disabled facility's use permit that affected the facility's financial viability denied one of the few sources of housing for persons with serious mental or physical disabilities that "prevent these persons from maintaining employment, obtaining education or securing permanent housing." See 74 F3d at 942.

A request is reasonable if it does not pose any fundamental alteration or undue burden on the respondent's

program. In *Southeastern Community College v Davis* (1979) 442 US 397, 60 L Ed 2d 980, 99 S Ct 2361, the first §504 case for the Supreme Court to interpret, the Court held that a nursing school did not have to undertake "affirmative action," and did not have to "accommodate" the needs of a candidate for admission who did not meet the established physical qualifications where doing so would have involved the "substantial" or "major" adjustments in its program. The student had substantial hearing impairments such that use of a hearing aid was not enough, and she had to lip read or use some other auxiliary assistance. The college showed that allowing this nursing student to continue on in her studies would have substantially lowered standards for nurses, who should be able to understand oral commands during instruction or while on the job in order to safely discharge their duties. 442 US at 413. The *Davis* decision relied heavily on the then newly implemented HEW regulations that defined many key concepts for disabled accommodations. 45 CFR §84 (1978). Particularly, the *Davis* decision cited with approval the HEW approach of requiring that disabled persons be able to meet all of the essential criteria for participation in a program "in spite of his [or her] handicap." 442 US at 405, referring to 45 CFR §84.3(k)(3) (1978) and 45 CFR pt 84, App A (1978).

In *Majors v Housing Auth.* (5th Cir 1981) 652 F2d 454, the court held that a housing authority must reasonably accommodate a mentally disabled tenant with the need for a companion animal despite a "no pets" policy, unless the policy constitutes an undue financial or administrative burden. The court noted that it was possible for the tenant to enjoy the benefits of the companion animal provided that some accommodation was made for the disability. The no pet rule was different from the qualifications in *Southeastern Community College* which were "inherent in the program and in the nursing profession." 652 F2d at 457.

In *U.S. Airways, Inc. v Barnett* (2002) 535 US 391, 152 L Ed 2d 589, 122 S Ct 1516, the Supreme Court enunciated a shifting burden test under the ADA that first requires the disabled person to show that the accommodation requested is reasonable "on its face." Once the plaintiff makes this showing, the defendant then must show special circumstances that demonstrate undue hardship to the defendant if the accommodation is made. The burden then shifts back to the disabled person.

Examples of failures to make a reasonable accommodation include the following:

- A refusal to waive a "no pet" rule to accommodate a depressed tenant's emotional need for her dog (*Auburn Woods I Homeowners Ass'n v FEHC* (2004) 121 CA4th 1578, 18 CR3d 669; *HUD v Riverbay Corp.* (HUD ALJ 1994) 02-93-0320-1; see 24 CFR §100.204(b)).
- A refusal to waive a "first-come/first-served" policy for allocating parking spaces (*Shapiro v Cadman Towers, Inc.* (2d Cir 1995) 51 F3d 328; see 24 CFR §100.204(b)).
- A refusal to accept a rent "guarantor" as an accommodation to a disabled tenant-applicant whose income was restricted because of his disability (*Giebeler v M & B Assocs*. (9th Cir 2003) 343 F3d 1143, 1146); but see *Bell v Tower Mgmt. Servs.* (D NJ, July 15, 2008, No. 07-CV-5305) 2008 US Dist Lexis 53514, in which the disabled plaintiff also asked for waiver of the minimum income requirement as an accommodation to her disability, which she alleged caused her to have a lower income. The court ruled against the plaintiff because she did not allege she "was capable of meeting the minimum income requirements prior to becoming disabled."
- A refusal to communicate with a home-seeker via a telephone relay-service operator for the deaf (*U.S. v Space Hunters, Inc.* (SD NY 2004) 2004 US Dist Lexis 23699, WL 2674608, aff'd in part and vacated in part (2d Cir 2005) 429 F3d 416).
- A refusal to rescind an eviction notice because of the disability of a disruptive minor may be held an unreasonable refusal to accommodate under the FHA, FEHA, and the Unruh Civil Rights Act. The minor had been placed in residential care after the disturbance. *McAlister v Essex Prop. Trust* (CD Cal 2007) 504 F Supp 2d 903.

Examples of unreasonable accommodation requests are the following:

- A request by long-term tenants (who later developed disabilities) that the landlord install a ramp or lift costing from $25,000 to $55,000 to make units built in 1910 accessible to wheelchairs (*Rodriquez v 551 W. 157th St. Owners Corp.* (SD NY 1998) 992 F Supp 385).
- A request to permit marijuana use prescribed for a disability under the Compassionate Use Act (Health & S C §11362.5) (*Ross v RagingWire Telecommunications, Inc.* (2008) 42 C4th 920, 70 CR3d 382).

A landlord may be obligated to accept a Section 8 rental assistance voucher as rent payment from a disabled tenant,

especially if the tenant is already in residence. The court in *Salute v Stratford Greens Garden Apartments* (ED NY 1996) 918 F Supp 660, aff'd (2d Cir 1998) 136 F3d 293, found that the Fair Housing Amendments Act of 1988 (42 USC §§3601-3619) obligation to afford reasonable accommodation does not require the landlord to accept a Section 8 voucher. However, the Supreme Court's subsequent decision in *U.S. Airways, Inc. v Barnett* (2002) 535 US 391, 152 L Ed 2d 589, 122 S Ct 1516, calls into question the reasoning in *Salute*. *Barnett* recognized that accommodations:

- Are not limited to the direct manifestations of the disability and must address practical needs caused by the disability; and
- May include special treatment for disabled persons.

535 US at 405, 152 L Ed 2d at 604. See *Freeland v Sisao LLC* (ED NY, Apr. 1, 2008, No. CV-07-3741) 2008 US Dist Lexis 26184. Accordingly, in *Giebeler v M & B Assocs.* (9th Cir 2003) 343 F3d 1143, the court held that allowing family members to cosign a lease guaranteeing rent payment by a disabled person unable to work was a reasonable accommodation of the tenant's inability to meet the landlord's income requirements. In *Freeland*, the court ruled that an existing tenant can allege sufficient facts to support a claim that acceptance of Section 8 was a reasonable accommodation of a disability that prevented the tenant from working.

Another source of reasonable accommodation standards is a HUD conforming rule that authorizes local public housing authorities to provide specified accommodations to Section 8 voucher tenants who are disabled. See 24 CFR pt 982. These include higher rent and utility allowances, longer search time, and live-in aides. (See HUD Notice PIH 2005-5 (HA) and HUD Notice PIH 2008-13 (HA), which provide that there is no limit on the extra time that the housing authority may allocate to a disabled tenant seeking a unit for which to use a voucher; that a PHA may approve a payment standard of up to 110 percent of the HUD Fair Market Rent; and that housing authorities must provide the tenant with a list of accessible units and agencies that provide assistance for moving expenses and security deposits.) Public housing authorities must also provide reasonable accommodations in the tenant selection and screening process to ensure that persons with disabilities have equal access to assisted housing. In addition to agency offices being accessible, the PHA should provide materials for sight- and hearing-impaired persons and should make special arrangements for applicants unable to come to the PHA. HUD Notice PIH 99-52 (Dec. 15, 1999).

In public housing and for Section 8/voucher programs administered by a public housing authority, a PHA must waive its occupancy standards if a family with a person with disabilities needs a unit that is larger than the occupancy standards allowed by the PHA because of the person's disabilities. HUD Notice PIH 99-52. A PHA also may not prohibit an eligible disabled family from accepting a nonaccessible unit that the family is eligible for which may become available before an accessible unit. HUD Notice PIH 2002-01.

Accommodation requests to repair housing facilities may be reasonable if the tenant can show that the lack of the repair that is otherwise required under the contract or by applicable codes would deny equal use and enjoyment of the premises. See *Congdon v Strine* (ED Pa 1994) 854 F Supp 355, in which the court held that repair requests were rightfully the subject of accommodation requests and were subject to the undue burden defense.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.27B (2) Reasonable Modifications

§2.27B (2) Reasonable Modifications

Another unique aspect of the protections for persons with disabilities is the requirement that landlords permit reasonable tenant modifications to existing premises if they are necessary to afford a disabled person full enjoyment of the premises. 42 USC §3604(f)(3)(A); Govt C §12927(c)(1); CC §54.1(b)(3)(A). See *U.S. v Freer* (WD NY 1994) 864 F Supp 324 (trailer park owner's refusal to allow tenant's installation of wheelchair ramp to trailer's entrance preliminarily enjoined as probable violation).

However, a tenant with a disability cannot require, under the Unruh Act (CC §51) or the Disabled Persons Act (CC §54), that a landlord make structural modifications unless required by a separate provision of law relating to structural access standards. *Coronado v Cobblestone Village Community Rentals, LP* (2008) 163 CA4th 831, 77 CR3d 883, disapproved on other grounds in *Munson v Del Taco, Inc.* (2009) 46 C4th 661, 94 CR3d 685. The court held that neither state law access standards nor the Americans With Disabilities Act require structural modifications to portions of rental property not used by the general public.

On March 5, 2008, the U.S. Departments of Justice (DOJ) and Housing and Urban Development (HUD) issued a "Joint Statement of the Department of Housing and Urban Development and the Department of Justice—Reasonable Modifications Under the Fair Housing Act." See http://www.hud.gov/utilities/intercept.cfm?/offices/fheo/disabilities/reasonable_modifications_mar08.pdf. The Joint Statement resolved a number of questions. It characterizes requests for assigned accessible parking spaces that require the housing provider to create signage, repaint markings, redistribute spaces, or create curb cuts as accommodations, not modification requests, even though some construction is required. Joint Statement, p 7, Q 11.

The Joint Statement states unequivocally that a request for permission for a modification is required; it does not refer to a requirement for an interactive process, as exists under accommodation rules. Joint Statement, p 9, Q 15. Note that the statute refers to discrimination in regard to modifications as "a refusal to permit" modifications. 42 USC §3604(f)(3)(A). The Joint Statement says: "An applicant or resident is not entitled to receive a reasonable modification unless she requests one." It also says that "[a] person with a disability must have the housing provider's approval before making the modification." It does not say what the consequence of making a modification without prior approval is, and states immediately after the above that the request for modification must be granted if the person with a disability meets the requirements for modification under the Act and provides the relevant documents and assurances. Joint Statement, p 10, Q 16.

The Joint Statement also precludes a private housing provider from insisting on moving a person with a disability requesting a reasonable modification to another unit that already has the requested feature. Since the person with a disability will be financing the modifications, and they are reasonable, the housing provider can propose, but not insist on, the move. Joint Statement, p 10, Q 18. However, since federally assisted housing providers must pay for accommodations that would otherwise be modifications under the Fair Housing Act for private housing providers, a federally assisted housing provider may offer an alternative unit with the needed features instead of being required to alter facilities in a person with a disability's current unit. Joint Statement, p 17, Q 31, Example 2.

Federal regulations limit the landlord's obligation to permit tenant modifications by requiring the tenant to pay for the modifications, to restore the interior of the premises to the condition that existed before the modification, to make payments into an account for purposes of covering restoration costs, and to make assurances that the modifications will be made according to applicable building permits and done in "a workmanlike manner." 24 CFR §100.203. A landlord may not, however, impose a higher security deposit on a disabled person who seeks a reasonable modification. 24 CFR §100.203; CC §54.1(b)(3)(A). Also, the landlord may impose restoration requirements after considering the following factors: (1) the extent and nature of the proposed modifications; (2) the expected duration of the lease; (3) the credit and tenancy history of the individual tenant; and (4) other information that may bear on the risk to the housing provider that the premises will not be restored. Further, the landlord may only require restoration in a common area if there is no public benefit to keeping the modification in the area. See generally Joint Statement, pp 12-15, Q 24-28. For the units it owns, a public housing authority must follow the more stringent requirements of 24 CFR §§8.4, 8.23(b)(1), 8.24,

and 8.33, which require PHAs to pay the cost of necessary modification unless such modifications are determined to be an undue financial hardship and administrative burden.

People with disabilities seeking accessible features in housing may have rights to those accessible features under other rules than those that apply to modification, and in this manner avoid obligations to finance the modification.

People with disabilities may make requests to comply with otherwise applicable design and construction requirements under the Fair Housing Act. Joint Statement, p 8, Q 12. The design and construction requirements of Fair Housing Act are found at 42 USC §3604(f)(1) and (2), as defined by 42 USC §3604(f)(3)(C). Privately operated housing first occupied on or after March 12, 1991, must have seven accessibility features regarding its facilities in common areas and in covered units, if there is at least one covered unit located in a structure with four or more units. Covered units are in structures with four or more units, and are on the ground floor or in structures that contain an elevator. 42 USC §3604(f)(7). More information on design and construction requirements can be obtained from Fair Housing Accessibility First (see Directory).

Federally funded projects must provide accessible facilities that do not require modification in many respects, so that the program participant does not have to ask the recipient to change the nature of facilities. 24 CFR §§8.20-8.33. New construction and certain alterations of multifamily housing facilities must be accessible. 24 CFR §§8.22, 8.23. The Americans With Disabilities Act (42 USC §§12101-12213) regulations similarly require state and local government activities to be accessible, including the housing activities. 28 CFR §§35.149-35.151. Note that the ADA requirements for accessibility do not have the 5-unit threshold required for the Rehabilitation Act of 1973 (29 USC §794) accessibility standards. Compare ADA regulations defining "facility" at 28 CFR §35.104 with Rehabilitation Act regulations defining "multifamily housing project" at 24 CFR §8.3. Where an undue financial hardship is found, the PHA must provide and implement alternatives to the modification.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.27C (3) Accessibility

§2.27C (3) Accessibility

Landlords must provide facilities that are accessible to persons with disabilities. Failure to do so creates exposure to liability when the dwelling is covered by fair housing laws with accessibility requirements and disabled persons are denied use and enjoyment of these premises because of inaccessible features.

NOTE: Requests to repair features that were already accessible can be an accommodation request. See *Congdon v Strine* (ED Pa 1994) 854 F Supp 355. See §2.27A.

- **Design and Construction Requirements Under the Fair Housing Act.** There may be a design and construction violation of the Fair Housing Act (FHA) (42 USC §§3601-3631). See 42 USC §3604(f)(1)-(3). Under 42 USC §3604(f)(3)(C), privately operated housing first occupied on or after March 13, 1991, must have seven accessibility features regarding its facilities in common areas and in covered units, if there is at least one covered unit located in a structure with four or more units. Covered units are in structures with four or more units and are on the ground floor or in structures that contain an elevator. 42 USC §3604(f)(7). More information on design and construction requirements can be obtained from Fair Housing Accessibility First (see Directory). Disabled persons may make requests to comply with otherwise applicable design and construction requirements. Joint Statement of the Department of Housing and Urban Development and the Department of Justice—Reasonable Modifications Under the Fair Housing Act, p 7, Q 12.
- **Federally Assisted Programs Subject to §504 of the Rehabilitation Act of 1973.** If a disabled person who needs a modification lives in housing that receives federal assistance, then the housing is subject to the accessibility requirements of §504 of the Rehabilitation Act of 1973 (29 USC §794). HUD's section 504 accessibility regulations for HUD-assisted and HUD-funded public housing are found at 24 CFR §§8.20-8.33. The various federal agencies will have their own regulations implementing the Rehabilitation Act of 1973. Section 504 requires federally assisted housing providers to provide accessible programs at their own expense and not at the expense of the disabled persons who are the ultimate beneficiaries. HUD Handbook 4350.3, §§2-8(A)(1); Joint Statement, p 16, Q 31. The disabled person does not need to finance modifications that are already required by §504. See Joint Statement, p 16, Q 31.
- **State or Local Government Activities Subject to the ADA Accessible Features Requirements.** If a disabled person who needs a modification lives in housing that is a state or local government facility, then the housing is subject to the Americans With Disabilities Act (ADA), Title II, Subtitle A accessibility requirements. See 42 USC §§12131-12134. The Department of Justice ADA accessibility regulations that apply to housing are found at 28 CFR §§35.149-35.151. These regulations are administered by various federal agencies, as designated in 28 CFR §35.190. The ADA and its regulations require state or local governments and state or local government-assisted housing providers to provide accessible programs at their own expense. 28 CFR §§35.149-35.151. Thus, the disabled person does not need to finance modifications that are already required by the ADA.
- **Residential Facilities Covered by the ADA Public Accommodations Accessibility Requirements.** Although the ADA does not apply to privately owned houses, apartments, and condominiums (*Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 1552, 87 CR3d 602; *Independent Hous. Servs. v Fillmore Ctr. Assocs.* (ND Cal 1993) 840 F Supp 1328, 1344), the public accommodations accessibility requirements in Title III of the ADA (42 USC §12182(a)) may apply to privately owned facilities. See *Nicholls v Holiday Panay Marina, LP* (2009) 173 CA4th 966, 93 CR3d 309 (tenant who rented boat slip in private marina allowed to sue owners for lack of wheelchair accessibility); *Kuchmas v Towson Univ.* (D Md 2008) 553 F Supp 2d 556 (resident in private dormitory on public school property allowed to bring ADA action for lack of wheelchair accessibility).
- **Removal of Accessible Features.** In *Elliot v Sherwood Manor Mobile Home Park* (MD Fla 1996) 947 F Supp 1574, a federal district court treated the threat to remove an access ramp as either a denial of a request for accommodation or a modification. The disabled plaintiff did not specify which provision of the Fair Housing Act (FHA) the defendants violated. The court observed that the accommodation and modification provisions of the FHA were implicated. 947 F Supp at 1577. Similarly, in *Thompson v Westboro Condominium Ass'n* (WD Wash,

Aug. 25, 2006, No. C05-1893) 2006 US Dist Lexis 60328, a disabled person alleged that the denial of the ability to leave an access ramp installed when not in use was a denial of a reasonable accommodation request. In denying the homeowners association's motion for summary judgment, the court recognized that by denying the plaintiff access to her unit, plaintiff experienced pain and suffering every day. There was no allegation of denial of a request for modification in *Thompson*, yet the right to make a reasonable modification was implicated because removal of a modification is denial of a modification.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.27D (4) Accommodation and Modification Request Procedures; Interactive Process

§2.27D (4) Accommodation and Modification Request Procedures; Interactive Process

The HUD/DOJ Joint Statement on Reasonable Modifications (see §2.27B) provides guidance to landlords receiving requests for reasonable accommodations or modifications. A landlord may establish written procedures for making and handling a request, but may not refuse a request on the basis of a tenant's failure to follow the procedures. Requests do not need to include the words "reasonable accommodation" or "modification." In addition, requests are not needed where they would be a "futile gesture," or where the housing provider is on notice that an accommodation may be necessary for a disabled person having difficulty with his or her housing. See §2.27A. See *Douglas v Kriegsfeld Corp.* (DC 2005) 884 A2d 1109.

Once a generalized request for an accommodation is made (see §2.27A), the landlord is obligated to engage in an interactive process with a tenant to determine whether a request for accommodation is necessary to afford the tenant with an equal opportunity to use and enjoy the housing. *Auburn Woods I Homeowners Ass'n v FEHC* (2004) 121 CA4th 1578, 1598, 18 CR3d 669. In making inquiries, however, care must be taken to avoid asking for unnecessary, private information about the nature or severity of a person's disability. See 24 CFR §100.202.

When there is a requirement to engage in an interactive process the provider must ask the tenant if there is an accommodation that the housing provider can consider to resolve the housing-related problem, but not ask if the disabled tenant does not wish to proceed. Otherwise, the housing provider risks taking action that illegally intrudes on the disabled tenant's privacy, and engaging in discriminatory disparate treatment in the terms and conditions of residency. If the actions of the tenant still breach the rental agreement and the tenant does not wish to engage in an interactive process to seek an accommodation, then the housing provider should proceed as it would for any other tenant who breaches the rental agreement. However, the housing provider should prepare proper documentation to withstand an investigation of a fair housing complaint alleging that the housing provider denied a reasonable accommodation, or failed to engage in an interactive process to seek a reasonable accommodation. See, *e.g., Groner v Golden Gate Garden Apartments* (6th Cir 2001) 250 F3d 1039.

If the disabled person responds to the provider's inquiry then the housing provider is obligated to seek an accommodation, and should follow interactive process guidelines. *Barnett v US Air, Inc.* (9th Cir 2000) 228 F3d 1105.

The Fair Housing Act (FHA) states that it does not require a dwelling to be made available to a disabled person who presents a danger to the person or property of third parties. 42 USC §3604(f)(9). This safe harbor applies only if an interactive process indicates that a reasonable accommodation is not possible. See *Roe v Sugar River Mills Assocs.* (D NH 1993) 820 F Supp 636; *Roe v Housing Auth. of the City of Boulder* (D Colo 1995) 909 F Supp 814; *Boston Hous. Auth. v Bridgewaters* (Mass 2009) 898 NE2d 848. The FHA does not expressly include in this safe harbor dangers posed by the disabled person to himself or herself. 42 USC §3604(f)(9).

Courts have still held, even in the face of this provision of the FHA, that for an eviction to occur the housing provider must show that no accommodation is possible. *Roe v Sugar River Mills Assocs., supra*; *Roe v Housing Auth. of the City of Boulder, supra*. These decisions heavily rely on language in the House Judiciary Committee report on amending the FHA in 1988 to include disability provisions that follow the United States Supreme Court's decision in *School Bd. of Nassau County v Arline* (1987) 480 US 273, 94 L Ed 2d 307, 107 S Ct 1123. See, *e.g., Roe v Sugar River Mills Assocs.,* 820 F Supp at 639.

In general, if an accommodation has been attempted and did not work, and there is no other accommodation that can be identified, then there may be no further obligation to engage in an interactive process to seek an accommodation. In *Groner v Golden Gate Garden Apartments* (6th Cir 2001) 250 F3d 1039, a disabled person with depression and schizophrenia was the subject of several noise complaints over six years, and landlord attempted to accommodate by contacting the disabled person's social worker and soundproofing the front door. The annual lease was later converted to month-to-month, and then the disabled person was given a termination notice when the disturbance continued. The court held that no accommodation would have solved the problems, and that the disabled person must show that a requested accommodation was reasonable.

PRACTICE TIP: Housing providers should exercise caution before determining that no reasonable accommodation is

possible. The cases that address the requirement for an interactive process are replete with egregious conduct by the subject disabled person that still needed to be accommodated.

The following cases required further interactive process before eviction:

- *Roe v Housing Auth. of the City of Boulder* (D Colo 1995) 909 F Supp 814 (court did not grant eviction after tenant struck and injured another tenant; accommodation must be attempted or must not be possible before an eviction can occur in case where plaintiff did not ask for an accommodation);
- *Roe v Sugar River Mills Assocs.* (D NH 1993) 820 F Supp 636 (disabled person threatened resident with physical violence leading to disabled person's conviction in criminal court for disorderly conduct; court ruled that accommodation must be sought through interactive process and must demonstrate that no reasonable accommodation will eliminate or acceptably minimize risk posed to other residents before eviction could be carried out);
- *Scialabba v Sierra Blanca Condominium Number One Ass'n* (ND Ill, July 11, 2001, No. 00 C 5344) 2001 US Dist Lexis 10054 (to evict disabled tenant posing direct threat to other tenants, landlord must show attempt to reasonably accommodate could not remove risk; court pointed to failures by condominium association to respond to requests to negotiate accommodation by disabled child's parents); and
- *Douglas v Kriegsfeld Corp.* (DC 2005) 884 A2d 1109 (plaintiff stated claim for failure to accommodate after landlord failed to discuss reasonable accommodation that would have cured tenant's default).

The courts allowed the eviction in the following cases:

- *Wirtz Realty Corp. v Freund* (Ill App 1999) 721 NE2d 589 (court upheld eviction based on recent objective threats by disabled tenant including brandishing large knives; parents of disabled tenant were involved throughout and behavior only escalated);
- *Arnold Murray Constr. v Hicks* (D SD 2001) 621 NW2d 171 (eviction allowed based on direct threat where brain-injured tenant exposed women in complex to his nudity, failed to close security door, and presented abusive and threatening behavior; court required landlord show no accommodation would eliminate or acceptably diminish risk disabled man posed; disabled man did not offer any proposed accommodation to deal with threatening behavior); and
- *Foster v Tinea* (La App 1997) 705 So2d 782, 785-6 (disabled man denied renewal of lease based on direct threats; court pointed to several years of misconduct including chasing children with machete, throwing tire tool into group of children, vulgarity, drinking that worsened temper, vulgar music, and sexual comments made to women in complex; court held that direct threats would not be considered if reasonable accommodations would eliminate or acceptably minimize risk; parents of disabled man tried to address behavior, at request of landlord in seeking accommodation).

Generally, information establishing whether a person is disabled can be provided by the person. Verification may also be provided by a medical professional, peer support group, social service agency, or reliable third person in a position to know about the individual's disability.

See generally Belville and Ryan, *Enabling the Disabled in Multi-Family Housing,* 23 Cal R Prop J 37 (Winter 2005); Garland, *A New Framework for Evaluating the Fair Housing Amendment Act's "Direct Threat" Cases,* 41 Clearinghouse Rev J of Poverty L & Policy 594 (Mar.-Apr. 2008).

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§2.27E c. Attorney Fees

Under the Americans With Disabilities Act (ADA) (42 USC §12205), the trial court has the discretion to award attorney fees to a prevailing plaintiff, unless special circumstances make the award unjust. *Jankey v Poop Deck* (9th Cir 2008) 537 F3d 1122. A prevailing defendant, however, is not entitled to fees unless the plaintiff's action was frivolous, unreasonable, or without foundation. See *Hubbard v SoBreck, LLC* (9th Cir 2009) 554 F3d 742. On attorney fees in actions under the Fair Housing Act (FHA), see §2.38.

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§2.27F 5. Gender Protections

Discrimination based on gender involves not only the same fundamental rules discussed above for other protected groups but also specialized rules for cases involving sexual harassment and domestic violence.

Not renting to recipients of Aid to Families with Dependent Children was held by a court to have a disparate impact on women. *HUD v Ross* (HUD ALJ 1994) 01-92-0466-8.

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§2.27G a. Sex Harassment

Sex harassment comes in two forms, quid pro quo and hostile environment. *Honce v Vigil* (10th Cir 1993) 1 F3d 1085, 1089; *HUD v Krueger* (HUD ALJ 1996) 05-93-0196-1. Quid pro quo harassment involves a housing provider conditioning the terms, conditions, or privileges of housing on granting a request for sexual favors. See 24 CFR §§100.65(b)(5), 100.400(c)(2); *HUD v Krueger, supra*. Under these authorities, the plaintiff must show that the request for sexual favors is unwelcome, that it affects the plaintiff's enjoyment or use of housing, and that it regards sex.

Hostile environment harassment exists "when the offensive behavior unreasonably interferes with use or enjoyment of the premises." *Honce,* 1 F3d at 1090; *DiCenso v Cisneros* (7th Cir 1996) 96 F3d 1004, 1008. Whether an environment is sufficiently hostile or abusive depends on the frequency, severity, and degree to which it is physically threatening or humiliating or whether it involved a "mere offensive utterance." 96 F3d at 1008. In *Jackson v Chicago Hous. Auth.* (ND Ill, Oct. 7, 2008, No. 08 CV 278) 2008 US Dist Lexis 79655, the court held that a claim under the Fair Housing Act (FHA) was stated in allegations that the defendant placed a man across the hall from a female tenant whom that man had previously sexually assaulted.

An owner is vicariously liable for an agent's sexual harassment if the owner is sufficiently involved or on notice. *U.S. v Veal* (WD Mo 2004) 365 F Supp 2d 1034, 1037; *U.S. v Balistrieri* (7th Cir 1992) 981 F2d 916, 930.

Confusion is engendered by the notion that a perpetrator of sex harassment can assert a defense that he or she subjected both men and women to harassing conduct and thus such equal treatment is not disparate treatment. See *Oncale v Sundowner Offshore Servs., Inc.* (1998) 523 US 75, 80, 140 L Ed 2d 201, 118 S Ct 998. In fact, any intentional discrimination is illegal as long as the adverse conduct is motivated "because of" the subject's membership in a protected group. *Price Waterhouse v Hopkins* (1989) 490 US 228, 239, 104 L Ed 2d 268, 109 S Ct 1775; *Oncale,* 523 US at 81. Arguably, under the ruling in *Price Waterhouse*, this proposition must also be true even if the discriminatory activity happened only once or as an exception to otherwise even-handed conduct.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.27H b. Domestic Violence Discrimination

§2.27H b. Domestic Violence Discrimination

Fair housing laws may help targets of domestic violence when the housing provider uses policies that on their face reveal stereotypical assumptions about women (overt intent theory), when actions of a housing provider reveal stereotypical assumptions about women (overt intent theory), or when the housing provider terminates the tenancy of the female target but not the tenancy of the male perpetrator or otherwise when responding to incidents of domestic violence treats females differently than males (disparate treatment theory). If the domestic violence victim lives separately from the perpetrator, her eviction based on general "no violence" policies may be prohibited by fair housing laws under the disparate impact theory because, based on criminal statistical data available from the United States and California Attorney Generals' offices, the victims of domestic violence are predominantly women. See, *e.g.,* http://www.ag.ca.gov/cjsc/publications/misc/dv98.pdf.

It is presently uncertain whether protections exist under fair housing laws if there are reoccurring incidents of domestic violence that materially disturb the neighbors or result in property damage. Recurring domestic violence may eventually give a housing provider just cause to terminate a victim's tenancy. This may not be merely on a second incident. Questions about the applicability of the Fair Housing Act (FHA) also exist when the victim requests a transfer to escape the perpetrator. See, *e.g., Robinson v Cincinnati Metro. Hous. Auth.* (SD Ohio, Apr. 29, 2008, No. 1:08-CV-238) 2008 US Dist Lexis 39523. Some untested theories described below may provide more opportunities for plaintiffs under fair housing laws in these circumstances.

Domestic violence can perhaps result in a successful eviction, or other adverse action, if the eviction is directed against both the target and the perpetrator who are residents and does not involve policies or practices based on stereotypical assumptions. This is especially true given the "one-strike-you're-out" HUD public housing policies not proscribed by the federal Violence Against Women Act (VAWA) (Pub L 109-162, 119 Stat 2960).

The following California state laws may be used to seek rights for the target of domestic violence:

- The Unruh Civil Rights Act (CC §51) (prohibits arbitrary discrimination against "all persons"; see *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 732, 180 CR 496; *In re Cox* (1970) 3 C3d 205, 216, 90 CR 24);
- The Unfair Competition Law (UCL) (Bus & P C §§17200-17210) (prohibits unlawful, unfair, or fraudulent business practices); and
- Civil Code §1946.7 (permits breaking lease for domestic violence victims on 30-day notice documented by police report or restraining order; establishes that incidence of domestic violence creates rebuttable preemption of nuisance if victim does not reside in the housing facility (see CCP §1161)).

In *Bouley v Young-Sabourin* (D Vt 2005) 394 F Supp 2d 675, the court denied a landlord's motion for summary judgment when the landlord evicted a woman after finding out that she was the victim of domestic violence. The court found that claims that the termination was initiated because the tenant was a victim of domestic violence and because the tenant refused to listen to the defendant's attempt to discuss religion with her after the incident, if proven, could constitute unlawful discrimination under the FHA. See also *Smith v City of Elyria* (ND Ohio 1994) 857 F Supp 1203, 1212, an equal protection case commenced under 42 USC §1983 against a police department, in which the court stated, "There is evidence in the record from which a jury could find the defendant's domestic disputes policy had a discriminatory impact and was motivated by intent to discriminate against women," citing stereotypical attitudes toward women reflected in the policies and in the manner in which the police responded to the domestic violence incident in question.

In *Robinson v Cincinnati Metro. Hous. Auth.* (SD Ohio, Apr. 29, 2008, No. 1:08-CV-238) 2008 US Dist Lexis 39523, the court held that the denial of a transfer request by a public housing tenant who was a victim of domestic violence did not violate the FHA. The court stated that there was no likelihood of success on the merits in this injunction action because the defendant's transfer policy was gender neutral and nondiscriminatory on its face, and the law applicable to public housing does not mandate a transfer on the basis of domestic violence. Although the housing authority did provide for transfers in instances in which there was a hate crime related to the placement of the victim by the housing

authority, the placement of the victim has no bearing on the perpetration of the domestic violence. The court also found that there was no irreparable injury because the defendant cannot be required to deter an independent third party from causing potential injury through criminal conduct. Ultimately, the court found that the housing authority had not denied the plaintiff any benefits due to her under its relationship with the housing authority; there was no eviction, nor were any housing authority services denied.

In *Jackson v Chicago Hous. Auth.* (ND Ill, Oct. 7, 2008, No. 08 CV 278) 2008 US Dist Lexis 79655, the court denied a motion to dismiss an intimidation claim, under FHA §3617, that the Chicago Housing Authority (CHA) intimidated a woman resident by placing a man who had sexually assaulted her across the hall from her dwelling. The CHA's control of the proximity of the perpetrator to the subject of domestic violence was the basis of liability in this case.

PRACTICE TIP: These cases suggest that the landlord in *Robinson* could be liable under fair housing laws for not responding to control the perpetrator by removing the victim to an undisclosed location if there is proof of discriminatory impact on women. It may have assisted the court if the plaintiff in *Robinson* produced records of the defendant's transfer of others. This would show that denying a transfer to the female target of domestic violence was an act of omission or an exception made on the basis of gender, creating fair housing liability by failing to control a known perpetrator of violence.

To date, no case has adopted the theory that landlords should control domestic violence perpetrators by removing the target to an undisclosed location. Although there is no duty to accommodate on the basis of gender under fair housing laws, the duty to act when there is both an opportunity to control violence and an ongoing relationship involving a duty to protect the victim may create fair housing obligations that reach outcomes similar to those in premises liability cases. See, *e.g., Rosales v Stewart* (1980) 113 CA3d 130, 169 CR 660; *Uccello v Laudenslayer* (1975) 44 CA3d 504, 118 CR 741; *Bradley v Carydale Enters.* (ED Va 1989) 707 F Supp 217.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.28 IV. CHART: GUIDE TO FAIR HOUSING AND ANTIDISCRIMINATION LAWS

§2.28 IV. CHART: GUIDE TO FAIR HOUSING AND ANTIDISCRIMINATION LAWS

Both landlords' and tenants' attorneys may use the chart that begins on page 208 as a guide for determining which federal and state fair housing laws apply to a particular case. The chart is indexed to the discussion of the fair housing laws in this chapter, including the Fair Housing Act (42 USC §§3601-3631), the Civil Rights Act of 1866 (42 USC §§1981-1982), the Unruh Civil Rights Act (CC §51), and the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996).

A. ACTIONABLE BASES OF DISCRIMINATION

	Fair Housing Act (42 USC §§3601-3631) (see §2.30)	Civil Rights Act of 1866 (42 USC §1982) (see §2.41)	Unruh Civil Rights Act (CC §51) (see §2.57)	California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) (see §2.49)
Basis of Discrimination				
1. Race	Yes (42 USC §3604)	Yes (42 USC §1982)	Yes (CC §51)	Yes (Govt C §12955(a))
2. Religion, National Origin, Ancestry	Yes (42 USC §3604)	No	Yes (CC §51)	Yes (Govt C §12955(a))
3. Immigration status	Yes, if effect on class protected under FHA (42 USC §3604; see *Espinoza v Hillwood Square Mut. Ass'n* (ED Va 1981) 522 F Supp 559).	No under §1982. Uncertain under §1981 if based on private acts (compare *Bhandari v First Nat'l Bank* (5th Cir 1987) 829 F2d 1343 with *Duane v GEICO* (4th Cir 1994) 37 F3d 1036 and *Espinoza v Hillwood Square Mut. Ass'n* (ED Va 1981) 522 F Supp 559) (§1981 covers alienage and immigration status in privately owned and managed housing)	Yes, if arbitrary (see *In re Cox* (1970) 3 C3d 205, 90 CR 24); or if a violation of CC §1940.3	Yes, if effect on basis of race, national origin (see also CC §1940.3; §§2.12, 2.19)
4. Sex	Yes (42 USC §3604)	No	Yes (CC §51)	Yes (Govt C §12955(a)); except for shared living area of single dwelling unit, available only to persons of one sex (Govt C §12927(c)(2)(B))
5. Marital Status	No	No	Yes (CC §51)	Yes (Govt C §12955(a); *Smith v FEHC* (1996) 12 C4th 1143, 51 CR2d 700)
6. Arbitrary Discrimination (*e.g.,* receipt of welfare payments, long hair)	No	No	Yes (*In re Cox* (1970) 3 C3d 205, 90 CR 24)	No
7. Familial Status	Yes (42 USC §3604)	No	Yes, if arbitrary (see *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 740, 180 CR 496)	Yes (Govt C §12955(a))
8. Disability	Yes (42 USC §3604)	No	Yes (CC §51)	Yes (Govt C §12955(a))
9. Age	No	No	Yes (CC §§51-51.3)	No
10. Sexual Orientation	No	No	Yes (CC §51)	Yes (Govt C §12955(a))

11. Source of Income	No	No	Yes, if arbitrary (see 59 Ops Cal Atty Gen 223 (1976); *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 180 CR 496)	Yes (Govt C §12955(a))
12. Medical Condition	No	No	Yes (as defined in Govt C §12926)	Yes (Govt C §12926)
13. Gender Identity Appearance and Behavior	No	No	Yes (CC §51; Govt C §12926(p); Pen C §422.56)	Yes (Govt C §§12926(p), 12955(a); Pen C §422.56)

B. PARTIES WHO MAY ENFORCE THE LAW

	Fair Housing Act (42 USC §§3601-3631) (see §§2.30-2.40)	Civil Rights Act of 1866 (42 USC §1982) (see §2.41)	Unruh Civil Rights Act (CC §51) (see §2.57)	California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) (see §§2.49-2.56)
Enforcement Party				
1. Private Citizens Against Whom Discrimination Is Directed	Yes (42 USC §§3610(a), 3613(a))	Yes (*Denny v Hutchinson Sales Corp.* (10th Cir 1981) 649 F2d 816)	Yes (CC §52(a))	Yes (Govt C §12980(a))
2. Persons Affected by Discrimination Directed at Persons Protected by Fair Housing or Civil Rights Laws	Yes (*Trafficante v Metropolitan Life Ins. Co.* (1972) 409 US 205, 34 L Ed 2d 415, 93 S Ct 364)	Yes (*Walker v Pointer* (ND Tex 1969) 304 F Supp 56)	Yes (CC §51.5) (see §2.20)	Probably, but unsettled
3. Noncitizens	Yes (42 USC §3612)	No	Yes (CC §52(a))	Yes (Govt C §12980(a))
4. Public Agency or Official	U.S. Attorney General, if there is a "pattern or practice" of denial of rights "raises an issue of general public importance" (42 USC §3614(a)); if enforcement matter referred to Attorney General by Sec'y of HUD (42 USC §3614(b)(1)(A), (b)(2)(A))	No	State Attorney General, District Attorney, or city attorney (CC §52(c))	State Attorney General or Director of Fair Employment and Housing (Govt C §12980(b))
5. Fair Housing Agencies and Other Organizations Diverting Resources to Enforce Fair Housing Laws	Yes *Havens Realty Corp. v Coleman* (1982) 455 US 363, 71 L Ed 2d 214, 102 S Ct 1114	No	Unsettled	Yes
	Fair Housing Act	Civil Rights Act of 1866		
6. Guest	Yes; *Woods-Drake v Lundy* (5th Cir 1982) 667 F2d 1198, FH-FL ¶15,417; *U.S. v L & H Land Corp.* (SD Fla 1976) 407 F Supp 576, 580; 24 CFR §100.60(b)(5); 24 CFR §100.65(b)(4)	Yes, *Olzman v Lake Hills Swim Club, Inc.* (2d Cir 1974) 495 F2d 1333		
7. Neighborhood Resident	Yes, *Havens Realty v Coleman* (1982) 455 US 363, 71 L Ed 2d 214, 102 S Ct 1114			
8. Broker denied commission	Yes, *Crumble v Blumthal* (7th Cir 1977) 549 F2d 462			

9. Other member of household not the target of the discrimination	Yes, *U.S. v Forest Dale* (ND Tex 1993) 818 F Supp 954

C. PROCEDURAL CONSIDERATIONS

	Fair Housing Act (42 USC §§3601-3631) (see §2.24)		Civil Rights Act of 1866 (42 USC §1982) (see §2.34)	Unruh Civil Rights Act (CC §51) (see §2.45)	California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) (see §§2.42-2.44)
	Administrative Remedies; Civil Action (42 USC §§3610, 3612) (see §§2.33-2.38)	Civil Action (independent of HUD involvement (42 USC §3613)) (see §§2.39-2.40)			
Procedure					
1. Agency Handling	HUD for investigation, conciliation, and possible enforcement (42 USC §3610(a)-(c)); HUD refers to state agency if equivalent rights and remedies available under state law (42 USC §3610(f))	No	No	DFEH can investigate, conciliate, adjudicate, and order relief (Govt C §§12930(f)(2), 12970)	DFEH for investigation, conciliation, hearing, and binding decision (Govt C §§12980-12989.3)
2. Civil Action	Yes, if HUD believes a civil action is justified (42 USC §3610(c))	Yes, even if complaint was filed with HUD under (42 USC §§3610(a), 3613(a))	Yes (*Denny v Hutchinson Sales Corp.* (10th Cir 1981) 649 F2d 816)	Yes (CC §52(a))	Yes (Govt C §§12980(h), 12989)
3. Statute of Limitations	One year to file with HUD (42 USC §3610(a)(1)(A)(i); for Attorney General, the statute is 18 months for enforcement of act regarding discriminatory practice; and 90 days for enforcement of conciliation agreement (42 USC §3614(b))	Two years (42 USC §3613(a)(1))	Probably 2 years under CCP §335.1 (see *Wilson v Garcia* (1985) 471 US 261, 85 L Ed 2d 254, 105 S Ct 1938)	Unsettled (see §2.69); probably 2 years under CCP §335.1; possibly 1 year under CCP §340(a)	Complaint must be filed with DFEH within 1 year after alleged violation occurred or terminated (Govt C §12980(b)); civil action must be filed within 2 years after occurrence or after termination of alleged discriminatory practice (Govt C §§12980(h), 12989.1)
4. Federal Court Jurisdiction	Yes (42 USC §§3610(e)-(f), 3612(o)); enforcement of administrative order in federal circuit court (42 USC §3612(j))	Yes (42 USC §3613(a)(1)(A))	Yes, without regard to amount in controversy (28 USC §1343(a)(4)	No	No
5. State Court Jurisdiction	Yes (see *Williams v Horvath* (1976) 16 C3d 834, 129 CR 453)	Yes (42 USC §3613(a)(1)(A))	Yes (*Sullivan v Little Hunting Park, Inc.* (1969) 396 US 229, 24 L Ed 2d 386, 90 S Ct 400)	Yes (CC §52)	Yes (Govt C §12980(h))
6. Limited Civil Case Jurisdiction	No	No	No	Yes, subject to jurisdiction limit	Yes (Govt C §12980(h))

D. REMEDIES

	Fair Housing Act (42 USC §§3601-3631) (see §§2.32-2.40)		Civil Rights Act of 1866 (42 USC §1982) (see §§2.41-2.47)	Unruh Civil Rights Act (CC §51) (see §2.57)	California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) (see §§2.51-2.56)	
	Administrative Remedies; Civil Action (42 USC §§3610, 3612, 3614) (see §§2.33-2.38)	Civil Action (independent of HUD involvement (42 USC §3613)) (see §§2.39-2.40)			Administrative Proceeding (Govt C §§12980-12989.3) (see §§2.52-2.55)	Civil Action (if DFEH does not issue an accusation (Govt C §§12980(h), 12989) (see §2.56)
Remedy						
1. Temporary Restraining Order	Yes (42 USC §§3610(e), 3612(g)(3), (j), 3614(d)(1)(A))	Yes (42 USC §3613(c)(1))	Yes (see *Sullivan v Little Hunting Park, Inc.* (1969) 396 US 229, 24 L Ed 2d 386, 90 S Ct 400)	Yes (see *Burks v Poppy Constr. Co.* (1962) 57 C2d 463, 20 CR 609)	Yes (Govt C §12983)	Yes (see Govt C §12989.2; *Commodore Home Sys., Inc. v Superior Court* (1982) 32 C3d 211, 185 CR 270)
2. Injunction	Yes (42 USC §§3610(e), 3612(g)(3), (j), 3614(d)(1)(A))	Yes (42 USC §3613(c)(1))	Yes (see *Jones v Alfred H. Mayer Co.* (1968) 392 US 409, 20 L Ed 2d 1189, 88 S Ct 2186)	Yes (see *Burks v Poppy Constr. Co.* (1962) 57 C2d 463, 20 CR 609)	Yes (Govt C §§12983, 12987(a)(2))	Yes (see Govt C §12989.2; *Commodore Home Sys., Inc. v Superior Court, supra*)
3. Affirmative Relief (*e.g.,* landlord must rent unit to plaintiff)	Yes (42 USC §§3612(g)(3), (o)(3); 3614(d)(1)(A))	Yes (42 USC §3613(c)(1))	Yes (see *Sullivan v Little Hunting Park, Inc., supra*)	Yes (see *Burks v Poppy Constr. Co.* (1962) 57 C2d 463, 20 CR 609)	Yes (Govt C §12987(a)(1))	No (see Govt C §12989.2, superseding *Commodore Home Sys., Inc. v Superior Court, supra*)
4. Punitive Damages	Yes, civil penalties (42 USC §§3612(g)(3), 3614(d)(1)(C))	Yes (42 USC §3613(c)(1))	Yes (*Woods-Drake v Lundy* (5th Cir 1982) 667 F2d 1198)	Statutory penalties of up to three times actual damage, but not less than $4000 (CC §52(a). No additional punitives under CC §3294 (*Doran v Embassy Suites Hotel* (ND Cal 2002) 2002 US Dist Lexis 16116)	Civil penalty of up to $10,000 to $50,000, depending on prior violations (Govt C §12987(a)(3))	Yes (as limited by Govt C §12989.2; *Commodore Home Sys., Inc. v Superior Court* (1982) 32 C3d 211, 185 CR 270)
5. Compensatory Damages	Yes (42 USC §§3612(g)(3), (o)(3), 3614(d)(1)(B))	Yes (42 USC §3613(c)(1))	Yes (*Phiffer v Proud Parrot Motor Hotel, Inc.* (9th Cir 1980) 648 F2d 548)	Yes (CC §52(a))	Yes (Govt C §12987(a)(4)) (and recovery for emotional distress is allowed; see §2.55)	Yes (see Govt C §12989.2; *Commodore Home Sys., Inc. v Superior Court, supra*)
6. Costs	Yes, prevailing party other than U.S. (42 USC §§3612(p), 3614(d)(2))	Yes (42 USC §3613(c)(1))	Yes, unless court otherwise directs (42 USC §1988(b); Fed R Civ P 54(d))	Yes, to prevailing plaintiff (CC §52(a))	Yes (Govt C §12987(a)(3)) (including expert witness fees; see §12965(b))	Yes (Govt C §12989.2; *Commodore Home Sys., Inc. v Superior Court, supra*) (including expert witness fees; see §2.56)

7. Attorney Fees	Yes, prevailing party other than U.S. (42 USC §§3612(p), 3614(d)(2))	Yes (42 USC §3613(c)(2))	Yes, to prevailing party (42 USC §1988(b); Fed R Civ P 54(d)(2))	Yes, to prevailing plaintiff (CC §52(a))	Yes (Govt C §12987(a)(3))	Yes (Govt C §12998(h)) (see *Flannery v California Highway Patrol* (1998) 61 CA4th 629, 71 CR2d 632; *Graham v DaimlerChrysler* (2004) 34 C4th 553, 21 CR3d 331, affirming availability of "catalyst" theory; confirming that multiplier is appropriate in certain cases)
8. Court-Appointed Attorney	Yes	Yes (42 USC §3613(b))	No	No	Yes	Yes

E. EXEMPT HOUSING RENTALS

	Fair Housing Act (42 USC §§3601-3631) (see §2.31)	Civil Rights Act of 1866 (42 USC §1982) (see §2.41)	Unruh Civil Rights Act (CC §51) (see §2.57)	California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) (see §2.49)
Type of Housing Rented				
1. Single-Family House Rented by owner	Exempt (42 USC §3603(b)(1)) if: 1. Owner is "private Individual" and does not own more than 3 single family homes at one time; 2. Owner does not own interest in or hold right to sale or rental proceeds of more than 3 single-family homes at one time; 3. Owner does not use rental facilities of real estate broker, agent, salesperson, or any person in business of selling or renting dwellings; and 4. Owner does not use discriminatory advertising in rental of dwelling.	No exemption	Probably no exemption if nonowner occupied (see 56 Ops Cal Atty Gen 546 (1973))	Exempt (Govt C §12927(c)(2)(A)-(B)): 1. Rental of portion of owner occupied single-family dwelling to no more than 1 roomer or border; 2. Advertising for housing limited to persons of one sex for sharing of living areas in a single dwelling unit.
2. Duplex, Triplex, or Fourplex	Exempt if owner resides in one of the units (42 USC §3603(b)(2))	No exemption	No exemption	No exemption
3. Five Units or More	No exemption	No exemption	No exemption	No exemption
4. Housing Owned by Private Club	Limitation of rental to members is exempt (42 USC §3607(a)) if: 1. Club is not open to public (*i.e.*, limited to members); 2. Club provides	No exemption	Unsettled	No exemption

	lodging as incident to its primary purpose; and 3. Housing is not owned or operated for commercial purpose.			
5. Housing Owned by Religious Organization	Limiting rentals to persons of same religion exempt (42 USC §3607(a)) if project does not restrict tenancy on basis of race, color, or national origin and is not owned or operated for commercial purpose.	No exemption	Unsettled	Exempt to extent preference given, to persons of same religion, unless membership in religion restricted to race, color, or national origin (Govt C §12955.4)
6. Mobilehome Sites	No exemption (42 USC §3602(b) see U.S. v City of Hayward (9th Cir 1994) 36 F3d 832), unless qualified as housing for older persons under 42 USC §3607(b). See §§2.22-2.25C, 6.18.	No exemption, unless qualified as housing for older persons under 42 USC §3607(b). See *Taylor v Rancho Santa Barbara* (9th Cir 2000) 206 F3d 932.	No exemption, unless qualified as housing for older persons under CC §§51.2-51.4. See §§2.25B, 6.18.	No exemption, unless qualified as housing for older persons under Govt C §12955.9. See §§2.25B, 6.18.
7. Emergency Shelters and Transitional Housing	No exemption (see *Turning Point, Inc. v City of Caldwell* (9th Cir 1996) 74 F3d 941, 942 ; *Community House, Inc. v City of Boise* (9th Cir 2007) 490 F3d 1041, 1048, fn 2)	No exemption	No exemption	No exemption

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§2.29 V. FEDERAL ANTIDISCRIMINATION AND FAIR HOUSING LAWS

The principal federal statute that prohibits discrimination in the sale, rental, and financing of housing is the Fair Housing Act of 1968, as amended by the Fair Housing Amendments Act of 1988 (42 USC §§3601-3619; see §§2.30-2.40). It is also referred to as Title VIII of the Civil Rights Act of 1968 (Pub L 90-284, 82 Stat 73). With its 1988 amendments, the Fair Housing Act has become the most important federal fair housing statute because of its expanded civil and administrative enforcement and protection of new classes from housing discrimination. HUD regulations adopted under the Fair Housing Act provide help in understanding the law and some basic examples of the law's coverage. 24 CFR §§100.50-100.400.

The Fair Housing Act establishes only the minimum for fair housing protections. It expressly permits state laws, such as California's Fair Employment and Housing Act, to grant additional protections to the enumerated classes. 42 USC §3615. On the other hand, the federal Act preempts any state or local law that provides lesser protections to the enumerated classes. 42 USC §3615.

Other significant federal fair housing laws include:

- The Civil Rights Act of 1866 (42 USC §§1981-1982; see §§2.41-2.47);
- Title IX of the Civil Rights Act of 1968 (42 USC §3631), which makes it a crime to intimidate or interfere with a potential tenant because of his or her race, color, religion, sex, handicap, familial status, or national origin;
- Title VI of the Civil Rights Act of 1964 (42 USC §§2000d—2000d-6), which prohibits discrimination in federally assisted programs;
- Section 504 of the Rehabilitation Act of 1973 (29 USC §794), which prohibits handicap discrimination in federally assisted programs;
- Age Discrimination Act of 1975 (42 USC §§6101-6107), which prohibits age discrimination in federally assisted programs; and
- Executive Order No. 11,063 (as amended by Executive Order No. 12,259, 46 Fed Reg 1253 (1980); Executive Order No. 12892, 59 Fed Reg 2939 (1994) and reprinted in the historical and statutory notes to 42 USC §1982), which requires equal opportunity in housing.
- Americans With Disabilities Act, Title II, Subtitle A, 42 USC §§12131-12134 which prohibits discrimination against the disabled in state or local government activities. HUD is assigned administrative authority over state and local government public housing, housing assistance, and referral programs. See 28 CFR §35.190(b)(4).

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A. Fair Housing Act

1. Scope

§2.30 a. Application, Protections, and Requirements

The Fair Housing Act (42 USC §§3601-3631) (FHA) is a comprehensive statute designed to enforce a policy of fair housing throughout the United States. Enacted as Titles VIII and IX of the Civil Rights Act of 1968, the FHA is substantially broader in scope than the Civil Rights Act of 1866 (42 USC §§1981-1982; see §§2.41-2.47). It protects all persons, not just citizens, against discrimination on specified bases. 42 USC §3604. Therefore, a noncitizen who has suffered discrimination on the basis of race, color, national origin, or any other enumerated basis, may invoke the protections of the FHA. See, *e.g.*, *Espinoza v Hillwood Square Mut. Ass'n* (ED Va 1981) 522 F Supp 559. The FHA makes it illegal to take any of the following actions based on a person's race, color, religion, sex, handicap, familial status, or national origin (42 USC §3604(a)-(e)):

- Refuse to sell or rent after making a bona fide offer, or to refuse to negotiate for the sale or rental of a dwelling, or otherwise to make the dwelling unavailable (see 24 CFR §§100.60, 100.202(a));
- Discriminate in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities (see 24 CFR §§100.65, 100.202(b));
- Make, print, or publish any notice, statement, or advertisement, with respect to the sale or rental of a dwelling, that indicates any preference, limitation, or discrimination (see 24 CFR §100.75);
- Represent that any available dwelling is not available for inspection, sale, or rental (see 24 CFR §100.80); and
- Induce or attempt to induce for profit the sale or rental of any dwelling through representations regarding the possible entry into the neighborhood of persons of a particular race, color, religion, sex, familial status, or national origin.

The FHA also prohibits discrimination based on a person's handicap or association with a handicapped person, and requires landlords to make reasonable accommodations and to allow reasonable modifications to a dwelling unit for a person with a handicap (see §2.27). 42 USC §3604(f); 24 CFR §§100.201-100.205.

The FHA may be invoked when retaliation against a protected class occurs. *Edwards v Marin Park, Inc.* (9th Cir 2004) 356 F3d 1058.

Under HUD regulations it is illegal to "steer" a housing applicant, *i.e.,* to discourage a person from renting by communicating that he or she would not be comfortable or compatible with existing residents, or assigning a person to a particular section of development on the basis of that person's race, color, religion, sex, handicap, familial status, or national origin. 24 CFR §100.70.

The FHA also protects persons who associate with members of a protected class. *Woods-Drake v Lundy* (5th Cir 1982) 667 F2d 1198, 1201.

"Dwelling" is defined as any building or portion of a building that is actually occupied or intended for occupancy as a residence, and vacant land offered for sale or lease for the construction of such a building. 42 USC §3602(b). This definition includes mobilehome sites (*U.S. v Grooms* (MD Fla 1972) 348 F Supp 1130), summer homes (*U.S. v Columbus Country Club* (3d Cir 1990) 915 F2d 877), and transitional housing for homeless persons (*Community House, Inc. v City of Boise* (9th Cir 2007) 490 F3d 1041).

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§2.31 b. Exemption

Expressly exempt from coverage by the Fair Housing Act is the rental of a single-family home in narrow circumstances in which (42 USC §3603(b)(1)):

(1) The landlord does not own, or have an interest in, more than three single family dwellings;

(2) The landlord does not sell more than one dwelling in a two-year period; and

(3) The rental relies on neither a real estate broker nor written discriminatory statements.

See *Hodorowski v Bell* (ED Wis 1978) 455 F Supp 432; *Singleton v Gendason* (9th Cir 1976) 545 F2d 1224. Also exempt are owner-occupied roominghouses or small apartments if they contain living quarters for no more than four families living independently of one another. 42 USC §3603(b)(2).

As indicated by a leading commentator on fair housing, the most important lesson about these exemptions is that they have rarely succeeded in protecting a defendant from liability. Schwemm, Housing Discrimination: Law and Litigation (2001). More important, the California Fair Employment and Housing Act does not exempt the properties described in federal law and thus covers virtually all rental units in the state (see §2.49).

As noted in §2.25, the Fair Housing Act exempts "housing for older persons" from its prohibition against discrimination based on "familial status." 42 USC §3607(b); 24 CFR §§100.300-100.308. State law, however, provides a different and more restrictive exemption for senior housing, and California landlords must comply with those more restrictive provisions. See §2.1.

A religious group or organization may give preference to persons of the same religion in the sale, rental, or occupancy of dwellings that it owns or operates for noncommercial purposes, provided religious membership is not restricted by race, color, or national origin. 42 USC §3607. In addition, a private club, not open to the public, which maintains a noncommercial lodging incidental to its primary purpose, may limit rental to its members or give its members preference. 42 USC §3607. But see *U.S. v Columbus Country Club* (3d Cir 1990) 915 F2d 877.

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§2.32 2. Enforcement

There are three separate and independent methods for enforcing the provisions of the Fair Housing Act (42 USC §§3601-3631):

(1) A victim of illegal discrimination may file an administrative complaint with the U.S. Department of Housing and Urban Development (HUD), which is obligated to investigate and prosecute meritorious complaints. 42 USC §3610; 24 CFR §§103.1-103.515. See §§2.33-2.38. Under a 1994 agreement reached with the California Department of Fair Employment and Housing (DFEH), HUD will transfer most complaints that it receives to DFEH for handling. If HUD determines that reasonable cause exists to believe that housing discrimination has occurred, the complainant has a right to prosecute the case with the assistance of government attorneys. Any party can elect a civil action rather than an administrative hearing. 42 USC §3612(a).

(2) The victim may bypass the foregoing procedure and commence a civil action immediately. 42 USC §3613. See §2.39.

(3) In a "pattern or practice" case, the U.S. Attorney General may bring an action for preventive relief. 42 USC §3614. See §2.40.

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a. Administrative Action

(1) Preparing and Filing Complaint

§2.33 (a) Filing With HUD

Responsibility for overall administration of the Fair Housing Act (FHA) (42 USC §§3601-3631) rests with HUD. 42 USC §3608(a). HUD has investigation, conciliation, and enforcement powers with respect to complaints of housing discrimination. 42 USC §3608(c)-(d). As noted in §2.32, the California Department of Fair Employment and Housing (DFEH) has now assumed most of these responsibilities.

Any person who feels that he or she has been or will be injured by an alleged violation of the Act may file a written complaint with HUD in the proper format and containing the information required by HUD. 42 USC §3610(a). The complainant may initiate a complaint by telephone, by mail, or in person at any HUD Office of Fair Housing and Equal Opportunity. 24 CFR §103.30. (These offices are located in most major cities and will be listed in the phone book's "Government" section. The HUD website (see Directory) also has a complete list.) The Secretary of HUD may also file a complaint. 42 USC §3610(a)(1)(A)(i). For a copy of the complaint form, see §2.34.

A complainant must file an administrative complaint within 1 year after the alleged discriminatory housing practice has occurred or terminated (42 USC §3610(a)(1)(A)(i)), but has 2 years to file a civil complaint (42 USC §3613(a)(1)(A)). See §2.39. The respondent is entitled to file an answer to the complaint. Both the complaint and answer must be verified.

An aggrieved person may file a complaint in person or by mail at: Fair Housing, Department of Housing and Urban Development, Washington, D.C. (see Directory) or any HUD office. Practitioners should check for the location of the nearest office.

A complainant may also file a complaint with a state or local agency that has been certified as "substantially equivalent." 24 CFR §103.30. No California *local* agencies are so certified.

Whenever an appropriate state or local agency (a "substantially equivalent agency") has been certified by the Secretary to process discrimination complaints (see 42 USC §3610(f)(3)-(5)) and a complaint falls within the agency's jurisdiction, the Secretary must refer the complaint to the certified agency. 42 USC §3610(f)(1). The Secretary is not allowed to take any further action on the complaint unless certain specified exceptions apply. 42 USC §3610(f)(2).

When the complaint is received by HUD or DFEH, it is considered filed for purposes of satisfying the statute of limitations. HUD can consider a complaint to be filed when it has received information by phone identifying the parties and describing generally the alleged discriminatory housing practice. 24 CFR §103.35.

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§2.33A (b) Filing With USDA

Historically, housing discrimination complaints filed against recipients of Rural Housing Services (RHS) funds, administered by the United States Department of Agriculture (USDA) (formerly the Farmers Home Administration), were treated as violations of nondiscrimination laws other than the Fair Housing Act (FHA) (42 USC §§3601-3631). As a result, the victims of housing discrimination in USDA subsidized rural housing programs were not afforded the substantially greater rights and remedies available under the FHA. However, beginning in October 1997, USDA began formally referring all complaints of housing discrimination in its federally subsidized rural housing programs to HUD pursuant to the Memorandum of Understanding between USDA and HUD, July 11, 1997 (MOU). The MOU basically provides that HUD has jurisdiction over complaints alleging jurisdiction under the FHA, but that USDA retains jurisdiction to the extent the complaints allege discrimination under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 or the Age Discrimination Act of 1975.

Under the MOU, when violation of the FHA is alleged, HUD and USDA agree to cooperate in conducting investigations. The agencies also agree to cooperate in the resolution or conciliation of a complaint under any of the civil rights laws. However, HUD may conciliate or settle complaints only under the FHA without the express consent of USDA, but it may not do so for complaints alleging violation of the other civil rights laws.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.34 (2) Form: Housing Discrimination Complaint (HUD 903.1)

§2.34 (2) Form: Housing Discrimination Complaint (HUD 903.1)

PLACE
POSTAGE
HERE

MAIL TO:

Public Reporting Burden for this collection of information is estimated to average 20 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The Department of Housing and Urban Development is authorized to collect this information by Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, (P.L. 100-430); Title VI of the Civil Rights Act of 1964, (P.L. 88-352); Section 504 of the Rehabilitation Act of 1973, as amended, (P.L. 93-112); Section 109 of Title I- Housing and Community Development Act of 1974, as amended, (P.L. 97-35); Americans with Disabilities Act of 1990, (P.L. 101-336); and by the Age Discrimination Act of 1975, as amended, (42 U.S.C. 6103).

The information will be used to investigate and to process housing discrimination complaints. The information may be disclosed to the United States Department of Justice for its use in the filing of pattern and practice suits of housing discrimination or the prosecution of the person(s) who committed that discrimination where violence is involved; and to State or local fair housing agencies that administer substantially equivalent fair housing laws for complaint processing. Failure to provide some or all of the requested information will result in delay or denial of HUD assistance.

Disclosure of this information is voluntary.

EQUAL HOUSING OPPORTUNITY

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Print

HOUSING DISCRIMINATION INFORMATION

Departamento de Vivienda y Desarrollo Urbano | Oficina de Derecho Equitativo a la Vivienda
U.S. Department of Housing and Urban Development | Office of Fair Housing and Equal Opportunity

Instructions: (Please type or print) Read this form carefully. Try to answer all questions. If you do not know the answer or a question does not apply to you, leave the space blank. You have one year from the date of the alleged discrimination to file a complaint. Your form should be signed and dated.

Your Name

Your Address

City | State | Zip Code

Best time to call | Your Daytime Phone No | Evening Phone No

Who else can we call if we cannot reach you?

Contact's Name | Best Time to call

Daytime Phone No | Evening Phone No

Contact's Name | Best Time to call

Daytime Phone No | Evening Phone No

What happened to you?

How were you discriminated against?

For example: were you refused an opportunity to rent or buy housing? Denied a loan? Told that housing was not available when in fact it was? Treated differently from others seeking housing?

State briefly what happened.

Print

HOUSING DISCRIMINATION INFORMATION

Departamento de Vivienda y Desarrollo Urbano — Oficina de Derecho Equitativo a la Vivienda
U.S. Department of Housing and Urban Development — Office of Fair Housing and Equal Opportunity

Why do you think you are a victim of housing discrimination?

Is it because of your:

· race · color · religion · sex · national origin · familial status (families with children under 18) · disability?

For example: were you denied housing because of your race? Were you denied a mortgage loan because of your religion? Or turned down for an apartment because you have children?

Briefly explain why you think your housing rights were denied and circle the factor(s) listed above that you believe apply.

Who do you believe discriminated against you?

For example: was it a landlord, owner, bank, real estate agent, broker, company, or organization?

Identify who you believe discriminated against you.

Name

Address

Where did the alleged act of discrimination occur?

For example: Was it at a rental unit? Single family home? Public or Assisted Housing? A Mobile Home?

Did it occur at a bank or other lending institution?

Provide the address.

Address

City State Zip Code

When did the last act of discrimination occur?

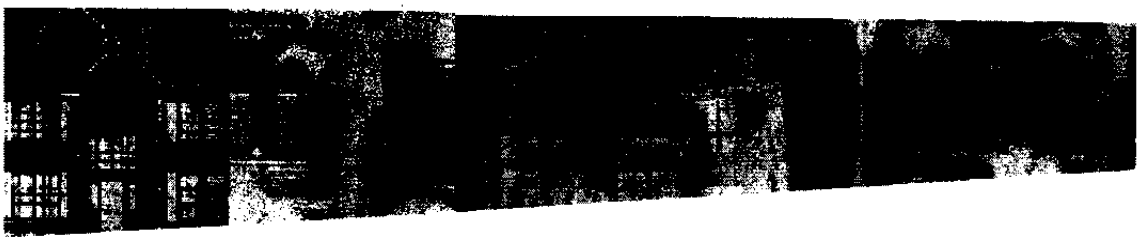
Enter the date ____/____/____

Is the alleged discrimination continuing or ongoing? Yes No_____ _____

Signature Date

Send this form to HUD or to the fair housing agency nearest you. If you are unable to complete this form, you may call that office directly. See address and telephone listings on back page.

Print



It is Unlawful to Discriminate in Housing Based on These Factors...

- Race
- Color
- National origin
- Religion
- Sex
- Familial status (families with children under the age of 18, or who are expecting a child)
- Handicap (if you or someone close to you has a disability)

If You Believe Your Rights Have Been Violated...

- HUD or a State or local fair housing agency is ready to help you file a complaint.
- After your information is received, HUD or a State or local fair housing agency will contact you to discuss the concerns you raise.

Detach here. Fold and close with glue or tape (no staples)

Keep this information for your records.

Date you mailed your information to HUD: ____/____/____

Address to which you sent the information:

Office _____ Telephone _____

Street _____

City _____ State _____ Zip Code _____

If you have not heard from HUD or a State or local fair housing agency within three weeks from the date you mailed this form, you may call to inquire about the status of your complaint. See address and telephone listings on back page.

Comment: This form may be filled out and filed online electronically (go to www.hud.gov). California complaints may

be sent by mail to the San Francisco office of HUD (see Directory).

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.35 (3) Response to Complaint

§2.35 (3) Response to Complaint

Within 10 days after a complaint is filed, the Secretary must serve on the respondent (the person accused of the discriminatory practice) a copy of the complaint and a notice identifying the alleged discrimination and advising the respondent of his or her procedural rights and obligations. The respondent may file an answer to the complaint; the answer must be received within 10 days after receipt of the notice. 42 USC §3610(a)(1)(B).

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§2.36 (4) Investigation and Conciliation of Dispute

The Secretary must investigate the matter within 100 days or notify the complainant and respondent of the reasons for not doing so. 42 USC §3610(a)(1)(B)-(C). The failure of HUD to complete an investigation within 100 days does not deprive HUD of jurisdiction over the matter, or a court of jurisdiction to resolve a subsequent civil action filed on behalf of the complainant. *U.S. v Sea Winds of Marco, Inc.* (MD Fla 1995) 893 F Supp 1051; *U.S. v Curlee* (CD Cal 1992) 792 F Supp 699, 700.

Between the time that a complaint is filed and either a charge is issued or the complaint is dismissed, the Secretary must engage in conciliation of the dispute, to the extent feasible. 42 USC §3610(b)(1). The Secretary must also prepare a final investigative report at the end of the investigation. 42 USC §3610(b)(5). If conciliation is successful, the agreement between the parties is reduced to a written conciliation agreement. 24 CFR §103.310. Under an agreement, the aggrieved party can receive damages, including those for humiliation or embarrassment, and attorney fees. He or she can also receive equitable relief, including access to the housing or alternative housing. 24 CFR §103.315. If a conciliation agreement is reached and there is reason to believe that the respondent has breached the agreement, the Secretary must refer the matter to the Attorney General with a recommendation that a civil action be filed under 42 USC §3614 to enforce the agreement. 42 USC §3610(c). If the Secretary concludes after the complaint is filed that prompt judicial action is required, the Secretary can authorize the Attorney General to file a civil action for appropriate temporary or preliminary relief pending disposition of the complaint. 42 USC §3610(e).

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§2.37 (5) Issuance of a Charge or Dismissal

Unless it is impracticable to do so or a conciliation agreement has been approved, the Secretary, within 100 days of the filing of the complaint (or within 100 days of "further action" under 42 USC §3610(f)(2)), must determine whether a discriminatory housing practice has occurred or is about to occur. 42 USC §3610(g)(1). If reasonable cause is found to believe that a discriminatory practice has occurred or is about to occur, the Secretary must immediately issue a charge under 42 USC §3612. If the matter concerns the legality of any state or local land-use ordinance, the matter must be referred to the Attorney General under 42 USC §3614. 42 USC §3610(g)(2). If there is no reasonable cause to believe that a discriminatory practice has occurred, the complaint must be dismissed. 42 USC §3610(g)(3). The Secretary is barred from issuing a charge once trial has begun in a civil action commenced by an aggrieved party under state or federal law. 42 USC §3610(g)(4). After HUD issues a charge, it must serve, on each respondent and complainant, a copy of the charge, information on making an election under 42 USC §3612(a) (see §2.38), and notice of an opportunity for a hearing. 42 USC §3610(h).

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§2.38 (6) Charge Issued: Election of Civil Action; Administrative Hearing

After a charge is issued, the complainant, the aggrieved person, or the respondent may elect to have it decided in a civil action instead of an administrative hearing. The election must be made no later than 20 days after receipt of service under 42 USC §3610(h) by the electing person or, if HUD has filed the complaint, no later than 20 days after service. 42 USC §3612(a). If an election is made to proceed with a civil action, the Secretary must authorize the Attorney General to begin a civil action within 30 days of the election. 42 USC §3612(o)(1). The court may grant the same relief available in civil actions brought under 42 USC §3613. 42 USC §3612(o)(3).

An administrative law judge who finds that a respondent has engaged or is about to engage in a discriminatory housing practice must promptly issue an order for appropriate relief. Such relief may include actual damages, injunctive or other relief, and civil penalties of up to $50,000. 42 USC §3612(g). HUD issued final regulations on the department's fair housing civil penalty procedures. See 24 CFR §180.671. Administrative law judges may assess a separate civil penalty against a respondent for each separate and distinct discriminatory housing practice. Under the old procedure, judges could only assess a single penalty in a particular case, regardless of how many incidents of discrimination were shown in the case. If the final decision includes a finding that the respondent has violated the Fair Housing Act in the course of a business that is regulated by a state or local licensing authority, the Secretary will notify the appropriate licensing agency of the decision and recommend appropriate suspension or revocation of the respondent's license. 42 USC §3612(g)(5); 24 CFR §180.700.

In either a civil or administrative proceeding under 42 USC §3612, prevailing parties may be awarded reasonable attorney fees and costs. 42 USC §3612(p).

The Secretary may petition any United States court of appeals for the circuit where the discriminatory practice occurred for enforcement of the administrative law judge's order and for appropriate temporary relief or restraining orders. 42 USC §3612(j). Judicial review of the administrative law judge's order is available under 28 USC §158. 42 USC §3612(i). If within 60 days after the judge's order is entered no petition for review under §3612(i) has been filed and the Secretary has not sought enforcement under §3612(j), any person entitled to relief under the order can petition the United States court of appeals for a decree enforcing the order. 42 USC §3612(m).

Any person who willfully fails to attend and testify or answer any lawful inquiry or to produce evidence under subpoena or other order is subject to a fine of up to $100,000, imprisonment for up to one year, or both. 42 USC §3611(c)(1). On the Secretary's power to issue subpoenas and order discovery to aid HUD investigations and hearings, see 42 USC §3611. In addition, a person may be subject to fine or imprisonment if he or she willfully falsifies, alters, or tampers with evidence. 42 USC §3611(c)(2).

Under 42 USC §3614a, the Secretary may issue regulations to effectuate the Administrative Procedure Act. Regulations on HUD's investigatory, conciliation, and enforcement procedures are found at 24 CFR pts 103-104.

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§2.39 b. Civil Action Under 42 USC §3613

The Fair Housing Act authorizes civil remedies for aggrieved persons to enforce their rights without exhausting any administrative remedies. 42 USC §3613. An aggrieved person may commence a civil action in an appropriate federal district or state court no later than 2 years after the occurrence or termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement (see §2.36), whichever occurs last. Except for actions arising from the breach of a conciliation agreement, the 2-year period is tolled while an administrative proceeding concerning a complaint or charge based on the discriminatory practice is pending. 42 USC §3613(a)(1). However, in an unpublished opinion, the Seventh Circuit has upheld a district court ruling that the statute is only tolled in complaints for "certified" state or local civil rights agencies. *Radivojevic v Granville Terrace Mutual Ownership Trust* (7th Cir 2001) 2001 US App Lexis 21797; CAVEAT: Federal rules restrict citing unpublished court opinions. (In California, DFEH is certified as a "substantially equivalent" fair housing agency by HUD, but local fair housing or human rights commissions are not.) Filing a complaint under 42 USC §3610(a) (see §2.33) does not bar a civil action on the same matter. If a conciliation agreement has been reached, however, a civil action may not be filed except to enforce the agreement. 42 USC §3613(a)(2). Once a hearing has been commenced by an administrative law judge on a charge of discrimination (see §2.38), a civil action may not be filed. 42 USC §3613(a)(3).

On timely application, the Attorney General may intervene in the civil action if the Attorney General certifies that the case is of general public importance. The Attorney General can obtain the same relief under 42 USC §3614(e) as is available to a complainant. 42 USC §3613(e).

On application of either the person alleging the discriminatory practice or the person against whom it is alleged, the court may appoint an attorney for such person, or may authorize commencement or continuation of the action without payment of fees, costs, or security if the person is unable to bear the costs of the action. 42 USC §3613(b). The court may award the plaintiff actual and punitive damages, in addition to appropriate relief, such as a permanent or temporary injunction, or a temporary restraining order. However, punitive damages may not be awarded unless compensatory or nominal damages are awarded or there is a violation of the Constitution. *Louisiana ACORN Fair Hous. v LeBlanc* (5th Cir 2000) 211 F3d 298, rehearing and rehearing en banc denied (5th Cir 2000) 224 F3d 767, cert denied (2001) 532 US 904. In its discretion, the court may allow the prevailing party, other than the United States, reasonable attorney fees and costs. 42 USC §3613(c).

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§2.40 c. U.S. Attorney General "Pattern-or-Practice" Action

Under 42 USC §3614, the U.S. Attorney General may initiate a civil action to enforce provisions of the Fair Housing Act if there is reasonable cause to believe that:

(1) Any person or group is engaged in a "pattern or practice" of resistance to the full enjoyment of the rights protected under the Act; or

(2) A group of persons is denied rights granted by the Act and the denial raises an issue of general public importance.

A "pattern or practice" of discrimination occurs when the discriminatory conduct is not an isolated, accidental, or peculiar departure from otherwise nondiscriminatory practices. *U.S. v Pelzer Realty Co.* (5th Cir 1973) 484 F2d 438, 445. Proof of a pattern or practice of discrimination may be established through a demonstrated discriminatory policy rather than proof of numerous specific acts. *U.S. v Hughes Mem. Home* (WD Va 1975) 396 F Supp 544, 551.

A civil action on a discriminatory housing practice must be commenced by the Attorney General within 18 months after the occurrence or termination of the practice. 42 USC §3614(b)(1)(B). An action based on the breach of a conciliation agreement (see §2.36), however, must be commenced within 90 days after it was referred to the Attorney General under 42 USC §3610(c). 42 USC §3614(b)(2)(B). Private persons are allowed to intervene in civil actions commenced by the Attorney General under the act. 42 USC §3614(e).

In addition to preventive relief, such as injunctions and restraining orders, monetary damages may be awarded to aggrieved persons in actions brought by the Attorney General. Civil penalties of up to $100,000 may also be assessed. In its discretion, the court may award the prevailing party, other than the United States, reasonable attorney fees and costs. 42 USC §3614(d).

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B. Civil Rights Act of 1866

§2.41 1. Application

The Civil Rights Act of 1866 (42 USC §§1981-1982) enforces the provisions of the 13th Amendment to the U.S. Constitution, which abolished slavery and prohibits racial discrimination. Section 1 of the original Act prohibited discrimination against any citizen with respect to property and the right to contract, and it extended equal protection under the law to all citizens. Section 16 of the Civil Rights Act of 1870 extended the right to contract and equal protection under the law to all persons within the jurisdiction of the United States; this protection is codified at 42 USC §1981. The 1866 Act's prohibition against discrimination regarding property rights is codified at 42 USC §1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 1982 prohibits racial discrimination in any type of housing; there are no exemptions (unlike the Fair Housing Act, which exempts certain housing accommodations (42 USC §3607); see §2.31). In *Jones v Alfred H. Mayer Co.* (1968) 392 US 409, 20 L Ed 2d 1189, 1192, 88 S Ct 2186, the Supreme Court held that §1982 covers a racially based refusal to sell a house but also noted that "§1982 is not a comprehensive open housing law." The courts have interpreted the section as applying to the sale or rental of a single-family residence by the owner (see *Ford v Wisconsin Real Estate Examining Bd.* (1970) 179 NW2d 786) and to the rental of apartments (*Jones v Sciacia* (ED Mo 1969) 297 F Supp 165, aff'd (2d Cir 1970) 422 F2d 393). It prohibits indirect as well as direct forms of discrimination. See, *e.g., Hall v Freitas* (ND Cal 1972) 343 F Supp 1099 (background check conducted on African-American applicants more stringent than typical check on white applicants).

In addition to discrimination in the sale or rental of property, §1982 prohibits discrimination affecting related property rights. It covers the right of white tenants to have African-American guests (*Walker v Pointer* (ND Tex 1969) 304 F Supp 56), and it protects an African-American homebuyer from exclusion from a subdivision recreational club if membership is routinely sold with the property (*Tillman v Wheaton-Haven Recreation Ass'n* (1973) 410 US 431, 35 L Ed 2d 403, 93 S Ct 1090). See also *Terry v Elmwood Cemetery* (ND Ala 1969) 307 F Supp 369 (rights of African-Americans to purchase cemetery plot). Section 1982 prohibits the owner of a housing project from reducing services and allowing the project to deteriorate when the tenant composition changes from predominantly white to predominantly African-American. *Concerned Tenants Ass'n v Indian Trails Apartments* (ND Ill 1980) 496 F Supp 522.

Persons who are not the direct victims of discrimination have standing under §1982 based on the theory that (a) they are often the only effective proponents of the rights of the "targets" of discrimination, and (b) they have the right under §1982 to associate with racial minorities. See, *e.g., Sullivan v Little Hunting Park, Inc.* (1969) 396 US 229, 24 L Ed 2d 386, 90 S Ct 400; *Walker v Pointer, supra.*

Some courts have held that §1981 extends to racial discrimination in property-related contracts such as leases (*e.g., Gore v Turner* (5th Cir 1977) 563 F2d 159; *Williamsburg Fair Hous. Comm'n v New York City Hous. Auth.* (SD NY 1980) 493 F Supp 1225), but the section is not often asserted as a basis for housing discrimination actions.

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§2.42 a. No State Action Requirement

For many years, the courts declared that the Civil Rights Act of 1866 (42 USC §§1981-1982) prohibited only acts of discrimination that state law sanctioned or supported. In the landmark decision of *Jones v Alfred H. Mayer Co.* (1968) 392 US 409, 20 L Ed 2d 1189, 88 S Ct 2186, the U.S. Supreme Court held that 42 USC §1982 prohibits racial discrimination by private citizens in the sale or rental of housing without regard to the presence or absence of state action and that the 1866 Act has independent and concurrent existence with the Fair Housing Act (42 USC §§3601-3631).

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§2.43 b. The Protected Classes

Although 42 USC §1982 primarily prohibits discrimination based on race (*Jones v Alfred H. Mayer Co.* (1968) 392 US 409, 20 L Ed 2d 1189, 1192, 88 S Ct 2186), the Supreme Court concluded that 42 USC §1981 protects all "identifiable classes of persons" who are discriminated against "solely because of their ancestry or ethnic characteristics." *Saint Francis College v Al-Khazraji* (1987) 481 US 604, 95 L Ed 2d 582, 592, 107 S Ct 2022. This broad description of the protected class encompasses most groups that traditionally have been considered ethnic minorities. See also *Gonzalez v Stanford Applied Eng'g* (9th Cir 1979) 597 F2d 1298, 1300 (dark-skinned Mexican-American); *Enriquez v Honeywell, Inc.* (WD Okla 1977) 431 F Supp 901 (Mexican-American); *Ortiz v Bank of America* (ED Cal 1982) 547 F Supp 550, 568 (Puerto Rican). In *Saint Francis College v Al-Khazraji, supra,* the Supreme Court indicated, however, that §1982 does not cover discrimination based solely on "the place or nation of his origin." 481 US at 613.

Section 1981 extends to discrimination directed at white persons. *McDonald v Santa Fe Trail Transp. Co.* (1976) 427 US 273, 49 L Ed 2d 493, 96 S Ct 2574. Because the relevant language is identical in both §§1981 and 1982, §1982 will presumably also be construed to apply to racial discrimination directed against whites. Section 1982 has been held to authorize whites to sue for discrimination based on their association with African-Americans. *Woods-Drake v Lundy* (5th Cir 1982) 667 F2d 1198, 1201.

Section 1982 applies only to racial discrimination against citizens. Other federal and state legislation, *e.g.,* the Fair Housing Act (42 USC §§3601-3631), protects noncitizens from racial and other forms of discrimination in property-rights matters. See, *e.g*., *Espinoza v Hillwood Square Mut. Ass'n* (ED Va 1981) 522 F Supp 559, cited in §2.30.

Section 1981 protects all persons within the jurisdiction of the United States from discrimination involving state action, including persons who are not citizens. See *Takahashi v Fish & Game Comm'n* (1948) 334 US 410, 92 L Ed 1478, 68 S Ct 1138. A federal district court in California ruled to the contrary regarding private acts of discrimination against noncitizens. See *De Malherbe v International Union of Elevator Constructors* (ND Cal 1977) 438 F Supp 1121. More recent Circuit-level and trial court decisions conflict on this issue. Compare *Bhandari v First Nat'l Bank* (5th Cir 1987) 829 F2d 1343 with *Duane v GEICO* (4th Cir 1994) 37 F3d 1036 and *Espinoza v Hillwood Square Mut. Ass'n, supra*.

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2. Enforcement

§2.44 a. Litigating Claims Under the Act

Only a private litigant may file a claim under the Civil Rights Act of 1866 (42 USC §§1981-1982). HUD's right of enforcement under the Fair Housing Act (see §2.30) does not apply to the 1866 Act. An action under the 1866 Act may be filed in federal district court without regard to the amount in controversy, or in any state court of general jurisdiction. *Sullivan v Little Hunting Park, Inc.* (1969) 396 US 229, 24 L Ed 2d 386, 90 S Ct 400.

The 1866 Act contains no limitation period, so state statutes of limitation control. 28 USC §1652; *Baker v F.F. Invs.* (7th Cir 1970) 420 F2d 1191; *Hoffman v Halden* (9th Cir 1959) 268 F2d 280, 305, overruled on other grounds in *Cohen v Norris* (9th Cir 1962) 300 F2d 24, 30. In *Wilson v Garcia* (1985) 471 US 261, 85 L Ed 2d 254, 105 S Ct 1938, the U.S. Supreme Court held that claims under 42 USC §1983 are best characterized as claims for personal injury, and are thus subject to state statutes of limitation for personal injury actions. *Wilson* implicitly overruled *Smith v Cremins* (9th Cir 1962) 308 F2d 187, in which the court held that 42 USC §1983 claims were subject to the 3-year limitation period of CCP §338(a), applicable to actions for liability created by statute.

Although *Wilson* addressed only §1983 claims, the court's reasoning appears to be equally applicable to civil rights actions under 42 USC §§1981 and 1982. Thus, it is reasonable to conclude that the 2-year statute of limitations for personal injury actions, set forth in CCP §335.1, will apply to actions to enforce the 1866 Act in California. In *Barajas v Bermudez* (9th Cir 1994) 43 F3d 1251, a case brought under the federal Migrant and Seasonal Agricultural Worker Protection Act, the court distinguished *Wilson,* but *Wilson* clearly remains good law for cases enforcing federal civil rights statutes.

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b. Remedies

§2.45 (1) Damages

A cause of action under 42 USC §§1981-1982 is generally based on tort principles. Therefore, damages for violations are normal tort damages, including punitive or exemplary damages when the facts warrant. See *Gore v Turner* (5th Cir 1977) 563 F2d 159; *Seaton v Sky Realty Co*. (7th Cir 1974) 491 F2d 634; *Woods-Drake v Lundy* (5th Cir 1982) 667 F2d 1198. The defendant in a case involving housing discrimination is held responsible for the natural consequences of his or her actions. In *Brown v Ballas* (ND Tex 1971) 331 F Supp 1033, the defendant's discrimination forced the plaintiff to prolong her search for housing. Therefore, the court held the defendant liable for the time that the plaintiff lost from work and expenses incurred in her attempts to locate another residence.

In determining the amount of compensatory damages to award, the court begins with the proposition that a person denied housing through illegal discrimination has suffered a substantial injury to the basic rights of citizenship—a right considered to be so valuable that damages are presumed without proof of actual damages. *Seaton v Sky Realty Co.* (7th Cir 1974) 491 F2d 634, 637. See *Washington v Official Court Stenographer* (ED Pa 1966) 251 F Supp 945, 947; *Basista v Weir* (3d Cir 1965) 340 F2d 74, 88. Thus, in addition to out-of-pocket expenses, compensatory damages may be awarded for mental anguish and personal humiliation. *Phiffer v Proud Parrot Motor Hotel, Inc.* (9th Cir 1980) 648 F2d 548; *Moore v Greene* (9th Cir 1970) 431 F2d 584; *McArthur v Pennington* (ED Tenn 1963) 253 F Supp 420, 430. See also *Richardson v Communications Workers of Am.* (8th Cir 1971) 443 F2d 974, 983. The plaintiff is still entitled to damages even if he or she locates other housing or obtains the right to occupy the disputed property. *Brown v Ballas, supra*; *Marr v Rife* (6th Cir 1976) 545 F2d 554.

Because damages in cases under the Civil Rights Act are based on tort, the court may award punitive damages in appropriate circumstances. *Woods-Drake v Lundy, supra*. See also *Wills v Trans World Airlines* (SD Cal 1961) 200 F Supp 360, 367. A showing of actual malice is unnecessary; it is sufficient that the defendant acted wantonly, with a conscious, deliberate disregard of the consequences. *Phiffer v Proud Parrot Motor Hotel, Inc., supra*.

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§2.46 (2) Injunctive Relief

Injunctive relief is available in an action under the Civil Rights Act of 1866 (42 USC §§1981-1982) when there has been a deprivation of civil rights. In *Lee v Southern Home Sites Corp.* (5th Cir 1970) 429 F2d 290, the defendants violated the Act by mailing letters (to named addressees) that offered housing at the advertised price only to members of the white race. The court enjoined the defendants from further racial discriminatory practices, and from renting or selling any lots, until first offering a lot to the nonwhite plaintiff on the terms specified in the letter. In addition, the court extended the same right to any other "class" members who could show by competent evidence that the letter deterred them from acquiring a house.

In *Smith v Sol D. Adler Realty Co*. (7th Cir 1970) 436 F2d 344, the court awarded compensatory damages to an African-American plaintiff for loss of civil rights and mental anguish when the defendants refused to rent to her. The court also ordered the defendants to tender the property to the plaintiff, and enjoined them from interfering with her peaceable enjoyment of the property.

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§2.47 (3) Attorney Fees

Under the Civil Rights Attorney's Fees Awards Act of 1976 (42 USC §1988), trial courts are given discretion to allow reasonable attorney fees in cases brought under the Civil Rights Act of 1866 (42 USC §§1981-1982) and certain other federal civil rights statutes. See *Woods-Drake v Lundy* (5th Cir 1982) 667 F2d 1198, 1204; *Phiffer v Proud Parrot Motor Hotel, Inc.* (9th Cir 1980) 648 F2d 548.

The legislative history of 42 USC §1988 supports the awarding of attorney fees to the prevailing plaintiff if no special circumstances make the award unjust. S Rep No. 1011, 94th Cong, 2d Sess (1976), 1976 US Code Cong & Ad News 5908, 5912. The good faith of a landlord does not necessarily constitute a special circumstance. *Williams v Hanover Hous. Auth.* (1st Cir 1997) 113 F3d 1294. The amount of attorney fees is governed by the same standards that apply to other types of equally complex federal litigation; there should be no reduction because the rights involved are nonpecuniary. S Rep No. 1011 at 5913. For a list of factors to be considered in computing the fees, see *Fountila v Carter* (9th Cir 1978) 571 F2d 487, 496; ABA Model Rules Prof Cond 1.5(a); Cal Rules of Prof Cond 4-200. See also California Attorney Fee Awards §2.9 (2d ed Cal CEB 1994).

The lawsuit need not be the sole cause of the relief obtained. See *Williams v Hanover Hous. Auth., supra*. The fact that a legal aid group or pro bono attorney represents the plaintiff does not affect the right to recover attorney fees. *Washington v Seattle Sch. Dist.* (1982) 458 US 457, 73 L Ed 2d 896, 918 n31, 102 S Ct 3187, citing with approval *Dennis v Chang* (9th Cir 1980) 611 F2d 1302, 1304; *Brandenburger v Thompson* (9th Cir 1974) 494 F2d 885; *Stevens v Dobs, Inc.* (ED NC 1974) 373 F Supp 618.

Section 1988 provides that fees may be awarded to the prevailing party; therefore, if there is a defense judgment, the defendant may request attorney fees. As a general rule, however, the court will not award such fees unless the plaintiff brought the action in bad faith. *Richardson v Hotel Corp. of Am.* (ED La 1971) 332 F Supp 519, aff'd (5th Cir 1972) 468 F2d 951. See generally *United States Steel Corp. v U.S.* (3d Cir 1975) 519 F2d 359, 364.

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§2.48 VI. CALIFORNIA ANTIDISCRIMINATION AND FAIR HOUSING LAWS

The two principal California statutes that prohibit discrimination in housing are the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) and the Unruh Civil Rights Act (CC §51). The FEHA prohibits housing discrimination based on race, color, religion, sex, marital status, national origin, ancestry, familial status, source of income, sexual orientation, or disability. Govt C §12955. The definition of sex discrimination has been amended to include "gender." Govt C §12926(p), referring to Pen C §422.56(c) (which defines "gender" to include "a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth"). Therefore, housing discrimination on the basis of transgender or perceived transgender status, is prohibited under FEHA. See §§2.49-2.56.

The Unruh Act prohibits business establishments, including landlords, from engaging in arbitrary discrimination. It lists certain protected classes, including sex (which includes pregnancy, childbirth and gender identity and expression), race, color, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, and age. CC §51; Govt C §12926(p); Pen C §422.56. These classes are illustrative only; the Act actually prohibits any arbitrary discrimination. See §2.58. The California Supreme Court has ruled that the Unruh Act covers discrimination on the basis of "personal characteristics," but not economic characteristics. *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 1160, 278 CR 614. But see *Sisemore v Master Fin., Inc*. (2007) 151 CA4th 1386, 60 CR3d 719 (unlawful to discriminate on basis of source of income—the operation of a day care home). Civil Code §54.1 prohibits housing discrimination against persons with disabilities. See §2.60.

Local ordinances may prohibit discrimination on other grounds, such as personal appearance, but state law may preempt any local regulation. See Govt C §12993(c). This section appears to preempt any local ordinance that prohibits housing discrimination against the classes covered by the FEHA, but whether it preempts local laws that cover other types of discrimination is unsettled. See, *e.g.,* San Francisco Police Code Article 33, §3304 (prohibiting housing discrimination based on additional categories of place of birth, weight, and height); Santa Cruz Municipal Code §21.01.010 (prohibiting housing discrimination based on additional category of personal appearance).

Both the Unruh Act and the FEHA provide administrative procedures and civil remedies for challenging housing discrimination in California. The principal advantage of the FEHA is that it guarantees an administrative procedure through which a complainant can obtain free legal representation to prosecute a meritorious case. See §§2.52-2.55. The Department of Fair Employment and Housing (DFEH) is obligated to investigate all complaints arising under the FEHA and to prosecute all meritorious complaints. The complainant may also file a civil action directly, and all the customary civil remedies, including punitive damages, are available. See §2.56.

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A. California Fair Employment and Housing Act

§2.49 1. Scope

The California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) is a comprehensive fair housing law that is similar to the Fair Housing Act (42 USC §§3601-3631; see §§2.30-2.40). Indeed, HUD has determined that the FEHA is substantially equivalent to the Fair Housing Act and therefore refers complaints that it receives to California's Department of Fair Employment and Housing (DFEH). Categories protected under the FEHA (Govt C §12955) are essentially the same as those under the federal law, with a few additional protected classes:

- race;
- color;
- religion;
- sex, including "gender" as defined by Pen C §422.56(c), and pregnancy, childbirth, or medical conditions related to pregnancy or childbirth (Govt C §12926(p));
- marital status;
- national origin;
- ancestry;
- familial status, including pregnant women, foster parents, and persons in the process of securing legal custody of a child or of becoming foster parents (Govt C §12955.2);
- source of income;
- disability, including any physical or mental disability as defined in Govt C §12926 (Govt C §12955.3; see §2.26); or
- sexual orientation.

In several important respects, the California Act is stronger than the federal Fair Housing Act:

(a) The FEHA adds gender identity and gender-related appearance and behavior, ancestry, disability, marital status, and sexual orientation to the list of protected classes (see cases in §2.50);

(b) The FEHA does not exempt small, owner-occupied buildings and the rental of single family dwellings;

(c) Under the FEHA, proof of intent is not necessary to establish a violation, and a landlord must show business necessity to rebut a prima facie case of disparate impact; (Govt C §12955.8);

(d) The FEHA unequivocally establishes liability when a landlord has both discriminatory and legitimate reasons for refusing to rent (Govt C §12955.8);

(e) The exemption for senior housing that may discriminate against families with children is generally more restrictive under the FEHA than under federal law (Govt C §12955.9); and

(f) The FEHA requires that when representing complainants' interests, DFEH must comply with attorneys' professional code of conduct, and must provide zealous representation of complainants' interests (Govt C §12989).

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.50 2. Prohibited Forms of Housing Discrimination

§2.50 2. Prohibited Forms of Housing Discrimination

"Discrimination" under California's Fair Employment and Housing Act includes, with respect to its enumerated protected categories, refusing to rent; refusing to negotiate; denying availability; providing inferior terms, conditions, privileges, facilities, or services; canceling a rental agreement; or providing segregated accommodations. Govt C §12927(c). Discrimination on the basis of the enumerated categories includes discrimination based on "a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics" (Govt C §12926(m)) or "when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity" (Govt C §12926.1(d)).

"Discrimination" also includes the refusal to permit reasonable modifications, at the expense of the person with a disability, of existing premises if the modifications are necessary to afford that person full enjoyment of the premises. When reasonable, the landlord may require the tenant to agree to restore the interior of the premises to the condition that existed before the modification, excluding reasonable wear and tear. Finally, "discrimination" includes the refusal to make reasonable accommodations in rules, policies, practices, or services when the accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling. Govt C §12927(c).

In the design, construction, or improvement of multifamily dwellings, "discrimination" includes the failure to design and construct the dwelling in a manner that allows access to and use by disabled persons, including required features, such as the installation of accessible routes and utility systems, wide doorways, special kitchen and bathroom modifications, and elevators for specific types of buildings. See Govt C §12955.1.

An owner may not make any oral or written inquiry regarding the protected classifications, engage in discriminatory advertising, retaliate against any person who has sought the protection of the FEHA, or "otherwise make unavailable or deny a dwelling based on discrimination because of [protected class status]." Govt C §12955(b)-(c), (f), (k). A real estate broker may answer factually and in good faith an inquiry from a prospective purchaser regarding the racial composition of a neighborhood, but illegal discrimination occurs if the broker's intent is to aid in the continuation of a segregated neighborhood. 58 Ops Cal Atty Gen 154 (1975).

A "housing accommodation" is any building, structure, or portion of a building or structure that is occupied, or intended to be occupied, as a residence by one or more families, and any vacant land offered for sale or lease for the construction of such a building, structure, or portion. Govt C §12927(d). Unlike the federal Fair Housing Act (see §2.31), the FEHA does not exempt small, owner-occupied buildings and the rental of single family dwellings.

The FEHA permits discriminatory advertising on the basis of gender "where the sharing of living areas in a single family dwelling unit is involved." Govt C §12927(c)(2)(B). The FEHA does not prohibit post-secondary educational institutions from providing separate housing for male and female students, for married students, or for students with minor dependents. Govt C §12995(a)(2).

The FEHA exempts religious organizations to the extent that they give preferences, in noncommercial rentals, to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin. Govt C §12955.4.

In *Brown v Smith* (1997) 55 CA4th 767, 64 CR2d 301, a landlord's sexual harassment of a tenant was held to be a form of gender discrimination prohibited by the FEHA.

In *Halprin v The Prairie Single Family Homes of Dearborn Park Ass'n* (7th Cir 2004) 388 F3d 327, the plaintiff failed to state a cause of action for violation of the Fair Housing Act (FHA) (42 USC §3604(c) (discriminatory statements)) because the alleged harassment by neighbors did not occur in the context of a sale or rental of a dwelling. The purpose of §3604, the court explained, was to address the practice of a refusal to sell or rent homes to minority groups, not to address the future problem of how the members of minority groups were treated once they were included. 388 F3d at 329.

The *Halprin* holding has not been applied to FHA cases in the Ninth Circuit, although practitioners should be prepared for such an argument. The FEHA, with its independent status and differently worded definition of "discrimination," should avoid such a narrow reading. The prohibition of housing discrimination under Govt C §12955(a)

does not limit such discrimination to a sale or rental, and the types of discrimination deemed unlawful under Govt C §12927(c)(1) include "post acquisition" conduct such as "harassment in connection with those housing accommodations" and refusal to permit reasonable modification or accommodation. See *Brown v Smith* (1997) 55 CA4th 767, 782, 64 CR2d 301 (upholding claim for housing harassment that occurred during tenancy and noting that basic principles applicable in employment cases should also apply in housing context).

The FEHA's prohibition of housing discrimination based on marital status, which is broader than that afforded by most fair housing laws, was examined by the California Supreme Court in *Smith v FEHC* (1996) 12 C4th 1143, 51 CR2d 700. The court held that a landlord cannot use religious belief that unmarried cohabitation is a sin as a basis to refuse to rent an apartment to an unmarried couple. The court held squarely that Govt C §12955 bans discrimination against unmarried couples. Applying the Religious Freedom Restoration Act of 1993 (42 USC §§2000bb—2000bb-4), the court held that Govt C §12955 does not impose a substantial burden on the landlord's religious beliefs: She is free to put her capital in other investments if she wishes to avoid renting to unmarried couples. (The Religious Freedom Restoration Act was amended in 2000, and no longer applies to state laws. 42 USC §2000bb-3(a), as amended by Pub L 106-274, 114 Stat 806. Arguably this amendment eliminates one possible compelling state interest issue in the analysis involving the Act's effect on California law.)

Subsequent to *Smith v FEHC, supra,* a Ninth Circuit panel held that enforcement of a similar statute in Alaska violated the free exercise clause of the U.S. Constitution. When the Ninth Circuit reheard the case en banc, however, it ordered dismissal of the action, stating that resolution of the constitutional issues was premature because no enforcement agency had investigated the landlords' rental practices or brought a civil or criminal action against the landlords under the challenged law. See *Thomas v Anchorage Equal Rights Comm'n* (9th Cir 1999) 165 F3d 692, vacated (9th Cir 2000) 220 F3d 1134.

Until there is further guidance from the courts, deciding whether a particular landlord's marital-status-based discrimination is legal or illegal will require a critical analysis of the landlord's motives and the compelling state interest protected by the FEHA. Allowing a landlord to violate the FEHA would seriously harm prospective renters, who would be denied equal access to housing accommodations. See also *Hess v FEHC* (1982) 138 CA3d 232, 187 CR 712; *Atkisson v Kern County Hous. Auth.* (1976) 59 CA3d 89, 130 CR 375. Several other states have addressed this issue and support the right of landlords to refuse to rent to unmarried couples based on religious exercise protections. See *The Conflict Between Religious Exercise and Efforts to Eradicate Housing Discrimination Against Nontraditional Couples: Should Free Exercise Protect Landlord Bias?,* 53 Wash & Lee L Rev 351 (1996).

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§2.51 3. Enforcement

The FEHA requires the DFEH to investigate all complaints based on discrimination against the classes protected under the Act and to prosecute meritorious cases. Govt C §12980 (see §§2.52-2.55). A complainant may also independently file a civil action without exhausting administrative remedies. Govt C §12989.1 (see §2.56).

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a. Administrative Relief

§2.52 (1) Filing Administrative Complaint

To initiate an action under the Fair Employment and Housing Act (FEHA), an aggrieved person may file a verified complaint with the Department of Fair Employment and Housing (DFEH). Govt C §12980(a). A complainant is *not* required to exhaust administrative remedies before filing a civil action under the FEHA. Govt C §12989.1 See §2.56. The state Attorney General or the Director of the DFEH may file an administrative complaint. Govt C §12980(b). The complainant must file an administrative complaint within 1 year after the alleged violation occurred or terminated (Govt C §12980(b)) but has 2 years in which to file a civil action (Govt C §12989.1).

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§2.53 (2) DFEH Action on Complaint

The Department of Fair Employment and Housing must serve the complainant with notice of time limits, rights of the parties, and choice of forums. When a complaint is filed, the DFEH must commence a prompt investigation, serve a copy of the complaint on the property owner, and attempt to eliminate any violation through conference, conciliation, and persuasion. Govt C §§12980(c), 12963, 12986, 12963.7. See §2.54. The DFEH may not dismiss a complaint unless the complainant withdraws it or the DFEH "determines after a thorough investigation that, based on the facts, no reasonable cause exists to believe that an unlawful housing practice … has occurred or is about to occur." Govt C §12981.1.

The DFEH has broad discovery powers to investigate the complaint (Govt C §§12963.1-12963.4), and superior courts have jurisdiction to enforce these powers (Govt C §12963.5). For example, in *DFEH v Superior Court* (2002) 99 CA4th 896, 121 CR2d 615, the DFEH petitioned the trial court for an order to compel the landlord and property manager to provide the agency information about former tenants and applicants, in order to aid in investigating alleged discrimination based on race and marital status. The trial court refused. On appeal, the court granted a peremptory writ for the DFEH, holding that the information was reasonably requested for relevance, and that disclosure would not unduly infringe on privacy rights.

Pending completion of the investigation, the DFEH or the California Attorney General may obtain temporary restraining orders to prevent the property owner from taking any action with respect to the rental, lease, or sale of the property. Govt C §12983.

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§2.54 (3) Conciliation or Mediation

After investigating a housing discrimination complaint, the DFEH may offer the parties a confidential conciliation process to help resolve the complaint before litigation. See Govt C §12963.7. See also http://www.dfeh.ca.gov/DFEH/Complaints. This program is important not only to landlords and property managers but also to real estate-related employers (*e.g.*, brokers, licensee associations, local boards of realtors, homeowner association managers), title insurance companies, and the like.

If the violation can be resolved through conciliation, all the parties must sign a written agreement approved by the DFEH. Govt C §12964. The department must approve any settlement to which the respondent and complainant agree. Govt C §12980(j). The settlement is a public document unless "otherwise agreed by the complainant and respondent and [the DFEH] determines that the disclosure is not required to further the purposes of the act." Govt C §12980(i). The DFEH must confirm compliance with the agreement within 1 year of its effective date. Govt C §12964.

At any time after the complaint is filed, the DFEH may request the FEHC to conduct mediation of the complaint pursuant to Govt C §§12960, 12961, or 12980. The DFEH may, however, withdraw a request for mediation at any time to pursue an investigation.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.55 (4) Prosecution of Complaint If DFEH Finds Reasonable Cause

§2.55 (4) Prosecution of Complaint If DFEH Finds Reasonable Cause

If the complaint is not resolved through conciliation or mediation and the DFEH finds that reasonable cause exists to believe that a violation has occurred, it must do the following (Govt C §12981(a)):

- Issue a written accusation that identifies the nature of the charges; and
- Serve the accusation and verified complaint on the respondent.

After the accusation is issued, either party may "opt out" of the administrative forum and into civil court by notifying the DFEH within 20 days. Within 30 days of receiving that notice of election, the DFEH will dismiss the accusation and file a complaint in state court. Govt C §12989.

Attorneys for the DFEH or the Attorney General will represent the complainant at no cost; they must comply with the Rules of Professional Conduct of the State Bar of California in representing the aggrieved person's interests. Govt C §12989. The Department becomes the plaintiff in the lawsuit and the complainant is named as the "real party in interest." The Department represents the interests of the state as an exercise of its police powers. See Govt C §§12920-12921. In addition, the Department represents the interests of the real party and is authorized to recover the full range of available relief on behalf of the real party. See Govt C §12987. An attorney-client relationship with the real party is not established, however. The real party has a right to intervene in the action with his or her own attorney. Govt C §12989(c)-(d).

If the FEHC finds a violation, it may order the respondent to cease the illegal discrimination. Govt C §12987(a). In addition, it may take these actions:

- Issue orders regarding the rental of the property if it is still available;
- Award "actual damages" to the complainant; and
- Provide for other appropriate affirmative relief.

Govt C §12987(a)(1), (2), (4). "Actual damages" include not only quantifiable out-of-pocket restitutive damages but also damages for emotional distress. See *Konig v FEHC* (2002) 28 C4th 743, 123 CR2d 1, in which the supreme court reviewed the FEHC's authority under this section and held that the FEHC may award damages for emotional distress in housing discrimination cases. The supreme court effectively overturned *Walnut Creek Manor v FEHC* (1991) 54 C3d 245, 284 CR 718, by finding that 1992 FEHA amendments granting the FEHC broad remedial authority, but providing parties with the option of a civil remedy, preserved judicial power under the California Constitution.

The FEHC may order payment to the complainant of a civil penalty of up to $10,000 for the first violation, up to $25,000 for a second violation within 5 years, and up to $50,000 for a third or more frequent violation within 7 years. It may also order payment to the prevailing party, other than the state, of reasonable attorney fees and costs, including expert witness fees. Govt C §12987(a)(3). A party aggrieved by the commission's final order may seek administrative mandamus review. The limitations of CCP §1094.5(f) do not apply, so that the superior court has broader discretion to modify the administrative decision. Govt C §12987.1(a). The superior court may (Govt C §12987.1(b)):

- grant temporary relief, including a TRO, or
- affirm, modify, set aside, or remand the order (and may enforce the order to the extent it is affirmed or modified).

The DFEH must conduct a compliance review within 1 year of the effective date of every final order or decision, and if necessary it may file an action in superior court to enjoin any continuing violation. Govt C §12981(d), (f).

Any person who files a complaint with the DFEH may simultaneously pursue any other judicial remedies without prejudice (Govt C §12993), but the DFEH must terminate its proceedings on entry of a final judgment in an action filed under CC §52, unless the judgment is a dismissal entered at the complainant's request. Govt C §12980(a). Conversely, the complainant is not entitled to any remedy from the FEHC unless he or she signs a written waiver of the rights and claims available under the Unruh Act. Govt C §12987.

The FEHA also provides an administrative remedy for violations of the Unruh Act. CC §52(f). See §§2.57-2.59.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.56 b. Civil Action

§2.56 b. Civil Action

The Fair Employment and Housing Act provides that an aggrieved person may file a complaint to initiate a civil action on a housing discrimination claim directly, without exhausting administrative remedies. Govt C §12989.1. The statute of limitations is two years.

Unlike civil actions based on violation of the federal Fair Housing Act, however, a party may be collaterally estopped from bringing an action based on violation of the FEHA if the DFEH found against the party in an administrative proceeding and the party failed to challenge the decision by filing an administrative mandamus action. See *Johnson v City of Loma Linda* (2000) 24 C4th 61, 99 CR2d 316, overruling the Second District case of *Swartzendruber v City of San Diego* (1992) 3 CA4th 896, 5 CR2d 64, and holding that a former employee was estopped from pursuing a FEHA claim for employment discrimination because he failed to timely prosecute a mandamus action. (The employee's federal damage claim under Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17) survived because the court found that allowing state agency findings to have a binding effect on Title VII claims would be inconsistent with the intent of Congress that federal courts apply de novo review to those claims.) Collateral estoppel applies to "quasi-judicial" administrative proceedings, and not to internal grievance procedures (*Ahmadi-Kashani v Regents of Univ. of Cal.* (2008) 159 CA4th 449, 71 CR3d 556) or grievance procedures under a collective bargaining agreement, which settle contractual, rather than statutory, disputes (*Ortega v Contra Costa Community College Dist.* (2007) 156 CA4th 1073, 67 CR3d 832).

In a civil action, the court may award:

- actual and punitive damages,
- injunctive relief, or
- other appropriate relief.

It has the discretion to award the "prevailing party, other than the state, reasonable attorney's fees and costs." Govt C §12989.2. With respect to attorney fees, the court may include a lodestar and possible multiplier as in *Serrano v Priest* (1977) 20 C3d 25, 141 CR 315 (*Serrano III*), and its progeny. See *Graham v DaimlerChrysler* (2004) 34 C4th 553, 21 CR3d 331, and companion case *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 21 CR3d 371 (requiring that plaintiff make prelitigation demand for settlement in order to recover catalyst theory attorney fees under FEHA). See also *Vasquez v State* (2008) 45 C4th 243, 85 CR3d 466 (clarifying that prelitigation settlement negotiations not required for non-catalyst theory recovery of FEHA attorney fees). *Flannery v California Highway Patrol* (1998) 61 CA4th 629, 71 CR2d 632. See also *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809 (supreme court held that attorney fees awarded under Govt C §12965 (exceeding fees already paid) belong to attorney, not client, unless their agreement provides otherwise). On the effect of "contingent risk" as a factor the court considers in its calculation of a multiplier or enhancement, see *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377; *Horsford v Board of Trustees of Cal. State Univ.* (2005) 132 CA4th 359, 33 CR3d 644; and *Greene v Dillingham Constr.* (2002) 101 CA4th 418, 124 CR2d 250.

The court may also award expert witness fees as a component of costs under a 1999 amendment to §12965(b), superseding the decision in *Davis v KGO-TV* (1998) 17 C4th 436, 71 CR2d 452.

For a discussion of what constitutes a prevailing party for purposes of the FEHA, see *EEOC v United Parcel Serv.* (9th Cir 2005) 424 F3d 1060; *Hon v Marshall* (1997) 53 CA4th 470, 62 CR2d 11 (decided under parallel statute on attorney fee awards in employment discrimination actions). A successful defendant is not entitled to attorney fees unless it is established that the plaintiff's case was frivolous, unreasonable, or lacking foundation. *Rosenman v Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 CA4th 859, 110 CR2d 903.

The FEHA precludes a complainant from obtaining concurrent remedies under the Unruh Civil Rights Act (CC §51) and in an administrative proceeding under Govt C §12980. The DFEH must terminate its proceedings when it is notified of entry of final judgment in an Unruh Act action (Govt C §12980(a)), and it may not grant a remedy in an administrative proceeding unless the complainant waives all rights and remedies under CC §52 (Govt C §12987).

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.57 B. Unruh Civil Rights Act

§2.57 B. Unruh Civil Rights Act

Because of the amendments to the California Fair Employment and Housing Act (FEHA) in 1992 and 1993 (see Govt C §§12955.1-12955.6, 12989-12989.3) (see §2.49) and the decision in *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 278 CR 614, the housing discrimination protections of the Unruh Civil Rights Act (CC §51) (Unruh Act) have become less significant for the classes that the FEHA covers. The *Harris* decision established that a victim of housing discrimination must prove intent in order to establish a violation. (This is a difficult burden that complainants filing under the FEHA do not bear. See Govt C §12955.8.) There are a few exceptions; for example, a showing of intentional discrimination is not required under the Unruh Act when violation of the Act is premised on violation of the federal Americans With Disabilities Act of 1990 (42 USC §§12101-12213). *Munson v Del Taco, Inc.* (2009) 46 C4th 661, 94 CR3d 685; *Lentini v California Ctr. for the Arts* (9th Cir 2004) 370 F3d 837.

NOTE: Technically, the Unruh Act consists only of CC §51. *Stamps v Superior Court* (2006) 136 CA4th 1441, 39 CR3d 706. However, amendments to the Act implementing its policies and providing further remedies are found in CC §§51.1-51.6 and 51.8-52. In practice, attorneys regard these sections as collectively representing the full Act, but the Legislature has never given its attention to this detail.

The Unruh Act expressly prohibits any business establishment from discriminating on the basis of (CC §51)

- sex (including "gender" as defined by Pen C §422.56(c), and pregnancy, childbirth, or medical conditions related to pregnancy or childbirth as defined in Govt C §12926(p)),
- race,
- color,
- religion,
- ancestry,
- national origin,
- disability (as defined in Govt C §§12926, 12926.1),
- medical condition (as defined in Govt C §12926(h)),
- marital status, or
- sexual orientation (as defined in Govt C §12926(q)).

Civil Code §51.2 requires that the Act also be construed as prohibiting business establishments from discriminating on the basis of age in the sale or rental of housing. A rental housing accommodation will generally be a business establishment within the meaning of the Act. *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 731, 180 CR 496. Like the FEHA, the Unruh Act does not exempt small, owner-occupied buildings or other landlords.

Persons protected under the Unruh Act include those who are perceived to have any particular characteristic of the listed classes in the Act or who associate with persons who have, or are perceived to have, any particular characteristic of the listed classes. CC §51(e)(5).

Registered sex offenders are not a "protected class" under the Unruh Act. 89 Ops Cal Atty Gen 85 (2006).

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.58 1. Application

§2.58 1. Application

The Unruh Civil Rights Act (CC §51) prohibits all arbitrary discrimination based on personal characteristics, not just discrimination based on the classifications enumerated in it (see §2.57), which have been deemed illustrative only. See uncodified declarations of legislative intent in Stats 2005, ch 420, §2; *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 278 CR 614; *In re Cox* (1970) 3 C3d 205, 90 CR 24. Determining whether discrimination is arbitrary may not be an easy task. In *Cox*, the court held that the Unruh Act "forbids a business establishment generally open to the public from arbitrarily excluding a prospective customer." 3 C3d at 217. The court pointed out the individual nature of the statutory right afforded to "all persons" by CC §51 and stressed the property owner's duty to serve all customers on reasonable terms without discrimination. While the scope of the Unruh Act's non-enumerated (arbitrary) classes was limited by the cases of *Gatto v County of Sonoma* (2002) 98 CA4th 744, 756, 120 CR2d 550 and *Hessians Motorcycle Club v J.C. Flanagans* (2001) 86 CA4th 833, 103 CR2d 552, more recently courts have been receptive to construing Unruh more expansively. See *Koebke v Bernardo Heights Country Club* (2005) 36 C4th 824, 31 CR3d 565 (marital status discrimination by country club); *Butler v Adoption Media, LLC* (ND Cal 2007) 486 F Supp 2d 1022, (marital status, sexual orientation, and sex); *Sisemore v Master Fin., Inc.* (2007) 151 CA4th 1386, 1405, 60 CR3d 719 (occupational status (home day care provider)).

To what extent discrimination that would be arbitrary for the owner of a retail establishment under *In re Cox, supra,* will also be found arbitrary for the owner of rental housing is not clear. One certainty is that the individual nature of the right afforded by the Unruh Act prevents a landlord from excluding an individual on the basis of class or group affiliation. *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 740, 180 CR 496.

The individualized nature of the rights under the Unruh Act may prohibit discrimination against an entire class, even when such practices proceed from a motive of rational self-interest. In *Marina Point*, the supreme court specifically rejected the "rational self-interest" standard of *Newby v Alto Riviera Apartments* (1976) 60 CA3d 288, 131 CR 547, as too broad. The *Marina Point* court reasoned (30 C3d at 740 n9) that

> [A]n entrepreneur may pursue many discriminatory practices "from a motive of rational self-interest," *e.g.,* economic gain, which would unquestionably violate the Unruh Act. For example, an entrepreneur may find it economically advantageous to exclude all homosexuals, or alternatively all nonhomosexuals, from his restaurant or hotel, but such a "rational" economic motive would not, of course, validate the practice.

The court pointed out that discrimination based on age by housing complexes designed for the elderly, however, is grounded on the "compelling societal interest" to provide for the special housing needs of senior citizens. 30 C3d at 743.

Effective January 1, 2006, persons protected under the Unruh Act include those who are perceived to have any particular characteristic of the listed classes in the Act or who associate with persons who have, or are perceived to have, any particular characteristic of the listed classes. CC §51(e)(5).

In addition to the factors specifically enumerated in the Unruh Act, discrimination based on the following has been held to be arbitrary, or is likely to be considered arbitrary, under the Act:

- *Sexual Orientation. Hubert v Williams* (1982) 133 CA3d Supp 1, 184 CR 161 (eviction because of tenant's homosexuality); *Stoumen v Reilly* (1951) 37 C2d 713, 234 P2d 969 (exclusion of homosexuals from public bar or restaurant prohibited under predecessor statute to Unruh Act). In 2005, the Act was amended to expressly prohibit discrimination on the basis of sexual orientation. See CC §51(b); Govt C §12926(q); Stats 2005, ch 420. Sexual orientation is defined in the Unruh Act as meaning heterosexuality, homosexuality, and bisexuality. See CC §51(e)(6); Govt C §12926(q); Stats 2005, ch 420.
- *Unconventional Personal Appearance. In re Cox* (1970) 3 C3d 205, 90 CR 24 (exclusion of individual from shopping center because of long hair and unconventional dress). *FEHC v Marion's Place* (2006) (FEHC Decision 03-04-070, Feb. 1, 2006) 2006 CAFEHC Lexis 1 (exclusion of transgender individual from nightclub for failure to conform to dress code that prohibited men from wearing dresses or skirts).
- *Immoral Reputation. Orloff v Los Angeles Turf Club* (1951) 36 C2d 734, 227 P2d 449 (exclusion of individual

from racetrack under predecessor statute to Unruh Act). See §2.8.

- *Welfare Recipients.* 59 Ops Cal Atty Gen 223 (1976) (termination of tenancy or refusal to rent on ground that tenant receiving welfare benefits), cited with approval by *Marina Point, Ltd. v Wolfson, supra*. Although the California Supreme Court in *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 278 CR 614, ruled that the Unruh Act does not prohibit discrimination based upon financial characteristics, considering the residential tenant applicant's source (rather than amount) of income alone is arguably arbitrary discrimination without evidence that the exclusion is based upon business necessity or compelling societal interest. See §2.9 and 52 C3d at 1168 n14. See also discussion in §2.23 of disparate impact claims under the federal Fair Housing Act, based on a "no AFDC" policy on families with children in *Gilligan v Jamco Dev. Corp.* (9th Cir 1997) 108 F3d 246, 248.

NOTE: In November 2009, as urgency legislation, California amended the Unruh Act to provide that any discount or other benefit offered or given to a consumer or prospective consumer by a business because the consumer "has suffered the loss or reduction of employment or reduction of wages" will not be considered arbitrary discrimination under the Act. CC §51.13.

- *Marital Status. Koebke v Bernardo Heights Country Club* (2005) 36 C4th 824, 31 CR3d 565 (registered domestic partners); 58 Ops Cal Atty Gen 608, 613 (1975) (exclusion based on marital status without evidence that exclusion is reasonable and rationally related to services performed and facilities provided). Effective January 1, 2006, the Act was amended to expressly protect this class. See Stats 2005, ch 420. See discussion in §2.50 on conflict between Ninth Circuit and California Supreme Court on whether enforcement of FEHA's prohibitions against marital status discrimination may violate constitutional rights of landlords whose religious beliefs forbid unmarried cohabitation.
- *Occupation. Sisemore v Master Fin., Inc.* (2007) 151 CA4th 1386, 1405, 60 CR3d 719 (occupational status (home day care provider)).
- *Families With Children. Marina Point, Ltd. v Wolfson, supra* (nonrenewal of lease with family who gave birth to a child during tenancy violates Unruh Act).
- *Association With Person in Unruh Act Protected Class.* Compare *Kotev v First Colony Life Ins. Co.* (CD Cal 1996) 927 F Supp 1316 with *Cloutier v Prudential Ins. Co.* (ND Cal 1997) 964 F Supp 299.

In *Brown v Smith* (1997) 55 CA4th 767, 64 CR2d 301, a landlord's *sexual harassment* of a tenant was held not to be prohibited by the Unruh Act, although it was held to be a form of gender discrimination prohibited by the FEHA. See §2.50. Civil Code §51.9 (enacted later) expressly prohibits sexual harassment as a form of gender-based discrimination and allows a civil action for damages for sexual harassment against a landlord or a property manager. See §3.70A.

For further discussion of protected classifications and comparison of coverage by existing state and federal laws, see §§2.7-2.27.

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§2.59 2. Enforcement and Remedies

The state Attorney General, any district or city attorney, or any aggrieved person may bring a civil action against any person or group engaged in a pattern or practice of resistance to a person's full enjoyment of the rights protected under the Unruh Act. CC §52(c). This authorization is similar to the power of the U.S. Attorney General to file an action in a "pattern or practice" case under the Fair Housing Act (42 USC §3613). See §2.40. The action may be filed in any appropriate state court (including small claims court if the asserted damages do not exceed the jurisdictional limits of the small claims court; see CC §52.2). The complaint must describe the facts relating to the pattern or practice, and request the preventive relief necessary to protect the complainant's full enjoyment of the rights secured under the Act. CC §52(c). On the statute of limitations that applies to Unruh Act actions, see §2.69.

Alternatively, the Department of Fair Employment and Housing may enforce the Unruh Act under the administrative remedy provided in the California Fair Employment and Housing Act (FEHA). In addition, the FEHA incorporates CC §51 into its protections against housing discrimination pursuant to Govt C §12955(d). However, the court in *FEHC v Marion's Place* (2006) (FEHC Decision 03-04-070, Feb. 1, 2006) 2006 CAFEHC Lexis 1 held that the Department may not claim a trebling of damages in cases brought before the Fair Employment and Housing Commission.

Any person who denies or aids in denying a person's full enjoyment of the rights secured under the Unruh Civil Rights Act (CC §51), or commits any discrimination prohibited in the Act, is liable for the actual damages suffered by the aggrieved party. CC §52(a). Actual damages are synonymous with compensatory damages under CC §3333, and include damages for humiliation, indignity, embarrassment, shock, apprehension, terror, or ordeal. *Capelouto v Kaiser Found. Hosp.* (1972) 7 C3d 889, 892, 103 CR 856; *Deevy v Tassi* (1942) 21 C2d 109, 130 P2d 389. The court may also award the aggrieved person an amount equal to three times the amount of actual damages, but not less than $4000. CC §52(a).

Whether this statutory penalty limits the amount of punitive damages allowed under CC §3294 is uncertain. Unpublished federal decisions held that it does, citing *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v De Anza Santa Cruz Mobile Estates* (2001) 94 CA4th 890, 114 CR2d 708 (when statute provides remedy that is punitive, plaintiff may not recover additional punitive damage award). See, *e.g.*, *Doran v Embassy Suites Hotel* (ND Cal 2002) 2002 US Dist Lexis 16116; see also *Freeman v Alta Bates Summit Med. Ctr. Campus* (ND Cal 2004) 2004 US Dist Lexis 21402. The Unruh Act statutory penalty, however, does not require a showing of fraud, oppression, or malice as required by CC §3294; therefore, it is arguable that an aggrieved person may be entitled to recover both the statutory penalty and punitive damages. See *Greenberg v Western Turf Ass'n* (1903) 140 C 357, 73 P 1050. If the aggrieved person was a victim of violence or threats of violence because of race, color, religion, ancestry, national origin, political affiliation, sex (including pregnancy, childbirth, and gender identity and gender-related appearance and behavior), or position in a labor dispute, he or she may be awarded $25,000 in addition to any actual damages. CC §52(b). See also Govt C §12926(p); Pen C §422.56.

The aggrieved party is entitled to recover reasonable attorney fees (CC §52(a)), the court having discretion to determine only the amount. *Engel v Worthington* (1997) 60 CA4th 628, 70 CR2d 526. The court may also award injunctive relief even though the Unruh Act does not expressly provide for such relief. *Burks v Poppy Constr. Co.* (1962) 57 C2d 463, 20 CR 609; *Don Wilson Builders v Superior Court* (1963) 220 CA2d 77, 33 CR 621. But see *Doran v North State Grocery* (2006) 137 CA4th 484, 491, 39 CR3d 922 (plaintiff's acceptance of CCP §998 offer precludes recovery of attorney fees because there is no finding of defendant's liability under the Unruh Act).

Under CC §51.6, a business establishment may not discriminate on the basis of gender with respect to the price charged for services of similar or like kind (see §2.58). The remedies for violation of §51.6 are those provided in CC §52(a), but an action under §51.6 is independent of any other remedy that may be available to an aggrieved party.

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§2.60 C. Equal Access Requirements for Persons With Disabilities

Civil Code §54.1, a provision separate from the Unruh Act (see §2.57), provides protections to disabled persons that are similar to those provided in the FEHA (see §2.26). Individuals with disabilities (including medical conditions specified in Govt C §12926(h)) are entitled to full and equal access to all housing accommodations that are offered for sale or rent. CC §54.1(b)(1). A "housing accommodation" includes any real property used or intended to be used as a home, residence, or sleeping place. CC §54.1(b)(2). Exempted are single-family residences in which no more than one room is rented. CC §54.1(b)(2).

A violation of CC §54.1 occurs when:

(1) The landlord refuses to lease to a disabled person because of the use of a guide, signal, or service dog; or

(2) The landlord refuses to allow the tenant to keep the dog on the premises.

CC §54.1(b)(6). The landlord may, however, establish reasonable rules regulating the presence of such dogs on the premises. CC §54.1(b)(6)(B).

Note, however, that the FEHA provides more protections for tenants with disabilities in this area, since case law has interpreted the reasonable accommodation provision to include tenants who need companion animals for psychiatric disabilities, whereas CC §54.1 is limited to "guide", "signal", or "service" dogs,. See *Janush v Charities Hous. Dev. Corp.* (ND Cal 2000) 169 F Supp 2d 1133; *Auburn Woods I Homeowners Ass'n v FEHC* (2004) 121 CA4th 1578, 18 CR3d 669.

A violation also occurs if the landlord refuses to lease to a disabled person because he or she is partially or wholly dependent on the income of a spouse who is a party to the lease. CC §54.1(b)(7). The landlord may consider the aggregate financial status of the disabled person and the spouse. CC §54.1(b)(7).

A violation of an individual's rights under the Americans With Disabilities Act of 1990 (ADA) (42 USC §§12101-12213) also constitutes a violation of CC §54.2, and nothing in CC §54.1 may be construed to limit an individual's access in violation of the ADA. CC §54.1(d). Consequently, to prove a violation of CC §54.1, a plaintiff need not prove intentional discrimination, because the ADA requires only a showing that the landlord's conduct denied equal housing accommodations as a result of a failure to accommodate the disability (see §§2.21, 2.23 for discussion of *Presta v Peninsula Corridor Joint Powers Bd.* (ND Cal 1998) 16 F Supp 2d 1134 and other cases).

Anyone who denies a person with a disability equal access to housing is strictly liable for actual damages, a statutory penalty of up to three times the actual damages but not less than $1000, and attorney fees awarded by the court. CC §54.3. The damages provisions of §54.3 are more limited than those of CC §52(a), but the plaintiff does not need to prove that the discrimination is intentional. A person aggrieved by a violation of CC §§54-54.2 may file a verified complaint with the Department of Fair Employment and Housing (see Directory) under Govt C §§12930-12955. CC §54.3(b).

Any aggrieved person, the district or city attorney, the state Department of Rehabilitation (see Directory), or the state Attorney General may bring an action to enjoin violation of the equal access laws. CC §§55-55.1. The prevailing party in an action for injunctive relief brought by an aggrieved person is entitled to recover reasonable attorney fees. CC §55.

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VII. PROSECUTION OF A RENTAL DISCRIMINATION CASE

§2.61 A. Establishing Illegal Discrimination

The plaintiff in a rental discrimination case has the burden of proving that the landlord committed an illegal discriminatory act. *Burris v Wilkins* (5th Cir 1977) 544 F2d 891. A landlord that engages in illegal discriminatory practices, however, rarely does so directly, *e.g.,* by expressly refusing to rent to a prospective tenant because of his or her protected class status. With the addition of familial status and disability to fair housing law, however, there has been a marked increase in cases involving overt discrimination because many landlords either do not understand the law or refuse to accept that it applies to their housing practices.

Individuals usually claim unlawful discrimination in one of several common situations:

(1) The landlord overtly discriminated on the basis of protected class status (overt discrimination);

(2) The landlord intentionally discriminated but asserts that he or she used a legitimate factor to deny tenancy (disparate treatment);

(3) The landlord intentionally discriminated by using both legitimate and illegitimate factors to deny tenancy (mixed motives);

(4) The landlord did not intentionally discriminate but used criteria applying to all applicants that have a disparate impact on members of a protected class (disparate impact);

(5) The landlord provided housing under more adverse terms than to others (exploitation).

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§2.62 1. Overt Discrimination

Establishing overt discrimination requires direct evidence of the discriminatory conduct, *e.g.,* that the landlord applied more stringent qualification standards to an applicant who is a member of a protected class than to other persons. Another example of overt discrimination is a housing provider's spurious assertion of an exemption from fair housing law, such as housing for older adults, as the basis for discrimination.

A landlord can rebut a claim of overt discrimination by proving that no discriminatory conduct occurred or by claiming that the law entitled him or her to discriminate.

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§2.63 2. Disparate Treatment

Disparate treatment occurs when members of a protected class are treated adversely and others, not members of that protected class, do not experience the adverse treatment in similarly situated transactions. To establish disparate treatment, the plaintiff must rely on indirect evidence of discrimination. The courts evaluate disparate treatment cases at trial by considering whether the plaintiff has proven a prima facie case of discrimination and, if so, whether the landlord has successfully defended it.

Under a disparate treatment analysis, if a prima facie case exits, the landlord has the burden of producing evidence to show that plaintiff was rejected for a legitimate, nondiscriminatory reason. This is a limited burden, because the housing provider is merely required to articulate, not to prove, the existence of a legitimate, nondiscriminatory reason for the action. The housing provider must, however, use admissible evidence. See *Texas Dep't of Community Affairs v Burdine* (1981) 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089.

If the housing provider meets this burden, the plaintiff has a final opportunity to show that the purported reason was merely a pretext. See, *e.g., Soules v HUD* (2d Cir 1992) 967 F2d 817 (housing provider had legitimate, nondiscriminatory reasons for not renting apartment and plaintiff failed to prove the reasons were pretextual); *HUD v Hacker, supra* (although plaintiff established a prima facie case of discrimination based on familial status in rental housing, charge was dismissed because plaintiff failed to prove by a preponderance of the evidence that housing provider's legitimate, nondiscriminatory reasons for actions were pretextual). A housing provider may also present evidence that it has a legitimate safety concern, not based on stereotypes, that justifies the discrimination. See *Community House, Inc. v City of Boise* (9th Cir 2007) 490 F3d 1041, 1050, citing *International Union* v *Johnson Controls* (1991) 499 US 187, 204, 113 L Ed 2d 158, 177, 111 S Ct 1196.

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§2.64 3. Mixed Motives

In mixed motive cases, the evidence shows that the landlord's refusal to rent was motivated by both legitimate and illegitimate factors. For example, a landlord does not want to rent to a Latino family because of prior bad experiences with Latinos but also has legitimate questions about the applicants' ability to pay the rent.

Under California law, the plaintiff is required to show only that discrimination toward a protected class played some role in the landlord's decision. "A person intends to discriminate if [protected class status] is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice." Govt C §12955.8.

This standard eases the plaintiff's burden; proof of the landlord's use of an illegitimate factor should be sufficient to establish liability, although damages may be limited if the applicant was otherwise unqualified. This formulation of "mixed motives" is similar to the federal rule, which follows the "*Price Waterhouse* standard" enunciated in *Price Waterhouse v Hopkins* (1989) 490 US 228, 104 L Ed 2d 268, 109 S Ct 1775. If any motive is discriminatory among other nondiscriminatory motives, the act is discriminatory. However, actions that would have occurred anyway in the absence of intent are not the basis of liability (*e.g.,* tenant can still be evicted if tenant does not pay rent). See *HUD v Denton* (HUD ALJ 1992) 05-90-0012-1:

> One of the most difficult problems posed by a case involving mixed motives is to determine the extent to which any particular motive was a cause of a respondent's action. Delving into an individual's mental processes to determine causation in terms of the degree and the timing of multiple motivations is an exercise in metaphysical abstraction. However, *Price Waterhouse* does not require a determination of the relative weight an unlawful motive had in a respondent's decision, nor does it require a determination whether the unlawful motive preceded or followed the lawful motive. All it requires is a finding… that it is more likely than not that… familial status played a part in that decision, and that they would have evicted [tenants] even if they had not allowed familial status to play a role.

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§2.65 4. Disparate Impact

In a disparate impact case, an applicant is not required to prove intent to establish illegal discrimination but only that "an act or failure to act … has the effect, regardless of intent, of unlawfully discriminating." Govt C §12955.8(b). The plaintiff typically establishes this proof by statistical evidence showing the impact of a particular policy either on the relevant population of protected class members or on a particular subgroup of class members. *Betsey v Turtle Creek Assocs.* (4th Cir 1984) 736 F2d 983 (impact on African-American and Latino tenants in a building). See generally Schwemm, Housing Discrimination: Law and Litigation (2001); Relman, Housing Discrimination Practice Manual (2006).

Under California law, the landlord has a stringent burden of rebuttal: The landlord must show that the policy having a discriminatory effect is "necessary to the operation of the business and effectively carries out the significant business need it is alleged to serve." Govt C §12955.8(b). If the landlord does not justify the criterion under this standard, the policy violates the law. Moreover, the court will also consider "whether or not there are feasible alternatives that would equally well or better accomplish the purpose advanced with a less discriminatory effect." Govt C §12955.8(b)(1).

PRACTICE TIP: Landlords should be advised to document carefully all of their rental policies regarding tenant screening criteria and house and community rules. The documentation should not only establish criteria or rules, but what business necessity they are designed to further.

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§2.66 B. Use of Testers

A common method of establishing a case of illegal discrimination is to use testers. After an alleged discriminatory act, a member of a class that is not the target of the discrimination is sent to repeat the experience. For example, an African-American person calls to inquire about an apartment advertised for rent, is informed that it is still available, but on arrival is told that the apartment has just been rented. A white tester of similar age and the same sex is selected to pose as a prospective tenant with a similar background and family composition. The tester visits the premises to inquire about the apartment and is informed that it is still available for rent. Sometimes multiple tests are conducted to establish a clear discriminatory pattern. If the landlord offers housing to the white testers, but denies it to the minorities, a prima facie case of illegal discrimination is established. *Smith v Anchor Bldg. Corp.* (8th Cir 1976) 536 F2d 231, 233.

Tests are designed to expose discrimination patterns. There can be many variations, including the numbers of testers sent, their demographic features, and the order in which they are sent. Single-person tests, as described above, were first accepted by the early Fair Housing Act case of *Bush v Kaim* (ND Ohio 1969) 297 F Supp 151. With paired testers, the minority tester appears first to replicate the experience of an aggrieved party and obtain time priority. That tester is followed by a control tester who usually replicates the demographic characteristics of the housing provider. Testers sometimes go in the "sandwich" format where a control tester is followed by a minority tester, who in turn is followed by another (or the same) control tester, as was accomplished in *Richardson v Howard* (7th Cir 1983) 712 F2d 319 and *Blockman v Sandalwood Apartments* (7th Cir 1980) 613 F2d 169. Tests can expose complex discrimination patterns. See *Gresham v Windrush Partners* (7th Cir 1984) 730 F2d 1417; *Davis v The Mansards* (ND Ind 1984) 597 F Supp 334. Testing evidence is absolutely essential in some cases. See "Measuring Racial Discrimination in American Housing Markets—The Housing Market Practices Survey," HUD-PDR-444, May 1979; "Housing Discrimination Study: Analyzing Racial and Ethnic Steering," HUD-1325-PDR, Nov. 1991; "Housing Discrimination Study: Synthesis," HUD-1318-PDR, Oct. 1991 (methodology discussions point out limitations in paired testing, which intrinsically must compare results in order to uncover disparities in treatment).

The courts have long accepted the use of testers as an appropriate method of proving illegal discrimination. See *Havens Realty Corp. v Coleman* (1982) 455 US 363, 71 L Ed 2d 214, 102 S Ct 1114; *Phiffer v Proud Parrot Motor Hotel, Inc.* (9th Cir 1980) 648 F2d 548; *Bush v Kaim* (ND Ohio 1969) 297 F Supp 151; *U.S. v Youritan Constr. Co.* (ND Cal 1973) 370 F Supp 643, remanded on other grounds (9th Cir 1975) 509 F2d 623. See also *FEHC v Prunty's New Beginnings* (2006) (FEHC Decision No. 04-05-046, June 6, 2006) 2006 CAFEHC Lexis 3. Courts have acknowledged the difficulty of proving illegal discrimination without the use of testers. See *Hamilton v Miller* (10th Cir 1973) 477 F2d 908.

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Source: Real Property/California Landlord-Tenant Practice/2 Fair Housing Considerations/§2.67 C. Standing

§2.67 C. Standing

Courts interpret standing requirements liberally in actions brought under the Civil Rights Act of 1866 (42 USC §§1981-1982) and the Fair Housing Act (42 USC §§3601-3631). A party has standing if the allegations show that he or she has suffered a distinct and palpable injury as a result of the defendant's actions. *Havens Realty Corp. v Coleman* (1982) 455 US 363, 71 L Ed 2d 214, 102 S Ct 1114; *Gordon v City of Cartersville* (ND Ga 1981) 522 F Supp 753. Clearly, any direct victim of illegal discriminatory practices will have standing. See *Harris v Itzhaki* (9th Cir 1999) 183 F3d 1043; *Denny v Hutchinson Sales Corp.* (10th Cir 1981) 649 F2d 816; *Grant v Smith* (5th Cir 1978) 574 F2d 252; *Johnson v Jerry Pals Real Estate* (7th Cir 1973) 485 F2d 528.

Standing has been extended under the Fair Housing Act to numerous categories of plaintiffs. They are as follows, stated in terms of widening scope:

- Bona fide home seekers or consumers are clearly covered.
- Members of the household who are injured by actions against another member. *U.S. v Forest Dale* (ND Tex 1993) 818 F Supp 954 (wife of deceased disabled tenant who was target of discrimination held to have standing in her own right as aggrieved party).
- Residents who are denied interracial association with a potential neighbor who was denied admission. *Trafficante v Metropolitan Life Ins. Co.* (1972) 409 US 205, 209, 211, 34 L Ed 2d 415, 93 S Ct 364.
- Household member and guest when the guest is the subject of discrimination. 24 CFR §100.60(b)(5) (evictions due to protected status of tenant or "guest"); 24 CFR §100.65(b)(4) (limiting use of privileges, services, or facilities based on protected status of "owner, tenant or a person associated with him or her"); *U.S. v L & H Land Corp.* (SD Fla 1976) 407 F Supp 576, 580; *Olzman v Lake Hills Swim Club, Inc.* (2d Cir 1974) 495 F2d 1333 (Civil Rights Act of 1866; prohibitions also extend to discriminatory guest policies for clubs or other amenities associated with housing).
- Resident denied sale of a mobilehome for ex-daughter-in-law because she had children. *Sandoval v Mazer* (D NM 1997) FH-FL ¶16,197.
- Broker who is denied commission. *Crumble v Blumthal* (7th Cir 1977) 549 F2d 462.
- Disabled tester who observes inaccessible features of a dwelling. *Smith v Pacific Props.* (9th Cir 2004) 358 F3d 1097.
- Fair housing organization that expends resources helping injured members. *Havens Realty Corp. v Coleman* (1982) 455 US 363, 71 L Ed 2d 214, 102 S Ct 1114; *Smith v Pacific Props., supra*.
- Member of the same neighborhood. *Havens Realty Corp. v Coleman* (1982) 455 US 363, 71 L Ed 2d 214, 102 S Ct 1114.
- A city denied minority residents. *Village of Bellwood v Dwivedi Realty* (7th Cir 1990) 895 F2d 1521.

Testers, who have no real intention of purchasing or renting property, have standing under the Civil Rights Act of 1866 (*Meyers v Pennypack Woods Home Ownership Ass'n* (3d Cir 1977) 559 F2d 894, overruled on other grounds in *Goodman v Lukens Steel Co*. (3d Cir 1986) 777 F2d 113) and under the Fair Housing Act (*Havens Realty Corp. v Coleman, supra*; *Harris v Itzhaki, supra*). A nonprofit corporation formed to provide equal opportunity in housing has standing because the alleged violation of the Fair Housing Act impaired the organization's ability to conduct or provide other community services, such as counsel low- and moderate-income homeseekers. See *Havens Realty Corp. v Coleman* (1982) 455 US 363, 71 L Ed 2d 214, 102 S Ct 1114; *Fair Hous. Council of Marin v Combs* (9th Cir 2002) 285 F3d 899. See also *Central Alabama Fair Hous. Ctr. v Lowder Realty Co.* (11th Cir 2000) 236 F3d 629; *Ragin v Harry Macklowe Real Estate Co.* (2d Cir 1993) 6 F3d 898. See also *FEHC v Prunty's New Beginnings* (2006) (FEHC Decision No. 04-05-046, June 6, 2006) 2006 CAFEHC Lexis 3 (fair housing agency is aggrieved person within meaning of Govt C §12927(g)). However, a fair housing agency must allege more than a frustration of its fair housing mission or a general diversion of its resources. At minimum, it must allege that, due to the defendant's discriminatory conduct, it has diverted resources from other specific activities such as counseling or mediation. *Fair Hous. Council of Marin v Combs, supra*. A fair housing agency also has standing under the Fair Housing Act and the California Fair Employment and

Housing Act (FEHA) (Govt C §§12900-12996) when a local government cancels its contract with the agency in retaliation for enforcement of the fair housing laws. *Walker v City of Lakewood* (9th Cir 2001) 263 F3d 1005. Such an action may also violate the requirement imposed on every recipient of federal assistance to affirmatively further fair housing. See 42 USC §3608(d), (e)(5).

Other persons who are not members of a protected class, but who suffer injuries because of discrimination, have standing to bring actions under the Fair Housing Act *Halet v Wend Inv. Co.* (9th Cir 1982) 672 F2d 1305 (white plaintiff had standing under the Fair Housing Act to challenge facially neutral policy having a racially discriminatory impact); *Walker v Pointer* (ND Tex 1969) 304 F Supp 56 (white tenant evicted for entertaining African-American friends) and under 42 USC §1982 (*Sullivan v Little Hunting Park, Inc.* (1969) 396 US 229, 24 L Ed 2d 386, 90 S Ct 400 (white lessor expelled from community recreational organization for renting property to African-American tenant); *Walker v Fox* (SD Ohio 1975) 395 F Supp 1303 (landlord's discriminatory rental practices caused white tenant to move and incur increased rental expenses); *Williamson v Hampton Mgmt. Co.* (ND Ill 1972) 339 F Supp 1146 (white lessee frustrated in attempts to sublease to African-American tenant).

However, in *Reycraft v Lee* (2009) 177 CA4th 1211, 99 CR3d 746, a mobilehome park's rules required guests of tenants to register and pay a fee to use the park's pool. The plaintiff, a disabled guest of a mobilehome park tenant, did not have standing to state a claim under CC §54.3 for monetary damages due to lack of compliance with accessibility guidelines under the Disabled Persons Act (CC §§54-55.2), because she did not register as a guest or pay the guest fee and did not suffer any actual damages. The court did state, however, that if the plaintiff had pursued injunctive relief she could have established standing because a plaintiff may sue under CC §55 if "aggrieved or potentially aggrieved by a violation of Section 54 or 54.1." 177 CA4th at 1219.

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§2.68 D. Owner's Responsibility for Agent's Discriminatory Acts

A property owner is liable for discriminatory acts committed by the apartment manager, rental agent, broker, or other agent under the common law doctrine of respondeat superior, or, what the Supreme Court refers to as "traditional theories of agency liability." *Meyer v Holley* (2003) 537 US 280, 154 L Ed 2d 753, 123 S Ct 824 (the Ninth Circuit issued a new opinion in *Holley v Crank* (9th Cir 2004) 400 F3d 667); *Cleveland v Caplaw Enters.* (2d Cir 2006) 448 F3d 518; *U.S. v Youritan Constr. Co.* (ND Cal 1973) 370 F Supp 643, 649, remanded on other grounds (9th Cir 1975) 509 F2d 623. As long as the agent acts within the scope of the agency, the owner is liable even if the acts are negligent, intentional, or malicious (CC §2338; *Hudson v Nixon* (1962) 57 C2d 482, 20 CR 620), or are contrary to instructions from the owner (*DeMirjian v Ideal Heating Corp.* (1954) 129 CA2d 758, 278 P2d 114; *Rosenberg v J. C. Penney Co.* (1939) 30 CA2d 609, 623, 86 P2d 696, 704). Admissions by an agent of discriminatory practices may be attributed to the owner. *Harris v Itzhaki* (9th Cir 1999) 183 F3d 1043.

Officers of a corporation cannot ordinarily be held personally liable for their failure to ensure the corporation's compliance with the Fair Housing Act (42 USC §§3601-3631), except when an agent acts under the authority of a licensed real estate broker or if the corporate veil can be pierced. See *Holley v Crank* (9th Cir 2004) 400 F3d 667.

Even tenants who fill vacancies for absentee landlords may have an agency relationship with the landlord that can subject the landlord to liability under the Fair Housing Act. *Marya v Slakey* (D Mass 2001) 190 F Supp 2d 95. In *Marya,* the court held that federal law, not state law, controls the issue of agency in cases alleging liability under the Fair Housing Act.

Conversely, an agent is liable for any illegal discriminatory acts even though they were committed on the owner's advice. *Jeanty v McKay & Poague, Inc.* (7th Cir 1974) 496 F2d 1119. An owner may be directly liable for negligence in failing to adequately supervise his or her agents, or to establish standard rental procedures. *U.S. v Youritan Constr. Co.*, *supra*.

An owner may be liable for punitive damages because of an agent's acts if the owner authorized or participated in the acts. Restatement (Second) of Agency §217c(a); *Walker v Todd Village, LLC* (D Md 2006) 419 F Supp 2d 743; *Williamson v Hampton Mgmt. Co., supra*; *Walker v Pointer* (ND Tex 1969) 304 F Supp 56, 64. Approval or ratification of an agent's acts may be found by an owner's failure to respond to a complaint about the agent's conduct or the owner's retention of the agent after the commission of a wrongful act. *Caldwell v Farley* (1955) 134 CA2d 84, 285 P2d 294; *Farvour v Geltis* (1949) 91 CA2d 603, 205 P2d 424; *McChristian v Popkin* (1946) 75 CA2d 249, 171 P2d 85.

An owner who rents an entire building to a third party and retains no control over subleasing is not liable for the third party's discriminatory practices. The third party is considered to be an independent contractor and not an agent of the owner. *Walker v Fox* (SD Ohio 1975) 395 F Supp 1303. See also *Northside Realty Assocs. v U.S.* (5th Cir 1979) 605 F2d 1348.

Landlords of a realty office were liable for noncompliance with the Americans With Disabilities Act of 1990 (42 USC §§12101-12213) despite a provision in the commercial lease shifting the responsibility to the tenant-realty office. *Botosan v Paul McNally Realty* (9th Cir 2000) 216 F3d 827.

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§2.69 E. Statute of Limitations

Statutes of limitations act to strictly prohibit the filing of claims after the statute of limitations period runs, calculated from the injury to the plaintiff. *AMTRAK v Morgan* (2002) 536 US 101, 110, 153 L Ed 2d 106, 120, 122 S Ct 2061. Statutes of limitations should be distinguished from statutes of repose, which are legislative acts cutting off exposure to liability based solely on an act of the defendant unrelated to the plaintiff's injury. *Lyon v Agusta S.P.A.* (9th Cir 2001) 252 F3d 1078, 1084 (statute of repose runs from date of first transfer from manufacturer; statute of limitations runs from date on which injury occurs).

The administrative remedy available through HUD has a 1-year limitations period. 42 USC §3610(a)(1)(A)(i). A private action has a 2-year limitations period. 42 USC §3613(a)(1)(A). Under the Fair Housing Act, an action may be filed within the applicable limitations period after a discriminatory housing practice "has occurred or terminated" or the "occurrence or termination" of a discriminatory housing practice. 42 USC §§3610(a)(1)(A)(i), 3613(a)(1)(A). The limitations period begins to run at the time of the discriminatory act, not when the act is discovered. *Havens Realty Corp. v Coleman* (1982) 455 US 363, 380, 71 L Ed 2d 214, 102 S Ct 1114; *Moseke v Miller & Smith, Inc.* (ED Va 2002) 202 F Supp 2d 492, 503.

To identify when a statute of limitations begins to run, the attorney must first identify what statutory right the plaintiff is seeking to redress. Because the date of an injury is closely tied to the categorization of the injury, the statute of limitations calculation depends on corresponding concepts of standing and subject matter jurisdiction. Consequently, court decisions on standing or subject matter jurisdiction can determine what statute of limitations applies for a given statute. A cause of action does not become "complete and present" for limitations purposes until the plaintiff can file suit and obtain relief. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v Ferbar Corp.* (1997) 522 US 192, 201, 139 L Ed 2d 553, 118 S Ct 542. See *Meyer v Holley* (2003) 537 US 280, 285, 154 L Ed 2d 753, 123 S Ct 824 (Fair Housing Act claims are tort actions that Congress has legislated against background of common law principles).

Statutes of limitations are subject to exceptions and may be shortened or extended by applying equitable theories of waiver, laches, estoppel, tolling, and fraudulent concealment (*Zipes v Trans World Airlines, Inc.* (1982) 455 US 385, 71 L Ed 2d 234, 102 S Ct 1127):

- Laches defense is available to defendants for relief from equitable remedies sought by plaintiffs who lacked diligence in asserting their claim, and who prejudiced the defendant by their lack of diligence. *AMTRAK v Morgan* (2002) 536 US 101, 122, 153 L Ed 2d 106, 127, 122 S Ct 2061.
- Equitable estoppel supposes that, through acts of the defendant, the plaintiff was induced to not file the action in time. *Bell v Fowler* (8th Cir 1996) 99 F3d 262.
- Equitable tolling will apply when there is no allegation of wrongdoing by either party, but the plaintiff even through due diligence could not become aware of the existence of his or her cause of action until they did file. *Chakonas v City of Chicago* (7th Cir 1994) 42 F3d 1132, 1135. Equitable tolling is read into every federal statute of limitation. *Holmberg v Armbrecht* (1946) 327 US 392, 397, 90 L Ed 743, 66 S Ct 582, 585.
- Fraudulent concealment is sometimes used to describe equitable estoppel (See *Cada v Baxter Healthcare Corp.* (7th Cir 1990) 920 F2d 446, 451), but may be distinguished as a rule that applies when the defendant fraudulently causes the plaintiff to be unaware of actionable conduct that cannot be discovered through due diligence. *Curtis v Conly* (1921) 257 US 260, 42 S Ct 100, 66 L Ed 222.

Laches may shorten the time otherwise allowed by a statute of limitations for a plaintiff. In suits brought seeking both equitable and legal remedies, courts generally follow the applicable statute of limitations. *Holmberg v Armbrecht* (1946) 327 US 392, 395, 90 L Ed 743, 746, 66 S Ct 582. When "unusual conditions or extraordinary circumstances" result in a prejudicial unexcused delay, courts have applied laches to establish a shorter time than that provided for by an otherwise applicable statute of limitations. *Kelley v Boettcher* (8th Cir 1898) 85 F 55, 62. But the laches doctrine is limited to equitable remedies. *Russell v Todd* (1940) 309 US 280, 288 n1, 84 L Ed 754, 760 n1, 60 S Ct 527 (laches may bar equitable remedy before local statute has run); *AMTRAK v Morgan* (2002) 536 US 101, 121, 153 L Ed 2d 106,

112, 122 S Ct 2061 (limitation of application of laches to only equitable remedies not stated in rebuttal to concerns that defendants in hostile environment cases *in general* will be prejudiced by application of continuing violations doctrine). Laches cannot supplant the time limitation stated in a statute of limitations if only legal remedies, and not also equitable remedies, are sought. *Morgan v Koch* (7th Cir 1969) 419 F2d 993, citing *Cope v Anderson* (1947) 331 US 461, 91 L Ed 1602, 67 S Ct 1340; *Swan v Board of Ed.* (2d Cir 1963) 319 F2d 56, 59. Laches is also generally not applicable to "the sovereign," although this doctrine seems to be eroding under the rationale of "providing relief to defendants." *Costello v U.S.* (1961) 365 US 265, 281, 5 L Ed 2d 551, 562, 81 S Ct 534 (citing numerous Supreme Court cases in which U.S. was party); *Illinois v Kentucky* (1991) 500 US 380, 388, 114 L Ed 2d 420, 430, 111 S Ct 1877 (in context of interstate compact case, "the laches defense is generally inapplicable against a State"). But see *HUD v Sparks* (HUD ALJ 2003) 05-92-1274-8 (equitable remedy used to relieve respondent from HUD's unjustifiable and prejudicial delay in investigating and litigating Fair Housing Act case).

The statute of limitations for continuing violations of the Fair Housing Act may not begin to run until the violations terminate. *Havens Realty Corp. v Coleman* (1982) 455 US 363, 380, 71 L Ed 2d 214, 102 S Ct 1114 (because racially discriminatory acts were continuing violations, plaintiffs were allowed to obtain remedies for injuries caused by entire sequence). An aggrieved person may commence a civil action "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 USC 3613(a)(1)(A). The last discriminatory event in a series of discriminatory events is the one that triggers the statute of limitations. *Moseke v Miller & Smith, Inc.* (ED Va 2002) 202 F Supp 2d 492, 502; *Inland Mediation Bd. v City of Pomona* (CD Cal 2001) 158 F Supp 2d 1120. There may not be an overt act by the defendant at the time of injury if the defendant acted to discourage plaintiffs from asserting rights that would have been a futile gesture to assert. The futile gesture doctrine was first applied in Title VII cases, beginning with *International Bhd. of Teamsters v U.S.* (1977) 431 US 324, 52 L Ed 2d 396, 97 S Ct 1843, and extended through subsequent decisions. See, *e.g., U.S. v Gregory* (4th Cir 1989) 871 F2d 1239, 1242. The futile gesture theory was first applied to housing discrimination cases in *Pinchback v Armistead Homes Corp.* (4th Cir 1990) 907 F2d 1447.

A statute of limitations does not begin to run again when the effects or consequences of a defendant's act occur. *Delaware State College v Ricks* (1980) 449 US 250, 66 L Ed 2d 431, 101 S Ct 498. (plaintiff notified of termination but offered a 1-year "terminal contract" under which he could continue to work; date plaintiff was notified of termination triggered running of statute of limitations). See also *Electrical Workers v Robbins & Myers, Inc.* (1976) 429 US 229, 50 L Ed 2d 427, 97 S Ct 441 (timely filing requirement not tolled because plaintiff had been pursuing grievance procedure set up in collective bargaining agreement). A freestanding violation may always be charged within its own charging period regardless of its connection to other violations. *Ledbetter v Goodyear Tire & Rubber Co.* (2007) 550 US 618, 167 L Ed 2d 982, 997, 127 S Ct 2162. See also *Bradley v Carydale Enters.* (ED Va 1989) 730 F Supp 709 (last act in long series of acts after initial termination notice was last actionable conduct triggering limitations period).

When an individual applicant is denied admission, and either is or should be aware of the event, the limitations period begins to run and is not a continuing violation or subject to equitable tolling. *Havens Realty Corp. v Coleman* (1982) 455 US 363, 381, 71 L Ed 2d 214, 102 S Ct 1114; *Meyers v Pennypack Woods Home Ownership Ass'n* (3d Cir 1977) 559 F2d 894, 903 n27; *James v Hafler* (ND Ga 1970) 320 F Supp 397. Where denial of admission cases involve published discriminatory policies, the notice of these policies to an applicant/plaintiff with standing is actionable conduct as a discriminatory statement, notice or advertisement as of the date of statement, notice, or publication (42 USC §3604(c)), and no further act is required under the futile gesture rule for the applicant/plaintiff to be able to allege a denial of rental or sales if he or she is looking for such housing (42 USC §3604(a)).

If discriminatory terms and conditions are imposed by the contract, *i.e.,* established at the beginning of the tenancy, the earliest date the limitations period can start to run is the formation date of the agreement. However, each time such a discriminatory term or condition is imposed is new actionable conduct. *Concerned Tenants Ass'n v Indian Trails Apartments* (ND Ill 1980) 496 F Supp 522. The aggrieved party may file actions for subsequent violations after earlier initially suffering discrimination in terms and conditions. *Bazemore v Friday* (1986) 478 US 385, 92 L Ed 2d 315, 106 S Ct 3000. See *Ledbetter v Goodyear Tire & Rubber Co.* (2007) 550 US 618, 167 L Ed 2d 982, 997, 127 S Ct 2162 (plaintiff alleged that defendant initially adopted a system in order to discriminate and later applied the system to her within charging period).

It is illegal to "make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination."

42 USC §3604(c). Statements, notices, or advertisements can communicate discreet acts or events, or they can communicate a continuing series of events or a continuing policy. *Pinchback v Armistead Homes Corp.* (4th Cir 1990) 907 F2d 1447. Violations under 42 USC §3604(c) can be discreet acts. For example, if a discriminatory term or condition is proposed prior to its going into force over the plaintiff, it remains a fleeting statement, and is a discrete, non-continuing act that triggers the applicable statute of limitations. *U.S. v Pelzer Realty Co.* (5th Cir 1973) 484 F2d 438 (cause of action completed when disparate term was demanded, no continuing violation discussed). On the other hand, when a sign is up over a drinking fountain in an apartment complex that states "Whites Only," the violation occurs each time a non-white who wishes to drink from the fountain reads the sign. This process continues as long as the sign is up over the fountain. HUD Handbook 8024.01, §3-2(D).

There are competing legal theories as to how to calculate the limitations period for evictions. One theory is that the last actionable event is when the notice was served, since all that follows is a mere consequence. *Delaware State College v Ricks, supra*. This theory is not supported by a careful reading of the *Ricks* opinion, since the limitations period in *Ricks* was triggered by the final decision reached by the college board of trustees after a long process involving years, numerous procedural stages, and several earlier notices. See *Benders v Bellows & Bellows* (7th Cir 2008) 515 F3d 757 (limits application of *Ricks* to terminations following substantial, predefined procedural requirements); *Bradley v Carydale Enters.* (ED Va 1989) 707 F Supp 217 (*Ricks* held to establish that limitations period began when defendant caused last injury, which in *Carydale* was when defendant served second notice of eviction).

Another theory is that the date the final decision was made and communicated to the tenant is the date of trial. See HUD Handbook 8420.01, §3-2(C). Two Fair Housing Act cases assert that the last date of discrimination is the date of dispossession. In *Harper v Union Sav. Ass'n* (ND Ohio 1977) 429 F Supp 1254 and in *Radecki v Joura* (8th Cir 1997) 114 F3d 115, the courts held that the date that actionable discrimination occurred was when the residents were dispossessed. See 42 USC §3604(a).

Decisional law on the statute of limitations for actions under the Unruh Civil Rights Act (CC §51) is confusing. The period for filing may be 2 years, under the assumption that such actions are equivalent to personal injury claims. See *West Shield Investigations & Sec. Consultants v Superior Court* (2000) 82 CA4th 935, 98 CR2d 612; *Mitchell v Sung* (ND Cal 1993) 816 F Supp 597 (both cases held Unruh Act claim is equivalent to personal injury action under common law; see CCP §335.1, effective January 1, 2003). But see *Gatto v County of Sonoma* (2002) 98 CA4th 744, 759, 120 CR2d 550 ("no single statute of limitations applies" to all Unruh Act protections; personal injury rule applies to remedies that evolved from common law and 3-year rule for liability created by statute under CCP §338(a) applies to remaining remedies); *Prudential Home Mortgage Co. v Superior Court* (1998) 66 CA4th 1236, 1245, 78 CR2d 566 (claim based on statute providing *mandatory* recovery of damages in addition to actual losses (*e.g.,* treble damages) is penal, thus subject to 1-year limitation in former CCP §340(1); now CCP §340(a)).

For statute of limitations on actions under the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), see §§2.28, 2.52.

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3

Rights and Duties During Tenancy

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I. INTRODUCTION §3.1

II. LANDLORD'S LIMITED RIGHT OF ENTRY
- A. Nature and Extent §3.2
- B. Procedure for Entry; Notice Requirements §3.3
- C. Form: Notice of Landlord's Intention to Enter Dwelling Unit §3.3A
- D. Remedies §3.4

III. IMPLIED COVENANT OF QUIET ENJOYMENT
- A. Nature §3.5
- B. When Is Covenant Breached? §3.6
- C. Remedies §3.7

IV. LANDLORD'S DUTY TO MAINTAIN AND REPAIR PREMISES §3.8
- A. Express Promise to Repair §3.9
- B. Housing Code Enforcement
  - 1. Enforcement Process §3.10
  - 2. Housing Statutes, Regulations, and Codes
    - a. Statutory Tenantability; CC §§1941, 1941.1 §3.11
    - b. Door and Window Locks; CC §1941.3 §3.11A
    - c. Toxic Mold and Other Health and Safety Statutes §3.11B
    - d. Department of Housing Regulations §3.11C
    - e. Uniform Housing Code §3.11D
  - 3. Certificate of Occupancy Violations §3.11E
- C. "Repair-and-Deduct" Remedy; CC §1942
  - 1. Statutory Basis §3.12
  - 2. Procedure §3.13
  - 3. Waiver Not Permitted §3.14
  - 4. Commercial Tenancies §3.15
- D. Statutory Action for Damages and Abatement; CC §1942.4 §3.15A
- E. Constructive Eviction Action §3.15B
- F. Nuisance Action §3.15C
- G. Implied Warranty of Habitability
  - 1. Development §3.16
  - 2. Application
    - a. Single-Family Homes §3.17
    - b. Commercial Tenancies §3.18
    - c. Government-Owned Housing §3.19
    - d. Common Areas §3.20
    - e. Premises Uninhabitable at Inception of Tenancy §3.21
    - f. Premises Become Uninhabitable After Tenant Is Required to Vacate §3.22
  - 3. Waiver §3.23
  - 4. Breach of Warranty of Habitability
    - a. Actionable Defects
      - (1) Defects Covered by Housing Codes or CC §§1941.1 and 1941.3 §3.24
      - (2) Defects Not Covered by Housing and Building Codes §3.25
      - (3) Defects Caused by Tenant §3.26
      - (4) Severity of Defects §3.27
      - (5) Evidence of Defects §3.28
      - (6) Notice of Defects §3.29
    - b. Reasonable Time to Repair §3.30

c. Sale of Premises §3.31
d. Remedies for Breach of Implied Warranty
(1) Defense to Unlawful Detainer Suit
(a) Summary of Procedure §3.32
(b) Complaint Need Not Allege Compliance With Implied Warranty §3.33
(c) Protective Orders §3.34
(2) Actions for Damages; Statutes of Limitations §3.35
(a) Statutory Damages; Abatement §3.36
(b) General Damages
(i) Difference in Value or Percentage Reduction §3.37
(ii) Discomfort and Annoyance §3.38
(iii) Personal Injury Damages §3.38A
(c) Special Damages §3.39
(d) Punitive Damages §3.40
(e) Costs and Attorney Fees §3.41
(3) Injunctive Relief §3.42
(4) Termination and Rescission §3.43
(5) Declaratory Relief §3.44
5. Tactical Considerations §3.45
a. Contract or Tort Action §3.46
b. Gathering and Preserving Evidence §3.46A
c. Availability of Insurance Coverage §3.47
d. Monetary Versus Equitable Claims §3.48
H. Form: Complaint for Damages for Breach of Warranty of Habitability and Related Torts, Specific Performance, and Injunctive Relief §3.48A

V. ASSIGNMENT AND SUBLETTING
A. Transfer of Leasehold Interests §3.49
B. Assignment and Subletting Distinguished §3.50
C. Effect of Transfer §3.51
D. Rights and Liabilities Following Transfer
1. Assignment
a. Assignee and Landlord §3.52
b. Assignor and Landlord §3.53
2. Subletting
a. Sublessee and Landlord §3.54
b. Sublessor and Landlord §3.55
E. Restricting Transfer of Leasehold Interests
1. Lease Covenants Restricting Transfer §3.56
2. Waiver of Covenant §3.57
3. Landlord's Withholding of Consent §3.58
4. Subleasing in Jurisdictions with Rent Control §3.58A
5. Interaction With CC §1951.4 Remedy §3.59
F. Effect of Tenant Bankruptcy on Lease Assignment §3.59A

VI. EXTENSION AND RENEWAL OF LEASE
A. Tenant's Right to Extend or Renew §3.60
B. Covenants to Extend or Renew
1. Legal Requirements §3.61
2. Exercise of Election to Renew §3.62
3. Automatic Renewal; Required Language in Lease (CC §1945.5) §3.63
C. Holding Over §3.64

VII. CHANGING TERMS OF TENANCY
A. Periodic Tenancy
1. 30-day Notice of Change in Terms §3.65
2. 60-day Notice of Residential Rent Increase Over 10 Percent §3.65A
3. Effect of Notice §3.65B
B. Fixed-Term Tenancy §3.66
C. Terminating Government Rent Subsidy Contracts in Rent Control Jurisdictions §3.66A
D. Rent Increases Under Government Subsidy Contracts §3.66B

VIII. LANDLORD LIABILITY FOR PERSONAL INJURY AND PROPERTY DAMAGE
A. Liability to Tenant

1. Negligent Failure to Correct Defects §3.67
2. Failure to Maintain Common Areas §3.67A
3. Injuries Caused by Criminal Acts of Third Parties §3.68
   a. Public Housing Projects §3.68A
   b. Privately Owned Apartment Buildings §3.68B
   c. Privately Owned Commercial Buildings §3.68C
   d. Public Buildings §3.68D
4. Exculpatory Clauses §3.69
5. Strict Liability §3.70
6. Liability for Sexual Harassment §3.70A

B. Liability to Third Parties
1. Liability for Negligence Regardless of Plaintiff's Status §3.71
2. Liability for Acts of Tenant §3.72

IX. TENANT LIABILITY FOR PROPERTY DAMAGE AND PERSONAL INJURY
A. Duty to Repair §3.73
B. Injury to Third Parties §3.74

X. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING §3.75

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§3.1 I. INTRODUCTION

During the term of the tenancy, the rights and duties of the parties are governed primarily by the lease or rental agreement between them unless the state legislature, a local governing body, or the courts adopt standards that override the contract terms. Because leases function as both conveyances of real property interests and contracts, practitioners should first review the lease or rental agreement to determine what rights and duties it creates. In the absence of an agreement, and in certain areas of overriding public importance, the attorney must consult both statutory law (state and local) and case law.

PRACTICE TIP: Practitioners should be aware that some property owners continue to use older forms of preprinted leases or rental agreement forms that may not comply with current law.

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II. LANDLORD'S LIMITED RIGHT OF ENTRY

§3.2 A. Nature and Extent

California law permits a landlord to enter premises rented to a tenant, but only in specified situations, at certain times, and, in many cases, after giving the tenant written notice. CC §1954. Rights created by §1954 cannot be waived in advance or modified except as provided in §1954. See CC §1953(a)(1). Under CC §1954, the landlord may enter the premises only:

- in an emergency;
- to make necessary or agreed-on repairs, decorations, alterations, or improvements;
- to supply necessary or agreed-on services;
- to exhibit the unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors;
- to make an inspection under CC §1950.5(f);
- when the tenant has abandoned or surrendered the premises; or
- under a court order.

Presumably, the landlord also may enter without fear of liability when the tenant initiates or consents to the entry at the time of entry.

The landlord may enter the premises only during "normal business hours," except in an emergency or when the tenant has consented to an entry during other than normal business hours at the time of entry or when the tenant has abandoned or surrendered the premises. CC §1954. This statute is often a source of disputes between landlords and tenants. "Normal business hours" are not defined by either statutory or case law, leaving open the issue of whether weekends fall within the definition and whether real estate agents showing the property fall within the permitted class of admittees.

DRAFTING TIP: The parties should include a definition of "normal business hours" in the rental agreement. The tenant might indicate any hours that might be out of the ordinary (for example, a tenant who works a night or swing shift might prefer that repairs be performed in the afternoon), and the landlord may obtain agreement that entry would be permitted on a Saturday morning or afternoon.

Apparently, California law does not authorize landlords to enter rental premises purely for the purpose of inspecting them (even though it may be required periodically under the landlord's liability insurance policy), because inspection is not listed as one of the reasons for entry in CC §1954. Accordingly, a landlord must claim that the purpose of an inspection is connected to providing services, improvements, repairs, decorations, or some other authorized basis for entry.

PRACTICE TIP: Rental agreements could detail types of agreed services that would justify entries (*e.g.,* inspect smoke detector annually to replace batteries, allow pest control services).

A landlord, however, may enter a rental unit for inspection under CC §1940.5(f), which authorizes an owner or the owner's agent to inspect a waterbed after it has been installed by the tenant and "periodically thereafter" to ensure that the installation complies with the requirements of that section.

In *Sachs v Exxon Co., U.S.A.* (1992) 9 CA4th 1491, 12 CR2d 237, the tenant operated a filling station on the premises, and a lease provision required the tenant to comply with all laws. The court read into this provision a requirement that, unless the tenant can otherwise provide reasonable assurances, the tenant must permit the landlord to inspect the premises for illegal soil contamination due to gasoline leakage (9 CA4th at 1498):

> In leases, as in contracts, a covenant of good faith and fair dealing has been implied. [Citation.] The covenant requires that neither party do anything which will have the effect of destroying or injuring the right of the other party to receive the benefits of the lease. [Citation.] One of the benefits provided to the Sachses by this lease is the promise of the defendants that they will not violate governmental laws and regulations

which apply to the leasehold. This assurance is of little benefit to the Sachses if they are precluded from assuring themselves that no such violations are taking place, *particularly* in circumstances in which they reasonably suspect violations.

Similar reasoning might be used in a residential context, *e.g.,* when the landlord reasonably suspects that illegal narcotics are being used or sold on the premises, as long as the lease contains a provision similar to that present in *Sachs,* although landlords should be careful about relying on *Sachs* for this purpose. For further discussion of this problem, see §§4.43-4.44, 7.60.

A landlord may not enter a rental unit to interfere with tenant organizing activities. To address problems that tenant organizers may encounter in attempting to meet with tenants at the tenant's unit, CC §1942.6 prohibits guests from being arrested as trespassers and prohibits unreasonable restrictions on guests coming into buildings containing rental housing units. For further discussion, see §5.33A.

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§3.3 B. Procedure for Entry; Notice Requirements

The legislature substantially amended the notice procedures in 2002 and 2003. The landlord must give the tenant reasonable notice of intent in writing to enter the premises (see §3.3A) and enter only during normal business hours. The notice must specify the date, approximate time, and purpose of the entry. CC §1954(d)(1). No written notice is required when the tenant and the landlord agree orally to an entry for the purpose of making repairs or supplying services that the tenant and the landlord have agreed on, but the oral agreement must specify the date and time of entry, which must occur within one week of the agreement. CC §1954(d)(3). No notice is required at all if the landlord enters in response to an emergency, if the tenant is present and consents to the landlord's entry at the time of entry, or after the tenant has abandoned or surrendered the premises. CC §1954(e). On what constitutes an abandonment or a surrender of the premises, see §§8.8-8.18.

WARNING: Amendments to CC §1954, effective January 1, 2003, deleted the exception to giving notice before entry based on "when it is impractical to give advance notice."

The written notice of entry may be mailed, but the presumption of reasonableness of the notice will not apply unless the notice is mailed at least 6 days prior to the entry. Alternatively, the written notice may be personally delivered to the tenant or left on, near, or under the usual entry door of the premises in a manner in which a reasonable person would discover the notice. CC §1954(d)(1).

Special advance notice procedures may be used to facilitate showing the unit to prospective or actual purchasers. In that event, the landlord may give oral notice, in person or by telephone, with at least 24 hours being presumed reasonable, if the landlord or its agent has given the tenant notice in writing that the property is for sale within 120 days before the oral notice. The oral notice must specify the date, approximate time, and purpose of the entry. CC §1954(d)(2).

The landlord may not abuse the right of entry or use it to harass the tenant. CC §1954(c). This language appears to be intended to cover situations in which entry is authorized under CC §1954 but the frequency of the landlord's entry has become excessive or unreasonable.

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Source: Real Property/California Landlord-Tenant Practice/3 Rights and Duties During Tenancy/§3.3A C. Form: Notice of Landlord's Intention to Enter Dwelling Unit

§3.3A C. Form: Notice of Landlord's Intention to Enter Dwelling Unit

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Notice of Landlord's Intention to Enter Dwelling Unit

Pursuant to Civil Code §1954, this is to notify you that I, _ _[*Landlord's name/Agent's name*]_ _, intend to enter your dwelling unit located at _ _[*address*]_ _ on _ _[*day/date*]_ _ at approximately _ _[*time*]_ _ for the purpose of _ _[*e.g., making necessary or agreed-upon repairs*]_ _. If this date or time is inconvenient for you, please contact me at _ _[*contact information*]_ _, within _ _[*e.g., 48 hours*]_ _, so that we may arrange a mutually acceptable date and time.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Comment: For full analysis of CC §1954, see §§3.2-3.3. On lease provision and drafting tips, see §1.66 and its comment. See also §4.43.

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§3.4 D. Remedies

In enacting and amending CC §1954, the legislature established standards (see §3.2) and procedures (see §3.3) for the landlord's entry into the premises, but did not specify in §1954 any remedies available when these rules are violated. The only express statutory remedy that allows for the recovery of damages and penalties for a "significant and intentional violation of CC §1954" is in CC §1940.2. See §8.150A. Proving an intentional violation is difficult.

If the landlord complies with the notice provisions of CC §1954, but the tenant refuses to allow access to the premises, the landlord's remedies similarly are unspecified. If the tenant occupies the property under a month-to-month tenancy, the landlord may simply elect to terminate the tenancy by giving a 30-day or 60-day notice to quit (see §8.69). Even in jurisdictions with eviction controls or in the case of federally subsidized housing programs, the tenant's refusal to permit the landlord reasonable access to the premises is often one of the enumerated good causes for eviction. If the lease contains either a covenant to comply with all laws or a covenant to allow access for the reasons specified in CC §1954, the landlord may serve a 3-day notice to perform the covenant or quit. If the tenant fails to comply within the 3-day period, the landlord could initiate an unlawful detainer action. A landlord who needs to obtain access to the premises before an eviction can be completed may have to seek a court order requiring access. Section 1954 specifically authorizes entry under a court order, as well as in other situations (see §3.2).

Litigation is often not an economically viable means of enforcing CC §1954 for either the landlord or the tenant. In some cases, a small claims court action for damages might work to induce compliance, but inserting an unrecognized claim for damages into a small claims action might also cause problems for the parties and the court. For discussion of options available in advising tenants or landlords generally, see §§4.1 (landlords), 5.1-5.4 (tenants).

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III. IMPLIED COVENANT OF QUIET ENJOYMENT

§3.5 A. Nature

Under CC §1927, every lease or rental agreement contains the landlord's implied covenant of quiet enjoyment (*Chandler v Hart* (1911) 161 C 405, 119 P 516; *Lost Key Mines, Inc. v Hamilton* (1952) 109 CA2d 569, 241 P2d 273; see *Petroleum Collections, Inc. v Swords* (1975) 48 CA3d 841, 122 CR 114), unless the agreement contains specific language to the contrary (*Kushner v Home Serv. Co.* (1928) 91 CA 692, 267 P 555; *Georgeous v Lewis* (1912) 20 CA 255, 128 P 768).

By renting the property, the landlord covenants that the tenant will not be evicted or disturbed in his or her possession by the landlord or anyone deriving title from the landlord. *Carty v Blauth* (1915) 169 C 713, 147 P 949; *Lost Key Mines, Inc. v Hamilton, supra*. Thus, the covenant protects the tenant from acts of the landlord that disturb the tenant's peaceful possession of the premises, either by legal action (*e.g.,* leasing part of the same premises to someone else; see *McAlester v Landers* (1886) 70 C 79, 82, 11 P 505) or by physical action (*e.g.,* renovating adjacent premises in such a way that the leased premises become uninhabitable; see *McDowell v Hyman* (1897) 117 C 67, 71, 48 P 984).

Originally construed to protect the tenant only against physical interference, the covenant has evolved to insulate the tenant against acts or omissions of the landlord that interfere substantially with the tenant's right to use and enjoy the property. *Petroleum Collections, Inc. v Swords, supra*. The perpetrator of the interference with the tenant's quiet enjoyment need not be the landlord personally; an actionable breach may occur if the interference is caused by a neighbor and the landlord does not take reasonable action to remedy the interference. *Andrews v Mobile Aire Estates* (2005) 125 CA4th 578, 590, 22 CR3d 832. The implied covenant might provide a cause of action for a tenant whose landlord abuses the right of entry under CC §1954 to the extent that it physically interferes with the tenant's use (see §§3.1, 3.4). See *Dwyer v Carroll* (1890) 86 C 298, 304, 24 P 1015; *Levitsky v Canning* (1867) 33 C 299. But see *North Pac. S.S. Co. v Terminal Inv. Co.* (1919) 43 CA 182, 185 P 205 (mere passing trespass, even by landlord, does not amount to breach of covenant of quiet enjoyment). An unsuccessful suit brought in bad faith to evict the tenant also constitutes breach of the covenant of quiet enjoyment. *Levitsky v Canning, supra*. But see *Stockton Theatres, Inc. v Palermo* (1954) 124 CA2d 353, 268 P2d 799 (good faith ejectment action not breach of covenant).

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§3.6 B. When Is Covenant Breached?

Determining whether there has been a breach of the covenant of quiet enjoyment generally depends on the facts in a particular case. *Stockton Dry Goods Co. v Girsh* (1951) 36 C2d 677, 682, 227 P2d 1. Breach can take many forms, including actual or constructive eviction. See, *e.g., LaFrance v Kashishian* (1928) 204 C 643, 644, 269 P 655 (plaintiff evicted from leased premises by one who established paramount title); *Guntert v City of Stockton* (1976) 55 CA3d 131, 126 CR 690 (arbitrary and unreasonable termination notice); *Goldman v House* (1949) 93 CA2d 572, 576, 209 P2d 639 (attempt to evict by wrongful and malicious means (utility cutoff) with knowledge of probable injury).

A landlord who does not take reasonable measures to remedy substantial annoyances of a tenant may be liable to a neighboring tenant who resides on the same property for breach of the implied covenant of quiet enjoyment. *Andrews v Mobile Aire Estates* (2005) 125 CA4th 578, 22 CR3d 832. While this case involved a mobilehome park owner, who had special rights and duties under express provisions in the lease and the state's Mobilehome Residency Law (see chap 6), the court relied in part on CC §1927 and the common law, which imposes the implied covenant of quiet enjoyment on all landlords. When such substantial annoyance is present, "the covenant of quiet enjoyment requires a reasonable response by the landlord, which may include conducting an investigation and thereafter, taking appropriate action, which may include, inter alia, the issuance of a warning to the offending party, the pursuit of injunctive relief against the tenant to enjoin the violation [under the Mobilehome Residency Law], or, if necessary, the commencement of eviction proceedings." 125 CA4th at 597.

California authorities disagree on whether there must be an actual or constructive eviction (see §§3.15B, 8.19) to constitute a breach of the covenant of quiet enjoyment, *i.e.,* whether the tenant must vacate the premises to be able to maintain a cause of action for breach. In *Petroleum Collections, Inc. v Swords* (1975) 48 CA3d 841, 122 CR 114, a commercial tenant sought to defend an action for unpaid rent by claiming that the landlord had breached the implied covenant of quiet enjoyment. The court held that the landlord's improper installation of a sign, in violation of local codes, could serve as a basis for the tenant's claim, but no breach of the implied covenant could be claimed unless and until the tenant vacated within a reasonable time (*i.e.,* until a constructive eviction occurred). Then, if the landlord sued for rent accrued before the constructive eviction, the tenant could claim as an offset any damages arising before and from the eviction, or bring an affirmative action for such damages. The complaint form in §3.48A may be modified to assert a breach of the covenant of quiet enjoyment.

In *Guntert v City of Stockton* (1976) 55 CA3d 131, 126 CR 690, the court refused to follow the decision in *Petroleum Collections, Inc. v Swords, supra*. The *Guntert* court held that a tenant asserting a breach of the implied covenant of quiet enjoyment may elect to keep the lease in effect, remain in possession, and sue for damages. In addition, the court held that the landlord's service of an invalid notice of termination (which the court characterized as "arbitrary and unreasonable") constituted a breach of the implied covenant of quiet enjoyment. 55 CA3d at 141. This holding was followed in *Marchese v Standard Realty & Dev. Co.* (1977) 74 CA3d 142, 148, 141 CR 370. In any event, under a statutory remedy for breach of the covenant of quiet enjoyment (CC §1940.2(a)(3); see §§3.7, 8.150A), the tenant need not even "be actually or constructively evicted in order to obtain relief" if the landlord uses or threatens to use force, willful threats, or menacing conduct to influence a tenant to vacate.

In *Beliveau v Caras* (CD Cal 1995) 873 F Supp 1393, applying California law, the court held that the covenant of quiet enjoyment is breached only by an eviction, actual or constructive. (The court apparently overlooked *Guntert v City of Stockton, supra*.) Accordingly, the court held that the tenant, who was sexually harassed by the resident manager and remained in possession, had no cause of action for breach of this covenant. (The tenant did, however, have a valid claim for violation of the federal Fair Housing Act (42 USC §§3601-3631; see §§2.30-2.40) and California's Unruh Civil Rights Act (CC §51) and Ralph Civil Rights Act (CC §51.7); see §§2.57-2.59.)

Note that the implied covenant of quiet enjoyment is similar to the implied warranty of habitability (see §§3.16-3.48). Courts that allow a residential tenant to assert a breach of the warranty of habitability (offensively or defensively) impose no requirement that the tenant first vacate the premises. See, *e.g., Green v Superior Court* (1974) 10 C3d 616, 111 CR 704; *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194. But see discussion of dependent versus

independent lease covenants in commercial leases in California Eviction Defense Manual §19.11 (2d ed Cal CEB 1993).

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§3.7 C. Remedies

Tenants have statutory, contract, and common law tort remedies for breach of the covenant of quiet enjoyment. Under CC §1940.2, a tenant may sue the landlord for wrongful and illegal acts committed for the purpose of influencing the tenant to vacate the dwelling. Prohibited acts under CC §1940.2(a) include the use, or threatened use, of force, threats, or menacing conduct constituting a course of conduct that interferes with the tenant's right to quiet enjoyment of the premises that would create an apprehension of harm in a reasonable person. The aggrieved tenant is entitled to a civil penalty of not more than $2000 for each act. CC §1940.2(b). For further discussion, see §8.150A.

A tenant suing for breach of the covenant of quiet enjoyment may recover contract damages under CC §3300, which may include damages for lost profits, lost business goodwill, and moving expenses, or under CC §3304, which prescribes difference in value damages (suggesting that a rent reduction may apply). See *Andrews v Mobile Aire Estates* (2005) 125 CA4th 578, 591, 22 CR3d 832.

Under the well-established common law rules in *Guntert v City of Stockton* (1976) 55 CA3d 131, 126 CR 690, and *Marchese v Standard Realty & Dev. Co.* (1977) 74 CA3d 142, 148, 141 CR 370, the tenant may stay in possession and sue for damages for breach of the covenant of quiet enjoyment. If the decision in *Petroleum Collections, Inc. v Swords* (1975) 48 CA3d 841, 122 CR 114, is followed, however, the tenant must vacate to state a cause of action for breach. Of course, the tenant then may sue for damages for "constructive eviction" if that approach appears preferable. See also *Pierce v Nash* (1954) 126 CA2d 606, 272 P2d 938.

Under either line of authority, the tenant may seek injunctive relief. In *Guntert v City of Stockton* (1976) 55 CA3d 131, 151, 126 CR 690, the court noted that the trial court had granted an injunction against the landlord's interference with the tenant's quiet enjoyment of the premises. In *Petroleum Collections, Inc. v Swords* (1975) 48 CA3d 841, 847, 122 CR 114, the court stated that the tenant could "remain in possession and seek injunctive or other appropriate relief."

If the breach actually excludes the tenant from a portion of the premises, it may constitute an "actual partial eviction," in which case the tenant may retain possession of the remainder and stop paying rent. *Giraud v Milovich* (1938) 29 CA2d 543, 85 P2d 182. But see *Dussin Inv. Co. v Bloxham* (1979) 96 CA3d 308, 157 CR 646, in which the defense was rejected because the court found that the tenant had not been evicted from a "substantial" portion of the premises.

In addition to contract claims for breach of the covenant, a tenant may recover in tort for wrongful eviction, trespass, negligent and intentional invasion of privacy, negligent and intentional infliction of emotional distress, and negligence. See *Spinks v Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 90 CR3d 453.

A related theory for redressing a breach of the covenant of quiet enjoyment is nuisance. See §3.15C. For discussion of an owner's rights and obligations concerning abating illegal use of firearms and drug-related activity in residential housing, see §§4.44, 8.59, discussing CC §§3485-3486 and the Narcotics Nuisance Abatement Act (Health & S C §§11570-11587). The Act defines drug dealing on the premises as a nuisance, authorizes abatement actions, and imposes penalties on property owners. In addition, CC §§3485-3486 permit city attorneys in selected jurisdictions in California to file an unlawful detainer action against a tenant on the basis of an arrest report (or on another action or report by a regulatory or law enforcement agency) if the owner fails to do so after 30 calendar days' written notice from the city. The tenant must also be notified of the nature of the action and possible defenses. CC §§3485(a), 3486(a).

For further discussion of remedies for breach of the covenant of quiet enjoyment emphasizing commercial tenancies, see California Eviction Defense Manual, chap 19 (2d ed Cal CEB 1993).

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§3.8 IV. LANDLORD'S DUTY TO MAINTAIN AND REPAIR PREMISES

Attorneys for both landlord and tenant should be aware of the respective legal rights and obligations concerning maintenance of the premises. The landlord's duty to maintain and repair the premises has several statutory and common-law sources. Under California law, in the absence of an agreement to the contrary (see CC §1942.1), the lessor of a building intended for human occupation must maintain the building in a tenantable condition, repair any dilapidation that renders it untenantable, install dead bolts on doors, a telephone jack with wiring, and window locks, and comply with various fire codes regarding exit doors. CC §§1941-1941.4.

The landlord's statutory duty to maintain and repair is expressly conditioned on the tenant's performance of the following affirmative obligations:

- Maintaining the premises and disposing of all waste in a clean and sanitary manner;
- Operating all fixtures properly;
- Not damaging or destroying the property; and
- Occupying the premises as the tenant's abode.

See CC §1941.2; see §§1.57, 4.1. One court of appeal has opined that the landlord's duty to maintain and repair is not conditioned on the tenant's payment of rent. See *Fairchild v Park* (2001) 90 CA4th 919, 928, 109 CR2d 442 (held landlord's obligation to provide habitable residence is independent of tenants' obligation to pay rent). (For analysis and criticism of *Fairchild*, see Moskovitz, *The Danger of Dicta*, 24 CEB Real Prop L Rep 253 (Oct 2001).)

A landlord might also claim that a failure to remedy uninhabitable conditions is excused by the tenant's denial of reasonable access to the premises that "interferes substantially" with the landlord's efforts to make the necessary repairs. CC §§1941.2; 1954; see §§3.13, 3.67. A landlord might also rely on CC §1929, which imposes on tenants a duty to repair any damage they cause to the premises.

The landlord's duty to maintain and repair also arises from the warranty of habitability that the courts have held to be implicit in rental agreements, at least for residential premises (see §§3.16-3.48). *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704. A duty may also be found in an express promise to repair in the rental agreement (see §3.9). On duty to repair in commercial tenancies, see California Eviction Defense Manual §§19.11-19.17 (2d ed Cal CEB 1993).

Depending on the circumstances of the particular case, various remedies may be pursued to obtain enforcement of the landlord's duty to maintain and repair the premises:

(a) The tenant may notify local administrative agencies that have authority to enforce the local housing or building code or order a rent rebate or decrease (see §§3.10-3.11D, 5.11, 5.14).

(b) If the cost of necessary repairs does not exceed one month's rent, a tenant of residential property may undertake the repairs and deduct the cost from the rent under CC §1942 (see §§3.12-3.15, 5.13).

(c) The tenant may assert breach of the warranty of habitability (see §§3.16-3.48), either as a defense to an unlawful detainer action after withholding rent (see §§3.32-3.34, 5.15), or as part of an affirmative suit against the landlord (see §§3.35-3.42, 5.16).

(d) The tenant may bring a statutory action for damages and abatement for violation of the tenantability statute or assert it in an unlawful detainer action as an affirmative defense (see §3.15B).

(e) Another remedy available to the tenant living in substandard premises arises from the common-law doctrine of constructive eviction (see §§3.6-3.8, 3.15B, 8.19).

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§3.9 A. Express Promise to Repair

A lease is considered a contract as well as a conveyance, and the statutory rules for interpretation of contracts apply to leases. *Strecker v Barnard* (1952) 109 CA2d 149, 152, 240 P2d 345. In *Sieber v Blanc* (1888) 76 C 173, 18 P 260, the court construed a lease provision requiring the landlord "to repair" to mean that the landlord must repair within a reasonable time after receiving notice from the tenant. See also *McNally v Ward* (1961) 192 CA2d 871, 884, 14 CR 260.

With all the attention devoted to implied warranties (see §§3.16-3.48), counsel may overlook the duty of repair imposed on the landlord by the rental agreement or other express promise or covenant to make repairs. Enforcing an express covenant may be the only avenue open to a tenant if the alleged breach affects a commercial tenancy (see, *e.g., Butler-Rupp v Lourdeaux* (2005) 134 CA4th 1220, 36 CR3d 685) or does not affect the unit's habitability. Suppose, for example, that the landlord of a luxury apartment house fails to repair the heater in the swimming pool or the clothes dryer in the laundry room. It probably would be difficult for the tenant to convince a court or jury that swimming pools and clothes dryers are essential to the habitability of the premises. A landlord who expressly promised to make repairs or to provide those facilities, however, might be held to have breached the express warranty. Unless the lack of repair rendered the unit uninhabitable (see *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, or the lease allows the tenant to cure any failure by the landlord to comply with repair obligations and deduct the cost from rental obligations (see *Golden Eagle Ins. Corp. v Cen-Fed Ltd.* (2007) 148 CA4th 976, 981, 56 CR3d 279), it is arguable that the breach of express warranty would not allow the tenant to withhold rent or otherwise take advantage of the remedies created by the landlord's breach of the implied warranty of habitability. But see *Leslie G. v Perry & Assocs.* (1996) 43 CA4th 472, 490, 50 CR2d 785 (stating in dicta that tenant may withhold rent when landlord fails to keep premises safe from criminal acts of third parties). In any event, the tenant could file an ordinary civil action for damages based upon the landlord's breach of lease. See *Golden Eagle Ins. Corp. v Cen-Fed Ltd., supra*.

PRACTICE TIP: Landlords' attorneys should advise their clients to include language in their rental agreements to the effect that providing specified amenities that do not affect habitability is within the landlord's discretion, and the reduction or removal of such an amenity is not a material breach of the agreement.

An express promise to repair, however, may be made well after the rental agreement is signed. An oral promise that accompanies or follows a written lease (and is not superseded by the lease) is not in conflict with the statute of frauds if the oral promise is to be fulfilled within 1 year of its making. CC §1624. Section 1624 applies to the leasing of real property only if the term of the lease is greater than 1 year. CC §1624(a)(3).

Traditionally, California courts followed the doctrine of "independent covenants" under which the tenant was not relieved of the obligation to pay rent merely because the landlord breached a covenant of the lease. The duty to repair and the duty to pay rent were considered independent covenants (*Arnold v Krigbaum* (1915) 169 C 143, 146 P 423), so the landlord's breach of an express promise to repair could not be raised as a defense to an unlawful detainer action. In *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, the California Supreme Court held that breach of the implied warranty of habitability applicable to residential tenancies may be raised as a defense to an unlawful detainer action for nonpayment of rent and was not barred by the doctrine of independent covenants. Much of the court's reasoning was based on its analysis of the realities of the modern residential rental market. 10 C3d at 622. The tenant contracts for, and expects to receive, habitable living space, not land. Deprivation of habitable living space constitutes a sufficiently serious breach to amount to a failure of consideration. For further discussion of *Green*, see §3.16.

In a residential tenancy context, it is unclear whether the landlord may transfer any or all of the duty to repair to the tenant, particularly in light of CC §1942.1, which prohibits waivers of a tenant's repair and deduct remedy (see §3.15; see also §3.24). The enforceability of such a clause might depend on the context in which it was made and whether the repair was one that the tenant could perform readily.

Drafting an appropriate clause in a rental agreement to describe the parties' intentions concerning their respective obligations to repair is often difficult. Depending on the circumstances, whether a court will enforce a repair obligation

that has been shifted to the tenant may depend on how well the clause was drafted. This problem is illustrated by two contemporaneous California Supreme Court cases involving virtually identical "compliance with law" clauses in commercial leases that required the tenants to maintain the premises and to pay all costs of complying with laws. In *Brown v Green* (1994) 8 C4th 812, 35 CR2d 598, the court held that the tenant was required to pay for government-ordered asbestos abatement; in *Hadian v Schwartz* (1994) 8 C4th 836, 35 CR2d 589, however, the court concluded that the landlord had to pay for earthquake retrofitting. Despite unambiguous "compliance with laws" clauses in each case requiring the tenants to pay for compliance costs, the court held that the issue of whether the landlord or the tenant must pay for government-mandated alterations is be "context dependent" based on a list of enumerated factors. See also *Prudential Ins. Co. v L.A. Mart* (9th Cir 1995) 68 F3d 370 (tenant not required to upgrade building to prevent potential earthquake damage, if building is otherwise in good condition and in compliance with applicable building and safety codes).

For discussion of covenants to repair and independent versus dependent covenants in commercial leases, see California Eviction Defense Manual §§19.11-19.17 (2d ed Cal CEB 1993). On available causes of action when an owner breaches an express covenant to repair in a commercial lease, see *Butler-Rupp v Lourdeaux* (2005) 134 CA4th 1220, 36 CR3d 685. For a discussion of the scope of a commercial landlord's express and implied promises to repair, and whether they allowed the tenant to recover the cost of repairs from a *former* landlord who has sold the property, see *Del Taco, Inc. v University Real Estate Partnership V* (2003) 111 CA4th 16, 3 CR3d 311.

For discussion of "compliance with laws" clauses in commercial leases, see Office Leasing: Drafting and Negotiating the Lease, chap 15 (Cal CEB 1996).

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B. Housing Code Enforcement

§3.10 1. Enforcement Process

One possible remedy for the landlord's failure to repair is for the tenant's attorney to complain to the city or county housing or building inspection department if contacting the landlord does not resolve the problem. See §§5.10-5.16. The name of the department varies from jurisdiction to jurisdiction. The department sends a building inspector to determine if there are housing code violations on the premises. If violations are found, the inspector sends the landlord a letter listing the violations and demanding that they be corrected. If the repairs are not made, the inspector may refer the case to the city or county attorney for a civil abatement lawsuit or to the district attorney for criminal proceedings. On enforcement of housing codes, see Health & S C §§17960-17992, 25 Cal Code Regs §§48-70, and applicable local ordinances.

If substandard residential housing substantially endangers the health and safety of residents or the public, a local enforcement agency may give the owner a notice to repair or abate. If the owner fails to comply with the notice, the agency may file an action seeking judicial appointment of a receiver to manage the property and remediate the violations or take other appropriate action, including demolition. Health & S C §§17980.6, 17980.7. See *City of Santa Monica v Gonzalez* (2008) 43 C4th 905, 76 CR3d 483 (holding that technical noncompliance with prelitigation notice provisions did not invalidate local entity's action for receivership and court order authorizing demolition). Section 17980.7 also gives tenants and tenant associations the right to seek a court order for the appointment of a receiver for a substandard building. The receiver may collect rents, manage the building, and use rents and loans to rehabilitate the building. The receiver may also make relocation payments to tenants who must move during repairs.

When property is contaminated with methamphetamine, Health & S C §§25400.10-25400.47 require stringent remediation and record-keeping obligations for any property owner who has been notified by a local health officer that the property is contaminated.

Similarly, for illegal firearms and drug abatement proceedings under CC §§3485-3486 and the Narcotics Nuisance Abatement Act (Health & S C §§11570-11587), the city attorney or city prosecutor must first notify the landlord concerning the nuisance activity and allow the landlord 30 calendar days to bring an unlawful detainer action. CC §§3485(a), 3486(a). For full discussion, see §4.44. Sometimes the local health department also enforces certain regulations involving immediate health dangers (such as rats), and may act more quickly and effectively than the building inspection department.

The effectiveness of local administrative remedies depends on many factors, including the diligence and budgets of the inspection departments and attorneys, the landlord's willingness to cooperate, and the calendars and attitudes of the courts. Results vary from locality to locality; many municipalities have poor records for remediation.

There are, however, several reasons for making a complaint to the local building inspector. First, there is normally no charge for code-enforcement proceedings; if the tenant cannot afford to litigate, local government will usually bear the expense of enforcement. (Note, however, that Health & S C §17951(b)-(c) does authorize cities and counties to impose fees to defray code enforcement costs, as long as the city or county has followed the procedures set out in Govt C §66016 for setting such fees, and that a few entities apparently charge such fees to tenants.) Second, if a diligent building inspector undertakes enforcement against a particularly egregious landlord, the results are sometimes quick and impressive. Third, if counsel intends to pursue one of the remedies discussed in §§3.32-3.48, it will be helpful to have a neutral expert such as a building inspector available to testify about the existence and extent of the violations and the landlord's efforts (or lack of effort) to repair them. Fourth, among the prerequisites for a statutory warranty of habitability suit by the tenant against the landlord (see §§3.15A, 3.35-3.36) are that a housing code enforcement office must have sent a written notice to the landlord requiring repair of the defect and the landlord must not have repaired the defect within 60 days of the notice.

Nevertheless, complaining to the building inspector is potentially risky. Landlords' attorneys can subpoena building inspectors to testify that the condition complained of was caused by the tenant or that the problem was minor and did

not constitute a code violation. The inspector should always be interviewed before being called to testify (see §3.48). If the building is in very bad condition, the effect of enforcement might be the initiation of condemnation proceedings under 25 Cal Code Regs §§50-70 (see Uniform Housing Code §§1101-1104), and the tenant might lose the housing altogether.

In *Flatford v City of Monroe* (6th Cir 1994) 17 F3d 162, a city inspector found defects which posed an immediate risk of fire or electrocution, and he ordered the building vacated within two and one half hours. The tenant and his family complied with the order, and later sued the official under 42 USC §1983 for violation of their rights to due process of law. The court held that the official was entitled to qualified immunity for failure to give an opportunity for an administrative hearing *before* the order was issued, as the official reasonably determined that an emergency existed. However, the official had no such immunity regarding his failure to offer an administrative hearing to the tenant *after* the order was issued, as "fundamental fairness" requires the opportunity for such a hearing, especially where the official made his initial decision quickly and might have made a mistake. See Lutton, *Tenants' Rights in Eviction Proceedings Brought Under Local Housing Codes*, 29 Clearinghouse Rev 967 (Feb. 1996).

If the tenant or the tenant's guests, invitees, or licensees caused the code violation, the landlord could serve a 3-day notice to perform a covenant of the lease or quit if the violation is curable (see §8.53). If the violation cannot be cured within the 3-day period, the landlord could initiate the eviction process by serving a 3-day notice to quit based on an incurable breach of the lease (see §8.54).

Landlords should be aware that failure to cure code violations that have become the subject of a formal notice of violation or other local code procedure may cost them the right to claim certain tax deductions. Under Rev & T C §17274, no deduction of interest, taxes, depreciation, or amortization is permitted to an owner who derives income from substandard housing, which is defined as housing that contains code violations that the owner has not taken reasonable steps to repair.

Rights to tenantable housing may also be affirmatively enforced by the "repair-and-deduct" remedy prescribed by CC §1942 (see §§3.12-3.15), by a private right of action under CC §1942.4 (see §3.15A), or under the common-law implied warranty of habitability (see §§3.35-3.48A).

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2. Housing Statutes, Regulations, and Codes

§3.11 a. Statutory Tenantability; CC §§1941, 1941.1

Attorneys for both the landlord and the tenant should familiarize themselves with the applicable housing codes that may come into play when the tenant complains to a local enforcement agency (see §3.10) or the tenant's attorney invokes the warranty of habitability, a key tenant remedy (see §§3.16-3.48A). One source of habitability obligations, CC §1941 (see §3.8), requires a landlord to

- put a rental unit into a condition fit for human occupation, and
- repair all subsequent dilapidations that render it "untenantable" except those caused by the tenant's lack of ordinary care.

The list in CC §§1941.1, 1941.3 (see §3.12) supplies the standard for what makes a unit untenantable under CC §1941. The list is also applicable to implied warranty of habitability actions or defenses. See, *e.g., Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707, in which the California Supreme Court held that a tenant may be entitled to a jury instruction on habitability based on the language of CC §1941.1, if appropriate under the facts of the case. See also *Smith v David* (1981) 120 CA3d 101, 176 CR 112.

Fines for failure to comply with notices of violation may be assessed against the owner. In *City & County of San Francisco v Sainez* (2000) 77 CA4th 1302, 92 CR2d 418, the court upheld the constitutionality of fines of $1000 per day assessed over almost a two-year period of noncompliance.

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Source: Real Property/California Landlord-Tenant Practice/3 Rights and Duties During Tenancy/§3.11A b. Door and Window Locks; CC §1941.3

§3.11A b. Door and Window Locks; CC §1941.3

All owners of rental units intended for human habitation must install dead bolts and window locks. CC §1941.3. Tenants are obliged to notify landlords if a tenant becomes aware of an inoperable dead bolt lock or window security or locking device, and landlords are not liable for a failure to correct any such defect until after a reasonable time has been allowed for such repair. (Compare standards and authorities discussed in §§3.13, 3.30.) A tenant has identical remedies for a landlord's failure to comply with §1941.3 as the tenant has for a breach of CC §1942, §1942.4, or §1942.5 and is expressly authorized to bring an action for damages and injunctive relief. See complaint form in §3.48A. Under CC §1941.3(c), a tenant may raise the violation of the statutory lock requirements as an affirmative defense in a nonpayment-of-rent unlawful detainer action. Housing units owned by the Department of Transportation and those that have been designated as historically significant by an appropriate government agency are exempt from the lock and deadbolt requirements. CC §1941.3(f)-(g).

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Source: Real Property/California Landlord-Tenant Practice/3 Rights and Duties During Tenancy/§3.11B c. Toxic Mold and Other Health and Safety Statutes

§3.11B c. Toxic Mold and Other Health and Safety Statutes

The presence of mold in residential or commercial buildings can affect tenantability and sometimes cause personal injuries (*e.g.,* allergic symptoms and asthma). Some mold infections can be very serious or even fatal (*i.e.,* toxic). To address the statewide proliferation of toxic mold, the California legislature authorized the state Department of Health Services (DHS) to identify toxic molds and determine permissible exposure limits to them. See Health & S C §§26100-26156. Six months after the DHS completes its study and adopts standards and publishes exposure guidelines, a residential landlord's obligation under Health & S C §§26147-26148 to disclose the presence of mold that exceeds the guidelines, or that poses a health threat, becomes effective. Although Health & S C §§26142-26145 initially required commercial and industrial landlords, and sometimes tenants, to make specific written disclosures and remediate the presence of mold as well as chronic water intrusions and flood conditions, a 2002 amendment to §26142 postponed these obligations until 6 months after the DHS adopts standards and publishes exposure guidelines. For discussion, see McCormick, *The Toxic Mold Protection Act—When Will It Be Implemented?,* 20 Cal Real Prop J 24 (Summer 2002); Jauregui & Brown, *A New Real Estate Issue: Toxic Mold,* 25 CEB Real Prop L Rep 40 (Jan. 2002).

WARNING: Independently of this legislation, the residential tenantability statutes and the implied warranty of habitability already provide relief in the form of damages and remediation of mold conditions that affect the tenantability of dwelling units or the health and safety of tenants. See CC §§1941-1942.4; *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704 (cited in §§3.16, 3.25). See complaint form in §3.48A. On litigating these claims, see Handling Mold Litigation in California (Cal CEB Action Guide September 2009).

For a property owner who has been notified by a local health officer that the property is contaminated by methamphetamine, Health & S C §§25400.10-25400.47 mandate stringent disclosure, remediation, and record-keeping obligations. Arguably, a residential tenant who is damaged by such contamination would have a viable claim for a breach of the implied warranty of habitability. See other state and local codes mentioned in §§3.10, 3.11C-3.11D as possible bases for habitability claims.

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§3.11C d. Department of Housing Regulations

The California Department of Housing and Community Development (HCD) is required to adopt housing maintenance regulations that are "substantially the same" as the most recent edition of the Uniform Housing Code (except its definition of "substandard building") and of other international building codes. Health & S C §17922(a)(1). The HCD has adopted the 1997 edition of the Uniform Housing Code (UHC) (see §3.11D), adding a few requirements of its own. See 25 Cal Code Regs §§32-46. An example of an HCD modification is 25 Cal Code Regs §42, which requires that every apartment building with 16 or more apartments must have a resident manager, a requirement not found in the UHC. See Directory for HCD's address and phone number. Counsel may verify the currently applicable version of the UHC by checking the adoption provision in 25 Cal Code Regs §32. The UHC is available from the International Conference of Building Officials (ICBO), listed in the Directory. (Although the ICBO replaced the 1997 UHC with the International Residential Code (IRC), California has not yet adopted the IRC.)

The standards established under the UHC, as amended by the HCD regulations and adopted by reference under Health & S C §17922(a)(1), generally preempt local occupancy ordinances. *Briseno v City of Santa Ana* (1992) 6 CA4th 1378, 8 CR2d 486. A municipality can modify code provisions, but only if the modifications are necessitated by local climatic, geological, or topographical conditions and the municipality makes an express finding that such conditions exist. Health & S C §§17958, 17958.5, 17958.7. In *Briseno,* Santa Ana's ordinance was found invalid for failure to comply with these requirements. 6 CA4th at 1383.

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§3.11D e. Uniform Housing Code

The Uniform Housing Code (UHC) (see §3.11C) contains numerous provisions, including protection against insect and rodent infestation and standards for clean and safe common areas (UHC §§1001.1, 1001.2(12)); adequate room size (UHC §503); light and ventilation (UHC §504); bathroom fixtures (UHC §§505.4, 505.5, 505.7); kitchens (UHC §505.3); hot and cold running water (UHC §1001.2(5)); heating (UHC §701.1); electrical outlets, light fixtures, and wiring (UHC §§701.2, 1001.5); emergency exits (UHC §§801, 1001.12); and fire resistant materials and fire extinguishing systems (UHC §§901, 1001.9, 1001.13).

Most cities and counties have simply adopted a specific version of the Uniform Housing Code by local ordinance (parts of which may be preempted by state regulation; see §3.11C). Other cities have adopted more stringent housing codes when permitted. Counsel should always check the local ordinances and the particular version of the Uniform Housing Code adopted by the city or county. Copies of the latest editions of the Code may be obtained by writing to the International Conference of Building Officials (ICBO); see Directory for address. (Note that the ICBO replaced the 1997 Uniform Housing Code with the International Residential Code, which individual cities and counties may have adopted but has not been adopted by the state.)

Regarding the size of appropriate civil penalties for housing code violations, see *City & County of San Francisco v Sainez* (2000) 77 CA4th 1302, 92 CR2d 418.

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§3.11E 3. Certificate of Occupancy Violations

Many local jurisdictions require landlords to obtain a certificate of occupancy indicating that the premises comply with local housing codes, before leasing the premises. These codes typically make it unlawful to lease, use, or occupy a building or structure unless a certificate of occupancy has been issued by the building department. In *Espinoza v Calva* (2008) 169 CA4th 1393, 87 CR3d 492, the trial court awarded judgment for possession in favor of the landlord in an unlawful detainer action and entered a money judgment for reduced rent because of the untenantable condition of the premises. The court of appeal reversed the money judgment, holding that the absence of a certificate of occupancy for the residential unit rendered the lease illegal and void. The appeal on the judgment for possession was moot because before the hearing, the tenants vacated.

Similarly, in *Lyke v Pursley* (1959) 171 CA2d 417, 340 P2d 709, an action for rescission, the court of appeal held that a tenant operating a motel under a lease owed no rent because the landlord had failed to obtain a certificate of occupancy or a license for the motel and that the lease was unenforceable and void as a matter of public policy. The court also upheld the remedy of rescission and restitution, but the remaining details of that remedy were not at issue in the appeal.

The holding in *Lyke* was followed in *Gruzen v Henry* (1978) 84 CA3d 515, 148 CR 573. The court of appeal in *Gruzen* ruled that the landlord's failure to obtain a certificate of occupancy from the city before entering into a rental agreement rendered the agreement void and unenforceable as contrary to public policy even though the local housing code was silent on the effect on leasing of the owner's failure to obtain the certificate. Thus, the landlord could not recover rent in the unlawful detainer action, but the court affirmed that portion of the judgment awarding the landlord possession.

Although it appears that the action in *Gruzen* was premised on a 3-day notice for nonpayment of rent, the court stated that it did not mean to imply that persons in the situation of the tenants may, "without compensation," continue to occupy premises because the landlord had not obtained a certificate of occupancy. Noting that in *Lyke*, the tenant not only denied the obligation to pay rent but also elected to rescind the lease, the court in *Gruzen* held that the landlord was "entitled to an order of eviction, but not to an award of rent." 84 CA3d at 519. Although this outcome appears contrary to well-established law governing evictions following 3-day notices (see §§8.37-8.38), an award of possession to the landlord is proper if the court declares that the rental agreement is void.

The question whether the tenant is ever liable for any kind of monetary compensation if rent cannot be collected under a void lease has not been directly ruled on in any reported case. In *Salazar v Maradeaga* (1992) 10 CA4th Supp 1, 12 CR2d 676, the tenant succeeded in defending an eviction in a rent controlled jurisdiction because the landlord had not paid required relocation expenses, even though the unlawful detainer action was based on a city order to vacate an illegal garage apartment. The court noted that the tenant was not at fault and had the continued right to occupy the garage under a "landlord-tenant relationship" until relocation benefits were paid; the court stated the following in dicta (10 CA4th Supp at 6 n5):

> This relationship gives rise to an obligation to pay the reasonable value of the use and occupancy of the premises under a privity of estate theory, even if the lease agreement is considered void because it contemplates an illegal use of the property. [Citations] The same result would be reached under a contractual theory where the circumstances of the illegal use constituted a breach of the implied warranty of habitability, obligating the tenant to pay only the reasonable value of the use and occupancy of the premises in its defective condition. [Citations] In this case the trial court, by awarding appellant no money, impliedly found that the premises had no value.

Under this reasoning, a trial court could order a tenant to pay the reasonable value of using the premises even if contract damages in the form of rent are not awardable. For further discussion of certificate of occupancy violations, see §10.62.

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C. "Repair-and-Deduct" Remedy; CC §1942

§3.12 1. Statutory Basis

Under CC §§1941-1942, a residential tenant may make repairs and deduct the cost from the rent under certain circumstances. This is not the exclusive remedy for correcting defects. CC §1942(d). See *Green v Superior Court* (1974) 10 C3d 616, 629, 111 CR 704.

The "repair-and-deduct" remedy applies only to dilapidations that render the premises untenantable. CC §1942(a). A dwelling is "untenantable" if it

- contains lead hazards as described in Health & S C §§17920.3 or 17920.10 (*i.e.,* deteriorated lead-based paint, lead-contaminated dust, lead-contaminated soil, or disturbing lead-based paint without containment, if the amount of lead exceeds the permissible levels established by law and is likely to endanger the health of the public or the tenant), or
- "substantially lacks" any of the following affirmative standard characteristics (see CC §§1941.1, 1941.3):
- effective waterproofing and weather protection,
- proper plumbing or gas facilities,
- hot or cold running water with connection to sewage disposal system,
- proper heating facilities,
- proper lighting or wiring,
- clean grounds or adequate garbage cans,
- floors, stairways, or railings in good repair,
- operable dead bolt locks on the entry doors, or
- locking mail receptacle for each unit in residential hotel, as required by Health & S C §§17958.3.

Under CC §1941.2, the "repair-and-deduct" remedy does not apply to any dilapidation caused or made irreparable by the tenant's "substantial violation" of any of the following duties:

- keeping the unit clean;
- disposing properly of garbage and other waste;
- properly using electrical, gas, and plumbing fixtures, and keep them as clean "as their condition permits";
- not willfully damaging the premises (or permit any other person to do so); and
- using the portions of the premises for their intended purposes (*e.g.,* sleeping or cooking).

If the landlord agreed in writing to perform cleaning and garbage disposal, these duties do not apply to the repair-and-deduct remedy. CC §1941.2(b).

The repair-and-deduct remedy may not be used for any dilapidation covered by CC §1929, which imposes on the tenant a duty to repair any deterioration caused by his or her lack of ordinary care (CC §§1941, 1942(c)), nor if the tenant's conduct interfered substantially with the landlord's efforts to effect repairs (CC §1954; see §3.8).

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§3.13 2. Procedure

The tenant must give the landlord notice of the dilapidations before using the repair-and-deduct remedy. CC §1942(a). Section 1942 does not expressly require that the notice state that the tenant intends to repair and deduct if the landlord fails to repair (although mentioning the remedy in the notice might induce the landlord to make the repairs). Notice may be given orally, but it is better to give written notice and keep a copy in case it is later necessary to prove that notice was given.

After giving notice, the tenant must give the landlord a "reasonable time" to make the repairs before undertaking to repair and deduct. CC §1942(a). If the tenant makes the repairs after the 30th day following notice, it is presumed that the tenant acted after a reasonable time. The tenant may repair and deduct on shorter notice, however, if "all the circumstances" require it. CC §1942(b). For example, the tenant should not have to wait 30 days during winter to have a valve replaced to turn on the heat.

PRACTICE TIP: A landlord who has received a notice under CC §1942 should immediately respond to the notice in writing stating his or her intentions to make the repairs within a reasonable time. Besides indicating the intention to make repairs, written notice should help to avoid misunderstandings concerning a "reasonable time" to make repairs. Unless there is such a response, the tenant could make the repairs prematurely, thinking that the landlord was unwilling to make the requested repairs within a reasonable time.

Several questions arise from the language in CC §1942(a) providing that the tenant may use the repair-and-deduct remedy to make repairs only when "the cost of such repairs does not require an expenditure more than one month's rent":

(a) If the "cost of such repairs" is $310 and the rent is $300, may the tenant deduct $300?

(b) If the cost of materials is $50, but the tenant takes four hours to perform the work himself or herself, may the tenant deduct his or her labor cost from the rent? (At the minimum wage, his or her usual wage, or a journeyman plumber's wage?)

(c) If the cost of repairing the central heating system is $1000, may four tenants pool their $250 rents to have the work done?

Although there are no reported cases addressing these questions, tenants' attorneys might argue that issues involving the scope of the repair-and-deduct remedy should be resolved in favor of encouraging tenants to use it. Landlords' attorneys could counter that the legislative intent was to limit the amount and frequency of the total repairs to two months' rent and twice in any 12-month period to eliminate the potential abuse of this remedy to make major, questionable repairs.

Instead of repairing and deducting, the tenant may vacate untenantable premises and be discharged from further obligation to pay rent. CC §1942(a). The tenant may not invoke the repair-and-deduct remedy more than twice in any 12-month period. CC §1942(a).

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§3.14 3. Waiver Not Permitted

A tenant's agreement to waive or modify the repair-and-deduct remedy is void as contrary to public policy. The parties may agree, however, that the tenant is responsible for improving, maintaining, or repairing all or part of the premises "as part of the consideration for rental." CC §1942.1. In this situation, the court would probably have to determine whether the covenant imposing duties on the tenant was a waiver of the tenant's rights under CC §1942 and whether the tenant knowingly agreed to be responsible for the obligation to repair transferred under the rental agreement.

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§3.15 4. Commercial Tenancies

Civil Code §1942, by its express language, does not make the repair-and-deduct remedy either applicable or inapplicable to commercial tenancies, and there is no reported case on the issue. Tenant advocates argue that CC §1941, which imposes the basic duty to repair on the "lessor of a building intended for the occupation of human beings," could include a commercial building intended to contain people (*e.g.,* an office building, but perhaps not an automated warehouse). Moreover, CC §1940(d) provides that the Chapter containing CC §§1940-1954 is not intended to apply only to dwelling units, unless a section specifically so states. The section imposing standards of tenantability (CC §1941.1), however, begins, "A dwelling shall be deemed untenantable for purposes of Section 1941…", implying that only residential buildings are covered. Practitioners will usually find that commercial leases contain a waiver of CC §1941, which is not prohibited by CC §1942.1.

The repair-and-deduct remedy is contained in Chapter 2 of Title V of the Civil Code (CC §§1940-1954.1). In CC §1940(a), the legislature provided that Chapter 2 applies to "all persons who hire dwelling units," but CC §1940(d) provides that §1940 should not be construed to limit application of any code section in Chapter 2 to dwelling units unless that section is so limited by its own terms. This last subsection appears to leave it to the courts to interpret the contradictory terminology of CC §§1941 and 1941.1, and to determine whether the repair-and-deduct remedy applies to commercial tenancies.

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§3.15A D. Statutory Action for Damages and Abatement; CC §1942.4

In addition to the affirmative relief discussed in §3.35, a residential tenant may bring an action for both damages and abatement under CC §1942.4 if the landlord demands or collects rent or issues a rent-increase notice or a 3-day notice to pay rent or quit under CCP §1161(2) when the rental unit is untenantable. See complaint form in §3.48A. An action under §1942.4, however, is available only if specified housing code enforcement steps have been taken, *i.e.*, all the following conditions must exist before the landlord's demand or notice (CC §1942.4(a)(1)-(4)):

- The unit substantially fails to meet any of the habitability requirements of CC §1941.1 (see §§3.8, 3.11, 3.12), violates Health & S C §17920.10, or is deemed and declared substandard as defined in Health & S C §17920.3 because conditions listed in §17920.3 exist in the unit to an extent that "endangers the life, limb, health, property, safety, or welfare of the public or the occupants";
- After inspecting the unit, a housing code enforcement official has sent a written notice to the landlord or the landlord's agent requiring abatement of the nuisance or repair of the defect;
- The landlord has not abated the nuisance or repaired the defect within 35 days of service of the notice and the delay is without good cause; and
- The defect was not caused by the tenant's lack of ordinary care under CC §1929 or violation of duties under CC §1941.2.

Under these facts, the landlord is liable to the tenant for (CC §1942.4(b)):

- actual damages (including emotional distress damages; *McNairy v C.K. Realty* (2007) 150 CA4th 1500, 59 CR3d 429);
- "special" damages of $100 to $5000;
- costs of the suit; and
- reasonable attorney fees.

A court awarding such damages may also order the landlord to abate any nuisance and to repair any substandard conditions that "significantly or materially affect" the occupants' health and safety, in which event the court may reserve jurisdiction to monitor compliance. CC §1942.4(c).

NOTE: Civil Code §1942.4 may be used defensively in unlawful detainer actions. Any landlord who brings an unlawful detainer action based on nonpayment of rent, and who is found to have violated §1942.4, is liable for reasonable attorney fees and costs of the suit, in an amount to be fixed by the court. CCP §1174.21.

An action under CC §1942.4 may be filed in small claims court if the claim does not exceed that court's jurisdiction (currently $7500 if the tenant is a natural person). CC §1942.4(e); CCP §116.221.

For private rights of action available to tenants under the Narcotics Nuisance Abatement Act (Health & S C §§11570-11587), see §4.44.

Abatement is not available in a commercial lease. *Underwood v Corsino* (2005) 133 CA4th 132, 34 CR3d 542 (trial court's abatement of commercial tenant's rent reversed even though tenant had successfully defended unlawful detainer action based on theory that landlord's conduct had frustrated purpose of lease).

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§3.15B E. Constructive Eviction Action

Another remedy available to a tenant occupying substandard premises arises from the common-law doctrine of constructive eviction (see §§3.6, 8.19). This applies whether the tenancy is residential or commercial. A constructive eviction results from the landlord's interference with or disturbance of the tenant's possession so that all or a portion of the premises are rendered unfit for occupancy or the tenant is deprived of beneficial use of the premises. *Groh v Kover's Bull Pen, Inc.* (1963) 221 CA2d 611, 34 CR 637; *Pierce v Nash* (1954) 126 CA2d 606, 272 P2d 938. Failure to repair and maintain the premises in a condition suitable for the purpose for which they were rented is a well recognized basis for a claim of constructive eviction. *Groh v Kover's Bull Pen, Inc., supra*; *Butt v Bertola* (1952) 110 CA2d 128, 242 P2d 32. The tenant must vacate the premises within a reasonable time after the failure to repair or maintain in order to claim constructive eviction. See *Pierce v Nash, supra*. Having vacated the premises, the tenant may then use the constructive eviction doctrine as a basis for a suit for damages against the landlord (*Groh v Kover's Bull Pen, Inc., supra*; *Pierce v Nash, supra*) or as a defense to the landlord's claim for any rent accruing after the constructive eviction (see *Kulawitz v Pacific Woodenware & Paper Co.* (1944) 25 C2d 664, 670, 155 P2d 24; *McAlester v Landers* (1886) 70 C 79, 11 P 505).

If the tenant unjustifiably fails to pay rent, the landlord may, of course, terminate the tenancy and seek to regain possession of the premises through the unlawful detainer process. Note, however, that a landlord who fails to exercise the right to terminate must continue to comply with landlord duties under the lease. *Kulawitz v Pacific Woodenware & Paper Co.*, *supra*.

For discussion of insurance coverage for constructive eviction, see Gerchick, *Reader Alert: Insurance Coverage for Constructive Eviction*, 21 Cal Real Prop J 22 (Summer 2003).

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§3.15C F. Nuisance Action

A developing remedy for conditions on the premises that affect the health or safety of tenants and their families is nuisance. See, *e.g., Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602 (overruled demurrer to complaint requesting abatement of public nuisance created by owner's failure to limit secondhand smoke in outdoor common areas; apartment tenant sued on behalf of minor daughter, who suffered from asthma and chronic allergies); *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194 (complaint alleging private nuisance and breach of implied warranty of habitability and requesting injunction to abate nuisance in addition to damages). See also *City of Santa Monica v Gonzalez* (2008) 43 C4th 905, 76 CR3d 483 (local entity action for receivership and court order authorizing demolition of substandard residential building), cited in §3.10.

For statutes authorizing public or private nuisance actions, or both, and discussion of owners' rights and obligations concerning illegal activities in residential housing, see §§3.10, 3.15A, 3.24-3.25, 3.68-3.68D, 4.44, 8.59. For comprehensive discussion of nuisance actions, see California Real Property Remedies and Damages, chap 11 (2d ed Cal CEB 2002).

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G. Implied Warranty of Habitability

§3.16 1. Development

In *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, the supreme court approved the holding in *Hinson v Delis* (1972) 26 CA3d 62, 102 CR 661, and held that there is an implied warranty of habitability in residential rental contracts that may be raised as a defense in an unlawful detainer action. In confirming the implied warranty doctrine, the *Green* court traced the common-law rule that the landlord had "no implied duty to repair" to its agrarian origin. The court noted that the rule developed at a time when most leases were agricultural, with structures "incidental" to the land and easily repairable by the "jack-of-all-trades" tenant-farmer. 10 C3d at 622. The court explained, however, that the majority of today's leases are for urban dwelling units. The modern tenant has neither the skills nor the finances to provide the ordinary elements of a home, and instead enters into a contract with a landlord who supplies those elements. In considering whether a warranty of habitability is implied in that contract, the court took note of the following (10 C3d at 623):

(a) The scarcity of adequate low-cost housing leaves tenants little bargaining power to negotiate for proper maintenance and repair (see *Henrioulle v Marin Ventures, Inc.* (1978) 20 C3d 512, 519, 143 CR 247);

(b) Widespread enactment of comprehensive housing codes shows legislative recognition of the landlord's duty to maintain habitable premises;

(c) There was a surge of development in the law of consumers' rights generally (including the application of implied warranty theories to real estate transactions); and

(d) The implied warranty doctrine was adopted by other jurisdictions.

In *Green*, the court rejected the contention that the repair-and-deduct remedy provided in CC §§1941-1942.1 (see §§3.12-3.15) was intended to be exclusive. It noted that these statutes limited repairs to an amount not exceeding one month's rent and (at that time) could be invoked only once in any 12-month period. As such, they were useful only for minor repairs. 10 C3d at 629.

Finally, the court held that implied warranty can be raised as a defense in an eviction action based on nonpayment of rent for the period during which the warranty was allegedly breached. The court noted that affirmative defenses are allowed in eviction actions if they determine the issue of possession. Formerly, the tenant's duty to pay rent and the landlord's duty to repair were held to be independent covenants. In modern urban settings, however, the issue of habitability is essential to the agreement; a landlord who breaches the warranty is not entitled to the full rent and thus has no justification for repossessing the premises. 10 C3d at 631.

In *Fairchild v Park* (2001) 90 CA4th 919, 928, 109 CR2d 442, a court of appeal stated in dicta that "the landlord's obligation to provide a habitable residence to the tenants is independent of the tenants' obligation to pay rent." For analysis and criticism of this dicta, see Moskovitz, *The Danger of Dicta,* 24 CEB Real Prop L Rep 253 (Oct 2001).

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2. Application

§3.17 a. Single-Family Homes

The decisions establishing the implied warranty of habitability (*Green v Superior Court* (1974) 10 C3d 616, 111 CR 704; *Hinson v Delis* (1972) 26 CA3d 62, 102 CR 661) both involved apartments, and *Green* stressed the problems of urban apartment dwellers. Although neither *Green* nor *Hinson* expressly stated whether the implied warranty covers single-family homes, in *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442, the implied warranty was applied to a single-family residential lease.

At least two of the major considerations invoked by the *Green* court (see §3.16) apply equally to single-family homes:

- Such homes are covered by housing codes, which affirm the landlord's duty to maintain habitable premises; and
- Tenants in single-family dwellings face the same scarcity of adequate low-cost housing, leaving them with as little bargaining power as apartment dwellers to negotiate for proper maintenance and repair.

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§3.18 b. Commercial Tenancies

In *Schulman v Vera* (1980) 108 CA3d 552, 166 CR 620, the court held that the implied warranty of habitability may not be raised by a commercial tenant as a defense to an unlawful detainer action based on nonpayment of rent. Similarly, in *Underwood v Corsino* (2005) 133 CA4th 132, 34 CR3d 542, the court ruled that the rent abatement provisions of CC §1942.4 do not apply to commercial tenancies. For discussion of habitability in the commercial leasing context, see Office Leasing: Drafting and Negotiating the Lease §§17.20, 18.5 (Cal CEB 1996) and California Eviction Defense Manual §§19.11-19.17 (2d ed Cal CEB 1993).

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§3.19 c. Government-Owned Housing

In California, a public housing authority (see Health & S C §§34200-34380) must covenant expressly in its rental agreements with low-income tenants to maintain the housing in accordance with local building codes. Health & S C §34332(a). Accordingly, state-owned or locally owned public housing should be covered by an express warranty of habitability. If not, such housing probably would be held subject to an implied warranty of habitability. As the court noted in *Hubbs v People ex rel Dep't of Pub. Works* (1974) 36 CA3d 1005, 1009, 112 CR 172:

> In the absence of a specific statute so declaring or agreement so specifying, plaintiffs, as tenants, do not lose any of their rights merely because their landlord happens to be the State of California.

In *City of New York v Rodriguez* (Sup Ct 1983) 461 NYS2d 149, the court held that the fact that the landlord is a municipality does not exempt it from application of the doctrine of implied warranty of habitability.

For public housing funded or subsidized by the federal Department of Housing and Urban Development (HUD), the local public housing authority is required to covenant in the lease to perform a number of specified maintenance functions. 24 CFR §966.4(e). The HUD-administered Section 8 program for privately owned housing with rent subsidies also requires lease provisions specifying the landlord's maintenance obligations. 24 CFR §§880.601(b); 881.601(b); see 24 CFR Part 882. Thus, for federally financed or subsidized housing, there is usually an express warranty of habitability in the lease.

When HUD owns rental housing, there is a federal implied and limited warranty of habitability under which HUD must take "reasonable, affirmative steps toward making the necessary repairs" that will put a rental property in "decent, safe, and sanitary" condition. *Conille v Secretary of HUD* (1st Cir 1988) 840 F2d 105, 117. When HUD fails to satisfy this obligation, the tenant may recover "restitution of rental payments made during the period of the breach, representing the difference between the value of the premises in a 'decent, safe, and sanitary' condition… and the value of the premises in their deteriorated condition." 840 F2d at 117. The court indicated that the value of HUD-owned premises in a decent, safe, and sanitary condition is the rent that the tenant had agreed to pay.

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§3.20 d. Common Areas

The implied warranty of habitability may cover defects in common areas of the building as well as in the tenant's apartment. See *Hinson v Delis* (1972) 26 CA3d 62, 70, 102 CR 661. Common areas covered might include hallways, lobbies, stairways, parking areas, laundry rooms, and so forth. An important aspect of maintenance of common areas is the much-litigated issue of the extent of the landlord's duty to provide security against crime. For discussion of the cases on this issue, see §§3.25 and 3.68-3.68D.

A landlord may also be liable on a negligence theory for failure to exercise due care for tenants' safety in common areas (see §3.67A).

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§3.21 e. Premises Uninhabitable at Inception of Tenancy

When the California Supreme Court established the implied warranty of habitability in *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704 (see §3.16), it expressly raised the question of whether the warranty applies if the premises are uninhabitable at the beginning of tenancy. That question was resolved in *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707, in which the court held that a tenant may invoke the warranty of habitability as a defense even if the tenant did know of the defective condition at the time of occupancy. After analyzing *Green v Superior Court, supra,* and CC §§1941-1942.1 (see §3.12), the *Knight* court concluded that policy considerations underlying the warranty of habitability prohibit holding that a tenant has impliedly waived the warranty by knowingly occupying defective premises. Those policy considerations include the inequality of bargaining power between landlord and tenant, California's severe shortage of low- and moderate-income housing, and the impracticality of imposing a duty on tenants to inspect increasingly complex modern apartment buildings. 29 C3d at 52.

The *Knight* court disapproved parts of *Quevedo v Braga* (1977) 72 CA3d Supp 1, 140 CR 143 as inconsistent with its decision. 29 C3d at 55 n7. The *Quevedo* court had stated in dictum that a tenant's suit for damages must allege (1) that the defects were unknown to the tenant at the time of occupancy, and (2) that the effect of the defects on habitability was apparent on reasonable inspection. See *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194, decided before *Knight v Hallsthammar, supra,* in which the court upheld a complaint for damages for breach of the implied warranty, even though the defects were present at the outset of the tenancy, but unknown to the tenant at the time of occupancy.

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§3.22 f. Premises Become Uninhabitable After Tenant Is Required to Vacate

It is unsettled whether the implied warranty of habitability applies if the premises become uninhabitable after expiration of a termination notice based on the tenant's breach of the rental agreement. Suppose, for example, that the tenant fails to pay rent, a 3-day notice to pay rent or quit is served and expires, and then the heating fails. The tenant's attorney may argue that the tenant remains a tenant until he or she is removed by judicial action or vacates voluntarily, and should still be entitled to the benefits of the lease. See *Kulawitz v Pacific Woodenware & Paper Co.* (1944) 25 C2d 664, 670, 155 P2d 24. Note, however, that the decision in *Kulawitz* was based on the doctrine of independent covenants, which was overruled in *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704 (see §3.16). Thus, a court might hold that the landlord's duty to maintain the premises is dependent on the tenant's duty to perform under the rental agreement. The landlord's attorney could also argue that the implied warranty of habitability had not been breached when the notice was served and the only remedy for the tenant would be a claim of constructive eviction if the landlord failed to provide services during the eviction process. See §§3.6-3.8, 3.15B, 8.19.

For a more extensive discussion of this problem, see Moskovitz, *The Implied Warranty of Habitability*: *A New Doctrine Raising New Issues*, 62 Calif L Rev 1444, 1448 n20 (1974).

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§3.23 3. Waiver

In *Green v Superior Court* (1974) 10 C3d 616, 625 n9, 111 CR 704 (see §3.16), the court stated that "generally" a residential landlord may not use superior bargaining power to compel the tenant to waive implied warranty rights in the lease or rental agreement. Out-of-state courts agree. See, *e.g., Fair v Negley* (Pa Super Ct 1978) 390 A2d 240, in which the court held that the implied warranty could not be waived, even though the lease stated that the tenant knew the roof was leaking, but took the premises "as is."

Several courts have shown a reluctance to find an implied waiver of the warranty of habitability. In *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707, the court held that a tenant's failure to vacate the premises after learning of defects does not constitute a waiver of the implied warranty defense. See §3.21. See also *Smith v David* (1981) 120 CA3d 101, 110, 176 CR 112; *Murillo v Rite Stuff Foods, Inc.* (1998) 65 CA4th 833, 848, 77 CR2d 12 (employee need not quit job to bring action for sexual harassment).

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4. Breach of Warranty of Habitability

a. Actionable Defects

§3.24 (1) Defects Covered by Housing Codes or CC §§1941.1 and 1941.3

In *Green v Superior Court* (1974) 10 C3d 616, 637, 111 CR 704 (see §3.16), the supreme court stated:

> In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability….

The court noted that the standards for "tenantability" in CC §1941.1 (see §3.12) may also provide some helpful guidance in determining the extent of the implied warranty. 10 C3d at 637 n23. There are numerous sources for housing maintenance and building codes in state and local law See, *e.g*., §§3.10-3.11D. See complaint form in §3.48A.

Minor code violations that do not affect habitability, however, must be considered de minimis and, if standing alone, would not constitute a breach of the warranty of habitability. See *Hinson v Delis* (1972) 26 CA3d 62, 102 CR 661.

Tenants raising the issue of a breach of the implied warranty of habitability are entitled to a jury instruction based on standards set forth in CC §1941.1, if relevant to the facts of the case, and §1941.1 is not limited in its application to use of the repair-and-deduct remedy in CC §1942 (see §3.12). *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707.

In a tenant's action for damages for breach of the implied warranty, it is proper to instruct the jury that it must find the building to be a "nuisance" if the building is substandard because violations of the Uniform Housing Code (see §3.11D) endanger the tenant's health, safety, property, or welfare. *Smith v David* (1981) 120 CA3d 101, 113, 176 CR 112. In *Smith,* the court also held that the trial court erred in refusing to give an instruction clarifying the relationship between housing codes and the warranty of habitability. A proper instruction would have advised the jury that the landlord's failure to comply with applicable code standards that materially affect health and safety constitutes a breach of the warranty of habitability, but that minor violations do not constitute such a breach. 120 CA3d at 109.

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§3.25 (2) Defects Not Covered by Housing and Building Codes

In *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704 (see §3.16), the court described the scope of the implied warranty of habitability to include those items that are basic to decent, safe, sanitary housing; it did not limit its holding to situations in which defects in the premises constitute housing code violations. Although stressing enactment of the code as an expression of public policy, the court also noted that "substantial compliance" with the code would be enough in "most cases." 10 C3d at 637. The issue in an implied warranty case is whether premises are habitable; serious code violations are simply one way of showing uninhabitability. See *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707. See also *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194.

Constructive eviction (see §§3.6-3.8, 3.15B, 8.19) can be shown even if no code violations are present. See, *e.g., Groh v Kover's Bull Pen, Inc.* (1963) 221 CA2d 611, 34 CR 637; *Sierad v Lilly* (1962) 204 CA2d 770, 22 CR 580. Several out-of-state cases suggest that the implied warranty of habitability is not limited to code violations. See *Todd v May* (Conn Cir Ct 1973) 316 A2d 793; *Boston Hous. Auth. v Hemingway* (Mass 1973) 293 NE2d 831; *Timber Ridge Town House v Dietz* (NJ Super Ct 1975) 338 A2d 21, 24; *Academy Spires, Inc. v Brown* (NJ Dist Ct 1970) 268 A2d 556; *Amanuensis, Ltd. v Brown* (Civ Ct 1971) 318 NYS2d 11.

It is unsettled whether a landlord's obligation to provide security against crime raises implied warranty of habitability issues if the defects are not code violations. Housing codes do not require extensive security measures such as adequate common-area lighting and burglar-proof windows and doors (although state law (and some local ordinances) require deadbolt locks and window security accessories or other similar devices; see §3.11A).

In a number of cases, courts have imposed tort liability on landlords for failing to maintain premises reasonably secure from crime and other physical injuries (see §§3.67-3.68D), but there are no reported decisions imposing liability for breach of the implied warranty of habitability when injury results from criminal acts. Some cases seem to suggest, however, that the implied warranty of habitability may have been violated as well. For general discussion of landlords' tort liability, see §§3.67-3.72.

Failure to provide reasonable security is a breach of the implied warranty of habitability that may be raised as a defense to an unlawful detainer action based on nonpayment of rent. See *Secretary of HUD v Layfield* (1978) 88 CA3d Supp 28, 30, 152 CR 342 (citing *Kline v 1500 Mass. Ave. Apartment Corp.* (DC Cir 1970) 439 F2d 477, 485). The landlord had issued a handbook and letter falsely assuring tenants that around-the-clock security guards would be provided. After acknowledging the potential applicability of the implied warranty, the court remanded for a determination of whether there had been a breach of the implied warranty or of an express warranty to provide security. 88 CA3d Supp at 31. For a standard jury instruction entitled "Business Proprietor's Liability for the Negligent/Intentional/Criminal Conduct of Others," see CACI 1000-1005 (similar to BAJI 8.22, "Duty of Landlord To Protect Tenant from Criminal Acts of Third Persons"). See also *Knight v Hallsthammar, supra,* on jury instructions on habitability.

Tenants may find that an action for nuisance can be effective in obtaining the landlord's protection from criminal acts. In *Lew v Superior Court* (1993) 20 CA4th 866, 25 CR2d 42, neighbors of defendant landlord each filed separate nuisance suits against him in small claims court, claiming that they were disturbed by drug dealers working from and around the landlord's property. After consolidating the actions, the small claims court awarded $218,325 to the plaintiffs. The court of appeal upheld the award, relying on Health & S C §11570, which makes every building used for drug dealing a nuisance. The court allowed the plaintiffs to recover for mental suffering, because a finding of nuisance allows compensation for discomfort and annoyance. Although the *Lew* plaintiffs were neighbors, the same form of action would appear to be available to tenants. For further discussion of landlords' problems in dealing with criminal activity on the premises and available remedies, see §4.44.

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§3.26 (3) Defects Caused by Tenant

Several courts have stated that there may be no breach of the implied warranty if the tenant's wrongful action or abnormal use of the premises caused the defects, because it would be unfair to permit the tenant to benefit from his or her own wrongdoing. See, *e.g., Hinson v Delis* (1972) 26 CA3d 62, 70, 102 CR 661; *Boston Hous*. *Auth*. *v Hemingway* (Mass 1973) 293 NE2d 831, 843; *Mease v Fox* (Iowa 1972) 200 NW2d 791, 796; *King v Moorehead* (Mo Ct App 1973) 495 SW2d 65.

Note that the tenant similarly cannot invoke the repair-and-deduct remedy for defects brought about by his or her own wrongful conduct. CC §1941.2 (see §3.12).

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Source: Real Property/California Landlord-Tenant Practice/3 Rights and Duties During Tenancy/§3.27 (4) Severity of Defects

§3.27 (4) Severity of Defects

Decisions involving the implied warranty of habitability have neither delineated the standards for habitability to be applied by trial courts, nor quantified the severity of defects necessary to constitute a breach of the implied warranty.

In *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707, the court held that the tenant is entitled to a jury instruction based on relevant standards set forth in CC §1941.1 (see §3.12), if appropriate to the facts of the case. The court declined to further delineate the standards, noting that there is an imperfect correlation between statutory or regulatory requirements and habitability. In *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, the court stated that the landlord need not provide premises in "perfect, aesthetically pleasing condition," but must provide "bare living requirements." The court added that substantial compliance with applicable housing codes will usually suffice. 10 C3d at 637. In *Smith v David* (1981) 120 CA3d 101, 109, 176 CR 112, the court held that a proper instruction on habitability should advise the jury that the landlord's failure to comply substantially with applicable building and housing standards that materially affect health and safety would constitute a breach of the warranty of habitability, but that minor violations would not. See also CCP §1174.2, discussed in §3.32.

PRACTICE TIP: Landlords' attorneys should stress the *Green* "bare living requirements" standard to rebut a warranty of habitability claim. For example, if one toilet in a rental unit is not working, but another working toilet is available in the unit, the attorney can argue that the warranty has not been breached.

The best way to gauge the degree of severity the courts will find sufficient is to consider the facts and holdings of reported cases. In *Hyatt v Tedesco* (2002) 96 CA4th Supp 62, 117 CR2d 921, for example, the undisputed evidence at an unlawful detainer trial showed that the roof leaked to the extent that leaking rain damaged the inside walls of the property, the windows were not waterproofed, water leaking in the bathroom had damaged the wall, and the thermostat did not work. The trial court found that the breach was not substantial, but reduced the rent by $200 and entered judgment for possession in the landlord's favor. The appellate court reversed and directed the trial court to enter conditional judgment for the tenant (see §3.32), holding that the breach was substantial because the defects were not merely cosmetic or aesthetic, but affected the "health and safety of the tenant." 96 CA4th Supp at 68.

Other courts have held that allegations of the following specific defects were sufficient to state causes of action for breach of the implied warranty:

(a) Hole created by dry rot in bathroom floor caused tenant and son to fall; leaking toilet caused foul odors and required tenant to mop floor continually; improperly fitted glass in front door caused constant draft in apartment. *Hinson v Delis* (1972) 26 CA3d 62, 102 CR 661.

(b) Collapse and nonrepair of bathroom ceiling; continual presence of vermin; lack of heat in four rooms; plumbing blockages; exposed and faulty wiring; illegally installed and dangerous stove. *Green v Superior Court* (1974) 10 C3d 616, 621, 111 CR 704.

(c) Screens and storm windows broken or missing; windows broken and boarded up; several radiators missing; holes in floors and walls; falling plaster; some electrical fixtures inoperative; sewage backup in cellar; vermin; unfit furniture; insufficient heat. *Berzito v Gambino* (NJ 1973) 308 A2d 17, 18.

(d) Rat infestation kept tenant and family from sleeping for three nights. *Lemle v Breeden* (Haw 1969) 462 P2d 470, 472.

(e) Filthy premises; inadequate wiring; kitchen sink, toilet, furnace, and handrail on stairs in disrepair; no screens on doors and windows. *Pines v Perssion* (Wis 1961) 111 NW2d 409, 411.

(f) Toilet ceased to function. *Jackson v Rivera* (Civ Ct 1971) 318 NYS2d 7, 8.

(g) No bathtub or shower. *Gillette v Anderson* (Ill App Ct 1972) 282 NE2d 149, 150 (cited in *Green v Superior Court* (1974) 10 C3d 616, 637 n22, 111 CR 704).

(h) Excessive air leakage around front door and windows; kitchen countertop and bathroom floor tiles in disrepair. *Steele v Latimer* (Kan 1974) 521 P2d 304, 306.

(i) Failure to repair or replace broken front door locks. *Brownstein v Edison* (Sup Ct 1980) 425 NYS2d 773.

(j) Failure to remove strong odor of cat urine. *Kekllas v Saddy* (Dist Ct 1976) 389 NYS2d 756.

(k) Lack of heat, hot water, and elevator service for a substantial portion of rental period; inadequate cleaning and maintenance; no lobby furniture; broken front door lock; irregular garbage collection. *111 E. 88th Partners v Simon* (Civ Ct 1980) 434 NYS2d 886, aff'd as modified (NY Sup 1985) 489 NYS2d 139.

When the evidence regarding the nature and effect of the defects is undisputed, the appellate court is not bound by a finding of the trial court that defects in the premises were not "substantial." The appellate court may make its own findings and reverse a trial court judgment for the landlord. *Hyatt v Tedesco* (2002) 96 CA4th Supp 62, 117 CR2d 921.

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§3.28 (5) Evidence of Defects

If the tenant alleges certain code violations constituting the breach, the local housing code itself should be introduced into evidence. For most California cases, this will be the Uniform Housing Code (see §3.11D). Most cities and counties have incorporated the Code by ordinance. Before being introduced into evidence, copies of the Code and ordinance should be certified as true copies by the city or county clerk. See Evid C §1530(a)(2).

The court is required to take judicial notice of the Uniform Housing Code as incorporated in the state housing law, Health & S C §§17910-17995.5. See Evid C §451(a). See also Jefferson's California Evidence Benchbook §49.15 (4th ed CJA-CEB 2009). The court is permitted to take judicial notice of the Code when it has been incorporated by local ordinance (see Evid C §452(b); see also Jefferson's Evidence Benchbook §49.18). Nevertheless, the tenant's attorney should introduce the local housing code into evidence to facilitate the court's determination of whether code violations occurred.

Usually the best way to prove that existing conditions violate the housing code is through evidence of an inspection by a city or county code-enforcement official. See, *e.g., Boston Hous. Auth. v Hemingway* (Mass 1973) 293 NE2d 831, 843 nl5. Inspection reports are public records that can be inspected and copied at the enforcement agency's local office. Govt C §§6253, 6254.7(c). Because such reports are official records, they may be introduced as evidence despite their hearsay nature. See Evid C §1280. See also Jefferson's Evidence Benchbook §5.1. They may be authenticated through the personal testimony of the official (see Evid C §§1400-1401), although authentication may be unnecessary if the official certifies copies of the records as true copies, and if the court is willing to take judicial notice of the official's position and the authenticity of the signature. See Evid C §1280. See also Jefferson's Evidence Benchbook §§5.2-5.3. The Best Evidence Rule does not preclude introduction of the copies. Evid C §1530. See also Jefferson's Evidence Benchbook §32.9. If the inspecting official would make a good witness for the tenant or the landlord, he or she should be served with a subpoena to testify and a subpoena duces tecum for the inspection records. CCP §1985. The testimony of other people (including the tenant) who observed the defective conditions may also be used to prove the code violations. Photographs may be introduced to confirm their testimony. See Evid C §§250, 1400-1401. See also Jefferson's Evidence Benchbook §31.29. Witnesses may also testify regarding other factors bearing on whether there was a breach of warranty, *e.g.,* the effect of the defects on the tenant's health and safety, the length of time that the defects persisted, and whether they were caused by the tenant's abnormal use. See also strategies discussed in §§5.10-5.12.

In mold exposure claims, proving or disproving the defective conditions nearly always becomes a battle between the landlord's and the tenant's experts. See Handling Mold Litigation in California (Cal CEB Action Guide September 2009).

If the tenant claims the alleged defects still exist at the time of trial, one of the most effective ways to determine the existence or severity of the alleged defects is a personal visit to the premises. In California, the judge may visit the premises (see *Union Oil Co. v Reconstruction Oil Co.* (1937) 20 CA2d 170, 66 P2d 1215) or order a jury viewing of them. CCP §651. See 2 Witkin, California Evidence §§25-31 (4th ed 2000). If a statement of decision is required and a finding is supported by a viewing, the statement must include the court's observations at the viewing. CCP §632.

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§3.29 (6) Notice of Defects

After adopting the implied warranty doctrine, the court in *Hinson v Delis* (1972) 26 CA3d 62, 70, 102 CR 661, stated in dictum that the "tenant must also give notice of the alleged defects to the landlord…." The court cited no authority for this assertion and gave no explanation for it. In *Quevedo v Braga* (1977) 72 CA3d Supp 1, 8, 140 CR 143, this dictum was repeated. *Quevedo* cites as authority for this point the decision in *Pollard v Saxe & Yolles Dev. Co.* (1974) 12 C3d 374, 380, 115 CR 648. In *Pollard*, the court held that a buyer's action for breach of the implied warranty in the sale of an apartment house was barred by his failure to give notice of the defects in a reasonable time. There is no indication in the court's opinion, however, that the seller knew of the defects from other sources. Additionally, in the sale of an apartment building, one can assume equal skill and knowledge on behalf of the buyer and seller, whereas exactly the opposite is true between landlord and tenant.

In *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, however, the supreme court made no mention of any notice requirement, even though the court cited other aspects of *Hinson v Delis, supra,* with apparent approval. In *Knight v Hallsthammar* (1981) 29 C3d 46, 55 n6, 171 CR 707, the court left open the questions of whether and when the tenant must give notice of the defects. The dicta in the *Hinson* and *Quevedo* decisions may simply be another way of saying that the landlord must have actual or constructive knowledge of the defects for the implied warranty of habitability to apply.

PRACTICE TIPS:

- Under existing California case law, the tenant should give the landlord a written and dated notice of the defects and retain a copy to introduce at trial. The notice should be sent by certified mail, return receipt requested, so that its receipt by the landlord can be proved. Oral notice is sufficient if its existence can be established by testimony.
- Landlords' counsel might argue that the tenant's failure to give notice indicates that the defect is not severe and that the defense is being used to delay the unlawful detainer action. Landlords often become aware of an alleged habitability defect when they receive the tenant's answer to an unlawful detainer complaint. Through bank statements and testimony, the attorney might attempt to show that the tenant's financial difficulties led to the 3-day notice to pay rent or quit, rather than the alleged defect and the subsequent rent withholding.

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§3.30 b. Reasonable Time to Repair

Some language in early implied warranty of habitability cases suggested that a tenant invoking the warranty would be required to allow the landlord a reasonable time to make repairs. See *Hinson v Delis* (1972) 26 CA3d 62, 70, 102 CR 661; *Quevedo v Braga* (1977) 72 CA3d Supp 1, 140 CR 143. In *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, however, the court made no mention of a reasonable time requirement.

In *Knight v Hallsthammar* (1981) 29 C3d 46, 55 n7, 171 CR 707, the supreme court expressly disapproved language in *Hinson v Delis, supra,* and *Quevedo v Braga, supra,* that suggested that exercise of the implied warranty depends on whether the tenant gave the landlord a reasonable time to make repairs. Rejecting an instruction given by the trial court, the court noted (29 C3d at 55):

> At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord's breach of the implied warranty of habitability exists whether or not he has had a "reasonable" time to repair.

Thus, the court left open the questions of whether and when notice of defects must be given (see §3.29).

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§3.31 c. Sale of Premises

The fact that the uninhabitable conditions existed before the current owner acquired the premises does not bar the tenant from invoking the implied warranty of habitability as a defense to an unlawful detainer action. *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707. In *Knight*, the plaintiff-landlords acquired the building and the next day served the tenants with notice of a substantial rent increase. The tenants withheld rent because of existing physical defects, and unlawful detainer proceedings eventually were begun. The supreme court held that the trial court's instruction on the issue of preexisting defects might have confused the jury into thinking that uninhabitable conditions existing under a previous owner might not be a defense against the current owner. 29 C3d at 57. At least when the unlawful detainer is based on rent currently being claimed due, the present owner is in breach of the warranty if the premises are uninhabitable. The change of ownership is an event over which the tenant has no control. 29 C3d at 57.

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d. Remedies for Breach of Implied Warranty

(1) Defense to Unlawful Detainer Suit

§3.32 (a) Summary of Procedure

Code of Civil Procedure §1174.2 prescribes procedures for residential unlawful detainer actions after default in payment of rent in which the tenant raises a breach of the landlord's obligations under CC §1941 or of any warranty of habitability as an affirmative defense. If it finds that a substantial breach has occurred (see, *e.g*., *Hyatt v Tedesco* (2002) 96 CA4th Supp 62, 117 CR2d 921, cited in §3.27), then under CCP §1174.2(a):

(1) The court must determine the reasonable rental value of the premises in its untenantable state to the date of trial;

(2) The court must deny possession to the landlord and adjudge the tenant to be the prevailing party, on the condition that the tenant pay the rent owed within a reasonable period not exceeding 5 days from the date of the judgment, or within the time set forth in CCP §1013 if the judgment is served by mail;

(3) The court may order the landlord to make repairs, in which event jurisdiction continues to ensure compliance;

(4) The court must order that the rent be limited to the reasonable rental value of the premises until repairs are completed; and

(5) The court must award costs and attorney fees to the tenant if provided by statute or contract.

If the tenant fails to pay all rent accrued to the date of trial, or if no substantial breach has occurred, the landlord must be awarded possession, granted judgment, and adjudged the prevailing party for purposes of awarding costs or attorney fees under any statute or contract. CCP §1174.2(b).

This procedure applies only to unlawful detainer cases premised on a tenant's alleged failure to pay rent. It has no bearing on unlawful detainer actions based on other grounds (*e.g.,* failure to vacate after 30 days' or 60 days' notice), in which habitability may be raised as a defense only to the amount of damages owing to the landlord. See, *e.g*., *North 7th St. Assocs. v Constante* (2001) 92 CA4th Supp 7, 11 n1, 111 CR2d 815 (even though breach not defense to unlawful detainer action, it may be asserted to reduce amount of daily damages for period after 30-day notice expires). Similarly, if the landlord alleges other bases for the eviction together with nonpayment of rent, the habitability defense applies only to the amount of damages; it is not a defense to possession in such joined actions if the trier of fact finds that the landlord is entitled to possession on any basis other than nonpayment of rent. For commercial tenancies, see California Eviction Defense Manual §§19.11-19.17 (2d ed Cal CEB 1993).

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§3.33 (b) Complaint Need Not Allege Compliance With Implied Warranty

In *De La Vara v Municipal Court* (1979) 98 CA3d 638, 159 CR 648, the tenant demurred to an eviction action based on nonpayment of rent, on the ground that the complaint failed to allege compliance with the implied warranty of habitability. The tenant argued that the action was based on contract, and that the plaintiff must allege compliance with conditions precedent to the defendant's duty to perform.

The court rejected this argument, noting that although the court in *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, held that breach of the implied warranty may be raised as a defense, a complaint need not negate anticipated defenses. The essential elements of an unlawful detainer complaint are set forth in CCP §§1161 and 1166, and do not include an allegation of compliance with the warranty of habitability. 98 CA3d at 642. (See §9.37 on essential elements of an unlawful detainer complaint.)

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§3.34 (c) Protective Orders

In *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, the supreme court approved the procedural device endorsed in *Hinson v Delis* (1972) 26 CA3d 62, 102 CR 661, of requiring the tenant to make rental payments at the contract rate into court as they become due, for as long as the tenant remains in possession. The court in *Green* stated that "[s]uch a procedure can serve as a fair means of protection of landlords from potential abuses of the proposed warranty of habitability defense." 10 C3d at 637. (Note that both courts appear to have overlooked CCP §572 and the decision in *In re Elias* (1962) 209 CA2d 262, 25 CR 739, which limit the situations in which protective orders are allowed.)

Requiring the tenant to pay the contract rent into court when due serves two purposes:

(1) Such payment removes an incentive for the indigent tenant to raise the implied warranty defense frivolously; and

(2) It protects the landlord from eventual loss of rent if the defense turns out to have no merit.

Protective orders and turnover orders are discussed more extensively in Moskovitz, *The Implied Warranty of Habitability*: *A New Doctrine Raising New Issues*, 62 Calif L Rev 1444, 1473 (1974). For discussion of procedural aspects of protective orders, see §11.30.

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§3.35 (2) Actions for Damages; Statutes of Limitations

In *Green v Superior Court* (1974) 10 C3d 616, 624, 111 CR 704, the court treated leases and rental agreements as contracts, not merely as conveyances of estates in land. Therefore, all normal remedies for breach of contract should apply, including an action for damages. See *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442 (cited in §§3.8, 3.16); *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194 (action by tenant for damages for breach of warranty upheld along with numerous tort causes of action). See also *Smith v David* (1981) 120 CA3d 101, 176 CR 112. See complaint form in §3.48A.

In a suit for damages for breach of the implied warranty, special damages should be recoverable (as discussed in §3.39), and general damages should be recoverable on one of the theories discussed in §3.37. Note, however, that in *Stoiber v Honeychuck, supra,* the court held that the tenant could claim general damages for discomfort and annoyance by framing a cause of action in terms of the tort of failure to provide habitable premises. See §3.38. The landlord's management company also might be liable under this theory if the company was responsible for maintaining the premises. *Stoiber v Honeychuck* (1980) 101 CA3d 903, 929, 162 CR 194.

Damages based on the theories of nuisance and intentional infliction of mental distress might also be claimed in an action based on breach of the implied warranty. See *Stoiber v Honeychuck, supra*; *Smith v David, supra*. Each of these theories will support a claim for punitive damages under appropriate facts. *Stoiber v Honeychuck, supra*. The *Stoiber* court also approved a negligence theory (101 CA3d at 922), but it does not appear that much is gained by adding this theory in a complaint pleading causes of action under the intentional tort and warranty theories, except that negligence is an insurable risk while intentional torts are not (see §3.47).

Breach of warranty and various tort theories are alternative remedies and cannot be used to give the tenant double recovery. 101 CA3d at 931. See also *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442.

A tenant may bring an affirmative suit for breach of the implied warranty of habitability even after stipulating to give up possession in an unlawful detainer action. In *Landeros v Pankey* (1995) 39 CA4th 1167, 46 CR2d 165, the court held that a settlement of an unlawful detainer action between landlord and tenant did not collaterally estop the tenant's later action for damages for breach of the implied warranty; the settlement neither referred to the breach of warranty claim nor provided that the settlement resolved all disputes between the parties.

PRACTICE TIP: Because settlements are common in unlawful detainer actions, it is important for both parties to consider whether or not to include a release of all claims in the stipulated judgment.

The statute of limitations might restrict recovery under some theories more than under others. Nuisance and intentional infliction of mental distress are torts, as is intentionally failing to provide habitable premises, outlined in *Stoiber v Honeychuck, supra*. Under these theories, the tenant can recover personal injury damages only for 2 years preceding the filing of the action under CCP §335.1 and property losses for the preceding 3 years under CCP §338. The implied warranty, however, is inserted by law into the lease or rental agreement. Under an oral agreement, the tenant can claim economic (*i.e.,* rent reduction, property damage, and other out-of-pocket) damages for up to 2 years (CCP §339); if the agreement is in writing, the limitation period is 4 years (CCP §337).

In addition to the sections that follow, on recoverable damages for breach of the warranty of habitability, see California Eviction Defense Manual §§15.38-15.50 (2d ed Cal CEB 1993).

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§3.36 (a) Statutory Damages; Abatement

In addition to the affirmative remedies discussed in §3.35, CC §1942.4 provides that a residential landlord who demands or collects rent, issues a notice of rent increase, or serves a 3-day notice, after being notified of a substandard condition by a housing code enforcement official may be required to abate the condition and may be liable to the tenant for actual damages, "special" damages of $100 to $5000, costs, and reasonable attorney fees. An action under §1942.4 may be preferable to one for breach of the implied warranty of habitability if the lease or rental agreement does not have an attorney fee clause, but certain prerequisites must be met for a §1942.4 action. For further discussion, see §3.15A. Civil Code section 1942.4(b)(1) permits an award of "actual damages." Actual damages includes damages for emotional distress. *McNairy v C.K. Realty* (2007) 150 CA4th 1500, 59 CR3d 429.

A landlord may also face liability, and potentially even a forced sale of the property, under the Narcotics Nuisance Abatement Act (Health & S C §§11570-11587), which may be considered as a potential cause of action in an implied warranty of habitability affirmative suit. For further discussion, see §4.44.

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(b) General Damages

§3.37 (i) Difference in Value or Percentage Reduction

A tenant who establishes a breach of warranty still must pay a "reasonable rent" for the period of the breach. The amount of "reasonable rent" depends on the damages caused by the breach of warranty (*i.e.,* contract rent minus damages equals "reasonable rent"). *Green v Superior Court* (1974) 10 C3d 616, 638, 111 CR 704. The *Green* court mentioned two approaches to the damages problem. The first bases damages on the difference between the fair rental value of the premises as warranted and the actual market value during the breach. *Green v Superior Court, supra*. See *Quevedo v Braga* (1977) 72 CA3d Supp 1, 8, 140 CR 143. The second approach estimates the percentage reduction in use caused by the landlord's breach and applies the reduction to the agreed-on rent. *Green v Superior Court* (1974) 10 C3d 616, 639 n24, 111 CR 704. See *Cazares v Ortiz* (1980) 109 CA3d Supp 23, 168 CR 108 (percentage reduction of one third).

The difference-in-value approach, which depends on proving the fair market value of the premises under different conditions of repair (one of which is hypothetical) could require expensive expert testimony. See *Cazares v Ortiz, supra*. The percentage-reduction-in-use test seems to invite an overall estimate of the impact of the defects.

In *Green v Superior Court, supra,* the court did not endorse either method of determining damages. The only reported cases (*Quevedo v Braga, supra,* and *Cazares v Ortiz, supra*) were decided by superior court appellate departments. Logically, it seems that neither approach can reduce the rent to zero. *Green* mentions the possibility, however, that the landlord's breach may be total, and that the tenant may owe no rent at all. 10 C3d at 639. See also *Smith v David* (1981) 120 CA3d 101, 112, 176 CR 112; *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 337, 5 CR 686.

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§3.38 (ii) Discomfort and Annoyance

Discomfort and annoyance have been rejected as compensable damages for breach of implied warranty by the California courts. See *Quevedo v Braga* (1977) 72 CA3d Supp 1, 9, 140 CR 143; *Cazares v Ortiz* (1980) 109 CA3d Supp 23, 168 CR 108. See also *Golden Gateway Ctr. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1999) 73 CA4th 1204, 87 CR2d 332 (discomfort does not entitle tenant to reduction under rent control law). In *Stoiber v Honeychuck* (1980) 101 CA3d 903, 916, 162 CR 194, however, the court approved damages for discomfort and annoyance caused by the landlord's failure to make repairs, when one of the tenant's causes of action was based on the tort of failing to provide habitable premises. The *Stoiber* court distinguished *Quevedo v Braga, supra,* on the ground that "no cause of action in tort was pleaded" in that case. 101 CA3d at 916. Similarly, CC §1942.4 (see §§3.15A, 3.36) permits an award of "actual damages" in actions to remedy untenantability, and that term includes damages for emotional distress. *McNairy v C.K. Realty* (2007) 150 CA4th 1500, 59 CR3d 429.

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§3.38A (iii) Personal Injury Damages

Some habitability violations may be severe enough to substantially affect the health of the occupants. On premises liability for personal injuries, see §§3.67-3.70A. See also California Tort Guide, chaps 1, 10 (3d ed Cal CEB 1996). On litigating personal injury claims caused by mold exposure in rental housing, see Handling Mold Litigation in California (Cal CEB Action Guide September 2009). For comprehensive treatment of personal injury tort litigation and damages, see California Personal Injury Proof (Cal CEB 1970); California Tort Damages, chaps 1-3, 6, 15 (2d ed Cal CEB 2002).

NOTE: A California court of appeal invalidated a rental agreement provision that required the tenant to submit to binding arbitration personal injury suits against the landlord. See *Jaramillo v JH Real Estate Partners, Inc.* (2003) 111 CA4th 394, 3 CR3d 525.

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§3.39 (c) Special Damages

The tenant should be able to recover, as special damages, various expenses actually incurred as a result of the landlord's breach of the warranty of habitability. In *Stoiber v Honeychuck* (1980) 101 CA3d 903, 913, 162 CR 194, the court held that a complaint for damages for breach of the implied warranty stated a cause of action by alleging "property damage and economic loss including but not limited to water damage to furniture, mattress and curtains." See also Moskovitz, *The Implied Warranty of Habitability*: *A New Doctrine Raising New Issues,* 62 Calif L Rev 1444, 1488 n196 (1974).

On special damages available in mold exposure actions, see Handling Mold Litigation in California (Cal CEB Action Guide September 2009).

In *Fair v Negley* (Pa Super Ct 1978) 390 A2d 240, 242, the court held that, when the implied warranty of habitability is breached, the tenant may sue and recover

- the difference between the rent paid and the reasonable rental value;
- any amounts the tenant spent to try to make the premises habitable; and
- any increase in the tenant's utility bills due to the uninhabitable condition of the premises.

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§3.40 (d) Punitive Damages

The tenant may be able to recover punitive damages in an action for breach of the implied warranty of habitability if the landlord's conduct was willful, oppressive, or malicious. See CC §3294. For discussion of tactical considerations relating to a claim for punitive damages, see §3.47. See also California Tort Damages (2d ed Cal CEB 2002).

In *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194, the tenant alleged causes of action based on theories of breach of the warranty of habitability, nuisance, intentional infliction of emotional distress, negligent violation of statutory duty, constructive eviction, and injunctive relief from unlawful business practices. The court held that:

(1) The tenant can sue in tort for damages resulting from a breach of the implied warranty of habitability (101 CA3d at 918); and

(2) The plaintiff's prayer for punitive damages was proper because she had alleged that the landlord's conduct was willful, oppressive, and malicious (101 CA3d at 920).

Thus, it appears that a cause of action for breach of the warranty may support a prayer for punitive damages under CC §3294. In any event, a tort cause of action can often be joined with a cause of action for breach of the implied warranty. 101 CA3d at 913.

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§3.41 (e) Costs and Attorney Fees

When a lease or rental agreement provides for an award of attorney fees to the prevailing party in an action on the contract, and the tenant brings an affirmative action for breach of an express or implied warranty of habitability, attorney fees and costs are governed by CC §1717. See *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442. The prevailing party is generally the party who recovered a greater relief in the action on the contract. The court may determine, however, that there is no prevailing party on the contract for the purpose of CC §1717. CC §1717(b)(1).

If a prevailing tenant wins exclusively on a tort theory, *i.e.,* is awarded punitive damages based on the landlord's tortious failure to provide habitable premises (see §3.40), attorney fees would not be recoverable, unless the contract expressly provides for recovery of fees by the prevailing party in a related tort action. See *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830; *Fairchild v Park, supra*. See also §§3.46, 13.25-13.33. For specific analysis of tort versus contract theories for awarding attorney fees and costs in an affirmative suit for breach of the implied warranty of habitability, see *Fairchild v Park, supra*.

In an affirmative suit brought by a residential tenant for damages under CC §1942.4 (see §§3.15A, 3.36), available in certain circumstances when the premises are untenantable, the prevailing party is entitled to reasonable attorney fees and costs. CC §1942.4(b). See *Galan v Wolfriver Holding Corp.* (2000) 80 CA4th 1124, 96 CR2d 112 (court ruled that defendant was not prevailing party after plaintiff voluntarily dismissed statutory untenantability action). Civil Code §1942.4 may also be used defensively in an unlawful detainer suit. A tenant who prevails in the suit (by proving that the landlord has violated CC §1942.4) is entitled to recover attorney fees and costs. CCP §1174.21.

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§3.42 (3) Injunctive Relief

Injunctive relief might be available to a tenant for a landlord's breach of the implied warranty of habitability under certain circumstances. If the complaint includes a cause of action for nuisance as well as for breach of the implied warranty, proper relief may include injunctive relief directing the landlord to abate the nuisance under CCP §731 in addition to damages. See *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194. See also *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602 (complaint requesting abatement of public nuisance created by owner's failure to limit secondhand smoke in outdoor common areas survived demurrer). Moreover, if the tenant remains on the premises and thus has standing to sue, or alleges a claim on behalf of the general public, injunctive relief might be available with respect to all the landlord's rental properties under Bus & P C §§17200-17209, which establish an injunctive remedy against unfair business practices. See *Stoiber v Honeychuck, supra*.

On injunctive relief available under statutory habitability law in the form of abatement of untenantable conditions, see §§3.15A, 3.36. On injunctive relief available under the Narcotics Nuisance Abatement Act (Health & S C §§11570-11587), see §4.44.

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§3.43 (4) Termination and Rescission

Under traditional contract law, a material breach of contract permits the innocent party to terminate, *i.e.,* to refuse to perform further. See 1 Witkin, Summary of California Law, *Contracts* §852 (10th ed 2005). The tenant must show that the defects were "serious" in order to prove a breach of the implied warranty (see §3.27). Such a showing may also enable the tenant to terminate the lease or rental agreement on grounds of material breach and to vacate the premises. Under CC §1942(a), the tenant may vacate and be relieved of any further obligation under the rental agreement if the conditions described in CC §§1941-1942 are present. See §3.12.

Rescission goes beyond termination, extinguishing the contract as if it had never been made. CC §1688. (On rescission generally, see California Real Property Remedies and Damages, chap 1 (2d ed Cal CEB 2002).) Because rescission treats the contract as if it never existed, the parties must restore to each other anything they received under the contract. CC §1691(b). This feature of rescission limits its usefulness in the landlord-tenant context. Presumably, the tenant would be required to restore to the landlord the "reasonable rental value" of the premises for the time of occupancy, and the landlord would be required to return to the tenant all rent paid under the rental agreement or lease. Thus, this remedy is often called "retroactive rent abatement." See *Berzito v Gambino* (NJ 1973) 308 A2d 17, in which the court awarded such relief (contract rent minus reasonable rent), but did not term the relief "rescission." Rescission seemingly offers the tenant no particular advantage over an action for damages for breach of the warranty of habitability for the time that the tenant lived in defective premises. It presents one disadvantage: The recovery may not exceed the total amount of rent paid. See Moskovitz, *The Implied Warranty of Habitability*: *A New Doctrine Raising New Issues*, 62 Calif L Rev 1444, 1489 (1974).

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§3.44 (5) Declaratory Relief

Declaratory relief may be advisable when the tenant wants to withhold rent, but is not sure that the landlord is breaching the implied warranty (*e.g.,* the defects are of borderline seriousness). Even a tenant who withholds rent in good faith runs a substantial risk of being evicted if the court does not find a breach of the implied warranty. Declaratory relief can enable the tenant to obtain a judicial determination of the materiality of the breach without risking eviction.

In *Hinson v Delis* (1972) 26 CA3d 62, 71, 102 CR 661, the tenant sought a declaratory judgment that she was obliged "to make rental payments only after the defendant complies with his duty to substantially obey the housing codes and make the premises habitable." The court held that this relief was proper. See Moskovitz, *The Implied Warranty of Habitability*: *A New Doctrine Raising New Issues*, 62 Calif L Rev 1444, 1492 (1974).

Declaratory relief may usefully be invoked by either landlords' or tenants' attorneys in a "test case" filed as an unlimited civil case, so that the issue is more likely to be resolved by a reported decision on review by a district court of appeal. Moreover, an action for declaratory relief has precedence on the superior court calendar. CCP §1062.3. Such considerations were involved in the tenant's decision to file an action for declaratory relief in *Hinson v Delis, supra*.

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§3.45 5. Tactical Considerations

A tenant's attorney must take a number of factors into account when preparing a lawsuit for breach of the warranty of habitability. As discussed in §§3.32-3.44, several causes of action are potentially available. Considerations in choosing among these causes of action are discussed in §§3.46-3.48.

Some attorneys prefer to take a "shotgun" approach to the action, joining as many potential claims a possible on the theory that one or more of them will be successful. Other tenant advocates prefer to tailor each action to its particular facts, limiting the action to the one or two causes of action that best apply and that have the best chance of success.

Different considerations may dictate the choice of causes of action for a particular case. When preparing a breach of warranty action, it is well to remember that habitability cases rarely turn on legal theories; these cases almost always turn on their facts, and the goal in preparing the action and drafting the complaint is to get the case before a trier of fact so that evidence of the habitability defects can be presented. If the complaint contains a number of legal theories, the tenant's attorney must be prepared to counter various demurrers and motions designed to eliminate causes of action, particularly in the case of unusual damage claims being defended by the landlord's insurance carrier (see §3.47).

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§3.46 a. Contract or Tort Action

Habitability claims may sound primarily in contract (breach of the warranty, whether express or implied) or tort (negligent maintenance of the premises, resulting in violations of housing and safety codes, regulations, or ordinances), or they may be brought as statutory claims under CC §1942.4. See, *e.g.*, causes of action in complaint form in §3.48A. Depending on the tenant's circumstances, one or the other of these causes of action may be preferable in a given case. If the action sounds primarily in contract, attorney fees should be available to the prevailing party under CC §1717 (see §13.25). Attorney fees are usually not available in a tort action, although they may be awarded in a tort action if the contract provides for recovery of fees in a tort action or if the plaintiff prevails on underlying issues on a contract cause of action and the contract has an attorney fees provision. See *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830.

Thus, the attorney must consider the tenant's potential liability for a substantial attorney fee award if the action is unsuccessful, weighed against the possibility of recovering attorney fees if the action is successful.

If the action sounds in tort, the tenant may be able to recover damages for discomfort and annoyance. See *Stoiber v Honeychuck* (1980) 101 CA3d 903, 916, 162 CR 194, discussed in §3.38. In some cases, the potential for recovering such damages may be important.

For discussion of tort versus contract theories in litigating mold exposure claims in landlord/tenant situations, see Handling Mold Litigation in California (Cal CEB Action Guide September 2009).

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§3.46A b. Gathering and Preserving Evidence

Before the tenant's attorney decides which course of action or legal remedy is best suited to achieving the goals of getting the repairs made at minimal expense and risk to the tenant, as well as obtaining compensation for the tenant's damages, the attorney should gather and preserve evidence and document the defective conditions and notice to the landlord in the manner described in §§3.27-3.30, 5.10.

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§3.47 c. Availability of Insurance Coverage

Most breach of habitability actions are tendered to the landlord's insurance carrier for defense, whether they are primarily contract or tort actions. The availability of insurance coverage may be an important consideration for the tenant's attorney. If the tenant pleads only intentional torts, however, or seeks to recover punitive damages by alleging that the landlord's conduct was willful, oppressive, or malicious (see §3.40), the insurer will deny coverage, although it might pay for the defense (see §§9.28-9.29). The absence of an insurance carrier deprives the tenant of a potential source of recovery; also, the landlord might become an extremely obdurate opponent and litigate the case aggressively.

Tenants' attorneys must weigh these considerations when deciding what causes of action to allege. If the tenant wants to have the insurer involved for coverage or to promote settlement opportunities, the attorney should consider including a negligence cause of action. If a negligence claim is alleged, the carrier will have a duty to defend as to that cause of action and to defend the suit. See §9.29. See, *e.g., MacKinnon v Truck Ins. Exch.* (2003) 31 C4th 635, 3 CR3d 228, which held that the "pollution exclusion" provision in a landlord's comprehensive general liability insurance policy will not preclude coverage for the landlord's defense and indemnity in a tenant's suit for injuries from exposure to pesticides negligently applied by the landlord to the premises. See also *Golden Eagle Ins. Corp. v Cen-Fed Ltd.* (2007) 148 CA4th 976, 56 CR3d 279 (no coverage for judgment for economic loss damages against landlord for breach of lease by failing to keep premises in good condition).

For further discussion on liability insurance, see Sullivan, *Landlord Liability Insurance: Why an Old Lease May Need to Learn New Tricks,* 26 Cal Real Prop J 22 (Vol 26 No 2, 2008). For discussion and strategies on third party insurance coverage in mold exposure actions, see Handling Mold Litigation in California (Cal CEB Action Guide September 2009).

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§3.48 d. Monetary Versus Equitable Claims

Most breach of warranty of habitability actions are filed after the tenant has vacated the premises, and they thus seek a monetary recovery. Accordingly, many of these cases are not worth a great deal of money, and in some jurisdictions, attorneys often refer tenants to small claims court for redress of their claims.

If the tenant still occupies the premises, it may be possible to pursue causes of action to compel the landlord to make the desired repairs, *e.g.,* an action under CC §1942.4 (see §§3.15A, 3.36), an action to abate a nuisance (see §3.42), or an action to enjoin an unlawful business practice (see §3.42). Compelling repairs and enjoining unlawful business practices are available only in a limited number of cases. Abatement of a nuisance is risky for the tenant, because a trier of fact that finds the premises sufficiently defective to constitute a nuisance might also order them condemned—an outcome that will result in the tenant's ouster from the premises. In an action to abate a nuisance under the Narcotics Nuisance Abatement Act (Health & S C §§11570-11587), relocation assistance may be available to innocent tenants. See §4.44.

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Source: Real Property/California Landlord-Tenant Practice/3 Rights and Duties During Tenancy/§3.48A H. Form: Complaint for Damages for Breach of Warranty of Habitability and Related Torts, Specific Performance, and Injunctive Relief

§3.48A H. Form: Complaint for Damages for Breach of Warranty of Habitability and Related Torts, Specific Performance, and Injunctive Relief

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff(s), _ _[*Name(s)*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**COMPLAINT FOR DAMAGES**
vs	)	**FOR BREACH OF WARRANTY**
	)	**OF HABITABILITY AND**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**RELATED TORTS, SPECIFIC**
	)	**PERFORMANCE, AND**
	)	**INJUNCTIVE RELIEF**
_____	)	

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Damages for Breach of Implied Warranty of Habitability by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _)

1. At all relevant times Plaintiff _ _[*name*]_ _ is and was an individual residing in the County of _ _ _ _ _ _, State of California.

2. Plaintiff does not know the true names, capacities, or basis for liability of defendants sued in this action as Does I through X, inclusive, and will amend this complaint when the same is ascertained. At all relevant times each defendant, including any defendant fictitiously named, was acting as the agent, servant, employee, partner, or joint venturer of each other defendant in doing the things alleged herein, and is responsible in some manner for the damages claimed herein by the plaintiff.

3. At all relevant times, defendant _ _[*name*]_ _ and Does I through V, inclusive, were the owners ("defendant owners") of the premises located at _ _[*address*]_ _ in the City of _ _ _ _ _ _, County of _ _ _ _ _ _, California ("the premises").

4. On or about _ _[*date*]_ _, plaintiff took possession of an apartment in the premises under a _ _[*oral/written*]_ _ _ _[*month-to-month tenancy agreement/lease for a term of, e.g., one year*]_ _ **("agreement"), entered into by plaintiff and defendant owners, and each of them, for a monthly rent of** _ _[*dollar amount*]_ _**, payable on the _ _ _ _ _ _ day of each month.** _ _[*State additional relevant facts, e.g., plaintiff has lived in the premises with four children for the applicable number of years until the present*]_ _**.**

**5. On or about _ _[*date*]_ _, certain defective conditions on the premises began to develop in that _ _[*specify each defect and the code provision it violates, e. g., toilet constantly leaked water on the bathroom floor causing foul odors, growth of mold/toxic mold, mildew, and a slippery surface that endangered/seriously affected the health or physical well-being of plaintiff, members of plaintiff's family, and guests; defendants' failure to correct this condition*

violated Uniform Housing Code section 100(f)]_ _.

6. Defendant owners had actual or constructive knowledge of each defective condition and failed to correct them.

7. The defective conditions were not caused by the wrongful or abnormal use of the premises by plaintiff or anyone acting or present on the premises under plaintiff's authority.

8. By failing to correct the defective conditions, defendant owners breached their contractual warranty of habitability, implied by law into every residential tenancy agreement.

9. As a direct and proximate result of defendant owners' failure to correct the defective conditions, the premises were not habitable and had either reduced or no rental value. During the time the defects existed, plaintiff paid a total of _ _[*dollar amount*]_ _ as rent to said defendants. Therefore, plaintiff suffered damages measured by (a) the difference between the fair rental value of premises if they had been in the condition as warranted and the fair rental value as it existed with the defective conditions, (b) a percentage reduction of use, *i.e.*, a reduction of plaintiff's rental obligation by the percentage corresponding to the relative reduction of use of the premises caused by the defendant's breach, or (c) any other measure allowed by law, in an amount to be determined by proof at trial.

10. As a direct and proximate result of defendant owners' failure to correct the defective conditions, plaintiff suffered property damage and economic loss as special damages in the sum of _ _[*dollar amount*]_ _ as follows: _ _[*specify, e.g., leaking roof/toilet/shower/sink and resulting moisture and growth of mold/toxic mold damaged plaintiff's carpet, furniture, clothing, and other personal possessions*]_ _.

11. The agreement between plaintiff and defendant owners provides that the prevailing party is entitled to recover reasonable attorney fees if litigation is necessary to enforce its terms. Therefore, if plaintiff prevails in this action, plaintiff will be entitled to reasonable attorney fees for prosecuting this action, in an amount to be determined by the Court.

SECOND CAUSE OF ACTION
(Specific Performance of Rental Agreement/Lease by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _)

12. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 11 of the First Cause of Action.

13. Plaintiff remains in possession of the premises and desires to reside there _ _[*indefinitely/until the expiration of the lease term*]_ _. The defective conditions continue to exist, and defendant owners do not intend to correct said conditions, as indicated by their _ _[*statements/conduct*]_ _.

14. The premises are situated in a unique location that provides certain social, educational, and economic benefits to plaintiff and members of plaintiff's family. The premises are plaintiff's home. Relocation would sever plaintiff's and the family's social, educational, and economic ties with their community that cannot be compensated adequately by monetary damages. Moving also would cause plaintiff and the family inconvenience, trauma and disruption of their lives that cannot be compensated adequately by monetary damages.

15. If defendant owners' failure to correct the defective conditions continues, plaintiff will continue to suffer damages as alleged in paragraphs 9-11 and 21, inclusive. Plaintiff will have to bring multiple actions to recover for those damages.

16. The consideration to be paid by plaintiff under the agreement is adequate, and the agreement is just and reasonable as to defendant owners.

17. Because plaintiff has no adequate remedy at law and would be required to bring multiple actions, plaintiff is entitled to an order compelling defendant owners specifically to perform obligations owed under the agreement and the implied warranty of habitability by correcting the defective conditions.

THIRD CAUSE OF ACTION

(Tortious Failure To Provide Habitable Premises by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _)

18. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 10 of the First Cause of Action, except for paragraph 8.

19. At all relevant times, defendant(s) _ _[*name(s)*]_ _ and Does VI through X, inclusive, ("defendant managers") were acting as agents and representatives of defendant owners in the management of the subject premises, and assumed the responsibility of maintaining the premises in a habitable condition.

20. By failing to correct the defective conditions, defendant owners tortiously breached the warranty of habitability, implied by law into every residential tenancy agreement. Because defendant owners and defendant managers all failed to correct the defective conditions, they each are liable to plaintiff for the nature and the amount of damages set forth in paragraphs 9-10, inclusive.

[*Insert one or more of the following damages options*]

[*Option 1: Fear of future harm; relocation costs*]

[21.A.] As a further, direct, and proximate result of the above-described acts and omissions by defendants, plaintiff is in constant fear of imminent harm and has been compelled to change his place of residence _ _[*at periodic times/permanently*]_ _, from the subject premises to a place of safety at great expense and to pay rent for another dwelling, resulting in damage to plaintiff, the exact amount to be determined by proof at trial.

[*Option 2: Discomfort and annoyance; emotional distress*]

[21.B.] As a further, direct, and proximate result of the above-described acts and omissions by defendants, plaintiff has suffered discomfort and annoyance and endured mental suffering caused by the fear for his own safety and that of his family. As a result of such injury, plaintiff has sustained damage in an amount to be determined by proof at trial.

[*Option 3: Personal injury; emotional distress*]

[21.C.] As a further, direct, and proximate result of the above-described acts and omissions by defendants, plaintiff has been hurt and injured in his health, strength, and activity, sustained injury to his body, and endured shock, anxiety, and injury to his nervous system and person, all of which have caused plaintiff great mental, physical, and nervous pain, distress, and suffering. As a result of such injury, plaintiff has sustained damage in an amount according to proof at trial.

[*Option 4: Personal injury; medical costs; physical disability*]

[21.D.] As a further, direct, and proximate result of the above-described acts and omissions by defendants, plaintiff was required to obtain medical services and treatment and will, in the future, be compelled to incur additional obligations for medical treatment in an amount according to proof at trial. Plaintiff is informed and believes and thereon alleges that he has suffered permanent loss in that _ _[*specify nature and degree of permanent health impacts*]_ _ as a proximate result of the nuisance created by defendants, the value of such loss to be proved at trial.

[*Option 5: Lost wages, past and future*]

[21.E.] As a further, direct, and proximate result of the above-described acts and omissions by defendants, plaintiff has suffered a loss of earnings in the past, and plaintiff's earning capacity in the future has been impaired, in monetary amounts to be determined by proof at trial.

[*Continue*]

22. Said defendants' failure to correct the defective conditions and their conduct in dealing with plaintiff was tortious, knowing, intentional, and willful or was in conscious disregard of the rights of plaintiff(s). Defendant(s) _ _[*name(s)*]_ _ had full knowledge or should have known of the damage that this failure would cause plaintiff.

**23. Furthermore, said defendants' conduct was malicious and oppressive, in that _ _[*allege specific facts supporting malice or oppression, such as, said defendants and each of them knew that the municipal building*

department has inspected the premises and found it violated numerous building and safety codes, and defendants neither informed plaintiff nor undertook any action to remedy the conditions of the premises, despite repeated, separate, and independent requests by plaintiff, who informed defendants in detail that the conditions were causing plaintiff extreme physical inconvenience and severe emotional distress]_ _**, and therefore plaintiff is entitled to punitive damages in an amount according to proof.**

FOURTH CAUSE OF ACTION
(Damages for Negligence by Plaintiff(s) _ _[*name(s)***]_ _ against Defendant(s) _ _[***name(s)***]_ _)**

24. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 10 of the First Cause of Action, and paragraphs 19 through 21 of the Third Cause of Action.

25. As a proximate result of said defendants' negligent failure to maintain the premises in a habitable condition, defendants are liable to plaintiff for the nature and the amount of damages set forth in paragraphs 9-10 and 21, inclusive.

FIFTH CAUSE OF ACTION
(Damages for Nuisance by Plaintiff(s) _ _[*name(s)***]_ _ against Defendant(s) _ _[***name(s)***]_ _)**

26. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 10 of the First Cause of Action, and paragraphs 19 through 23 of the Third Cause of Action.

27. The defective conditions constituted a nuisance, endangering plaintiff's life, limb, health, property, safety, or welfare, and impeding comfortable use of the premises.

28. Defendant owners and managers were required by law to abate the nuisance, but failed to do so. As a direct and proximate result, said defendants are liable to plaintiff for the damages set forth in paragraphs 9-10, 21 and 23, inclusive.

SIXTH CAUSE OF ACTION
(Abatement of Nuisance by Plaintiff(s) _ _[*name(s)***]_ _ against Defendant(s) _ _[***name(s)***]_ _)**

29. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 10 of the First Cause of Action, 13 through 15 of the Second Cause of Action, paragraphs 19 through 23 of the Third Cause of Action, and paragraphs 27 through 28 of the Fifth Cause of Action.

30. This nuisance continues to exist, and defendant owners and managers have indicated by their statements or actions, or both, that they do not intend to abate it. Unless defendants are enjoined to abate this nuisance, their failure to abate it will continue.

31. Plaintiff has no adequate remedy at law, and thus is entitled to an order compelling defendants to abate the nuisance.

SEVENTH CAUSE OF ACTION
(Intentional Infliction of Emotional Distress by Plaintiff(s) _ _[*name(s)***]_ _ against Defendant(s) _ _[***name(s)***]_ _)**

32. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 10 of the First Cause of Action, 13 through 15 of the Second Cause of Action, paragraphs 19 through 23 of the Third Cause of Action, and paragraphs 27 through 28 of the Fifth Cause of Action.

33. As a direct and proximate result of the failure of defendant owners and managers to correct the defective conditions, and of their conduct in dealing with plaintiff, plaintiff suffered extreme emotional and psychological distress, severe harm, and anguish in that _ _[*specify physical or other manifestations of distress and the extent to which plaintiff's day-to-day physical comfort was affected by the defective conditions of the premises***]_ _, all to plaintiff's general damage for the entire period that the defective conditions persisted, in a total amount according to proof.**

34. Said defendants' failure to correct the defective conditions and their conduct in dealing with plaintiff was knowing, intentional, and willful, because they had full knowledge or knew with substantial certainty of the extreme emotional and psychological distress, severe harm, and anguish that their conduct would cause

plaintiff or any person of ordinary sensitivity. Said conduct was outrageous and intended to cause harm and emotional distress to plaintiff as further set forth in paragraph 35, below.

35. Furthermore, said defendants' conduct was outrageous, intentional, malicious and oppressive, in that _ _[*allege specific facts supporting malice or oppression, such as, said defendants and each of them knew that the municipal building department has inspected the premises and found it violated numerous building and safety codes, and defendants neither informed plaintiff nor undertook any action to remedy the conditions of the premises, despite repeated, separate, and independent requests by plaintiff, who informed defendants in detail that the conditions were causing plaintiff extreme physical inconvenience and severe emotional distress*]_ _**, and therefore plaintiff is entitled to punitive damages in an amount according to proof.**

EIGHTH CAUSE OF ACTION
(Damages for Violation of Statutory Warranty by Plaintiff(s) _ _[*name(s)*]_ _ **against Defendant(s)** _ _[*name(s)*]_ _**)**

36. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 10 of the First Cause of Action, 13 through 15 of the Second Cause of Action, paragraphs 19 through 23 of the Third Cause of Action, and paragraphs 27 through 28 of the Fifth Cause of Action.

37. Plaintiff's apartment substantially fails to meet certain standards of habitability established by _ _[*e.g., Civil Code §1941.1*]_ _**, in that** _ _[*specify each defect and the code provision it violates, e.g., toilet/shower/sink constantly leaked water on the bathroom floor causing foul odors, growth of mold/toxic mold, mildew, and a slippery surface that endangered/seriously affected the health or physical well-being of plaintiff, members of plaintiff's family, and guests; defendants' failure to correct this condition violated Civil Code §1941.1(b) and (c)*]_ _**. Defendant owners had actual or constructive knowledge of each defective condition, as described in paragraph 38, and failed to correct them.**

[*Insert one of the following alternatives*]

[*Alternative 1: Public entity gave notice]*

38. On or about _ _[*date*]_ _**, the housing code enforcement department of** _ _[*e.g., city or county*]_ _ **sent a written notice to defendant owners requiring repair of the substandard conditions described in paragraph 37. Under Civil Code §1942.4(a), more than 35 days have elapsed since the department sent notice, and said defendants have not repaired the substandard conditions, and their delay in doing so is without good cause.**

[*Alternative 2: Tenant gave notice]*

38. On or about _ _[*date*]_ _**, said defendants and each of them knew that the premises violated numerous building and safety codes, and after that plaintiff made numerous repeated, separate, and independent requests to repair the substandard conditions described in paragraph 37.**

[*Alternative 3: Both public entity and tenant gave notice]*

38. On or about _ _[*date*]_ _**, the housing code enforcement department of** _ _[*e.g., city or county*]_ _ **sent a written notice to defendant owners requiring repair of the substandard conditions described in paragraph 37, and plaintiff made numerous repeated, separate, and independent requests to repair them. Under Civil Code §1942.4(a), more than 35 days have elapsed since the department sent notice, and said defendants have not repaired the substandard conditions, and their delay in doing so is without good cause.**

[*Continue*]

39. The substandard conditions were not caused by the lack of ordinary care or a violation of statutory duties on the part of plaintiff.

40. Defendant owners were required by law to repair the conditions, but failed to do so. As a direct and proximate result, said defendants are liable to plaintiff for the damages set forth in paragraphs 9-10 and 21, inclusive. _ _[*Add if all statutory Civil Code §1942.4 requirements have been met: Defendants are additionally liable to plaintiff for statutory damages and attorney fees under Civil Code §1942.4(a)-(b)*]_ _**.**

NINTH CAUSE OF ACTION
(Injunction to Abate Violation of Statutory Warranty by Plaintiff(s) _ _[*name(s)*]_ _ **against Defendant(s)**

_ _[*name(s)*]_ _)

41. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 10 of the First Cause of Action, 13 through 15 of the Second Cause of Action, paragraphs 19 through 23 of the Third Cause of Action, paragraphs 27 through 28 of the Fifth Cause of Action, and paragraphs 37 through 40 of the Eighth Cause of Action.

42. The substandard conditions continue to exist, constitute a continuing nuisance, and significantly or materially affect the health or safety of plaintiff and plaintiff's family who reside in the premises. Defendant owners have indicated by their statements or actions, or both, that they do not intend to make repairs.

43. Unless defendant owners are ordered to abate the nuisance and repair the substandard conditions, their failure to do so will continue. Plaintiff is entitled to an order compelling said defendants to abate the nuisance and repair the substandard conditions under Civil Code §1942.4(c).

TENTH CAUSE OF ACTION
(Injunction Against Unlawful Business Practice by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _)

44. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 10 of the First Cause of Action, 13 through 15 of the Second Cause of Action, paragraphs 19 through 23 of the Third Cause of Action, paragraphs 27 through 28 of the Fifth Cause of Action, and paragraphs 37 through 40 of the Eighth Cause of Action.

45. Defendant owners own various residential rental properties in _ _ _ _ _ _ County, and are engaged In the business of seeking to rent such premises to the public. Unsafe and unsanitary conditions similar to those alleged above are also present on each of these other properties. Defendants have had actual and constructive knowledge of such conditions and a reasonable time to repair them, but have failed to do so and do not intend to do so. Unless defendants are enjoined from engaging in this practice, they will continue to do so.

46. This failure constitutes an unlawful business practice and unfair competition in violation of California Business and Professions Code §§17200-17209. Therefore, plaintiff is entitled to an order enjoining defendants from continuing to engage in such practice.

WHEREFORE, plaintiff requests judgment as follows:

a. For general damages in the sum of _ _[*dollar amount*]_ _;

b. For special damages in the sum of _ _[*dollar amount*]_ _;

c. For exemplary damages on the Third, Fifth and Seventh Causes of Action in a sum according to proof;

d. For reasonable attorneys' fees on the First, Second, Eighth, Ninth, and Tenth Causes of Action;

e. On the Second Cause of Action, for an order requiring that defendant owners specifically perform their duty to maintain the premises under the implied warranty of habitability;

f. On the Sixth and Ninth Causes of Action, for an order requiring that defendant owners and managers abate the nuisance and repair the substandard conditions found to exist in the premises;

g. On the Tenth Cause of Action, for an order enjoining defendants from engaging in their unlawful business practice;

h. For statutory damages on the Eighth Cause of Action

i. For costs of this action, and

j. For further relief that the Court considers just and proper.

Dated: _ _ _ _ _ _ _ _[*Name of Firm*]_ _
By: __[*Signature of attorney*]__
_ _[*Typed name of attorney*]_ _
Attorney for Plaintiff _ _[*name*]_ _

Copies: Original (file in state court when summons issued); copies for service (one for each defendant party); office copy; client copy.

Comment: See Cal Rules of Ct 2.112, which requires each cause of action to be separately numbered, to state the legal theory, and identify each party on whose behalf and against whom the cause of action is asserted. On preparing and serving complaints, see California Civil Procedure Before Trial, chaps 14-18 (4th ed Cal CEB 2004). On captions for court papers, see Civ Proc Before Trial, chap 11.

On litigating mold exposure claims in landlord/tenant situations, see Handling Mold Litigation in California (Cal CEB Action Guide September 2009).

First Cause of Action. A dwelling is uninhabitable if it substantially lacks any of the items listed in CC §§1941.1, 1941.3, including dead bolt locks on all entry doors. For additional lists of actionable defects, see §§3.12, 3.27. If tenant gave notice of defects, or if code violation reports were filed, tenant should so allege in ¶6. Such notice should not be required, however, if landlord otherwise had knowledge of defects. See §3.29. Also, breach of warranty of habitability may be found whether or not landlord had reasonable time to repair. *Knight v Hallsthammar* (1981) 29 C3d 46, 55, 171 CR 707. See §3.30. On damages alleged in ¶10, see *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194. See §§3.38, 3.39. If the lease contains an attorney fee clause for either party (¶11), the party who prevails may recover attorney fees despite the language of the clause. CC §1717(a). See §§3.41, 13.25-13.33, 13.40.

Second Cause of Action. Required elements of a claim for specific performance are discussed in California Real Property Remedies and Damages §§5.6-5.15 (2d ed Cal CEB 2002). The tenant may also allege in ¶14 an inability to move because decent housing is not available. Such an allegation is not, however, a prerequisite to specific performance.

Third Cause of Action. A contract action for breach of warranty of habitability is not the only remedy available against a landlord for failure to repair. The tenant may also sue in tort for damages resulting from breach of warranty and get additional damages for discomfort and annoyance. See *Stoiber v Honeychuck* (1980) 101 CA3d 903, 913, 162 CR 194; §§3.40, 3.46. The tenant may also recover personal injury and other tort damages. See §§3.67-3.67A.

Tort actions on defective premises may be stated against the landlord's agents in ¶19, when the facts support the allegation. See §3.40; *Stoiber v Honeychuck* (1980) 101 CA3d 903, 928, 162 CR 194.

On the factual and legal grounds for punitive damages alleged in ¶23, see §§3.40, 3.47. All facts showing malice and oppression should be alleged, *e.g.,* the tenant may have been unable to find other decent housing and the landlord knew of this fact.

Fourth Cause of Action. A tenant may also sue on a negligence theory for damages resulting from uninhabitability. See *Stoiber v Honeychuck* (1980) 101 CA3d 903, 913, 162 CR 194; §§3.40, 3.47. Including a cause of action for negligence is wise when intentional torts are alleged. Negligence requires a lesser burden of proof and may trigger defense of the action by the landlord's insurer.

Fifth Cause of Action. Defective condition of the premises, depriving the plaintiff of safe, healthy, and comfortable use of the premises, may form the basis for an action for nuisance under CCP §731. See *Smith v David* (1981) 120 CA3d 101, 176 CR 112; *Stoiber v Honeychuck* (1980) 101 CA3d 903, 919, 162 CR 194; *Spaulding v Cameron* (1954) 127 CA2d 698, 274 P2d 177. See California Real Property Remedies and Damages §§11.2-11.16 (2d ed Cal CEB 2002). See also private right of action for nuisance available under the Narcotics Nuisance Abatement Act (Health & S C §§11570-11587), discussed in §4.44. This cause of action may be modified to assert a public nuisance, such as in *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602 (apartment tenant allowed to sue on behalf of daughter, who suffered from childhood asthma and chronic allergies, to abate public nuisance created by owner's failure to limit secondhand smoke in outdoor common areas).

Sixth Cause of Action. See *Smith v David* (1981) 120 CA3d 101, 176 CR 112; *Stoiber v Honeychuck* (1980) 101 CA3d 903, 928, 162 CR 194.

Seventh Cause of Action. See *Smith v David* (1981) 120 CA3d 101, 176 CR 112; *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194.

For a discussion of the law supporting the eighth and ninth causes of action, see §§3.15A, 3.36.

Tenth Cause of Action. An action to enjoin any unfair business practice (see Bus & P C §§17200-17209) may be brought by a member of the public on behalf of the public generally. See §3.42; *Stoiber v Honeychuck* (1980) 101 CA3d 903, 926, 162 CR 194; *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 101 CR 745.

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V. ASSIGNMENT AND SUBLETTING

§3.49 A. Transfer of Leasehold Interests

Assignment and subletting are the two common methods of transferring leasehold interests. The rights and obligations of landlord, tenant, and transferee of the interest vary, depending on how the transfer is characterized (see §§3.50-3.55) and on what provision the lease or rental agreement makes for such transfers (see §§3.56-3.59).

In the absence of a lease provision to the contrary (see §3.56), a tenant has the right to transfer the leasehold interest either by assignment (*Kassan v Stout* (1973) 9 C3d 39, 106 CR 783) or by sublease (*Chandler v Hart* (1911) 161 C 405, 414, 119 P 516). See also *Little v Guadron* (1986) 187 CA3d Supp 1, 4, 232 CR 516. The same rule applies to commercial leases. CC §1995.210(b). When a residential lease provides that the tenant may assign the tenancy, or sublet any portion of the premises, only with the landlord's consent, arguably that consent may be refused only when the landlord has a reasonable objection to the proposed assignment or subletting. See *Kendall v Ernest Pestana, Inc.* (1985) 40 C3d 488, 220 CR 818. (On commercial leases, see CC §§1995.240-1995.270 and Office Leasing: Drafting and Negotiating the Lease, chap 24 (Cal CEB 1996). See also California Eviction Defense Manual §19.9 (2d ed Cal CEB 1993).) A lease may, however, preclude assignment and subletting altogether. 40 C3d at 499 (citing Restatement (Second) of Property §15.2(2) (1977)); see CC §1995.230 (commercial leases).

PRACTICE TIP: In rent-controlled jurisdictions, many landlords' attorneys advise their clients to prohibit assignment and subletting in their rental agreements so that tenants will be unable to transfer their rights under the agreement as a method of avoiding vacancy decontrol provisions.

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§3.50 B. Assignment and Subletting Distinguished

Whether a transfer is characterized as an assignment or a subletting may have significant consequences in terms of the rights and obligations of the parties. See §§3.51-3.55. The form of the transfer and the label given it by the parties are not determinative; the legal character of the transfer is determined by its substance and effect. *Williams v Hinckley* (1930) 109 CA 574, 293 P 644; *Kendis v Cohn* (1928) 90 CA 41, 265 P 844.

The distinction between an assignment and a sublease turns on the extent of the interest transferred. An assignment is the transfer of the entire unexpired interest in the leasehold with no reversionary interest remaining in the transferor. *Hartman Ranch Co. v Associated Oil Co.* (1937) 10 C2d 232, 73 P2d 1163; *Reed v South Shore Foods, Inc.* (1964) 229 CA2d 705, 40 CR 575. A transfer is not an assignment if it includes only a portion of the remaining term (*Ericksen v Rhee* (1919) 181 C 562, 185 P 847; *Jordan v Scott* (1918) 38 CA 739, 177 P 504) or if the transferor reserves a right of reentry (*Hartman Ranch Co. v Associated Oil Co., supra*). Consequently, a sublease is a transfer of less than the entire remaining leasehold interest. Thus, if the transferor retains a right of reversion (*Williams v Hinckley, supra*) or transfers an interest in only a portion of the premises (*Ericksen v Rhee, supra*), the transfer is a sublease and not an assignment.

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§3.51 C. Effect of Transfer

The effect of a transfer of a leasehold interest is determined by the laws governing a conveyance of an interest in real property, as well as by the terms of the lease agreement. As discussed in §§3.52-3.55, a transfer of the leasehold interest affects the rights and obligations of all the parties.

A valid assignment (*i.e.,* a transfer of the tenant's entire interest (see §3.50)) terminates the privity of estate that existed between landlord and tenant. *Barkhaus v Producers Fruit Co.* (1923) 192 C 200, 219 P 435; *Gilman v Nemetz* (1962) 203 CA2d 81, 21 CR 317. By itself, the assignment has no effect on the privity of contract between the landlord and the tenant-transferor (see *Samuels v Ottinger* (1915) 169 C 209, 146 P 638; *Schehr v Berkey* (1913) 166 C 157, 135 P 41), although related events such as the assignee's assumption of the transferor's obligations under the lease, or the landlord's release of the transferor from all obligations under the lease (see §§3.52-3.55), will affect the terms and continued existence of the contractual relationship between the landlord and the original tenant. When an assignee takes possession of the premises, privity of estate is created between the landlord and the assignee. *Realty & Rebuilding Co. v Rea* (1920) 184 C 565, 194 P 1024; *Samuels v Ottinger, supra*; *K & M, Inc. v LeCuyer* (1951) 107 CA2d 710, 238 P2d 28. Without a new contractual arrangement, however, there is no privity of contract between the landlord and the assignee. *Bonetti v Treat* (1891) 91 C 223, 27 P 612.

Because a sublessor retains a reversionary interest in the leasehold estate (see §3.50), the subletting alone terminates neither privity of estate nor privity of contract between the landlord and the sublessor. *Hartman Ranch Co. v Associated Oil Co.* (1937) 10 C2d 232, 73 P2d 1163; *Webb v Jones* (1927) 88 CA 20, 263 P 538. There is no privity of estate between the landlord and the sublessee because the sublessee is merely in possession of the premises for the sublessor. *Johnson v Couch* (1961) 189 CA2d 687, 11 CR 645. If the sublessee assumes the tenant's obligations under the lease, however, courts treat the landlord as a third party beneficiary of the assumption agreement (*Hartman Ranch Co. v Associated Oil Co., supra*), and the sublessee as a third party beneficiary of the lease agreement (*Marchese v Standard Realty & Dev. Co.* (1977) 74 CA3d 142, 141 CR 370; see also *Cordonier v Central Shopping Plaza Assocs.* (1978) 82 CA3d 991, 147 CR 558).

Although concepts of privity of estate and privity of contract are somewhat archaic, they retain importance because they affect the rights and obligations that exist among the landlord, tenant, and assignee or subtenant. See §§3.52-3.55.

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D. Rights and Liabilities Following Transfer

1. Assignment

§3.52 a. Assignee and Landlord

The assignee's relationship to the landlord is based on the privity of estate that is created by the assignment. See §3.51; *Realty & Rebuilding Co. v Rea* (1920) 184 C 565, 194 P 1024; *K & M, Inc. v LeCuyer* (1951) 107 CA2d 710, 238 P2d 28. The assignee succeeds to all the tenant's interest in the leasehold estate (*Scheerer v Goodwin* (1899) 125 C 154, 57 P 789), and to the benefit of all covenants and agreements of the landlord that run with the land (CC §§1460-1471; *Laffan v Naglee* (1858) 9 C 662). Most leasehold covenants run with the land. See *Laffan v Naglee, supra*. Thus, the assignee may enforce against the landlord those rights that attach because of privity of estate and may enforce covenants of the lease such as covenants of warranty and quiet enjoyment. CC §§1462-1463. Moreover, the tenant (and therefore the tenant's assignee) is expressly given power to enforce the terms of the lease agreement against the landlord and the landlord's assignees, except for covenants against encumbrances or covenants relating to title or possession of the premises. CC §823.

By virtue of privity of estate, the landlord can enforce against the assignee all covenants implied by law and running with the land, including the covenant to pay rent. CC §§822, 1463; *Realty & Rebuilding Co. v Rea, supra*; *Ericksen v Rhee* (1919) 181 C 562, 185 P 847. No privity of contract is created by an assignment, however, and the assignee is bound only by obligations that arise from actual possession or privity of estate. *Realty & Rebuilding Co. v Rea, supra*. The assignee's obligations continue only during his or her occupancy, and terminate on abandonment of possession or reassignment of the lease. *Hartman Ranch Co. v Associated Oil Co.* (1937) 10 C2d 232, 73 P2d 1163; *Realty & Rebuilding Co. v Rea, supra*. If the assignee expressly assumes the tenant's obligations under the lease, however, the landlord is viewed as a third party beneficiary of that assumption, and the assignee becomes liable to the landlord for covenants such as payment of rent for the lease term. *Realty & Rebuilding Co. v Rea, supra*; *Rosenkranz v Pellin* (1950) 99 CA2d 650, 222 P2d 249.

Because a covenant to pay rent is a covenant running with the land (*Salisbury v Shirley* (1884) 66 C 223, 5 P 104), the landlord can recover rent from the assignee by virtue of the privity of estate between them for as long as the assignee remains in possession of the premises. *Timm v Brown* (1947) 78 CA2d 609, 178 P2d 10; *Salisbury v Shirley, supra*. The assignee's liability to the landlord for rent is not released by payment of rent to the assignor. *Jordan v Scott* (1918) 38 CA 739, 177 P 504. Because the obligation to pay rent arises from privity of estate between assignee and landlord, the assignee is not liable for rent accruing after he or she surrenders possession of the premises, unless the assignee has expressly assumed the lease obligations or otherwise covenanted to pay rent. *Treff v Gulko* (1932) 214 C 591, 7 P2d 697.

Whatever remedies the landlord has against the original tenant for breach of a lease agreement or for recovery of possession also exist against the assignees of the tenant for any cause of action accruing while they were assignees. CC §822.

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§3.53 b. Assignor and Landlord

The assignor does not escape liability to the landlord merely by assigning the leasehold interest; privity of contract between the landlord and the tenant-assignor continues even though privity of estate terminates on assignment. See *Peiser v Mettler* (1958) 50 C2d 594, 328 P2d 953; *De Hart v Allen* (1945) 26 C2d 829, 161 P2d 453; *Samuels v Ottinger* (1915) 169 C 209, 146 P 638. The assignor's liability continues to the expiration of the lease term even when the landlord accepts the assignment and the assignee assumes the lease obligations. *Peiser v Mettler, supra*; *De Hart v Allen, supra*; *Munzinger v Caffrey* (1942) 49 CA2d 180, 121 P2d 13. The assignor is relieved of liability under the lease only if the landlord agrees to rescind the original lease and enter into a new agreement with the assignee (see *Douglas v Schindler* (1930) 209 C 616, 289 P 625), or to release the assignor from liability (see *Beckjord v Slusher* (1937) 22 CA2d 559, 71 P2d 820). The assignor's liability extends only to cover the original lease term; the assignor is not liable for any period that the assignee holds over after the lease term. *Meredith v Dardarian* (1978) 83 CA3d 248, 147 CR 761.

The assignor's continued liability most often arises in connection with the issue of payment of rent. The assignor's obligation to pay rent survives an assignment by virtue of privity of contract, even if the landlord accepts rent from the assignee. *Schehr v Berkey* (1913) 166 C 157, 135 P 41. See also *Triest & Co. v Goldstone* (1916) 173 C 240, 159 P 715. The assignee becomes a surety for the rent obligation to the assignor, but the assignor remains the primary obligor for the payment of rent to the landlord. *De Hart v Allen, supra*. Thus, if the assignee defaults in payment of rent, the assignor is liable to the landlord (along with the assignee; see §3.52), but also has a right of action against the assignee for reimbursement of any amounts actually paid to the landlord.

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2. Subletting

§3.54 a. Sublessee and Landlord

Neither the sublessee nor the landlord can enforce the covenants of the lease against the other merely by force of the sublease. *Hartman Ranch Co. v Associated Oil Co.* (1937) 10 C2d 232, 73 P2d 1163; *Webb v Jones* (1927) 88 CA 20, 263 P 538.

If the sublessee expressly assumes the original tenant's obligations under the lease and the landlord accepts the sublease, however, then both the landlord and the sublessee can enforce the lease covenants against each other. The landlord is treated as a third party beneficiary of the assumption agreement (*Hartman Ranch Co. v Associated Oil Co., supra*), and the sublessee is treated as a third party beneficiary of the lease agreement (*Marchese v Standard Realty & Dev. Co.* (1977) 74 CA3d 142, 141 CR 370; see also *Cordonier v Central Shopping Plaza Assocs.* (1978) 82 CA3d 991, 147 CR 558).

Thus, the landlord has no right of action against the sublessee for rent unless the sublessee has expressly assumed the covenants of the lease or a third party beneficiary contract has been created. *Lesser v Pomin* (1934) 3 CA2d 117, 39 P2d 451; *City Inv. Co. v Pringle* (1925) 73 CA 782, 239 P 302. See also *Dorcich v Time Oil Co.* (1951) 103 CA2d 677, 230 P2d 10.

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§3.55 b. Sublessor and Landlord

A sublease does not terminate the mutual obligations of the sublessor and the landlord; they remain in privity of contract and privity of estate. *Hartman Ranch Co. v Associated Oil Co.* (1937) 10 C2d 232, 73 P2d 1163. Thus, the sublessor remains liable for rent under an express covenant despite the landlord's acceptance of rent from and acknowledgment of the sublessee. *Brosnan v Kramer* (1901) 135 C 36, 66 P 979. The sublessor may also be liable in damages to the landlord for the sublessee's improper use of the premises. *Smith v United Crude Oil Co.* (1919) 179 C 570, 178 P 141. Conversely, the sublessor may maintain an action for damages against the landlord for wrongfully evicting the sublessee in breach of the covenants of the lease. *Haddad v McDowell* (1933) 131 CA 565, 21 P2d 616.

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Source: Real Property/California Landlord-Tenant Practice/3 Rights and Duties During Tenancy/ E. Restricting Transfer of Leasehold Interests/§3.56 1. Lease Covenants Restricting Transfer

E. Restricting Transfer of Leasehold Interests

§3.56 1. Lease Covenants Restricting Transfer

A lease or rental agreement may prohibit assignment or subletting absolutely or may condition the exercise of the right to sublet on the landlord's prior written approval. If the landlord's consent must be obtained, such consent may not be withheld unreasonably. *Carma Developers (Cal.), Inc. v Marathon Dev. Cal., Inc.* (1992) 2 C4th 342, 6 CR2d 467; *Kendall v Ernest Pestana, Inc.* (1985) 40 C3d 488, 220 CR 818. After the *Carma* and *Kendall* decisions, the legislature adopted CC §§1995.010-1995.340 to specify the conditions under which assignment and subletting may be restricted in commercial leases. See Office Leasing: Drafting and Negotiating the Lease, chap 24 (Cal CEB 1996). See also California Eviction Defense Manual §19.9 (2d ed Cal CEB 1993).

For examples of lease provisions, see §1.54; for discussion of judicial construction of such provisions, see §§3.58, 14.50.

PRACTICE TIPS:

- To avoid liability, residential landlords, like their commercial counterparts, often specify the conditions under which an assignment will be approved and what steps a tenant must take to secure that approval. Such clauses often further provide that if the tenant fails either to follow the set procedure or to meet the standards and conditions set forth in the rental agreement, any denial of consent will be considered to have been reasonable.
- When a tenant has filed a petition for relief in bankruptcy (see chap 14), restrictions on lease assignment may be disregarded by the bankruptcy court in approving a lease assignment under certain circumstances (see §14.50).
- In rent-controlled jurisdictions, many landlords' attorneys advise their clients to prohibit assignment and subletting in their rental agreements so that tenants will be unable to transfer their rights under the agreement as a method of avoiding vacancy decontrol provisions.

Because of their restrictive nature, covenants limiting assignment and subletting are strictly construed against the landlord. *Karbelnig v Brothwell* (1966) 244 CA2d 333, 53 CR 335; *Licht v Gallatin* (1927) 84 CA 240, 257 P 914. Thus, for example, a covenant against assignment is not breached by a sublease or an assignment of a sublease given by the original tenant. *Cross v Bouck* (1917) 175 C 253, 165 P 702. Similarly, there is no breach of a covenant against subletting when a mortgage is placed on the leasehold (*Chapman v Great W. Gypsum Co.* (1932) 216 C 420, 14 P2d 758), or when one tenant assigns the lease to a cotenant (*Buck v Cardwell* (1958) 161 CA2d 830, 327 P2d 223). Neither is transfer of equity interests in a business enterprise prohibited by such a covenant. *Ser-Bye Corp. v C.P. & G. Markets* (1947) 78 CA2d 915, 179 P2d 342 (sale of tenant's corporate shares); *Richardson v La Rancherita* (1979) 98 CA3d 73, 159 CR 285 (sale of partnership interest).

A restriction against assignment or subletting is a personal covenant and does not run with the land (*i.e.,* it binds only the original tenant, and not an assignee or sublessee, unless there is an express provision to that effect). *Crowell v City of Riverside* (1938) 26 CA2d 566, 80 P2d 120; *Kendis v Cohn* (1928) 90 CA 41, 265 P 844.

PRACTICE TIP: If the tenant wrongfully attempts to assign or sublease the premises, the landlord may serve a 3-day notice to perform a covenant of the lease or quit on the original tenant and on any subtenant in actual possession. CCP §1161. If the tenant and subtenant fail to comply with the notice, the landlord may file an unlawful detainer action.

In *Carma Developers (Cal.), Inc. v Marathon Dev. Cal., Inc.* (1992) 2 C4th 342, 6 CR2d 467, the California Supreme Court ruled that a recapture provision in a commercial lease, under which the lessor might terminate the leasehold on the lessee's request for permission to sublet or assign, was not an unreasonable restraint on alienation or a prohibited restriction on transfer. *Carma* appears to be limited to commercial tenancies. See also *Ilkhchooyi v Best* (1995) 37 CA4th 395, 45 CR2d 766, in which the court held unconscionable a clause that entitled a commercial landlord to 75

percent profits from a covenant not to compete on a sale of the tenant's business and subsequent assignment of the lease.

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§3.57 2. Waiver of Covenant

An assignment executed in breach of a covenant against assignment is not void, but merely voidable; the leasehold passes to the assignee or sublessee subject to the landlord's right to declare a forfeiture of the lease. *Karbelnig v Brothwell* (1966) 244 CA2d 333, 53 CR 335; *Randol v Tatum* (1893) 98 C 390, 33 P 433. The covenant is for the landlord's benefit (*Taylor v Odell* (1942) 50 CA2d 115, 122 P2d 919), and it may be waived by the landlord (*Spangler v Spangler* (1909) 11 CA 321, 104 P 995). The landlord's right to declare a forfeiture has been considered waived under the following circumstances:

(a) The landlord did not object at the time of assignment, and demanded rent of the assignee and sued to recover it (*Spangler v Spangler, supra*);

(b) The landlord permitted the assignee to enter the premises and remain in possession (*Buchanan v Banta* (1928) 204 C 73, 266 P 547); and

(c) The landlord accepted rent from the tenant (*Goodwin v Grosse* (1922) 56 CA 615, 206 P 138) or the assignee (*Trubowitch v Riverbank Canning Co.* (1947) 30 C2d 335, 182 P2d 182).

The landlord must have actual knowledge of the assignment or sublease in order for there to be a waiver. *German-American Sav. Bank v Gollmer* (1909) 155 C 683, 102 P 932.

The perennial problem of determining when the landlord has waived the right to object to an assignee or sublessee was addressed for rent control jurisdictions by the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535). As provided in CC §1954.53(d)(4):

> Acceptance of rent by the owner shall not operate as a waiver or otherwise prevent enforcement of a covenant prohibiting sublease or assignment or a waiver of an owner's rights to establish the initial rental rate unless the owner has received written notice from the tenant that is party to the agreement and thereafter accepted rent.

For further discussion of the Act's effect on assignment and subletting, see §§3.58A, 4.40-4.40B, 7.25-7.28. See also *Cobb v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2002) 98 CA4th 345, 119 CR2d 741, discussed in §§7.25, 7.28.

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§3.58 3. Landlord's Withholding of Consent

When a lease provides that the tenant may assign his or her interest, or sublet any portion of the premises only with the landlord's consent, that consent may be refused only when the landlord has a reasonable objection to the proposed assignment or subletting. *Kendall v Ernest Pestana, Inc.* (1985) 40 C3d 488, 220 CR 818. Although the holding in *Kendall* was partly codified and partly limited with respect to commercial leases (see CC §§1995.210-1995.270), arguably the decision still applies in residential tenancies, which enjoy protection under the implied covenant of good faith and fair dealing equally with commercial tenancies. See authorities cited in §3.75.

When a commercial lease provision does not prohibit outright assignment or subletting but requires the landlord's consent, the lease may specify an express standard or condition for withholding consent, but if no standard is expressed, the landlord may not unreasonably withhold consent. CC §§1995.240-1995.260. For full discussion of this issue in commercial tenancies, see Office Leasing: Drafting and Negotiating the Lease, chap 24 (Cal CEB 1996); California Eviction Defense Manual, chap 19 (2d ed Cal CEB 1993).

Whether the landlord's withholding of consent is reasonable is a question of fact to be determined by an examination of the circumstances surrounding the transfer. See *Reuling v Sergeant* (1949) 93 CA2d 241, 208 P2d 1046; *Bedford Inv. Co. v Folb* (1947) 79 CA2d 363, 180 P2d 361; *Richardson v La Rancherita* (1979) 98 CA3d 73, 159 CR 285. See also *Ilkhchooyi v Best* (1995) 37 CA4th 395, 45 CR2d 766.

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§3.58A 4. Subleasing in Jurisdictions With Rent Control

In tight housing markets with rapidly escalating rents, landlords owning rent-controlled buildings often face a problem with tenants attempting to pass on their rent-controlled apartments. Additionally, tenants in larger rent-controlled units who need roommates to meet the rent, and who cannot readily move to smaller quarters because of high rents, often have a succession of individuals who move in and out of the unit. These situations often present problems for landlords who have difficulty controlling who is living in a building and ascertaining when they have obtained a "vacant" or decontrolled unit.

The Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535) was adopted in 1995. The Act outlawed vacancy control and included provisions regarding subleasing in order for landlords to determine when they have the right to raise the rent beyond the controls established by the local agency.

In particular, CC §1954.53(d) states that no law may prohibit a lease or rental agreement from establishing the rental rates if the unit is sublet. In addition, it provides: "Where the original occupant or occupants who took possession of the dwelling or unit pursuant to the rental agreement with the owner no longer permanently reside there, an owner may increase the rent by any amount allowed by this section to a lawful sublessee or assignee who did not reside at the dwelling or unit prior to January 1, 1996." The section then provides that this right does not apply to partial changes in occupancies where an original occupant who entered into the original lease agreement with the owner remains in possession. In addition, the section further provides that acceptance of rent does not constitute a waiver of the owner's right to set a new rent level unless the original tenant who was an actual party to the original rental agreement gave written notice to the owner and the owner thereafter accepted rent. The wording of the section is not clear as to the party from whom rent must be accepted. Because an owner cannot prohibit a sublease when there is no prohibition against subleasing in the rental agreement, and because §1954.53(d) does not deal with evictions, it seems that the only reasonable interpretation of this language is that the rent that must be accepted (for there to be a waiver) must be rent paid by the subtenant.

On the effect of the Costa-Hawkins Act on an unauthorized rent increase in a rent-controlled jurisdiction after the landlord has accepted rent from the subtenant, see *Cobb v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2002) 98 CA4th 345, 119 CR2d 741, cited in §§7.25, 7.28. See also landlord drafting tips in §4.40B.

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§3.59 5. Interaction With CC §1951.4 Remedy

Under CC §1951.4, the landlord may continue the lease in effect even though the tenant has breached the lease and abandoned the property, and hold the tenant responsible for rent due under the lease as it comes due, if the lease allows the tenant to assign or sublet the premises, subject to reasonable standards or with the landlord's reasonable consent. CC §1951.4(b)(1)-(3). For detailed discussion, see §8.15. Thus, if the landlord wishes to use the CC §1951.4 remedy, the lease must contain such a covenant and the landlord must not terminate the tenant's right to possession. For further discussion, see Office Leasing: Drafting and Negotiating the Lease, chap 24 (Cal CEB 1996).

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§3.59A F. Effect of Tenant Bankruptcy on Lease Assignment

The Bankruptcy Code may preempt many of the contractual and state law provisions on assignment and restrictions on assignment of leases. For discussion, see §§14.35, 14.43, 14.49-14.52.

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VI. EXTENSION AND RENEWAL OF LEASE

§3.60 A. Tenant's Right to Extend or Renew

A tenant has no absolute right to extend or renew a lease (*Ferry v McNeil* (1963) 214 CA2d 411, 29 CR 577) and is normally obligated to surrender the premises on expiration of the specified lease term (*Coburn v Goodall* (1887) 72 C 498, 14 P 190; *Schilling v Holmes* (1863) 23 C 227). Such a right may be created, however, by a covenant or condition in the lease (see §§3.61-3.63) or by the conduct of the landlord and tenant after expiration of the lease term (see §§3.65-3.66).

The courts distinguish between extension and renewal. Extension is the continuation in time of the original lease, "stretching" or "spreading out" the term of the original lease. *Burroughs v Ben's Auto Park, Inc.* (1945) 27 C2d 449, 164 P2d 897; *Smith v Arthur D. Little, Inc.* (1969) 276 CA2d 391, 81 CR 140. A renewal, on the other hand, creates a new and distinct tenancy. *Burroughs v Ben's Auto Park, Inc., supra*; *Smith v Arthur D. Little, Inc., supra*. Neither extension nor renewal interrupts possession under the original lease. When a renewal is executed before expiration of the original term, the tenant is entitled to continuous possession. *Reynolds v McEwen* (1952) 111 CA2d 540, 244 P2d 961.

Option to extend provisions may be unenforceable if another clause in the lease governs the circumstances. See, *e.g., 11382 Beach Partnership v Libaw* (1999) 70 CA4th 212, 82 CR2d 533 (premises destroyed by fire; cancellation provision in lease prevailed over tenant's option to extend term).

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B. Covenants to Extend or Renew

§3.61 1. Legal Requirements

Covenants or options to extend or renew leases are very common. See *Glenn v Bacon* (1927) 86 CA 58, 260 P 559. They need not be set forth in the lease itself (*Braun v Leo G. McLaughlin Co.* (1928) 93 CA 116, 269 P 191), and they may be entered into after execution of the original lease (see, *e.g., Bard v Kent* (1942) 19 C2d 449, 122 P2d 8).

In a lease that will be extended or renewed for more than one year, the covenant or option falls within the statute of frauds (CC §1624) and therefore must be in writing. If the option or covenant is executed after execution of the original lease, it must be supported by new consideration (*Bard v Kent, supra*); if incorporated in the lease, it should be supported by the consideration for the lease.

Any ambiguity or uncertainty in the renewal provisions will be construed against the author of the renewal language, usually the landlord, who will be considered responsible for the uncertainty. *Buck v Cardwell* (1958) 161 CA2d 830, 327 P2d 223; *Erickson v Boothe* (1947) 79 CA2d 266, 179 P2d 611. Whether the provision will be interpreted as made for renewal or extension is determined by the parties' intentions (*Smith v Arthur D. Little, Inc.* (1969) 276 CA2d 391, 81 CR 140), and not by the technical meanings of the terms (*Howell v City of Hamburg Co.* (1913) 165 C 172, 131 P 130). The provision must be enforceable; one that is indefinite or uncertain will be considered void. *Ablett v Clauson* (1954) 43 C2d 280, 272 P2d 753; *Morrison v Rossignol* (1855) 5 C 64. If the covenant does not specify the terms of the extension or renewal, the terms of the original lease are presumed to apply. Such a covenant has been held sufficiently definite and certain to be enforceable. *Penilla v Gerstenkorn* (1927) 86 CA 668, 261 P 488. A covenant that provides an ascertainable standard for determining the rent for the extension or renewal period will be held to be sufficiently definite, and the court will fix the amount of rent if the parties do not. *Chaney v Schneider* (1949) 92 CA2d 88, 206 P2d 669.

Unless otherwise clearly stated in the lease, a provision for extension or renewal will be construed as being exercisable only once. *Becker v Submarine Oil Co.* (1921) 55 CA 698, 204 P 245. The courts have usually upheld and enforced provisions giving the tenant the right to perpetual renewal of the lease. *Fisher v Parsons* (1963) 213 CA2d 829, 29 CR 210; *Becker v Submarine Oil Co., supra*. The preferred view seems to be that a perpetual renewal provision does not create perpetuities problems because the lease vests in all respects on its execution, and rights under it (although exercisable in the future) do not have the characteristics of a contingent or future estate. See *Fisher v Parsons, supra*. But see *Shaver v Clanton* (1994) 26 CA4th 568, 31 CR2d 595 (commercial lease with perpetual options to renew construed to be limited to 99 years and thus not to violate the rule against perpetuities).

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§3.62 2. Exercise of Election to Renew

A lease provision for extension or renewal usually requires that the tenant give notice of the election to renew. See, *e.g., Howell v City of Hamburg Co.* (1913) 165 C 172, 131 P 130. The tenant must give notice of intent to renew in unequivocal and unqualified terms. *Hayward Lumber & Inv. Co. v Construction Prods. Corp.* (1953) 117 CA2d 221, 255 P2d 473.

Courts require rather strict compliance with the terms of the lease on matters such as giving notice before expiration of the original term in the manner and on the terms specified in the lease. *Simons v Young* (1979) 93 CA3d 170, 155 CR 460 (lawyer-tenant barred from renewing for not giving notice within the required 90 days from expiration of term despite improvements made in converting apartments to law offices); *Hayward Lumber & Inv. Co. v Construction Prods. Corp., supra*. If the lease does not specify the manner in which the option to renew may be exercised, any reasonable conduct that communicates to the landlord the tenant's intent to renew is sufficient. See *Cicinelli v Iwasaki* (1959) 170 CA2d 58, 338 P2d 1005.

When a lease does not require the tenant to give notice of an intent to exercise an option to renew, the tenant's continuing in possession after the end of the original lease term shows that intent. *ADV Corp. v Wikman* (1986) 178 CA3d 61, 223 CR 262. However, when the lease requires the tenant to give notice to exercise an option to renew and the tenant fails to do so, the fact that the tenant has made substantial improvements to the property just before the option date does not satisfy the notice requirement or entitle the tenant to equitable relief. *Bekins Moving & Storage Co. v Prudential Ins. Co.* (1985) 176 CA3d 245, 221 CR 738. *Bekins* illustrates the importance of precisely complying with the terms of the option.

Unless the lease specifies otherwise, exercise of an option to renew is effective when the tenant deposits it in the mail. *Palo Alto Town & Country Village, Inc. v BBTC Co.* (1974) 11 C3d 494, 113 CR 705. When a lease requires a notice of exercise of option to be sent by certified mail and the tenant complies with the lease by sending a certified letter in the mail, the tenant cannot be held responsible for loss of the letter by the post office. *Jenkins v Tuneup Masters* (1987) 190 CA3d 1, 235 CR 214. The court reasoned that when there is actual receipt by the mail carrier, the notice has been properly sent. At that point the risk of loss falls on the landlord.

Under certain favorable facts, a court may exercise its equitable power to hold that a new term has vested despite the tenant's failure to comply literally with the requirements of the lease. See *Streicher v Heimburge* (1928) 205 C 675, 272 P 290. In *Leonhardi-Smith, Inc. v Cameron* (1980) 108 CA3d 42, 166 CR 135, the court held that the tenants effectively had renewed their lease despite their technical noncompliance with a lease provision requiring them to give written notice more than 90 days before expiration of the term. The tenants had given oral notice more than 90 days before expiration, and written notice within the 90-day period. The landlord had accepted rent from them and knew that they were making substantial improvements to the premises.

When the tenant's right to renew depends on performance of conditions or covenants in the lease, nonperformance or breach of those conditions defeats the right to renew. *Swift v Occidental Mining & Petroleum Co.* (1903) 141 C 161, 74 P 700; *Behrman v Barto* (1880) 54 C 131. A tenant is not entitled to renew when he or she is in default in rent even if payment is not an express condition of renewal. Payment of rent is an implied condition that must be satisfied before an option to renew can be exercised. *Nork v Pacific Coast Med. Enters.* (1977) 73 CA3d 410, 140 CR 734.

An option to renew usually can be exercised by an assignee of the tenant (*Spangler v Spangler* (1909) 11 CA 321, 104 P 995; *Penilla v Gerstenkorn* (1927) 86 CA 668, 261 P 488), but not by a subtenant (*Ablett v Clauson* (1954) 43 C2d 280, 272 P2d 753). Even an assignee may not be able to exercise the option if the right to renew is limited to the tenant named in the lease. *Standard Oil Co. v Slye* (1913) 164 C 435, 129 P 589.

Options to renew are specifically enforceable. *Mitchell v Exhibition Foods, Inc.* (1986) 184 CA3d 1033, 229 CR 535. On the remedy of specific performance, see California Real Property Remedies and Damages, chap 5 (2d ed Cal CEB 2002).

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§3.63 3. Automatic Renewal; Required Language in Lease (CC §1945.5)

Some leases provide for automatic renewal or extension for all or part of the full term of the lease if the tenant remains in possession after expiration of the specified term or fails to give notice of intent not to renew before the expiration date. Under such a provision, the tenant has the burden of preventing renewal and remains bound by the covenants of the lease, including the obligation to pay rent (as opposed to damages in the form of reasonable rental value). *Shenson v Shenson* (1954) 124 CA2d 747, 269 P2d 170.

Many leases provide that the tenants must give notice to the landlord of their intent not to renew the lease, usually 30 days before the lease's expiration date, and that the lease will continue on a month-to-month basis thereafter. The tenant's failure to provide this notice would cause the tenant to be liable to the landlord for any damages incurred as a result of the breach. Tenant attorneys could argue that these provisions are voidable if they do not comply with the automatic renewal provisions outlined in CC §1945.5.

To be binding, an automatic renewal provision must be printed in at least eight-point boldface type where it appears in a residential lease. The lease must also contain an eight-point boldface statement above the tenant's signature line that the automatic renewal provision appears in the body of the lease. CC §1945.5. Without these protections, the lease is voidable by the party who did not prepare it (usually the tenant), and any attempted waiver of these protections is void as against public policy. CC §1945.5. If the required provisos are included in the lease in the manner specified, the presumption of CC §1945 applies (*i.e.,* that the parties have renewed the lease on the same terms). CC §1945.5. See §3.62.

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§3.64 C. Holding Over

The tenant must surrender the premises to the landlord on expiration of the lease term. A tenant who holds over without the landlord's consent is a tenant at sufferance (*Colyear v Tobriner* (1936) 7 C2d 735, 742, 62 P2d 741; *Moon v Marker* (1938) 26 CA2d 33, 37, 78 P2d 460). When the tenant holds over without permission, the landlord may bring an unlawful detainer action (see chaps 9-13) without serving a termination notice (see chap 8) or taking any other action to terminate the tenancy. CCP §1161(1); *Lee Chuck v Quan Wo Chong & Co.* (1891) 91 C 593, 28 P 45; *Ryland v Appelbaum* (1924) 70 CA 268, 233 P 356.

If the tenant holds over after expiration of the term and the landlord accepts rent from the tenant, it is presumed that they have renewed the rental on the same terms and for the same length of time (not to exceed 1 month, if rent is payable monthly, or in any case 1 year) as under the original lease. CC §1945. A hiring of real property for an unspecified term is legally construed as being renewed on the same terms at the end of the term implied by law. CC §§1946, 1946.1.

Thus, the duration of a tenancy implied from a holding over is determined by the rental period. *Skaggs v Elkus* (1872) 45 C 154; *Blumenberg v Myres* (1867) 32 C 93. For example, if the rent was payable monthly under the lease, the new tenancy implied from acceptance of rent is from month to month (*Renner v Huntington-Hawthorne Oil & Gas Co.* (1952) 39 C2d 93, 244 P2d 895), or a renewal for 1 month (*Kaye v M'Divani* (1935) 6 CA2d 132, 44 P2d 371). But see *The City v Hart* (1985) 175 CA3d 92, 220 CR 349 (CC §1945 implies landlord's consent to new tenancy only when landlord accepts rent *after* expiration of term; landlord's acceptance *before* expiration of term, of rent that covered periods both before and after expiration, did not create new tenancy when landlord had claim against funds for other payments due under lease and had told tenant lease would not be extended).

When the landlord refuses to renew or accept rent during a holdover period, there is no presumption of a renewal under CC §1945. *Swithenbank v Wood* (1929) 99 CA 341, 278 P 496. A mere holding over, without acceptance of rent or other conduct of the landlord from which acceptance can be inferred, does not renew the tenancy. *Canning v Fibush* (1888) 77 C 196, 19 P 376.

If the lease contains an express renewal provision, that provision controls and the CC §1945 presumption does not apply. *Vavuris v Pinelli* (1957) 147 CA2d 390, 305 P2d 149; *Hull v Laugharn* (1934) 3 CA2d 310, 39 P2d 478. For discussion of automatic renewal provisions, see §3.61.

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VII. CHANGING TERMS OF TENANCY

A. Periodic Tenancy

§3.65 1. 30-day Notice of Change in Terms

Methods of modifying the terms of a periodic tenancy are governed by statute. *Stoppelkamp v Mangeot* (1871) 42 C 316. Under CC §827(a), the landlord may change the terms of a periodic tenancy by giving notice in writing of the change to the tenant, to take effect at the end of a period at least as long as the term of the tenancy itself. In most situations for a month-to-month tenancy, the notice must take effect "at the expiration of not less than 30 days," but the lease or rental agreement may provide that notice changing the terms of the tenancy may be given not less than 7 days before the expiration of the term, to take effect on expiration of the term. If a state or federal regulation, or a contract, provides for a longer period of notice of a rent increase, however, the notice must be served according to the longer period. CC §827(c).

The method of serving a 30-day notice changing the terms of a tenancy varies, depending on the exact nature of the notice. Under CC §827(b)(1)-(2), the notice of a rent increase (of 10 percent or less) for a residential tenancy may be given by either of the following:

- Personal delivery to the tenant; or
- First-class or express mail under CCP §1013.

Mailing the notice under §1013 requires an extension of the notice period by adding on a prescribed number of days depending on the method of mailing (*e.g.,* express mail delivery requires adding on 2 court days to the notice period under §1013(c)). (See Warning in §3.65A.) The same service methods apply to notices of residential rent increases over 10 percent, but the notice period is 60 days instead of 30 days. See §3.65A.

Notice of all other changes in terms of a tenancy requiring a 30-day notice must be given in the manner specified in CCP §1162 (see §§8.62-8.65). CC §827(a). (Note, however, that a 30-day or 60-day notice terminating a month-to-month tenancy may be served either as provided in CCP §1162, or by certified or registered mail as provided in CC §§1946 and 1946.1. See §§8.69, 8.74.)

WARNING: A landlord may not demand that a tenant pay rent or security deposit payments in cash unless the tenant has previously attempted to pay the landlord with a check drawn on insufficient funds or the tenant has instructed the drawee to stop payment on a check, draft, or order for the payment of money. Even then, the landlord may only demand a cash rental payment or security deposit payment for 3 months following the tenant's attempt to pay with a check on insufficient funds or instruction to stop payment on the check. CC §1947.3.

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§3.65A 2. 60-day Notice of Residential Rent Increase Over 10 Percent

A landlord must give a 60-day notice of a rent increase for a residential tenancy if the increase is greater than 10 percent of the rent charged to the tenant during the 12 months preceding the increase. CC §827(b)(3). The legislature's uncodified declaration of intent states that the 60-day notice is "not intended to constitute rent control, nor is it a statement of public policy regarding acceptable or unacceptable levels of rent increases," but the longer notice period was necessary because of the "tight rental market conditions" in some communities. Stats 2000, ch 680, §1.

A former city ordinance requiring 60 days' notice of a rent increase was held preempted by CC §827. *Tri County Apartment Ass'n v City of Mountain View* (1987) 196 CA3d 1283, 242 CR 438. But see *Roble Vista Assocs. v Bacon* (2002) 97 CA4th 335, 118 CR2d 295, in which a Palo Alto ordinance that required residential landlords to offer a 1-year lease to tenants was held preempted by CC §827 by the trial court but reversed on appeal. The court of appeal held that no state law preempted the ordinance because it addressed the minimum duration of a lease and not the amount of notice that must be given to terminate a tenancy.

Apparently because of difficulties in applying the 60-day notice requirement to landlords providing rental housing under the federal Section 8 program, this requirement does not apply to a rent increase caused by a change in a tenant's income or family composition as determined by a recertification required by statute or regulation. CC §827(b)(3).

A 60-day notice of a rent increase of greater than 10 percent for a residential tenancy under CC §827(b)(1) and (3) may be given by either of the following:

- Personal delivery to the tenant; or
- First-class or express mail under CCP §1013.

Mailing the notice under §1013 requires an extension of the notice period by adding on a prescribed number of days depending on the method and place of mailing (*e.g.,* regular mail delivery to a California address requires adding on 5 calendar days to the notice period under §1013(a)). See §8.29 on additional §1013(a) allowances.

WARNING: This seemingly innocuous mailing alternative is, in fact, a trap for unsuspecting landlords. First, a notice of rent increase cannot be served by the method of post and mail. Second, under CCP §1013, for the notice to be valid, it must bear a notation of the date and place of mailing or be accompanied by an unsigned copy of an affidavit or certificate of mailing.

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§3.65B 3. Effect of Notice

When served on the tenant, the notice creates and establishes the changed terms as part of the lease if the tenant continues to occupy the premises after the notice takes effect. CC §827(a). A modification raising the rent may be waived by a subsequent agreement for lower rent that is executed by payment of the lower rent and its acceptance by the landlord. *Alden v Mayfield* (1912) 164 C 6, 127 P 45. Depending on the nature of the lease and the effect of the modification, the modification itself may need to be in writing. See CC §§1697 (modification of oral contracts), 1698 (modification of written contracts); *Grant v Aerodraulics Co.* (1949) 91 CA2d 68, 204 P2d 683.

WARNING: In rent-controlled jurisdictions, landlords should be cautious about exercising their right to modify the lease terms under CC §827, because if a tenant vacates after receiving such a notice, the vacancy decontrol or total exemption provisions of the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535) may not apply. See §7.25.

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§3.66 B. Fixed-Term Tenancy

When a tenancy is for a fixed term, the rent usually cannot be raised, and other conditions of the lease cannot be modified, by giving notice under CC §827 (see §§3.65-3.65B). *Colyear v Tobriner* (1936) 7 C2d 735, 62 P2d 741; *Canning v Fibush* (1888) 77 C 196, 19 P 376. Some leases allow the landlord to raise the rent if the tenant enters into an unapproved sublease.

A tenant under a lease for a fixed term who holds over after expiration of the term is not liable under CC §827 for increased rent, but only for the reasonable rental value of the premises as a tenant at sufferance. *Colyear v Tobriner, supra*. Some lease provisions predetermine the reasonable rental value of the premises if the tenant holds over after expiration of the lease term. Others provide that a holdover after expiration is, in effect, a periodic month-to-month tenancy, in which event a rent increase may be achieved by giving notice described in §§3.65-3.65A.

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§3.66A C. Terminating Government Rent Subsidy Contracts in Rent Control Jurisdictions

The Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535) provides for additional notice and protections for tenants living in subsidized housing when the owner of the housing elects to terminate its contract with the governmental entity. In 1999, the legislature added CC §1954.535 to provide that tenants must be given 90 days' notice of the effective date of the termination. In that event, the tenant is not required to pay more than the tenant's share of the rent, as calculated under the contract or recorded agreement with the government entity that is being terminated, for 90 days after receipt of the notice. The legislature also added other restrictions on future rents that may be charged by landlords in rent control jurisdictions who terminate such contracts. These are discussed in §§7.25-7.28, 7.53-7.79.

In *Apartment Ass'n, Inc. v City of Los Angeles* (2006) 136 CA4th 119, 38 CR3d 575, the court held that CC §1954.535 preempts a local ordinance that prohibited a landlord from charging the tenant more than the tenant's portion of the rent under the terminated Section 8 contract with the housing authority.

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§3.66B D. Rent Increases Under Government Subsidy Contracts

Many government programs provide financial assistance to landlords and tenants. For tenants, most programs require that a tenant's rent be limited to some percentage of the tenant's gross income; therefore, tenants must qualify to participate in such programs. The Section 8 program (see §1.36), for example, requires that landlords enter into contracts with the local housing authority, which then pays a portion of the contract rent to the landlord and the tenant pays the balance of the rent. Other programs result in rents being limited unless the government entity approves a rent increase. In all programs, there is typically a procedure that a landlord must follow to secure an increase in rents; some local jurisdictions control rent increases in such programs that are state-run. Landlords can therefore find it difficult to deal with the agencies to obtain increases in the rental ceilings and choose a proper legal remedy if the application for a rent increase is denied. In 3*00 DeHaro St. Invs. v Department of Hous. & Community Dev.* (2008) 161 CA4th 1240, 75 CR3d 98, a property owner with a contract with the California Department of Housing & Community Development (HCD) had rehabilitated the property with public funds and then rented to low-income tenants, as contracted. The owner later sought to have rents increased and followed the procedures set forth in HCD regulations but, without a hearing, HCD denied the owner's application. The owner sued HCD for damages for breach of contract and for declaratory relief. The trial court dismissed the action on the basis that the owner's sole remedy was administrative mandamus under CCP §1094.5. The court of appeal reversed and held that because there had been no hearing at HCD, and the regulations did not provide for a hearing of any kind, mandamus was not the appropriate remedy and the owner could pursue declaratory relief and relief for breach of its contract.

On special considerations governing evictions from government-assisted housing, see California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993).

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VIII. LANDLORD LIABILITY FOR PERSONAL INJURY AND PROPERTY DAMAGE

A. Liability to Tenant

§3.67 1. Negligent Failure to Correct Defects

Under CC §1714, the general duty-of-care standard, everyone is liable for an injury to another caused by his or her want of ordinary skill or care in the management of his or her property. Despite this general rule, California courts had long held that a landlord was not liable to the tenant for injuries caused by the defective condition of the leased premises (*Priver v Young* (1923) 62 CA 405, 216 P 966), except in case of fraudulent concealment of the defect (*Shotwell v Bloom* (1943) 60 CA2d 303, 140 P2d 728); existence of an express covenant to repair (*Singer v Eastern Columbia, Inc.* (1945) 72 CA2d 402, 164 P2d 531); or existence of a statutory duty to repair (*Gustin v Williams* (1967) 255 CA2d Supp 929, 62 CR 838).

In *Rowland v Christian* (1968) 69 C2d 108, 70 CR 97, the California Supreme Court broke with that rule and applied CC §1714 to impose liability on possessors of land for injuries incurred on the premises. Although this case was a suit by a guest against a tenant for injuries incurred on the premises, the *Rowland* rule has been applied in subsequent court of appeal decisions to hold landlords liable under CC §1714 for injuries caused to tenants by defective conditions on the premises. *Brennan v Cockrell Invs., Inc.* (1973) 35 CA3d 796, 111 CR 122 (defective railing); *Evans v Thomason* (1977) 72 CA3d 978, 140 CR 525 (fire caused by defective plug); *Minoletti v Sabini* (1972) 27 CA3d 321, 103 CR 528 (defective repair of window). See *Barnes v Black* (1999) 71 CA4th 1473, 84 CR2d 634, holding defendant landowner had not negated finding of duty by proving that injury to tenant occurred in public street at foot of steep driveway on landowner's property.

In *Chapman v Silber* (2001) 734 NYS2d 541, 760 NE2d 329, New York's highest court held that a tenant's child could recover for injuries caused by lead-based paint chips when the landlord was aware that the premises (due to its age) probably contained lead-based paint, that ingestion of chips from such paint posed a health hazard to young children, that young children resided on the premises, and that there had been complaints about chipping paint.

In *Brennan v Cockrell Invs., Inc., supra,* the court noted that the landlord's possession and degree of control over the premises are significant factors to be weighed in determining whether the landlord met the duty of care imposed by CC §1714, but held that no legitimate public interest would be served by maintaining a general immunity for landlords from the statutory standard of care. A landlord must act toward a tenant as a reasonable person, taking into account all the circumstances, including the likelihood of injury, the probable severity of injury, the burden of reducing or avoiding the risk, and the degree of control over the risk-creating defect. 35 CA3d at 800.

Landlords' attorneys should argue that inspections can be made only in accordance with rules governing landlords' entry (see §3.3), and that entry solely for purposes of inspection is not permitted when the tenant is in possession of the premises. CC §1954. In *Becker v IRM Corp.* (1985) 38 C3d 454, 213 CR 213, the supreme court held that a landlord has a duty to inspect the rental premises to determine whether they are safe and may be held liable to the tenant for injuries incurred from a defective condition whose existence would have been disclosed by a reasonable inspection. *Becker* was overruled in *Peterson v Superior Court* (1995) 10 C4th 1185, 43 CR2d 836, to the extent that *Becker* held that a landlord may be strictly liable to a tenant for a defective condition on the premises (see §3.70). The tenant may still proceed with a negligence action against the landlord and with strict liability claims against manufacturers, distributors, and retailers of defective products. See also *McCarthy v Martinson* (1996) 51 CA4th 632, 684, 59 CR2d 149, holding that the *Peterson* decision applies retroactively.

A landlord may incur liability for tenant injuries sustained on property over which the landlord openly and affirmatively exercises control but neither owns nor uses for commercial benefit. In *Alcaraz v Vece* (1997) 14 C4th 1149, 60 CR2d 448, the tenant was injured when he tripped over a broken water meter box located on a narrow, city-owned strip of land running between the sidewalk and the landlord's property line. Opposing the landlord's motion for summary judgment, the tenant alleged that the landlord maintained and controlled the strip of lawn on which the meter

box was located and that after the incident the landlord enclosed the entire lawn in front of the property, including the city-owned strip of land. The supreme court held that these allegations raised a triable issue of fact as to whether the landlord exercised control over the city's strip and thus had a duty to warn the tenant or to protect him from the hazard in question. However, in *Contreras v Anderson* (1997) 59 CA4th 188, 69 CR2d 69, the court affirmed a summary judgment in favor of the owner of a residence for injuries sustained by a passerby who fell on a slippery brick pathway between the curb and the sidewalk in front of the residence. The court found that, to predicate liability under *Alcaraz v Vece, supra,* the adjoining landowner would have to be seen as making a "dramatic assertion of a right" usually associated with ownership or possession, and that acts of "neighborly maintenance" of such property did not meet that standard and the "control" required by *Alcaraz v Vece*.

A landlord also may be liable in tort for a tenant's injuries caused by defective conditions on the premises that constitute a breach of the implied warranty of habitability (see discussion in §3.25). *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194. By analogy, a tenant may argue that a landlord is liable in negligence (on a derivative tort theory) for injuries caused by conditions that do not meet the tenantability standards of any housing statute, regulation, or code. See §§3.11-3.11D.

If plaintiff's damages derive solely from breach of contract, plaintiff may not recover damages for emotional distress arising solely from property damage or economic injury, as contrasted with personal injury. Stating the cause of action on a theory of negligence does not avoid this rule. *Butler-Rupp v Lourdeaux* (2005) 134 CA4th 1220, 36 CR3d 685. In contrast, CC §1942.4 (see §3.15A) permits an award of "actual damages" in actions to remedy habitability, and that term includes damages for emotional distress. *McNairy v C.K. Realty* (2007) 150 CA4th 1500, 59 CR3d 429.

NOTE: A landlord does not necessarily have a duty to prevent an injury on the premises caused by a tenant's negligent act. See *Pineda v Ennabe* (1998) 61 CA4th 1403, 72 CR2d 206 (unsupervised child fell out of screened, second-story apartment window while bouncing on bed placed under window by parent). (For additional discussion of a landlord's liability for acts of tenants, see §3.72.) Nor does a landlord have a duty to protect tenant children from dangerous conditions on an adjacent street. See *Brooks v Eugene Burger Mgmt. Corp.* (1989) 215 CA3d 1611, 264 CR 756.

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§3.67A 2. Failure to Maintain Common Areas

A landlord's duty to exercise due care for tenants' safety in common areas "includes within its scope adopting *reasonable precautions* to prevent young children from toppling out of windows in common areas of the building." *Amos v Alpha Prop. Mgmt.* (1999) 73 CA4th 895, 898, 87 CR2d 34. The court distinguished the holding in *Pineda v Ennabe* (1998) 61 CA4th 1403, 72 CR2d 206 (see §3.67), because in *Amos*, the window was in a common area and parental negligence was not an issue.

In *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602, the court held that an apartment tenant with a child who suffered from asthma and chronic allergies was not precluded from suing to abate a public nuisance created by the landlord's failure to limit secondhand smoke in outdoor common areas.

On additional rulings on liability for injuries in common areas and areas over which the owner has or exercises control, see *Alcaraz v Vece* (1997) 14 C4th 1149, 60 CR2d 448; *Barnes v Black* (1999) 71 CA4th 1473, 84 CR2d 634; *Brennan v Cockrell Invs., Inc.* (1973) 35 CA3d 796, 111 CR 122; all cited in §3.67. See also *Leslie G. v Perry & Assocs.* (1996) 43 CA4th 472, 50 CR2d 785; *Medina v Hillshore Partners* (1995) 40 CA4th 477, 46 CR2d 871; and other cases on common-area injuries caused by criminal acts, cited in §§3.68-3.68D.

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§3.68 3. Injuries Caused by Criminal Acts of Third Parties

Determining the liability of a property owner for a tenant's injuries resulting from criminal conduct by a third party if often difficult given the varied circumstances and conflicting public policies involved. The trend of supreme court decisions (see, *e.g., Castaneda v Olsher* (2007) 41 C4th 1205, 63 CR3d 99; *Delgado v Trax Bar & Grill* (2005) 36 C4th 224, 30 CR3d 145; *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 107 CR2d 617; *Sharon P. v Arman, Ltd.* (1999) 21 C4th 1181, 91 CR2d 35; *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 25 CR2d 137) has been to scrutinize the issues of duty and causation in the context of summary adjudication, treating these issues as questions of law, rather than fact, and to cut back on landlord liability for personal injuries. See, *e.g.,* Imre, *The Civil Side of Crime: The High Court's Changing Approach to Liability for Another's Criminal Acts*, 24 CEB Civ Litigation Rep 186 (Aug. 2002). Some courts, however, show a reluctance to have cases determined by summary judgment motions and find that there are triable issues of fact relating to causation of the plaintiff's injuries. See *Raven H. v Gamette* (2007) 157 CA4th 1017, 68 CR3d 897.

Some courts continue to recognize that even if an owner has no duty to provide security, it may still owe a duty, by having special knowledge or by virtue of a special relationship, to take other protective measures. See reported cases in §§3.68A-3.68C. In *Castaneda v Olsher* (2007) 41 C4th 1205, 1214, 63 CR3d 99, the supreme court adopted the description of the required risk analysis stated in *Vasquez v Residential Invs., Inc.* (2004) 118 CA4th 269, 280, 12 CR3d 846:

> The duty analysis… requires the court in each case (whether trial or appellate) to identify the specific action or actions the defendant had a duty to undertake. "Only after the scope of the duty under consideration is defined may a court meaningfully undertake the balancing analysis of the risks and burdens present in a given case to determine whether the specific obligations should or should not be imposed on the landlord."

On the narrow issue of property owner liability for allowing a nuisance caused by drug activity, the legislature has created numerous remedies, including abatement proceedings, disclosure requirements, and monetary penalties. See, *e.g.,* private right of action available to persons under the Narcotics Nuisance Abatement Act (Health & S C §§11570-11587), discussed in §4.44.

PRACTICE TIP: When considering a potential suit, an attorney must compare the facts to those in the numerous authorities on this subject, assess duty and causation issues carefully, and assist the client in deciding whether monetary damages or abatement is more important for the particular action.

The following sections focus on landlord liability in reported decisions on common law, personal injury actions.

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§3.68A a. Public Housing Projects

In *Zuniga v Housing Auth.* (1995) 41 CA4th 82, 48 CR2d 353, the plaintiffs' complaint for damages alleged that they were *tenants at defendants' public housing project,* that the project was plagued with drug dealers, that plaintiffs had asked defendants to protect them but defendants failed to do so, and that drug dealers retaliated by burning down plaintiffs' apartment, killing five members of plaintiffs' family. The trial court sustained a demurrer to the complaint, but the court of appeal reversed because the owner was aware of the problems and did not warn the plaintiffs. The decision in *Zuniga* was criticized in a later supreme court decision, *Zelig v County of Los Angeles* (2002) 27 C4th 1112, 119 CR2d 709, cited in §3.68D.

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§3.68B b. Privately Owned Apartment Buildings

The California Supreme Court addressed liability issues of landlords to their residential tenants in two important decisions: *Castaneda v Olsher* (2007) 41 C4th 1205, 63 CR3d 99, and *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 107 CR2d 617.

In *Castaneda,* the supreme court reversed the court of appeal and reinstated the trial court's ruling in a case in which a mobilehome park tenant was inadvertently injured by an altercation involving gang members who lived in the same park. The court affirmed summary judgment in favor of the park owners because facts known to the owners did not make a violent gang episode sufficiently foreseeable as to impose on them the duty to take measures to protect other tenants. Accordingly, the court held that the owners were not liable for renting to known gang members, for failing to evict known gang members, or for failing to hire security guards or install additional lighting. With regard to the issue of requiring landlords to screen tenants, the court stated (41 C4th at 1216):

> [W]e are not persuaded that imposing a duty on landlords to withhold rental units form those they believe to be gang members is a fair or workable solution to this problem, or one consistent with our state's public policy as a whole. Absent circumstances showing extraordinary foreseeability, we decline to recognize such a duty.

In addressing the issue of whether the owners were liable for failing to evict the gang members after they had begun to annoy residents, the court noted that undertaking an eviction cannot be considered to be a minimal burden, particularly if evictions are regulated by the Mobilehome Residency Law (CC §798.56) or local eviction control ordinances. The court ruled that the two prior incidents at the park involving the discharge of weapons (one where the perpetrator was unknown and the other involving a different set of occupants from the ones causing plaintiff's injuries) did not show that it was "highly foreseeable" that the gang member who injured the plaintiff would be involved in a violent gang confrontation and cause injury to the plaintiff.

In *Saelzler,* the plaintiff was assaulted on defendants' premises, an apartment complex, by unknown assailants after she attempted to deliver a package. The court upheld the trial court's grant of summary judgment because the plaintiff failed to show, as a triable issue of fact, that defendants' failure to provide either additional security guards or functioning, locked security gates actually caused her injuries. In analyzing the causation issue, the court rejected the plaintiff's expert testimony as speculative and stated that a general finding of the foreseeability of future injury or assault on the premises does not inevitably establish that the defendant's omission caused the plaintiff's injuries. "Actual causation is an entirely separate and independent element of the tort of negligence." 25 C4th at 778. For discussion of the causation issue in the context of a legal malpractice case arising from a premises liability action, see *Ambriz v Kelegian* (2007) 146 CA4th 1519, 53 CR3d 700 (concluding causation may be triable issue of material fact when circumstances show likelihood of foreseeability of injury).

Castaneda was distinguished in *Tan v Arnel Mgmt. Co.* (2009) 170 CA4th 1087, 88 CR3d 754. The Court of Appeal reversed the trial court, concluding that plaintiffs presented substantial evidence of prior similar incidents of a reasonably foreseeable risk of violent criminal assaults on the property, so as to impose on defendants a duty to provide relatively minimal security measures. The test is prior "similar" incidents, not prior "identical" incidents. 170 CA4th at 1100. Plaintiffs demonstrated three prior incidents of sudden, unprovoked, increasingly violent assaults by a stranger in the middle of the night, on people in ungated parking areas on the apartment complex's premises, causing great bodily injury. Because plaintiffs asked for only relatively minimal security measures—ones already taken by defendants in another portion of the property—the degree of foreseeability required was not especially high. Because the prior assaults were sufficiently similar to make the attack foreseeable and to place a duty of care on defendants, the trial court erred in ruling that defendants had no duty of care.

Saelzler was distinguished in *Raven H. v Gamette* (2007) 157 CA4th 1017, 68 CR3d 897. Plaintiff was raped in her apartment by a man who was not a tenant in the building. Plaintiff claimed that the rapist was able to enter the building because the landlord had knowingly failed to maintain the front door (in a high crime area), and that the rapist was able to enter her apartment because the landlord failed to provide security measures (which the landlord had provided to

other tenants) that allowed her windows to be left open safely on hot evenings. The trial court granted summary judgment for the landlord, ruling that the tenant had failed to provide sufficient evidence to *establish* that these failures *caused* the rape. The court of appeal reversed, holding that a plaintiff need show only that the landlord's failures were a "substantial factor" in causing the rape, and that she had presented sufficient evidence to permit a jury to rule in her favor.

Sufficient evidence raising a triable issue of fact was found to overturn summary judgment in favor of the landlord in *Madhani v Cooper* (2003) 106 CA4th 412, 130 CR2d 778. In *Madhani*, the injured tenant could identify the perpetrator causing the plaintiff's injuries and there was evidence that the injured party had complained about the conditions or prior conduct. The court concluded that the landlord had a duty to protect the tenant from the aggressive tenant and that given the facts "it is up to the jury at trial, not the court on summary judgment," to decide whether it is reasonably probable that installing a security camera or removing the aggressive tenant from the building or other feasible remedies could have prevented the other tenant's injuries. 106 CA4th at 418.

Similarly, in *Vasquez v Residential Invs., Inc.* (2004) 118 CA4th 269, 12 CR3d 846, quoted with approval by the supreme court in *Castaneda,* the landlord, after notice, failed to replace a broken glass pane in the door to tenant's apartment. The tenant covered the space with a plywood board, which a jealous boyfriend broke to achieve entry and murder his girlfriend. The court reversed a summary judgment for the landlord, holding that the landlord had a duty to replace the pane, because the burden of doing so was minimal compared to the foreseeable danger of entry by criminals. Because this risk was foreseeable, the murder was not a "superseding cause" of the death, although the jury might apportion the bulk of the responsibility to the murderer. See also *Barber v Chang* (2007) 151 CA4th 1456, 60 CR3d 760 (summary judgment not appropriate when aggressive tenant had exhibited prior similar threatening conduct and landlord did not undertake minimally burdensome measures to address known threat).

In *Medina v Hillshore Partners* (1995) 40 CA4th 477, 46 CR2d 871, the court held that the owner of an apartment complex had no duty to protect *members of the public using adjacent public streets* from gang members who congregated at the complex, even though the owner had notice of the gang activities. See also *Rosenbaum v Security Pac. Corp.* (1996) 43 CA4th 1084, 50 CR2d 917.

In *Leslie G. v Perry & Assocs.* (1996) 43 CA4th 472, 50 CR2d 785, a tenant was raped in a parking garage under the apartment building. The rapist was never caught. The tenant sued the landlord for negligence, claiming that he had failed to repair a broken security gate. The landlord moved for summary judgment, and in response the tenant submitted the deposition testimony of a crimes expert who had opined that the rapist was attracted to the garage by the broken gate. The trial court granted the motion, and the court of appeal affirmed. The court held that, even assuming that the landlord had a *duty* to fix the gate, the tenant had failed to raise a triable issue of fact on the element of *causation*, as the rapist might have entered the garage by some means other than through the broken gate (*e.g.,* through another door, or by following a tenant through the gate). The court also stated that when there is evidence that the crime could have occurred "even in the absence of the landlord's negligence," causation cannot be proved by an expert's opinion based on speculation, conjecture, and inferences. The court noted that remedies such as "withholding rent" are available to tenants whose landlords fail to perform contractual duties to protect against crime.

In *Pamela W. v Millsom* (1994) 25 CA4th 950, 30 CR2d 690, the court relied on *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 25 CR2d 137 (see §3.68C), in rejecting a residential tenant's lawsuit against her landlord for negligence, breach of the implied warranty of habitability, and nuisance after the tenant was raped by a man who had been stalking her. The court held that the crime was not foreseeable because, even though the complex was in a "high crime area," the tenant presented no evidence of prior assaults in the complex.

Earlier cases in which courts upheld tort claims for failure to provide security or take other action in residential buildings include *Penner v Falk* (1984) 153 CA3d 858, 200 CR 661 (upheld cause of action for negligence when landlord knew of previous crimes on premises, but failed to take corrective measures in response to tenant's complaints; denied cause of action for breach of warranty of habitability, because no allegation of uninhabitability or housing code violations); *Kwaitkowski v Superior Trading Co.* (1981) 123 CA3d 324, 176 CR 494 (landlord who knew of similar incidents in common hallway but failed to repair defective door lock liable in tort to raped tenant); *O'Hara v Western Seven Trees Corp.* (1977) 75 CA3d 798, 142 CR 487 (tort cause of action upheld when landlord knew other tenants had been raped and falsely told plaintiff premises were patrolled). See also *Rosales v Stewart* (1980) 113 CA3d 130, 169 CR 660; *Uccello v Laudenslayer* (1975) 44 CA3d 504, 118 CR 741.

In the following cases, however, the courts rejected claims based on failure to provide security: *Riley v Marcus*

(1981) 125 CA3d 103, 177 CR 827 (complaint that failed to allege prior violent crimes on premises insufficient to state cause of action); *7735 Hollywood Blvd. Venture v Superior Court* (1981) 116 CA3d 901, 172 CR 528 (tenant, raped by intruder, failed to state cause of action by alleging merely that landlord knew of crime in area and failed to replace burned-out light bulb); *Totten v More Oakland Residential Hous., Inc.* (1976) 63 CA3d 538, 134 CR 29 (allegation that landlord knew of recent violent crime in neighborhood insufficient to sustain cause of action for plaintiff's injuries caused by two gun-wielding strangers).

Generally, a landlord has no duty to warn a prospective tenant of the presence of a vicious dog in the neighborhood. *Wylie v Gresch* (1987) 191 CA3d 412, 236 CR 552. Cases have consistently refused to impose liability on landlords to protect against dangerous conditions off the premises or dangerous persons or animals over which the landlord has no control, or that come onto the property in a location or manner over which the owner has no control. 191 CA3d at 419. See also *Mata v Mata* (2003) 105 CA4th 1121, 130 CR2d 141, cited in §3.68C. But if the landlord knows that a tenant harbors a vicious dog in the landlord's building, the landlord must order the tenant to get rid of the dog or, if that fails, must evict the tenant. *Donchin v Guerrero* (1995) 34 CA4th 1832, 41 CR2d 192.

For further discussion of landlord liability and a jury instruction addressing the landlord's duty (CACI 1006), see §§3.68C, 13.33D.

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§3.68C c. Privately Owned Commercial Buildings

In the context of a commercial landlord's responsibility to take security precautions on behalf of tenants (and their employees and guests), the California Supreme Court has held that the issues of the landlord's duty and the foreseeability of harm are questions of law to be determined by the court. *Sharon P. v Arman, Ltd.* (1999) 21 C4th 1181, 91 CR2d 35; *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 25 CR2d 137. See also *Kentucky Fried Chicken, Inc. v Superior Court* (1997) 14 C4th 814, 824, 59 CR2d 756. This means that many cases can be disposed of on a summary judgment motion before trial. See, *e.g., Ericson v Federal Express Corp.* (2008) 162 CA4th 1291, 77 CR3d 1.

In *Ann M.,* for example, an employee of one of the shopping center's tenants was raped in the tenant's shop. She sued the shopping center for negligence, claiming that the defendant breached its duty of care by failing to provide security guards to patrol the common areas (a provision not required by the lease with the tenant). There was no evidence that the landlord had knowledge of any previous, similar violent crimes on the premises. The court noted that "a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards" (6 C4th at 679), and held that, because there had not previously been a violent crime similar to the rape in the shopping center, the rape was not sufficiently foreseeable to impose such a duty on the landlord.

The *Ann M*. court suggested (in dicta) that the degree of foreseeability required might be relaxed if:

(1) The rape had occurred in a business that was next door to a substantially similar business that had experienced violent crime on the premises; or

(2) The rape had occurred in a business that is inherently more dangerous (*e.g.,* an all-night convenience store or parking garage). 6 C4th at 679 n7, 680 n8.

In a later decision, however, the supreme court rejected the view that covered or underground commercial parking garages are inherently dangerous, and denied a claim for negligence against a landlord brought by a woman who was raped in a subterranean garage, because there was no evidence of similar crimes in the area. See *Sharon P. v Arman, Ltd.* (1999) 21 C4th 1181, 91 CR2d 35. The facts in *Sharon P*. indicated that even if the landowner had undertaken security measures, they would not necessarily have deterred or prevented the crime. The only factor the court found compelling in a determination of landowner's liability is repeated instances of criminal conduct in the place where the plaintiff is injured. (For further discussion of a commercial landlord's duty to provide security, see California Tort Guide §§10.6-10.7 (3d ed Cal CEB 1996).)

The supreme court frequently reiterates that the foreseeability of the conduct of third parties is crucial in determining whether a landowner has a duty to employ security guards or implement physical protective measures. See, *e.g*., *Delgado v Trax Bar & Grill* (2005) 36 C4th 224, 30 CR3d 145; *Wiener v Southcoast Childcare Ctrs., Inc.* (2004) 32 C4th 1138, 12 CR3d 615.

Even if a proprietor has no duty under *Ann M.* and *Sharon P.* to provide a security guard or undertake expensive preventative measures, it may still owe a duty, by virtue of a special relationship, to take other measures to protect a customer, such as warning the customer. In *Delgado v Trax Bar & Grill, supra,* one patron followed another one (plaintiff) to the parking lot of a Trax restaurant. He then picked a fight and called to 12-15 friends lounging nearby to aid in beating and kicking plaintiff, stopping only after plaintiff had been knocked unconscious with a baseball bat. Trax employees did not warn the plaintiff, although they knew that the assault would likely happen. Plaintiff sued Trax and others; the only surviving cause of action against Trax at trial was for "premises liability." Although there was no evidence of prior criminal assaults on the premises or in the vicinity, the court ruled that the proprietor had a special relationship with the plaintiff because it served intoxicating drinks to its customers for consumption on the premises. Because the proprietor had actual notice of an impending assault against the plaintiff, it had a duty "to take reasonable, relatively simple, and minimally burdensome steps" to attempt to avert the danger. 36 C4th at 250. The supreme court stated that when the "burden of preventing future harm caused by third party criminal conduct is great or onerous," the injured party must demonstrate heightened foreseeability, evidenced by prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location. "By contrast, in cases in which

harm can be prevented by simple means or by imposing merely minimal burdens, only 'regular' reasonable foreseeability as opposed to heightened foreseeability is required." 36 C4th at 243 n24.

Following *Delgado,* the supreme court in *Morris v De La Torre* (2005) 36 C4th 260, 30 CR3d 173, ruled that a special relationship may extend not only to a proprietor's customers but also to its invitees, such as someone waiting in the parking lot for companions who are inside making purchases. The court noted that such a relationship may give rise to a duty to call 911 or take other similar measures that are appropriate and reasonable under the circumstances.

The negligent undertaking doctrine applied when an employee was assaulted by a customer in a store where the store owner had hired a security guard service. In reversing a summary judgment, the court held liability may be found if the security services are provided in a negligent manner and the injury was caused by the failure to exercise reasonable care in providing the services. *Mukthar v Latin Am. Sec. Serv.* (2006) 139 CA4th 284, 42 CR3d 563. The failure to demonstrate causation justifies summary judgment for the defendant. *Rinehart v Boys & Girls Club* (2005) 133 CA4th 419, 34 CR3d 677.

The duty of a landlord to prevent injuries to third parties is limited if a tenant is in exclusive possession of the property. The court in *Delgado v Trax Bar & Grill* (2005) 36 C4th 224, 250, 30 CR3d 145, stated that an injured third party plaintiff seeking to hold the proprietor of a business liable must show "defendant had actual notice" of the dangerous condition in question, and if so, then "its special-relationship-based duty included an obligation to take reasonable, relatively simple, and minimally burdensome steps to attempt to avert that danger." See §§3.71-3.72. Determining whether the landlord has the right to enter and inspect commercially leased premises while pursuing an unlawful detainer action against the tenant raises a different set of problems. In *Stone v Center Trust Retail Props., Inc.* (2008) 163 CA4th 608, 77 CR3d 556, for example, a slip and fall case resulting from the tenant's negligence in maintaining the premises, the court of appeal ruled that the date on which a landlord obtains a judgment for possession of the premises is the date on which the landlord becomes liable for the condition of the premises. For further discussion of *Stone*, see §§3.72, 13.33D.

NOTE: Although the court's stated desire to find a "bright line" for such liability is understandable, the court chose too early a time; a landlord is not legally entitled to physical possession of the leased premises until a writ of possession is issued and executed by the local sheriff or other officer enforcing such writs. This is especially problematic in residential buildings, where entry by a landlord is restricted by CC §1954.

In 2008, the California Judicial Council amended CACI 1006 to summarize these judicially created duties regarding the safety of rental property as follows:

- A landlord must inspect the premises before leasing and on renewal to ascertain and correct "unsafe conditions."
- After a tenant has taken possession, the landlord must use reasonable care to correct an unsafe condition in an area under the landlord's control if the landlord knows or reasonably should have known about it.
- After a tenant has taken possession, the landlord must use reasonable care to correct an unsafe condition in an area under the tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.

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§3.68D d. Public Buildings

The California Supreme Court further limited landowner liability when the landowner is a public entity. In *Zelig v County of Los Angeles* (2002) 27 C4th 1112, 119 CR2d 709, the court held that Los Angeles County had no liability for injuries suffered as a result of a criminal homicide in its courthouse and no duty to adopt security measures to protect the public from such conduct. The court based its analysis on the governmental immunity provisions of Govt C §815, narrowly construed Govt C §835, and made §835 the exclusive remedy for public entity liability for dangerous conditions of public property. As part of its discussion, the court criticized and distinguished the decision in *Zuniga v Housing Auth.* (1995) 41 CA4th 82, 48 CR2d 353 (cited in §3.68A), which held a public housing authority liable for the deaths of tenants who had been victimized by gangs operating in the housing project on the basis that the authority had been aware of the problems and had failed to warn plaintiffs of the problems. For further discussion of *Zelig* and its effect on *Zuniga*, see Nellis, *Comment*, 24 CEB Civ LR 207 (Aug. 2002).

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§3.69 4. Exculpatory Clauses

A landlord may not disclaim liability for injury to persons or property caused by his or her negligent failure to correct defective conditions. Any clause that purports to excuse the landlord from the duty to exercise care in preventing personal injury or property damage is void as against public policy. CC §1953(a)(5). See §1.27.

In *Burnett v Chimney Sweep, LLC* (2004) 123 CA4th 1057, 20 CR3d 562, the court held that an exculpatory provision did not bar a commercial tenant's negligence lawsuit for damages caused by mold. The provision purported to cover property damage and personal injury, but did not expressly mention negligence, and therefore under settled law it did not shield the landlord from liability for "active" negligence as contrasted with "passive" negligence. Thus, if the landlord was actively negligent in refusing to remediate leaks, water intrusion, and mold, then it may be liable under the theory of "active negligence."

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§3.70 5. Strict Liability

In *Becker v IRM Corp.* (1985) 38 C3d 454, 213 CR 213, the California Supreme Court held that a landlord could be strictly liable for a tenant's injuries caused by a latent defect that existed when the unit was rented to the tenant. *Becker* was overruled in *Peterson v Superior Court* (1995) 10 C4th 1185, 43 CR2d 836, to the extent that *Becker* held that a landlord may be strictly liable to a tenant for a defective condition on the premises. The tenant may still proceed with a negligence action against the landlord and with strict liability claims against manufacturers, distributors, and retailers of defective products. The *Peterson* decision applies retroactively. *McCarthy v Martinson* (1996) 51 CA4th 632, 634, 59 CR2d 149.

See Bernhardt, *Sticky Bathtubs and Slippery Rules*, 18 CEB Real Prop L Rep 278 (Oct. 1995); Babcock, Peterson v Superior Court: *What Happened to the Paramount Policy?*, Pac L J 373 (Winter 1997).

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§3.70A 6. Liability for Sexual Harassment

Under CC §51.9, a landlord or a property manager may be liable to a tenant in a civil action for damages for sexual harassment. What the tenant needs to prove was substantially liberalized by amendments to CC §51.9(a)(1) in 1999. The tenant must show that (1) there was a business or service relationship, which not only includes that of landlord and property manager, *but also an agent acting on behalf of the landlord or property manager;* (2) the defendant made sexual advances, solicitations, requests, or demands, or was guilty of physical, verbal, or visual conduct of a sexual nature or of a hostile nature based on gender; (3) the conduct was both unwelcome and either pervasive or severe; (4) there was an inability on the part of the tenant to easily terminate the relationship; and (5) the tenant suffered or will suffer economic loss, disadvantage, or personal injury that specifically includes emotional distress or the violation of a statutory or constitutional right. Sexual harassment under CC §51.9 was added to CC §52(b), which prescribes the remedies available to persons whose rights under CC §51.7 or §51.9 are violated. These remedies include civil penalties and compensatory and exemplary damages.

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B. Liability to Third Parties

§3.71 1. Liability for Negligence Regardless of Plaintiff's Status

Historically, a landlord's duty of care to third persons was dependent on the plaintiff's status as a trespasser, licensee, or invitee. *Oettinger v Stewart* (1944) 24 C2d 133, 148 P2d 19. A trespasser is a person who enters the premises without a privilege to do so; an invitee is a business visitor invited onto the premises for business dealings; a licensee is a person who is privileged to enter the premises with the possessor's consent (*e.g.,* a social guest). 24 C2d at 136. The general rule was that the landlord owed a duty of care to invitees, but not to trespassers or licensees. 24 C2d at 136.

In *Rowland v Christian* (1968) 69 C2d 108, 70 CR 97, the court held that a possessor of land has a duty of care and may be liable for injuries incurred by another, regardless of the plaintiff's status as a trespasser, invitee, or licensee. *Rowland* involved an action for damages brought against the tenant by a guest whose hand was injured when a cracked faucet broke. The supreme court held that the tenant, as a possessor of land, has a duty of care under CC §1714 regardless of the plaintiff's status as a licensee. Although the plaintiff's status as a trespasser, invitee, or licensee may be one factor in determining liability, the court held that it is not determinative. The CC §1714 duty of care has also been imposed on landlords who are not in possession of the premises. *Brennan v Cockrell Invs., Inc.* (1973) 35 CA3d 796, 111 CR 122; *Evans v Thomason* (1977) 72 CA3d 978, 140 CR 525; *Minoletti v Sabini* (1972) 27 CA3d 321, 103 CR 528.

In *Resolution Trust Corp. v Rossmoor Corp.* (1995) 34 CA4th 93, 40 CR2d 328, the court held that defendant landowners were not liable to an adjoining landowner for fuel leaks originating from a leased gas station on defendant's property. Defendants had not actively caused or contributed to the contamination. Although they had a right to enter the leased premises, they had no duty to the plaintiffs. Although the plaintiff's status is no longer determinative, it usually has some bearing on resolution of the issue of the landlord's liability. *Rowland v Christian, supra*. Thus, earlier case law concerning the plaintiff's status may be consulted for guidance in determining whether the landlord acted reasonably in exercising the duty of care imposed by CC §1714. Issues for which earlier case law might be relevant in a given case include:

(a) Which party had use and control of the premises (*Beeston v Lampasona* (1960) 182 CA2d 519, 6 CR 531; *Yazzolino v Jones* (1957) 153 CA2d 626, 315 P2d 107);

(b) Whether any common areas were under the landlord's control (*Yazzolino v Jones, supra*);

(c) The nature and normal use of the premises (*Hayes v Richfield Oil Corp.* (1952) 38 C2d 375, 240 P2d 580);

(d) Whether use of the premises was public or private (*Hayes v Richfield Oil Corp., supra*);

(e) The parties' knowledge of defects on the premises (*Shotwell v Bloom* (1943) 60 CA2d 303, 140 P2d 728; *Dorswitt v Wilson* (1942) 51 CA2d 623, 125 P2d 626);

(f) The nature and use of fixtures installed on the property by the tenant (*Goodman v Harris* (1953) 40 C2d 254, 253 P2d 447);

(g) The extent of the third party's invitation onto the premises (*Johnston v De La Guerra Props., Inc.* (1946) 28 C2d 394, 170 P2d 5; *Donnell v California W. Sch. of Law* (1988) 200 CA3d 715, 246 CR 199; *Sockett v Gottlieb* (1960) 187 CA2d 760, 9 CR 831); and

(h) Whether the tenant's activities were subject to the landlord's control (*Mundt v Nowlin* (1941) 44 CA2d 414, 112 P2d 782).

Although the general standards of duty and causation continue to evolve (see supreme court cases discussed in §§3.68-3.68D), case law clearly imposes on owners and occupiers of land the duty of exercising reasonable care in maintaining the premises, and imposes liability regardless of the plaintiff's status. Avoiding liability may be especially difficult if the plaintiff is a child and is injured by someone whom the landowner knows to have criminal propensities. See *Romero v Superior Court* (2001) 89 CA4th 1068, 107 CR2d 801. Accordingly, landlords should maintain adequate insurance coverage for tort liability on the premises. See Sullivan, *Landlord Liability Insurance: Why an Old Lease May*

Need to Learn New Tricks, 26 Cal Real Prop J 22 (Vol 26 No 2, 2008).

PRACTICE TIP: Landlords' attorneys should advise their clients to include a provision in the rental agreement specifying that the landlord's liability insurance is carried for the landlord's benefit to avoid a claim for indemnification by the landlord for the tenant's tortious liability.

A landlord who sells his property is not liable to third parties injured after the sale, even if the injury was caused by the landlord's negligence before the sale — unless the landlord concealed the defect from the new owner. It would be unfair to hold the landlord liable in this situation because he had no right to go back onto the property and fix the defect or warn potential victims or to obtain insurance against liability for such lawsuits. *Lewis v Chevron U.S.A. Inc.* (2004) 119 CA4th 690, 14 CR3d 636.

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§3.72 2. Liability for Acts of Tenant

A landlord may be held liable for injuries to third parties caused by a tenant if the landlord knew of the tenant's dangerous propensities and rented the premises to the tenant anyway, or failed to terminate the tenancy or take other protective measures after acquiring such knowledge. See, *e.g*., *Barber v Chang* (2007) 151 CA4th 1456, 60 CR3d 760; *Madhani v Cooper* (2003) 106 CA4th 412, 130 CR2d 778, discussed in §3.68C. See also *Rosales v Stewart* (1980) 113 CA3d 130, 169 CR 660 (child killed by bullet fired from adjoining premises; sufficient cause of action against perpetrator's landlord for parents to allege that landlord knew of tenant's dangerous propensities before renewing lease); *Uccello v Laudenslayer* (1975) 44 CA3d 504, 118 CR 741 (minor social guest attacked by tenant's dog; landlord with actual knowledge of dog's vicious tendencies has duty to third persons to order tenant to remove dog from premises). See also *Portillo v Aiassa* (1994) 27 CA4th 1128, 32 CR2d 755 (commercial landlord's duty includes inspecting premises to discover dangerous guard dog kept on premises by tenant).

In *Sturgeon v Curnutt* (1994) 29 CA4th 301, 34 CR2d 498, the court held that a landlord was not liable to a tenant's guest for injuries she suffered from an accidental shooting by the drunken tenant, because the guest failed to show that the tenant had previously injured anyone because of alcohol or firearms or that he had previously handled guns unsafely while drunk.

The landlord has no duty to inspect the premises to discover dangerous conditions created by the tenant. See, *e.g., Pineda v Ennabe* (1998) 61 CA4th 1403, 72 CR2d 206 (unsupervised child fell out of screened, second-story apartment window while bouncing on bed placed under window by parent). To incur liability in these situations, the landlord must have actual knowledge of the dangerous condition, as well as a right to have the danger removed from the premises. *Uccello v Laudenslayer, supra.* In *Uccello,* the court noted that removing the dangerous condition does not impose an extensive burden on the landlord. The landlord can readily obtain insurance to protect against liability to third parties, or require that the tenant obtain such insurance before renting the premises. 44 CA3d at 514. Under some circumstances, a landlord may have a duty to inspect for a dangerous conditions. *Portillo v Aiassa*, *supra*.

Whether the landlord has notice of the dangerous condition is often crucial. In *Yuzon v Collins* (2004) 116 CA4th 149, 10 CR3d 18, for example, an invitee who was bitten by a tenant's pit bull dog sued the landlord for his injuries. The court upheld summary judgment for the landlord, finding no substantial evidence supporting an inference that the landlord knew of the dog's vicious propensities. But in *Donchin v Guerrero* (1995) 34 CA4th 1832, 41 CR2d 192, the plaintiff was attacked by the tenant's dogs four blocks from the leased premises, and the court held that there were triable issues of fact concerning (1) whether the landlord knew of the dogs' vicious propensities, and (2) whether the landlord had the ability to prevent the attacks. Some evidence indicated that the landlord knew of the dogs' vicious propensities. On the second question, the landlord argued that he had no duty to prevent attacks away from the property. The court rejected this argument, holding that the landlord could have prevented the attack by serving a 30-day notice on the tenant to get rid of the dogs or to vacate the premises.

The duty of a landlord to third parties when the landlord is in the process of evicting a tenant who has been negligent in maintaining the premises is more complicated. See, *e.g., Stone v Center Trust Retail Props., Inc.* (2008) 163 CA4th 608, 77 CR3d 556, in which the court ruled that a duty to inspect commercial premises may attach when the landlord obtains a judgment for possession. In the residential context, it is likely that no duty will attach for liability arising out of the condition of the leased premises unless and until a writ of possession has not only been issued but has also been executed by the proper authorities and the landlord has been physically restored to possession. Entry simply for inspection purposes is not permitted by CC §1954. Residential leases do not reserve the right to inspect as did the commercial lease in *Stone*; such a provision would violate §1954. Once the landlord has possession, the landlord may have a duty to inspect residential premises and make changes to ensure that the premises are safe and will not cause injury to third parties. See also CC §2929.3, which requires owners to maintain vacant properties obtained after a foreclosure sale. For further discussion of *Stone* and a jury instruction addressing the landlord's duty, see §§3.68C, 13.33D.

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IX. TENANT LIABILITY FOR PROPERTY DAMAGE AND PERSONAL INJURY

§3.73 A. Duty to Repair

A tenant has no general duty to correct defective conditions on the premises, although the lease or rental agreement can shift the duty to repair to the tenant. The tenant does have a duty to use ordinary care to preserve the premises in a safe condition, and to repair deterioration caused by lack of ordinary care. CC §§1928-1929; see *Glenn R. Sewell Sheet Metal, Inc. v Loverde* (1969) 70 C2d 666, 75 CR 889; *Lynn v DePue Warehouse Co.* (1962) 198 CA2d 742, 17 CR 841.

On termination of the tenancy, the tenant must return the premises to the landlord in the same condition as at the inception of the lease, allowing for normal wear and tear. *Haupt v La Brea Heating & Air Conditioning Co.* (1955) 133 CA2d Supp 784, 284 P2d 985. The estimated cost of repair is a proper method of measuring damages resulting from the tenant's breach of the covenant to restore, even if the lessor fails to make the necessary repairs. *Polster, Inc. v Swing* (1985) 164 CA3d 427, 210 CR 567 (instead of repairing premises after former tenant vacated, landlord accepted lower rent from new tenant because of premises' condition). The tenant's duty to use ordinary care to preserve the premises does not extend to areas over which the tenant has no control. *Rathbun Co. v Simmons* (1928) 90 CA 692, 266 P 369.

The tenant has no right to reimbursement for any repairs or improvements made without the landlord's consent (*Whipple v Haberle* (1963) 223 CA2d 477, 36 CR 9), except for the limited right to apply one month's rent to such repairs under the repair-and-deduct remedy set forth in CC §1942 (see §§3.12-3.15). A residential landlord is excused from the statutory duty to repair dilapidations on the premises (CC §§1941-1941.1) if the tenant is in substantial violation of one of several enumerated affirmative obligations, and the violation contributes substantially to the dilapidation or to the landlord's inability to repair it. CC §1941.2. The tenant obligations enumerated in CC §1941.2 are the following:

- keeping the part of the premises tenant occupies as clean and sanitary as its condition permits;
- disposing of all rubbish, garbage, and other waste in a clean and sanitary manner;
- properly operating all electrical, gas, and plumbing fixtures, and keeping them as clean and sanitary as their condition permits;
- refraining from willfully or wantonly destroying, defacing, damaging, impairing, or removing any part of the structure or facilities, and not permitting any person on the premises with the tenant's permission to perform any such acts; and
- occupying the premises as his or her abode using those portions designed for living, sleeping, cooking, and dining only for the purposes for which they were intended.

PRACTICE TIP: The landlord can use the tenant's breach of these duties to rebut the defense of breach of the implied warranty of habitability in an unlawful detainer action. See §§3.32-3.34.

To recover damages for breach of a covenant to repair, the landlord normally would be required to show the condition of the premises at the beginning and termination of the tenancy. When the premises are surrendered in a damaged condition, however, the landlord has proved a prima facie case, and the tenant must show that the damage was due to a cause not covered by the covenant. *Markowitz v Ikemoto* (1958) 159 CA2d 242, 323 P2d 513.

Under the usual covenant to repair, the tenant is not obligated to rebuild when part of the premises is destroyed through no fault of the tenant. See *ASP Props. Group v Fard* (2005) 133 CA4th 1257, 35 CR3d 343 (lease requiring tenant to maintain and repair roof may not reasonably be construed to require tenant to totally replace roof).

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§3.74 B. Injury to Third Parties

Historically, the California rule was that a tenant or other possessor of land owed a duty of ordinary care to an invitee, but was not liable for injuries to a trespasser or licensee except when caused by the tenant's willful or wanton conduct. See *Palmquist v Mercer* (1954) 43 C2d 92, 272 P2d 26. (On these categories of visitors to the premises, see §3.73.)

In *Rowland v Christian* (1968) 69 C2d 108, 70 CR 97, the California Supreme Court abrogated this rule and held that a tenant owes a duty under CC §1714 to maintain the property with ordinary care and skill in order to prevent injury to others, without regard to the plaintiff's status as a trespasser, invitee, or licensee. See §3.73. *Rowland* involved an action by a social guest of the tenant against the tenant for failing to warn the plaintiff of the dangerous condition of a cracked faucet handle. Thus, a tenant is clearly held to a duty under CC §1714 to exercise ordinary care to prevent injury to his or her guests. Under this rule, a tenant also owes a duty of care to a trespasser, although the plaintiff's status as a trespasser still might be a factor in determining the tenant's liability. See §3.73.

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§3.75 X. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Every lease and rental agreement includes an implied covenant of good faith and fair dealing that neither party will do anything that will have the effect of destroying or injuring the other's right to receive the benefits of the contract. *Carma Developers (Cal.), Inc. v Marathon Dev. Cal., Inc.* (1992) 2 C4th 342, 371, 6 CR2d 467; *Andrews v Mobile Aire Estates* (2005) 125 CA4th 578, 589, 22 CR3d 832.

In *Northridge Hosp. Found. v Pic 'N' Save No. 9, Inc.* (1986) 187 CA3d 1088, 1100, 232 CR 329, for example, the sublessee had an option to extend the lease, but he could not effectively exercise the option unless the sublessor exercised *his* option to extend his master lease with the owner. Citing *Kendall,* the court held that the sublease contained an implied covenant of good faith and fair dealing, which required the sublessor to exercise his option to renew the master lease.

To date, no published opinion has allowed an implied covenant of good faith to be used as a defense to eviction, although in other contexts (see, *e.g., Edmond's v MacDonald Group, Ltd.* (1985) 171 CA3d 598, 217 CR 375) the covenant has been allowed as the basis of an action for relief by the tenant against the landlord, just as many other causes of action are allowed against a landlord that are disallowed as eviction defenses. See also *Cordonier v Central Shopping Plaza Assocs.* (1978) 82 CA3d 991, 147 CR 558; *McWilliams v Holton* (1967) 248 CA2d 447, 451, 56 CR 574. In *John Hogan Enters. v Kellogg* (1986) 187 CA3d 589, 231 CR 711, the court applied the doctrine in favor of a commercial landlord who refused to consent to assignment of a lease that provided for rent as a percentage of gross sales because the assignee projected lower gross sale than the existing tenant. It should be noted that all the cases cited above involved commercial leases. See also California Eviction Defense Manual §19.20 (2d ed Cal CEB 1993).

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4

Counseling the Landlord

Nancy C. Lenvin

I. INTRODUCTION §4.1

II. RETAINER AGREEMENTS
- A. Written Fee Agreement §4.2
- B. Limited Scope Representation
  - 1. Applicable Law §4.2A
  - 2. Checklist: Landlord Fee Agreement §4.2B
- C. Disclosure Regarding Professional Liability Insurance §4.2C

III. SOLICITING AND CHOOSING TENANTS
- A. Advertising Vacant Units §4.3
- B. Identification of Tenant §4.3A
- C. Screening Applicants
  - 1. Purpose §4.4
  - 2. Written Rental Applications §4.5
    - a. Format of Application §4.6
    - b. Information Requested in Application §4.7
    - c. Checklist: Tenant Information §4.8
    - d. Credit Checks and Other Investigations §4.9
    - e. Form: Application to Rent (California Apartment Form 3.0-R Association) §4.10
  - 3. Screening Fees §4.11
  - 4. Verifying Application §4.12
  - 5. Responding to Inquiries §4.13
  - 6. Evaluating Application and Selecting Tenant
    - a. Antidiscrimination Requirements §4.14
    - b. Occupancy Limits §4.15
    - c. Minimum Income Standards; Verification of Income §4.15A
  - 7. Retaining Application §4.16

IV. MANDATORY DISCLOSURES RE ENVIRONMENTAL AND OTHER HAZARDS §4.16A
- A. Lead §4.16B
- B. Methamphetamine Contamination §4.16C
- C. Mold §4.16D
- D. Pest Control Disclosure Notice §4.16E

V. RENTAL AGREEMENT
- A. Advantages of Written Over Oral Agreement §4.17
- B. Use of Printed Rental Agreement Forms
  - 1. Advantages §4.18
  - 2. Disadvantages §4.19
- C. Drafting Considerations and Strategies
  - 1. Term Provisions: Periodic or Fixed-Term Tenancy
    - a. Distinctions §4.20
    - b. Anticipating Tenant's Failure to Vacate at End of Term §4.21
    - c. Effect of Rent Control §4.22
  - 2. Security Deposits
    - a. Characterization §4.23
    - b. Amount of Security Deposit §4.24
    - c. Interest on Security Deposit §4.25
    - d. Limits on Residential Landlord's Use of Security Deposits §4.26
    - e. Replenishment and Increase of Deposit During Tenancy §4.27
    - f. Return of Security Deposit §4.28
      - (1) Residential Tenancies

(a) Notice of Right to Inspection §4.28A
(b) Return of Deposit §4.28B
(2) Commercial Tenancies; Return of Deposit §4.28C
(3) Drafting Tips §4.28D
g. Effect of Termination of Landlord's Interest in Premises §4.29
3. Key Money; Commercial Tenancies §4.29A
4. Rent Provisions
a. Manner of Receiving Rent
(1) Form of Payment
(a) Personal Check or Cash Equivalent §4.30
(b) "Labor-for-Rent" Arrangements §4.31
(2) Date of Payment §4.32
(3) Mode of Delivery §4.33
b. Establishing Rent for Vacant Units §4.34
c. User Fees §4.35
d. Rent Increases §4.36
5. Federally Required Lead Disclosures and Abatement §4.37
6. Restrictions on Use of Premises §4.38
7. Waiver of Tenant's Rights §4.39
8. Parties to Lease; Occupants; Guests §4.40
a. Assignment and Subletting §4.40A
b. Vacancy Decontrol and Roommates §4.40B
9. Options to Renew §4.41
10. Utility Charges and Ratio Utility Billing
a. Jurisdiction §4.41A
b. Water and Sewer Billing Methods §4.41B
c. Gas and Electricity Charges §4.41C
d. Other Charges §4.41D
e. Miscellaneous Regulatory Issues §4.41E
11. Other Provisions
a. Attorney Fees §4.42
b. Landlord's Right of Entry §4.43
c. Late Fees §4.43A
d. Insurance §4.43B

VI. COPING WITH DRUG-RELATED AND FIREARM ACTIVITY ON THE PREMISES §4.44

VII. PROPERTY MANAGEMENT §4.45
A. Resident Property Managers
1. Employee or Independent Contractor? §4.46
2. Compensation §4.47
3. Termination and Eviction §4.48
B. Landlord's Liability for Acts of Manager §4.49
C. Making Repairs; Code Compliance §4.50
D. Security Deposit Issues on Termination of Tenancy §4.51

VIII. PRESALE AND DEVELOPMENT ISSUES §4.52

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§4.1 I. INTRODUCTION

Although advising landlords used to be a somewhat simple task with a readily accessible body of law, it has become a highly technical area fraught with traps for the unwary. This is particularly true in jurisdictions that have adopted residential rent and eviction controls (see chap 7). Advising landlords has become further complicated by seismic concerns that have triggered legislation requiring retrofitting of buildings, insurance coverage issues, and environmental issues, including the requirement that the landlord disclose the presence of toxic mold and lead (see §§3.11B, 4.16A-4.16D, 4.37, 4.43B).

The practitioner must have a clear understanding of the landlord's level of sophistication and goals. Moreover, the attorney must be aware of all local ordinances and of changes (both adopted and proposed) in state and local law and able to translate management concerns and potential problems into workable solutions. Even very experienced property owners often are not aware of uncertainties and potential problems concerning their rental properties. The practitioner should thus be sensitive to the existence of other problems that the client may experience, and must raise those issues with the client, even if they are not part of the problem that caused the client to seek legal assistance.

Balancing advice with advocacy is often difficult because many owners of residential rental units and management companies are reluctant to incur legal costs for anything but evictions. This reluctance is usually caused by depressed markets and psychological barriers. Nonetheless, the exposure for attorneys who fail to raise these issues may be substantial; attorneys must devise strategies for transmitting the necessary information to the client or confirming that the client has declined this advice.

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II. RETAINER AGREEMENTS

§4.2 A. Written Fee Agreement

As in other matters of legal representation, attorneys representing landlords should use written retainer agreements. The scope of the employment should be described in detail, whether the client is about to purchase real property, seeks management advice, or wants to pursue an eviction.

Under Bus & P C §6148(a), when the client is charged a fee on other than a contingency basis, a written agreement is required if:

- The client is not a corporation; and
- The total expense to the client is reasonably foreseen to exceed $1000.

The written agreement must:

- Specify any basis for compensation including but not limited to the hourly rate, statutory fees, or flat fees and other standard rates, fees, and charges applicable to the case; and
- Describe the general nature of the legal service to be provided and the responsibilities of the attorney and client.

When the agreement is entered into, the attorney must provide the client with a copy of the agreement, signed by all the parties. Bus & P C §6148(a). Failure to comply with §6148 renders the agreement voidable at the client's option; if the contract is voided, the attorney is entitled to collect a reasonable fee, presumably based on the value of services rendered. Bus & P C §6148(c). Such written agreements are considered confidential for purposes of the attorney-client privilege. Bus & P C §6149.

The eventual scope of representation is often unclear at the beginning of the attorney's employment. Given the complexity of the area, sound practice calls for the attorney to cover many topics in the initial discussion with the client and then to write a confirming letter setting forth the agreed scope of the work to be performed and the areas in which the client has declined assistance.

For evictions, the attorney should advise the client that the process may either be relatively short and inexpensive or long and expensive and that this is often beyond the control of the attorney or the client. Many attorneys require larger retainers for unlawful detainers than for other cases, because the attorney may have to invest substantial time in the case before the client receives the first bill.

Some attorneys charge set fees for particular work, such as preparing a rental agreement or prosecuting an uncontested unlawful detainer case. Setting a fair flat fee is difficult because the attorney can easily underestimate the number of hours that will be required. If the attorney charges a set fee for an eviction that is likely to be uncontested, the retainer agreement should specify the precise scope of the work covered by the fee. For example, the agreement should specify whether the fee includes:

- Court appearances;
- Briefs necessary if the case becomes contested; and
- Collection of a judgment.

The agreement should identify all persons to be evicted, and it should explain the consequences of failing to name a party who might later assert a claim of possession. See §9.35. In addition, the attorney should specify the number of consultations, in person or by telephone, that are included in the fee, and their length.

The retainer agreement should also provide that representation of the landlord in the unlawful detainer action does not obligate the attorney to defend the landlord if the tenant brings an affirmative action against the landlord. Similarly, the agreement should not provide that the attorney must take all action necessary to regain possession for the landlord, because this might compel the attorney to complete a second proceeding, or to pursue appeals, writs, or other procedural options. Such additional actions should be undertaken only with the client's full understanding of, and agreement to, the time and expense involved.

For a compendium of fee agreement forms along with useful comments to those forms and discussion of relevant law and ethical considerations, see Fee Agreement Forms Manual (2d ed Cal CEB 2007), which contains a sample fee agreement for representation of a residential landlord in an unlawful detainer action. On representation agreements generally, see California Civil Procedure Before Trial, chap 3 (4th ed Cal CEB 2004).

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B. Limited Scope Representation

§4.2A 1. Applicable Law

Limited scope representation (sometimes called "unbundling") is a "relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks the attorney will perform for the person." Cal Rules of Ct 3.35(a). It is increasingly used in landlord-tenant and family law cases. In most limited scope representation, the attorney and the client agree on which specific tasks the attorney will perform, which will thus be within the scope of the representation, and they agree that the client represents himself or herself in all other aspects of the matter. Less commonly, attorney and client agree that the attorney will handle one or more discrete issues from start to finish, and the client will assume responsibility for the other issues.

NOTE: The applicable Cal Rules of Ct 3.35-3.37 and accompanying Judicial Council Forms MC-950, MC-955—MC-956, and MC-958 became effective January 1, 2007.

Unlawful detainer actions are a prime area for unbundled services, both for tenants and landlords. While tenants traditionally have been unable to afford full representation, many practitioners find that low income landlords also need limited scope assistance to successfully pursue their remedies. Due to the procedural complexities of landlord-tenant law, the benefits of paying for some professional assistance becomes more obvious to litigants, as it significantly increases the likelihood of success and can save a litigant both time and money. As a result, landlord-tenant assistance can be a profit center for attorneys who can efficiently prepare a case for presentation and effectively coach the litigant. Since the laws governing this area of practice are highly localized and complex, this is a prime area where a qualified attorney can provide valuable assistance to a self-representing litigant.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.2B 2. Checklist: Landlord Fee Agreement

§4.2B 2. Checklist: Landlord Fee Agreement

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Services that lend themselves to limited scope assistance *for the landlord* in the unlawful detainer context include:

- Identification of the elements of a claim and the evidence required to prove them.
- Preparing (or, at a minimum, reviewing) all pleadings and exhibits that will be filed in court, including the complaint, cover sheets, summons, request to set case for trial, and request for entry of default (or summary judgment motion). (A case can be delayed or thrown out for insufficient facts (or mistakes) in pleadings (see California Eviction Defense Manual §13.1 (2d ed Cal CEB 1993)), and this can be very costly in unlawful detainer actions.)
- Explaining state law that allows only parties to review court files and copy pleadings in the court file in unlawful detainer actions. Parties must always bring identification to court to examine the file. See CCP §1161.2.
- Determining whether pretrial discovery is required and whether counsel must assist in taking depositions or preparing interrogatories or demands for production of documents.
- Organizing the documentary evidence in a binder in the order of presentation, together with any foundational requirements.
- Scripting of the elements of the presentation.
- Scripting of cross-examination questions for the opposing side and other witnesses.
- Preparing an evidence binder for the judge, as well as a proposed judgment.
- Outlining procedural requirements and deadlines.
- Providing copies of statutes or other legal authorities, and/or drafting a trial brief.
- Attending or coaching in settlement conferences, including helping the client analyze the financial and other costs/benefits of any particular settlement option or term.
- Assisting with (by preparing or reviewing all court-filed papers in connection with) writs of execution and other postjudgment collection remedies.

Many attorneys use checklists to memorialize their discussions with the client and define the scope of the limited representation. The checklists are then attached to and incorporated into the fee agreement. If the parties make a change in the scope of the representation after entering into the initial agreement, the checklist should also be revised or replaced to document the changes that have been made. For a compilation of resources on limited scope representation, see the California Courts website at http://www.courtinfo.ca.gov/programs/equalaccess/ethiss.htm#limited.

WARNING: Because it is necessary to describe the scope of the attorney's services specifically in writing, counsel should not use a full-service fee agreement when providing limited scope representation. See sample forms and checklists in Fee Agreement Forms Manual, chap 9 (2d ed Cal CEB 2007). If it becomes necessary during the case for counsel to substitute in as counsel of record under a full-service agreement, the form Substitution of Attorney—Civil (Without Court Order) (Judicial Council Form MC-050; Mandatory) must be used.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.2C C. Disclosure Regarding Professional Liability Insurance

§4.2C C. Disclosure Regarding Professional Liability Insurance

An attorney must disclose in writing the absence of professional liability insurance directly to a client at the outset of the attorney-client relationship when it is reasonably foreseeable that the total amount of time to be used in representing the client will exceed 4 hours. An attorney who does not provide this notice must inform the client in writing within 30 days of the date that the attorney subsequently knows or should know that he or she no longer has professional liability insurance. Cal Rules of Prof Cond 3-410.

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III. SOLICITING AND CHOOSING TENANTS

§4.3 A. Advertising Vacant Units

The rental of residential housing is regulated by state and federal laws prohibiting discrimination at every stage of the rental process, including the landlord's efforts to obtain tenants through advertisements. The Fair Housing Act (42 USC §§3601-3631) prohibits any advertisement that indicates preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin. 42 USC §3604(c); *Holmgren v Little Village Community Reporter* (ND Ill 1971) 342 F Supp 512 (advertisements soliciting tenants who speak specified foreign languages violate 42 USC §3604(c) by indicating preference based on national origin). The California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) prohibits advertising that discriminates on the basis of race, color, religion, sex, sexual orientation, national origin, source of income, ancestry, marital status, familial status, or disability. Govt C §§12926(p), 12955(c). Under Govt C §12927(c)(2)(B), advertising for housing limited to persons of one sex to share living areas in a single dwelling unit is exempt from the prohibitions of Govt C §12955(c). For detailed discussion of state and federal laws prohibiting discrimination in housing, see chap 2.

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§4.3A B. Identification of Tenant

There are times when a landlord is asked to rent a unit to one person but to allow a different person to occupy the unit. For example, a parent may request that the landlord rent the unit to the parent but allow the parent's child to be the occupant, or an employer may ask a landlord to rent it a unit and allow its employee to be the sole occupant of that unit. These situations, while initially attractive from a financial perspective, must be analyzed very carefully, or unexpected difficulties may arise during or at the end of the tenancy.

Attempting to withhold tenancy status from the occupant, even if the occupant is not a rent payer, may create significant liabilities for the landlord. In *Spinks v Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 90 CR3d 453, the rental agreement was between an out-of-state employer and the landlord, and the occupant was in possession of the premises due to her employment. When the employment terminated, the occupant was instructed by her employer to vacate. When she failed to do so, the tenant-employer instructed the landlord to change the locks and remove the furniture, which the landlord did. The court held that a triable issue of fact existed as to whether the occupant was a third party beneficiary under the rental agreement between the landlord and tenant, which if found to exist would expose the landlord to claims for damages for breach of that contract, for breach of the implied covenant of good faith and fair dealing, as well as compensatory and punitive damages sounding in tort for disturbing the occupant's peaceable possession.

PRACTICE TIP: Landlords should be advised never to use self-help to evict an occupant. In addition, landlords should consider characterizing the status of such an occupant as a subtenant and provide for notice, and even perhaps for the payment of rent, in the event the tenant named in the rental agreement fails to pay rent. In jurisdictions with just cause eviction controls, removing such an occupant might be extremely difficult. Therefore, it should be made clear in the rental agreement that the occupant has an obligation to pay the reserved rent, thereby providing the landlord a remedy against the occupant, as well as against the tenant, in the event the rent is not paid or some other breach of the rental agreement occurs.

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C. Screening Applicants

§4.4 1. Purpose

The primary goal of the screening process is to find a desirable tenant, typically a stable occupant who is a good credit risk and will not damage the premises or disturb other tenants.

In depressed housing markets, landlords and management companies are often willing to accept less-than-qualified applicants to reduce their losses from vacant units. To assist the client in assessing the costs of a vacancy and of accepting an undesirable tenant, the attorney should be prepared to provide reasonable figures for the expense of evicting an undesirable tenant, particularly in jurisdictions with eviction controls where evictions for nuisance tenants are not only expensive and difficult, but often produce damage claims against a landlord if the suit for any reason is not successful. In tight markets, where rents are rising and vacancies are few, landlords should be cautioned not to appear biased in any way in their efforts to obtain the very best tenant for the highest rent.

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§4.5 2. Written Rental Applications

The most common method of obtaining necessary information regarding prospective tenants is to use a written application. A written application signed by the applicant must be obtained before a landlord can obtain a credit check. It also benefits the landlord by providing a record of representations made by the tenant to obtain the rental unit. If the unit will be occupied by more than one adult, the landlord should obtain a separate application from each occupant to verify his or her financial capability and character. Since any court records in unlawful detainer actions are not available for checking until 60 days after the filing of a complaint pursuant to CCP §1161.2 (and never available if the defendant has "prevailed" in the action within that 60-day period), a written application that asks about prior evictions and the reasons why an applicant is seeking to move becomes even more crucial.

DRAFTING TIP: The rental agreement should incorporate the application by reference, and it should provide that the landlord may terminate the agreement on discovering that the tenant has made a material misrepresentation in the application. See §1.69.

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§4.6 a. Format of Application

Preprinted rental application forms may be obtained from a variety of sources including local apartment owners associations (which are members of the statewide California Apartment Association) and stationery stores.

PRACTICE TIP: Clients should be cautioned to ensure that the tenant signs not only the application but also the actual rental agreement before moving into the unit. A rental agreement not signed by the tenant could be ineffective under the statute of frauds (if the lease is for a period of more than 1 year; see §4.17), or the tenancy could be found to be an unrestricted "oral tenancy."

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.7 b. Information Requested in Application

§4.7 b. Information Requested in Application

The information requested in a rental application should be tailored to meet the goals of the screening process, such as determining the applicant's ability to pay the rent, stability, responsibility, reputation, and character. In addition, the application should contain the applicant's express authorization for the landlord to:

- Contact all persons or firms named as references, former landlords, or employers; and
- Verify the contents of the application, including obtaining a credit report on the applicant.

Many landlord's attorneys urge their clients to obtain not only an express authorization, but also an express release of the landlord from any liability incurred in connection with the landlord's investigation of the applicant.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.8 c. Checklist: Tenant Information

§4.8 c. Checklist: Tenant Information

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A written rental application form should request the following information regarding the prospective tenant:

- Current employer (including address and telephone number), salary, and length of employment;
- Sources of income (other than salary);
- Current liabilities;
- Previous landlords (including addresses and telephone numbers), length of prior tenancies, and reasons for leaving;
- Credit references;
- Names and dates of birth of all persons who will occupy the premises;
- Names of relatives or others to contact in case of emergency;
- Authorization for the landlord to contact references and verify the contents of the application; and
- Signature of the applicant and date of application.

See residential rental application form in §4.10. Note that the landlord may not use a tenant's *source* of income as a basis for rejecting the tenant. See §§2.49, 4.14, 4.15A.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.9 d. Credit Checks and Other Investigations

§4.9 d. Credit Checks and Other Investigations

The Consumer Credit Reporting Agencies Act (CCRAA) (CC §§1785.1-1785.35) and the Investigative Consumer Reporting Agencies Act (ICRAA) (CC §§1786-1786.56) impose requirements on landlords who use consumer credit or investigative reports as a basis for accepting or rejecting tenants. The CCRAA governs reports with information on a tenant's creditworthiness and the ICRAA governs reports with information on a tenant's character.

Within 3 days of requesting an investigative consumer report, the ICRAA (CC §1786.16(a)(3), (b)(1)) requires the landlord to:

- Disclose to the applicant that an investigative consumer report will be prepared on the applicant's character, general reputation, personal characteristics, and mode of living;
- Provide the applicant with a written form on which the applicant may request a copy of the report; if requested, the copy must be sent to the applicant within 3 business days of receipt; and
- Provide the applicant with the name and address of the agency preparing the report and a summary of the provisions of CC §1786.22, which govern the applicant's right to inspect the agency's files that contain information about the applicant.

A court of appeal held that the ICRAA is unconstitutionally vague as applied to tenant screening reports containing unlawful detainer information because a reasonable person cannot determine whether such information "constitutes 'character' information governed by the ICRAA or 'creditworthiness' information governed by the CCRAA." See *Ortiz v Lyon Mgmt. Grp.* (2007) 157 CA4th 604, 611, 69 CR3d 66. Accordingly, a landlord who obtains a screening report containing unlawful detainer information for the purpose of assessing a rental application does not violate the ICRAA if the landlord does not comply with CC §1786.16(a)(3), (b)(1).

PRACTICE TIP: Because the scope of the ruling in *Ortiz* is unclear, it is more prudent to advise landlord clients to comply with the ICRAA when ordering investigative reports on applicants. The *Ortiz* decision has extensive analysis of the interplay between the CCRAA and the ICRAA and the legislative history of both Acts.

If the landlord rejects the applicant or the rent is increased based on an investigative report, CC §1786.40(a) requires the landlord to include the name and address of the investigative reporting agency in the notice of rejection or rent increase sent to the applicant or tenant.

No prior notice is required under the CCRAA to access an applicant's credit report. But if the applicant is rejected because of information in the credit report, disclosures are mandated under CC §1785.20(a). Along with the notice of rejection, the owner must immediately send to the applicant:

- the name, address, and telephone number of the credit reporting agency;
- a statement that the decision to reject the applicant was based wholly or partially on information in the credit report;
- a statement that the applicant has a right to obtain, within 60 days, a free copy of the credit report from the agency and a right to dispute the accuracy of the information.

PRACTICE TIP: A landlord intending to report a defaulting tenant to a credit reporting agency, however, must give notice to the tenant, prior to or within 30 days after the landlord transmits the negative credit information, by personal delivery or first class mail to the tenant's last known address. CC §1785.26(c). See §§1.29, 13.75. Prospective notice should also be included in the rental agreement. See §1.43.

Under the CCRAA, a credit reporting agency must adopt reasonable procedures to assure the accuracy of information contained in the credit reports and investigate all consumer disputes. CC §§1785.14-1785.16. See §5.25A. Landlords should promptly respond to inquiries from credit reporting agencies, because a failure to respond will result in the disputed item being removed from the report. Similar dispute resolution procedures exist under the ICRAA for investigative reporting agencies. See CC §§1786.10-1786.30.

NOTE: A consumer has the right to place a security freeze on his or her credit report that prevents the agency from releasing the report without the consumer's consent. See CC §§1785.11.2, 1785.11.6. There are numerous exceptions; *e.g.,* a freeze does not apply to public record data about the consumer collected by the agency.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.10 e. Form: Application to Rent (California Apartment Association Form 3.0-R)

§4.10 e. Form: Application to Rent (California Apartment Association Form 3.0-R)

APPLICATION TO RENT

❒Tenant
❒Guarantor

(all sections must be completed) **Individual applications required from each occupant 18 years of age or older.**

Last Name	First Name	Middle Name		Social Security Number
Other names used in the last 10 years		Work phone number ( )		Home phone number ( )
Date of birth	E-mail address			Mobile/Cell phone number ( )
Driver's license number	Expiration	State	Other ID	

1.	Present address		City	State Zip
	Date in	Date out	Owner/Agent Name	Owner/Agent Phone number
	Reason for moving			Current rent $ /Month
2.	Previous address		City	State Zip
	Date in	Date out	Owner/Agent Name	Owner/Agent Phone number
	Reason for moving			
3.	Next previous address		City	State Zip
	Date in	Date out	Owner/Agent Name	Owner/Agent Phone number
	Reason for moving			

Proposed occupants List all in addition to yourself	Name	Name
	Name	Name
	Name	Name

Will you have pets?	Describe	Will you have a waterbed?	Describe

I ❒ am ❒ am not a member of the Armed Forces (including the National Guard and Reserves)

A.	Present occupation or source of income		Employer name
	How long with this employer?	Supervisor's phone number ( )	Employer address
	Name of your supervisor		City, State, Zip
B.	Prior occupation		Employer name
	How long with this employer?	Supervisor's phone number ( )	Employer address
	Name of your supervisor		City, State, Zip

Current gross income $ Per	Check one ❒ Week ❒ Month ❒ Year	**Please list ALL of your financial obligations below.**

Name of your bank	**Branch or address**

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RECEIPT FOR TENANT SCREENING AND/OR CREDIT CHECKING FEES

On _____, Owner/Agent received $_____ from the undersigned, hereinafter called "Applicant,"
(Date)
who offers to rent from Owner/Agent the premises located at:

_____ **, Unit # (if applicable)** _____
(Street Address)

_____ **, CA** _____**.**
(City) *(Zip)*

Applicant authorizes verification of information supplied by Applicant via methods which may include, but are not limited to, tenant screening and credit checking.

California Apartment Association Approved Form
www.caanet.org
***Form 3.0-R** – Revised 1/07 - ©2007 – All Rights Reserved*
Page 1 of 2

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Print

Name of Creditor	Address	Phone Number	Monthly Pymt. Amt.
		( )	
		( )	
		( )	
		( )	
		( )	
		( )	

In case of emergency, notify:	Address: Street, City, State, Zip	Relationship	Phone
1.			
2.			

Personal References:	Address: Street, City, State, Zip	Length of Acquaintance	Occupation	Phone
1.				
2				

Automobile: Make: _____ Model: _____ Year: _____ License #: _____

Automobile: Make: _____ Model: _____ Year: _____ License #: _____

Other motor vehicles: _____

Have you ever filed for bankruptcy? _____ Have you ever been evicted or asked to move? _____

Have you ever been convicted of selling, distributing or manufacturing illegal drugs? _____

Applicant represents that all the above statements are true and correct and hereby authorizes verification of the above items including, but not limited to, the obtaining of a credit report and agrees to furnish additional credit references upon request. Applicant consents to allow Owner/ Agent to disclose tenancy information to previous or subsequent Owners/Agents.

Owner/Agent will require a payment of $_____ , which is to be used to screen Applicant with respect to credit history and other background information. The amount charged is itemized as follows:

1. Actual cost of credit report, unlawful detainer (eviction) search, and/or other screening reports $_____
2. Cost to obtain, process and verify screening information (may include staff time and other soft costs) $_____
3. Total fee charged (cannot exceed $30 per applicant, which may be adjusted annually with the CPI as of 1-1-98)$ _____

The undersigned is applying to rent the premises designated as:

Apt. No. _____ Located at _____

The rent for which is $ _____ per _____. Upon approval of this application, and execution of a rental agreement or lease, the applicant shall pay all sums due, including required security deposit of $_____, before occupancy.

_____ _____

Date *Applicant* **(signature required)**

CALIFORNIA APARTMENT ASSOCIATION CODE FOR EQUAL HOUSING OPPORTUNITY

The California Apartment Association supports the spirit and intent of all local, state and federal fair housing laws for all residents without regard to color, race, religion, sex, marital status, mental or physical disability, age, familial status, sexual orientation, or national origin.

The California Apartment Association reaffirms its belief that equal opportunity can best be accomplished through effective leadership, education, and the mutual cooperation of owners, managers, and the public.

Therefore, as members of the California Apartment Association, we agree to abide by the following provisions of this Code for Equal Housing Opportunity:

- We agree that in the rental, lease, sale, purchase, or exchange of real property, owners and their employees have the responsibility to offer housing accommodations to all persons on an equal basis.
- We agree to set and implement fair and reasonable rental housing rules and guidelines and will provide equal and consistent services throughout our residents' tenancy.
- We agree that we have no right or responsibility to volunteer information regarding the racial, creed, or ethnic composition of any neighborhood, and we do not engage in any behavior or action that would result in "steering."
- We agree not to print, display, or circulate any statement or advertisement that indicates any preference, limitations, or discrimination in the rental or sale of housing.

Unauthorized Reproduction of Blank Forms is Illegal.

Payment is to be used to screen "Applicant" with respect to credit history and other background information. The amount charged is itemized as follows:

1. Actual cost of credit report, unlawful detainer (eviction) search, and/or other screening reports $_____
2. Cost to obtain, process and verify screening information (may include staff time and other soft costs) $_____
3. Total fee charged (cannot exceed $30 per applicant, which may be adjusted annually with the CPI as of 1-1-98) $_____

_____ _____

Date *Applicant*

_____ _____

Date *Owner/Agent*

California Apartment Association Approved Form
www.caanet.org
***Form 3.0-R** – Revised 1/07 - ©2007 – All Rights Reserved*
Page 2 of 2

Unauthorized Reproduction of Blank Forms is Illegal.

Comment: Each adult occupant should complete a separate rental application.

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§4.11 3. Screening Fees

Under CC §1950.6(a), a landlord may charge an applicant for a residential rental a nonrefundable "screening fee" to cover the cost of obtaining information about the applicant, including personal reference checks, credit reports, screening reports, and other data. The screening fee is expressly excluded from the definition of an "advance fee" under Bus & P C §10026. CC §1950.6(j).

The amount of the screening fee is limited to the landlord's out-of-pocket costs of gathering the information, not to exceed $30 per applicant, and it may include the cost of the credit check and the reasonable value of administrative costs of the landlord or the landlord's agent. CC §1950.6(b). The $30 limit may be increased by the same percentage increase as that of the Consumer Price Index, beginning January 1, 1998. A landlord who knows or should have known that no rental unit is available may not charge a screening fee unless the applicant consents in writing. CC §1950.6(c). The landlord must provide the applicant with a receipt itemizing the expenditures and the time spent by the landlord in obtaining the information (CC §1950.6(d)) and, if requested, a copy of the credit report (CC §1950.6(f)). A landlord who does not perform a personal reference check or obtain a credit report must return any unused portion of the fee. CC §1950.6(e).

Before CC §1950.6 was enacted, tenants claimed that the application fee became part of their security deposits once they were accepted as tenants. Civil Code §1950.6 allows landlords to charge nonrefundable application fees without concern about claims that the fee is part of the security deposit, provided that all requirements of §1950.6 have been met. Fees not expressly sanctioned by §1950.6 are probably suspect. See amendments to definition of "security" in CC §1950.5(b), made under Stats 2002, ch 1061, §1, discussed in §4.23.

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§4.12 4. Verifying Application

The landlord should be aware that California's Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) prohibits the owner of a housing accommodation (as defined in the Act) from making or causing to be made any written or oral inquiry regarding the race, color, religion, sex (which includes pregnancy, childbirth, and gender identity and expression), sexual orientation, source of income, marital status, national origin, ancestry, familial status, or disability of any rental applicant. Govt C §§12926(p), 12955(b). Therefore, when verifying a rental application, the landlord must not solicit such information from any persons contacted.

In light of changes in credit reporting disclosure requirements (see §4.9), a landlord should keep good records on information obtained about prospective tenants, including actual reports from a credit reporting agency or an organization that provides information on unlawful detainer actions.

PRACTICE TIP: Landlords should be counseled to minimize the risk of liability (based on fair housing and application denial disclosure laws) by establishing written application criteria, forms, and procedures and follow them consistently with all applicants. Recommend keeping records for a period of four years after the acceptance of the first qualified applicant.

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§4.13 5. Responding to Inquiries

A landlord who is asked to provide a reference for a tenant or information about a tenant must be careful to provide accurate, truthful information.

A landlord who provides false information that causes another landlord to reject an applicant tenant, or that otherwise injures a prospective tenant, could be liable to the tenant for defamation. CC §46(5). When the information is given in response to a query from a prospective landlord, the communication is probably entitled to a qualified privilege (*i.e.,* the communication is actionable only if the landlord acted with malice). See CC §47(c). See also *Lesperance v North Am. Aviation, Inc.* (1963) 217 CA2d 336, 341, 31 CR 873, (communication from plaintiff's former employer entitled to qualified privilege when given in response to request from prospective employer).

If a former landlord misleadingly gives a good recommendation about a defaulting or problem tenant primarily to get rid of that tenant, under basic tort principles the landlord may be liable to the new landlord who relies on the information and is damaged. As under employment law, a landlord may refuse to give a reference if the landlord's policy is to provide neither good nor bad references and only to confirm that the tenant lived in the premises and the dates of occupancy.

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6. Evaluating Application and Selecting Tenant

§4.14 a. Antidiscrimination Requirements

When devising a method of evaluating rental applications and selecting a tenant, the landlord must be aware of the federal and state laws that prohibit discrimination in residential housing. These laws, discussed in detail in chap 2, are the following:

- Civil Rights Act of 1866 (42 USC §§1981-1982), which prohibits discrimination in housing on the basis of race (42 USC §1982; see §§2.41-2.47);
- Fair Housing Act (42 USC §§3601-3631), which prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin (42 USC §3604; see §§2.30-2.40); and
- California's Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), which prohibits discrimination on the basis of marital status, disability, gender identity and expression, sexual orientation, source of income, and ancestry, as well as on the bases enumerated in 42 USC §3604 (Govt C §§12926(p), 12955; Pen C §422.56; see §§2.49-2.56).

In addition, the Unruh Civil Rights Act (CC §51), which expressly prohibits discrimination on the basis of sex, gender identity and expression, pregnancy, childbirth, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation, prohibits all arbitrary discrimination, even when it is not based on one of the classifications listed in or incorporated into CC §51. See uncodified declarations of the legislature in Stats 2005, ch 420, §2; *In re Cox* (1970) 3 C3d 205, 90 CR 24. See also §§2.57-2.59. Persons protected under the Unruh Act include those who are perceived to have any particular characteristic of the listed classes in the Act or who associate with persons who have, or are perceived to have, any such characteristic. CC §51(e)(5).

On screening tenants using income information other than "source of income," see §4.15A.

NOTE: The City of Escondido, California passed an ordinance in 2006 that penalizes landlords for renting to undocumented immigrants. If a written complaint is filed with the City alleging an undocumented immigrant is living in a property, the landlord is notified in writing of the complaint. If the City verifies that the resident is not legal, then the landlord must correct the violation. Failure to correct the violation will result in the loss of the landlord's business license. The ordinance has been challenged in the courts. See chap 2.

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§4.15 b. Occupancy Limits

Practitioners should advise their landlord clients of the risks associated with setting limits on the number of tenants who can reside in the premises and the criteria used to make those determinations. Such limitations may be held to constitute discrimination against families with children in violation of the Fair Housing Act (42 USC §§3601, 3604(a)); HUD regulations (see 24 CFR §§100.50-100.90); the Unruh Civil Rights Act (CC §51), and many local ordinances. See, *e.g., Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 180 CR 496. In *Pfaff v HUD* (9th Cir 1996) 88 F3d 739, the court held that a reasonable numerical occupancy limit established by the landlord rebutted a *prima facie* case of discrimination. The court further held that HUD had acted arbitrarily and capriciously and ordered the administrative procedure dismissed. *Pfaff* may provide some comfort to landlords who establish reasonable occupancy limits, but the cost of asserting and proving reasonableness is probably prohibitive for most property owners.

Landlords should encourage and track efforts at the state and national level to have legislation passed that would establish "safe harbor" numerical occupancy standards. Such standards would prevent arguments that building code occupancy standards (which permit an unusually large number of persons in dwelling units) should be used to determine whether discrimination against families has occurred. The real estate industry is seeking the enactment of a reasonable occupancy standard, *i.e.,* two persons per bedroom, that would be presumed to comply with the fair housing laws. For further discussion of occupancy limits, see §2.24.

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§4.15A c. Minimum Income Standards; Verification of Income

The Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), which prohibits discrimination on the basis of a tenant's source of income (Govt C §12955; see §§2.49, 4.14), does not prohibit a landlord from establishing reasonable income standards (see §2.9). Minimum income standards were upheld in 1991 by the supreme court in *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 278 CR 614. Nor does the FEHA require a landlord to accept a tenant for whom the government will pay rent in the form of a subsidy directly to the landlord, such as a tenant with a Section 8 voucher (see §2.17). But if the landlord accepts a Section 8 tenant, the landlord must follow established guidelines for nondiscrimination in applying minimum income requirements for the tenancy. See §2.9A.

A landlord may verify a tenant's length of employment and the source and the amount of the tenant's income. The FEHA, however, requires the landlord to consider the combined income of each tenant applying for the unit together on the same basis as the landlord considers the aggregate income of married persons living together. Govt C §12955(n). See §2.9C.

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§4.16 7. Retaining Application

Landlords should be encouraged to retain the rental application for at least 10 years as part of their regular record keeping and to update the information. Such record keeping may assist in finding and serving a defaulting tenant. See generally Debt Collection Practice in California (2d ed Cal CEB 1999).

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.16A IV. MANDATORY DISCLOSURES RE ENVIRONMENTAL AND OTHER HAZARDS

§4.16A IV. MANDATORY DISCLOSURES RE ENVIRONMENTAL AND OTHER HAZARDS

Heightened awareness of problems that can arise from various substances has resulted in additional regulation of matters that must be disclosed to a tenant prior to the tenant signing a rental agreement and taking occupancy of a rental unit. Additionally, there are other community issues that also sometimes come to the forefront and require disclosure to tenants. See §§4.16B-4.16E. See also §1.29.

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§4.16B A. Lead

For all buildings that were built prior to 1978, the federal Environmental Protection Agency (EPA) requires that all owners of residential property that is to be rented to others disclose any known lead-based paint and related hazards. Additionally, each owner is required to provide to each tenant a copy of the EPA pamphlet "Protect Your Family From Lead in Your Home." The tenant is obliged to sign an acknowledgment of receipt of the pamphlet and the owner is required to keep a copy of that acknowledgment. See §§1.29, 1.77, 4.37 for more details on federal requirements.

Many localities, particularly those with many pre-1978 buildings (*e.g.*, San Francisco), have adopted similar rules about disclosures and have prepared booklets that must be given to tenants. These booklets often advise both owners and tenants to be extremely careful about making repairs to walls, windows, or doors that probably contain lead-based paint.

There is increasing litigation over damages caused to children by lead-based paint and frequent attempts to obtain statewide regulation governing contractors, building maintenance, and health issues related to lead-based paint. See, *e.g*., Health & S C §§105251-105257, which establish as crimes certain activities relating to lead-related construction courses, lead-related construction work or abatement, and lead hazard evaluation. Note that the definition of "untenantable" in CC §1941.1 includes the presence of lead hazards as described in Health & S C §§17920.3 or 17920.10.

PRACTICE TIP: Owners should check their insurance policies for coverage of claims for injuries sustained as a result of lead contamination, make sure that all employees are trained in how to handle repairs where lead-based paint is involved, and hire contractors who have obtained special certification and training in handling both painting and repairs if there is a high degree of likelihood that lead-based paint is present.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.16C B. Methamphetamine Contamination

§4.16C B. Methamphetamine Contamination

Effective January 1, 2006, Health & S C §§25400.10-25400.47 established disclosure, remediation, and recordkeeping obligations for a property owner after the owner has been notified by a local health officer that the property is contaminated by methamphetamine. Effective January 1, 2010, the level of methamphetamine allowed on an indoor surface of the premises to be considered safe for human occupancy was increased from 0.1 micrograms per 100 square centimeters to 1.5 micrograms. Health & S C §25400.16.

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§4.16D C. Mold

Mold and the related health problems that can occur have been the subject of increased attention by lawmakers at both the local and state levels. See §3.11B. Increased publicity about health problems that arise from mold have made tenants more aware of the problem. There are different strains of mold, each having different effects. The problem seems to be worse in newer buildings that have been constructed in a way that seals the interiors of the structures so that air cannot travel between the interior spaces and the outside. Most mold grows in spaces where moisture cannot escape so that the spaces do not become fully dry.

Landlords are well advised to check their insurance policies to determine whether there is coverage for mold-related claims from tenants. Moreover, landlords should treat complaints about mold very seriously and respond in appropriate ways to remove the substance and to ensure that all bathrooms and other areas are both well ventilated and sealed from water intrusions (*e.g.*, around windows, sinks, showers, and bathtubs). In addition, landlords should provide instructions to tenants about ventilating bathrooms and kitchens and require that tenants report to the landlord or manager any signs of mold.

At present, there is no mandatory statewide requirement to disclose mold issues on residential or commercial buildings, but any mold growth that causes personal injury or property damage is actionable. See §§3.11B, 3.48A. Some local jurisdictions have adopted regulations. There are experts in the field who will come to inspect an apartment or a building that has experienced a mold problem. A list of such experts may be available from local health departments or the California Apartment Association. Training classes also exist to teach maintenance personnel and owners how to deal with mold problems.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.16E D. Pest Control Disclosure Notice

§4.16E D. Pest Control Disclosure Notice

Before the tenancy begins, each new tenant must be given a copy of the notice provided by a registered structural pest control company under Bus & P C §8538 if the owner has executed a contract for periodic pest control service for the premises. See §1.29.

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V. RENTAL AGREEMENT

§4.17 A. Advantages of Written Over Oral Agreement

Written rental agreements benefit all parties, because having a written document often removes areas of dispute. If the term of a lease is more than one year, the statute of frauds requires that the lease be in writing. CC §1624(a)(3). Although an agent of either party may sign the writing, the agent must have written authority, subscribed by the principal, to do so. CC §1624(a)(3). (For further discussion of the applicability of the statute of frauds to residential leases, see §1.13.)

Using a written agreement also allows inclusion of an "entire agreement" provision (see §1.78), which makes it difficult for a tenant to claim the existence of representations, oral agreements, or lost contemporaneous written agreements concerning the tenancy.

Presumably, an oral lease could include a provision for attorney fees, but proving the existence of such a provision would be difficult. A written agreement allows the landlord to obtain attorney fees in an action for unlawful detainer or breach of the agreement, although it also entitles the tenant to attorney fees if the tenant prevails in an unlawful detainer or other action (see §4.47).

In a jurisdiction with an ordinance that permits only "good cause" evictions, or that lists permitted causes for eviction (see §§7.54-7.76), a written rental agreement may be especially advantageous to the landlord. Many local ordinances that restrict evictions permit eviction for a breach of the rental agreement. See §7.57. Therefore, the landlord should include in the written rental agreement all covenants and restrictions that apply to the tenancy. See §§1.31, 4.38. Some local ordinances enumerate permissible grounds for eviction, such as "habitual late payment of rent" or "interference with comfort, safety, and enjoyment of landlord or other tenants in the building." The landlord may include in the rental agreement these by requiring that the tenant comply with all laws or may include them in the language of the local ordinance.

DRAFTING TIP: For important provisions, for which the landlord is prepared to go to the expense of an eviction, the rental agreement should recite that breach of the provision will be considered a material breach of the agreement. In addition, if the standard for eviction in the local ordinance is vague, the rental agreement may set forth a detailed standard for material breach. For example, if "habitual late payment of rent" is a permitted ground for eviction, the agreement could provide that the parties agree that the late payment of rent three times in any 12-month period will constitute such habitual late payment of rent.

Regardless of the provisions of local ordinances, it may be difficult for a landlord to evict a tenant for a minor breach. Although in *Hignell v Gebala* (1949) 90 CA2d 61, 66, 202 P2d 378, the court held that it would not examine the extent of a breach in an unlawful detainer action if the tenant's breach is willful, it also held that a willful breach does not in itself preclude a tenant from obtaining relief from forfeiture (90 CA2d at 71). See also *McNeece v Wood* (1928) 204 C 280, 285, 267 P 877 (trivial breach will not support forfeiture). Another practical danger is that a landlord who attempts to evict a tenant for a trivial breach is vulnerable to a charge that the dominant motive for the eviction is an unlawful one, camouflaged by the allegation that the tenant has committed a minor breach.

Finally, certain intended restrictions will not apply to the tenancy unless they are set forth in the rental agreement. See *Keating v Preston* (1940) 42 CA2d 110, 115, 108 P2d 479, 482. Important examples include prohibitions against assignment and subletting and restrictions on use of the premises. Proving that such restrictions were agreed to may be an impossible task; in the absence of a lease provision to the contrary, a tenant is free to assign or sublet. See *Kassan v Stout* (1973) 9 C3d 39, 43, 106 CR 783 (assignment); *Chandler v Hart* (1911) 161 C 405, 414, 119 P 516 (sublease).

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B. Use of Printed Rental Agreement Forms

§4.18 1. Advantages

Preprinted rental agreements prepared by associations of landlords, notably those from the California Apartment Association (CAA) and its constituent member associations, are usually more than adequate to meet the needs of most property owners and have been tailored for rent control jurisdictions in which lawyers have developed means for providing protection to property owners under the local ordinances. While most large owners still use forms prepared by their own lawyers and that are tailored for their particular buildings, the CAA preprinted forms (see §§1.25-1.26, 1.80-1.81) are often very useful because they represent the industry standard and are very convenient to use.

PRACTICE TIP: The technique of providing definitions in a lease form for terms found in local rent control ordinances has proven extremely helpful. For example, most eviction control ordinances allow an eviction when the tenant has been "habitually late" in paying the rent. Placing a reasonable standard in the rental agreement for what constitutes "habitually late payment of rent" gives tenants notice of what may occur if they undertake certain conduct and provides a contractual standard most courts will uphold if and when such a case goes to trial. This may avoid the problem of the landlord's having to convince a court what the term "habitually late" means.

Preprinted lease forms commonly used by landlords are reproduced in §§1.80-1.85. Attorney-drafted lease clauses are in §§1.37-1.79.

A landlord may adapt a printed lease form by adding, amending, or deleting specific provisions. Such forms generally have space for additional terms and provisions. If the space is insufficient, the landlord may type additional provisions on an addendum to the lease.

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§4.19 2. Disadvantages

The most common and dangerous pitfall in the use of older printed rental agreement forms, or those not produced for the California residential market, is that the forms frequently contain outdated, or unenforceable, provisions. This problem is diminishing with the depletion of merchants' stock of older printed forms, but it continues to exist because not all publishers have deleted illegal provisions or kept up with changes in the law. A landlord who innocently relies on a form containing invalid provisions may take actions prejudicial to his or her interests on the apparent strength of the rental agreement. Therefore, landlords' attorneys should encourage their clients not only to submit forms to them for an initial review, but to obtain periodic updates, as well.

Provisions that are wholly or partially unenforceable, but that commonly appear in printed lease forms, include:

- the landlord's right to enter a rental unit at will, without notice to the tenant or without cause (see §§3.2-3.4);
- the tenant's waiver of several statutory rights or the right to withhold rent for breach of the implied warranty of habitability (see §3.14);
- the landlord's, but not the tenant's, right to recover attorney fees (see §§4.42, 13.25); and
- restrictions on the number of tenants who may occupy the unit (see §4.40).

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C. Drafting Considerations and Strategies

1. Term Provisions: Periodic or Fixed-Term Tenancy

§4.20 a. Distinctions

In addition to deciding whether the rental agreement will be written or oral, the landlord must determine whether the tenancy term will be periodic (*e.g.,* from month to month) or fixed (sometimes referred to as a "term for years"). A key distinction between the two is the manner in which the terms may be renewed or terminated.

For a periodic tenancy, the term is presumed to be equivalent to the period chosen by the parties for the payment of rent. CC §1944. For example, the tenancy is presumed to be from month to month if the rent is paid monthly and there is no evidence of an agreement for a term of another length. A periodic tenancy is renewed automatically if the lessor accepts rent from the lessee unless either party gives notice of termination at least equal to (a) the term of the hiring, or (b) as provided by statute, whichever is less. See CC §§1945, 1946, 1946.1. See §§1.9, 8.69.

A fixed-term tenancy terminates at the end of the term unless the lease provides for automatic conversion to a month-to-month tenancy or the tenant holds over and the landlord accepts rent. There is no presumption of renewal if the landlord does not accept rent from a tenant who stays in possession after the tenancy terminates. CC §1945. See §1.10. In jurisdictions without eviction controls, the landlord may institute an unlawful detainer action immediately if the tenant holds over past the end of the fixed term, without notifying the tenant before filing the action. In jurisdictions with eviction controls, the mere fact of "holding over" after expiration of the term is probably not just cause to evict, and the landlord will probably be required to have some other good cause for seeking to evict the tenant. See §7.54.

If the landlord accepts rent from the tenant after the fixed term has expired, the tenancy is presumed to continue on the same terms and conditions as under the fixed-term lease except that the duration of the tenancy is determined by the pattern of rent payment (*e.g.,* monthly payments create a month-to-month tenancy) and is limited to one year. CC §1945; *Renner v Huntington-Hawthorne Oil & Gas Co.* (1952) 39 C2d 93, 244 P2d 895. See §3.64.

DRAFTING TIP: It is helpful for landlords to provide in the lease that on expiration of its term the tenancy converts to a month-to-month agreement only with the written consent of the landlord. This gives the landlord the option to renew the lease by service of written notice, or to allow the lease to terminate by its own terms, in which case the tenant would become a tenant at sufferance and subject to an unlawful detainer action. See §1.44. Otherwise, under CC §1945.5, a clause in a fixed-term lease that provides for automatic renewal or extension of the lease if the tenant remains in possession after the lease terminates, or fails to give notice of intent not to renew, is voidable by the party that did not prepare the lease unless the clause meets certain requirements regarding type size and location and contains a separate statement that such a clause is in the lease. A tenant may not waive this protection. CC §1945.5.

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§4.21 b. Anticipating Tenant's Failure to Vacate at End of Term

For both periodic and fixed-term tenancies, the landlord should anticipate the problem that the existing tenant may hold-over, thus making the landlord unable to deliver possession of the premises to a new tenant on a certain date.

DRAFTING TIP: This problem can be solved by providing in the new rental agreement that there is no liability to the new tenant if the landlord is unable to deliver possession of the premises and that the inability to deliver is not the fault of the landlord. Such clauses usually provide, however, that the tenant may terminate the rental agreement if the landlord is unable to deliver possession of the premises within a specified number of days. See §1.72.

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§4.22 c. Effect of Rent Control

The existence of a rent control ordinance ordinarily should not affect a landlord's decision whether to rent for a fixed term or on a month-to-month basis. If a fixed term is selected, however, the landlord should include in the rental agreement a provision entitling the landlord to increase the rent during the term by any increases that might be approved by the local rent control authority. Although local rent control ordinances supersede rental agreements on such matters as maximum rent increases and grounds for eviction, they do not affect contracts that have set the rent for a period of time.

Under the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535), most landlords can raise rents when an apartment becomes vacant. In a jurisdiction that (on or before January 1, 1995) had adopted a vacancy control type of rent control, however, the landlord may not raise the rent to market rate if the landlord (1) terminated the prior tenancy by a notice under CC §1946 or §1946.1; (2) effected a termination by canceling a government rent subsidy contract or giving a notice changing the terms of tenancy under CC §827 (see §§3.65-3.65B); or (3) received a notice that the dwelling unit contains serious health, safety, fire, or building code violations that have been unabated for at least 60 days after governmental citation. CC §1954.50. See §§4.34, 7.4, 7.25-7.28.

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2. Security Deposits

§4.23 a. Characterization

Landlords should be encouraged to require and retain an adequate security deposit and to characterize it as a "security deposit" in the rental agreement. The laws on security deposits, screening or application fees, and key money that can be levied by a landlord vary greatly between residential tenancies (see CC §§1950.5-1950.6) and nonresidential tenancies (see CC §§1950.7-1950.8).

All payments, fees, deposits, or other charges (except for regular rent installments and screening fees (see §4.11)) paid by a residential tenant that are imposed "at the beginning of the tenancy to be used to reimburse the landlord for costs associated with processing a new tenant," or that are imposed "as an advance payment of rent, used or to be used for any purpose," are considered to be "security." CC §1950.5(b). More importantly, "nonrefundable" security is prohibited for residential tenancies. CC §1950.5(m).

All payments intended to be held as security for the performance by the tenant during the tenancy are considered to be a security deposit and fall under the provisions of CC §1950.5. Such payments (*e.g.,* cleaning fees, key deposits) are subject to §1950.5 and may not be characterized as "nonrefundable." Up-front fees to compensate the landlord for costs incurred in the leasing process (other than the $30 screening fee allowed by CC §1950.6 (see §4.11)) are also within the scope of §1950.5. Early cases held that any money taken from a person who becomes a tenant was subject to CC §1950.5 (see, *e.g.*, *People ex rel Smith v Parkmerced Co.* (1988) 198 CA3d 683, 244 CR 22). Then the California Supreme Court, in *Kraus v Trinity Mgmt. Servs.* (2000) 23 C4th 116, 96 CR2d 485, held that only money taken "to secure the landlord against future tenant defaults" was subject to §1950.5. 23 C4th at 141. The expanded definition of "security" in CC §1950.5(b) (see Stats 2002, ch 1061, §1), however, includes money collected at the beginning of the tenancy for reimbursing the landlord for new tenant processing costs, and supersedes that particular ruling in *Kraus*. See also discussion of statutory framework in §§8.167-8.169.

Commercial tenancies have different rules on security deposits, and the law prohibits the collection of key money unless it is disclosed in writing. See CC §§1950.7-1950.8, discussed in §§4.28C, 4.29A, 8.167-8.176.

DRAFTING TIPS:

- All advance deposits should be called "security deposits" so that the landlord's use of the deposit is limited only by the provisions of applicable law. If, for example, the deposit were characterized as "last month's rent," it could not be used toward the cost of repairing any damage caused by the tenant.
- It is also advisable to provide that the security deposit may not be used by the tenant for the last month's rent to ensure that the funds will be available for repairs or other uses at the expiration of the tenancy.
- If an evaluation of a landlord's standard lease reveals provisions that violate CC §1950.5, the client should be advised to revise them (including giving a 30-day notice to effect the change) to avoid a class action suit by tenants. See, *e.g., Granberry v Islay Invs.* (1984) 161 CA3d 382, 207 CR 652.
- From a tax standpoint, the landlord generally benefits by labeling deposits as "security" rather than "last month's rent." See *Clinton Hotel Realty Corp. v Commissioner* (5th Cir 1942) 128 F2d 968.

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§4.24 b. Amount of Security Deposit

The total security demanded or received by a landlord for a residential rental may not exceed an amount equal to two months' rent on an unfurnished unit and an amount equal to three months' rent on a furnished unit. CC §1950.5(c). Rent paid in advance by the tenant toward the first month of the tenancy does not count toward the maximum security permitted. Civil Code §1947.3 provides that a landlord may not demand cash for a security deposit. See §1.30.

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§4.25 c. Interest on Security Deposit

State law does not impose any obligation on the landlord to pay interest on tenant deposits (*Korens v R.W. Zukin Corp.* (1989) 212 CA3d 1054, 261 CR 137) or to segregate them from other assets.

Some local ordinances, however, require payment of interest on deposits, regardless of whether the deposit is characterized as a security deposit or as last month's rent. Such ordinances typically require that a tenant be given the unpaid accrued interest either in a direct payment or as a credit against the rent.

DRAFTING TIP: The rental agreement should specify either the manner in which interest on the security deposit must be paid or that no interest will be paid. Any such provision should also provide that payment of interest will continue only as long as it is legally required.

A direct payment is preferable to a credit because the landlord's check creates a written record that may serve as evidence if a dispute arises in the future. Some ordinances provide remedies for failure to pay interest and the failure to pay may affect the validity of a 3-day notice to pay rent or quit. See §8.37. Tenants often argue that the landlord's failure to pay interest entitles them to a rent offset and may even assert the defense in an unlawful detainer action. This argument may be significant when the landlord serves a 3-day notice to pay rent or quit, because such notices must state the precise amount of rent due. See §8.37. If the landlord neglects to take his or her failure to pay interest into consideration, the notice may actually overstate the amount of rent due.

PRACTICE TIP: There are no reported decisions upholding the validity of such a defense as applied to interest on deposits, but landlords can avoid the defense altogether by attaching a check for the unpaid interest to the 3-day notice to pay rent or quit.

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§4.26 d. Limits on Residential Landlord's Use of Security Deposits

Civil Code §1950.5 is subject to opposing interpretations by residential landlord and tenant attorneys and judges. It is generally agreed that this section is poorly written and ambiguous; *i.e.,* it is unclear on the purposes for which the landlord may use a security deposit. See the dissenting opinion in *People ex rel Smith v Parkmerced Co.* (1988) 198 CA3d 683, 244 CR 22. Tenant lawyers argue that CC §1950.5(e)-(f) limits the use of the deposit to the following:

- Rent defaults;
- Repair of damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or the tenant's guest or licensee;
- Cleaning of the premises on termination of the tenancy; and
- Remedying tenant defaults in any obligation under the rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if authorized by the rental agreement.

Landlord attorneys, on the other hand, argue that because subdivision (b) describes the deposit as being "used or to be used for any purpose, including, but not limited to, any of the following" before listing the above-stated specific uses (see CC §1950.5(b)), the legislature implied that the security deposit may also be used for other unpaid monetary obligations of the tenant arising out of the lease, *e.g.*, late charges, insufficient check charges, attorney fees, and litigation and other costs. Landlords should use the lease or rental agreement to clarify intentions regarding use of the security.

Although neither the legislature in Stats 2002, ch 1061, §1 (expanding the definition of "security;" see §4.23) nor the supreme court in *Kraus v Trinity Mgmt. Servs.* (2000) 23 C4th 116, 141, 96 CR2d 485, addressed this issue directly, this distinction made by the court in *Kraus* arguably supports the narrow interpretation of CC §1950.5(e) urged by tenant attorneys (23 C4th at 141):

> Subdivision (e) specifies the only uses to which such fees may be put by the landlord, again confirming that the "fee, deposit, or charge" which may be a security within the subdivision (b) definition is one held by the landlord to ensure reimbursement for future tenant defaults.

The ambiguities in CC §1950.5 affect two crucial areas on the collection and refund of security deposits, namely:

- How broadly the scope of the term "security" is defined for characterizing as "nonrefundable" fees and deposits (other than rent) collected by the landlord (see CC §1950.5(a)); and
- The actual uses to which the landlord may apply the fees and deposits at the application stage, throughout the rental term on the tenant's default, or at the end of the tenancy (see CC §1950.5(e)).

Because these issues are essentially two sides of the same coin, the legislature or the courts must eventually reconcile the provisions of subdivisions (a), (e), and (f), which directly contradict each other despite the 2002 and 2003 legislative reform. See also §§8.167-8.168, 8.172A, 8.173A.

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§4.27 e. Replenishment and Increase of Deposit During Tenancy

Some rental agreements include covenants by the tenant to replenish any security applied by the landlord during the tenancy to rent defaults or repair of damage caused by the tenant. Enforcement of such a provision would ensure that the landlord holds the maximum security permitted under CC §1950.5(c) throughout the tenancy. Some agreements also provide that, on 30 days' notice, the landlord may require that the security be increased to the maximum amount permitted by law. This provision would allow the landlord to increase the security whenever rent for the unit is increased. See §1.50.

CAUTION: Replenishment of deposit clauses have been challenged by tenant advocates on the argument that they constitute a rent increase in rent-controlled jurisdictions or violate the spirit or actual interpretation of CC §1950.5. Careful drafting of the rental agreement may avoid such arguments. See chap 1. On demanding cash payment of security deposits, see §4.24.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.28 f. Return of Security Deposit

§4.28 f. Return of Security Deposit

The security deposit laws require substantial documentation and notices to tenants, especially in residential tenancies.

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(1) Residential Tenancies

§4.28A (a) Notice of Right to Inspection

Within a reasonable time after one party gives the other notice of termination of a residential tenancy, or before the expiration of the lease term, CC §1950.5(f) requires the landlord to

- notify the tenant of the option to request and attend an inspection that allows the parties to identify the deficiencies in the premises caused by the tenant; and
- if the tenant requests the inspection, provide the tenant with an itemized list of potential deductions from the security, excepting ordinary wear and tear, and give the tenant an opportunity to remedy the identified deficiencies.

The inspection requirement does not apply to terminations caused by the tenant's default in the payment of rent (CCP §1161(2)), the tenant's breach of a covenant or condition of the rental agreement (CCP §1161(3)), or the tenant's committing waste or nuisance or subletting in violation of the agreement (CCP §1161(4)). See CC §1950.5(f)(1), (q).

For practice tips and further details and discussion of the inspection process, and a form notice of right to inspection, see §§4.51, 8.172A-8.172B.

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§4.28B (b) Return of Deposit

In residential tenancies and within three weeks after a tenant who has paid a security deposit vacates the premises, CC §1950.5(g) requires the landlord to

- deliver to the tenant, by personal delivery or first class mail, an itemized statement, including expense receipts, of the amount of, and basis for, any security retained; and
- return any unused portion of the security to the tenant.

NOTE: A preliminary itemized statement, separate from the one described in §1950.5(g) is required if the tenant requests an inspection before vacating the premises; see §§4.28A, 8.172A.

These deduct/refund obligations in residential tenancies, including extensive documentation of the landlord's expenses, involve detailed procedures that were made even more complex by legislation enacted in 2002 and 2003. See discussion of CC §1950.5(e)-(k) in §§8.172-8.173F.

As a practical matter, it may be difficult for the landlord to comply with CC §1950.5(g), particularly if damage to the premises is substantial. The landlord may know or believe that the damage exceeds the deposit, but may not be able to obtain a job order or final bill within the 3-week period. If so, the landlord should at least obtain or make a good faith estimate for the repairs and follow procedures in CC §1950.5(g)(3), discussed in §§8.173D-8.173F. The supreme court held that a landlord who *in good faith* failed to comply with the 3-week refund period in CC §1950.5 could set off amounts due for unpaid rent, repairs, and cleaning costs against any money due the tenant as a refund of the security deposit. *Granberry v Islay Invs.* (1995) 9 C4th 738, 38 CR2d 650. The court reasoned that the remedy provided in §1950.5 for a landlord's *bad faith* retention of a security deposit (see §8.174) implied that the legislature did not intend to penalize landlords for good faith retention.

On remedies for landlord's breach, see §8.174. On effect of retained security on unlawful detainer actions, see §8.176.

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§4.28C (2) Commercial Tenancies; Return of Deposit

In commercial tenancies, an itemized statement of the disposition of the security deposit must be sent and a refund must be made within 2 weeks or 30 days after the tenant vacates (depending on whether the deduction is made only for unpaid rent or for a combination of rent, repairs, and cleaning), and there is no right to an inspection. See CC §1950.7(c)-(e), cited in §§8.172-8.173F. After a tenant abandons the lease, the landlord may withhold from the deposit only unpaid rent that has accrued as of the date the deposit is required to be refunded, but may not withhold or offset future rent damages the landlord may later recover under CC §1951.2. *250 L.L.C. v Photopoint Corp.* (2005) 131 CA4th 703, 32 CR3d 296.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.28D (3) Drafting Tips

§4.28D (3) Drafting Tips

- Laws governing the timing and manner of refunding security deposits are subject to change. The rental agreement should provide that the deposit will be returned "in accordance with law that is applicable at the time the tenancy terminates."
- If the agreement provides for a shorter period of time to account for the deposit, *e.g.,* 14 days, the landlord is still bound by the terms of the agreement.
- Difficulty in locating the tenant or in determining when the time to return the deposit begins to run can also be solved in the agreement, by providing that the deposit will be sent to the premises unless the tenant leaves a forwarding address and that the time will run from the date the tenant turns in the keys or otherwise surrenders possession to the landlord.
- With cotenants who may change over time, a provision that describes and identifies the persons to whom the deposit will be returned by name will compel successors to resolve the issue among themselves. Landlords should not deal with individual cotenants but only with the group or its representative to avoid such problems as needing to evict only one of the cotenants or getting caught in the middle of a roommate dispute.
- In commercial tenancies, a waiver of any or all of the tenant's security deposit statutory rights must be expressly, clearly, and unambiguously stated in the lease. See §4.28C.

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§4.29 g. Effect of Termination of Landlord's Interest in Premises

Under CC §1950.5(h), a landlord whose interest in residential rental property terminates by sale, assignment, death, appointment of a receiver, or otherwise may be released from liability for the security deposit in one of two ways:

(1) The landlord may transfer the security deposit (less lawful deductions) to a successor and notify the tenant (a) of any claims made against the security and (b) of the transferee's name, address, and telephone number; or

(2) The landlord may return the security deposit (less lawful deductions) to the tenant, with the itemized statement required by CC §1950.5(g). (Note that this second option is contradicted by an amendment made to §1950.5(g) in 2003 restricting the time frame or triggering factor for the deduct/refund procedure; see §8.173B.)

If the landlord uses the first option, the transferee then has all the rights and obligations of a landlord holding the security. CC §1950.5(k). See §8.172.

If the seller elects to refund the deposit at the time of sale to a tenant whose lease provides that the deposit is for the last month's rent, that tenant presumably loses the ability to claim that the deposit constituted full prepayment of the last month's rent despite any interim increases in the monthly rent. See §4.23. It is unclear whether the purchaser may demand deposits from existing tenants whose deposits were refunded by the seller under CC §1950.5. Civil Code §1950.5(j) creates joint and several liability between a purchaser and the selling landlord if the landlord did not transfer the deposits to the purchaser.

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§4.29A 3. Key Money; Commercial Tenancies

The attorney drafting the lease should describe in the lease or rental agreement all payments contemplated by the parties. Side letters or verbal agreements should be avoided. For example, some landlords or master tenants demand, as a condition of initiating, continuing, or renewing a lease, that a tenant pay undocumented "key money" (*i.e.,* an up-front bonus payment made by the tenant to secure the tenancy). However, CC §1950.8 prohibits the landlord in nonresidential leases from demanding "key money" or the landlord's attorney fees incurred in preparing the lease, unless the amount is stated in "the written lease or rental agreement."

A court of appeal in the Second District interpreted §1950.8 and held it is not unlawful for a landlord merely to make a demand for key money as a condition of renewing a lease. The court noted from legislative history that the purpose of §1950.8 was not to prohibit demand or collection of key money, but to eliminate underground or under-the-table pressure tactics used by some landlords of requiring cash payments of key money that are not documented in the lease. The court ruled that "the written lease or rental agreement" described in §1950.8 refers to the prospective contract for the new tenancy period to which the demand applies. For liability to attach under §1950.8, the tenant must prove that the landlord (a) made a demand for key money as a condition of initiating, continuing, or renewing a lease or rental agreement, and (b) failed to state the amount of the demanded payment in the resulting written lease or rental agreement between the parties. See *Edamerica, Inc. v Superior Court* (2003) 114 CA4th 819, 7 CR3d 921.

The penalty for violating §1950.8 can equal three times the amount of actual damages, plus costs, including attorney fees, in obtaining the penalty. CC §1950.8(c). Exceptions are the following (CC §1950.8(d)-(f)):

- The landlord and the tenant may agree to the advance payment of rent in the lease or rental agreement;
- The landlord may charge reasonable amounts for "conducting reasonable business activity in connection with initiating, continuing, or renewing" the tenancy; and
- The landlord may increase the rent to recover building operating costs if the right to the rent, the method of calculating the increase, and the time period covered by the increase are stated in the lease or rental agreement.

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4. Rent Provisions

a. Manner of Receiving Rent

(1) Form of Payment

§4.30 (a) Personal Check or Cash Equivalent

Determining how a landlord wishes to receive payment of the rent is an issue to be decided when the rental agreement is drafted. The rental agreement should also set forth the landlord's remedies in case of nonpayment of rent (see §§1.40-1.43, 1.67-1.68).

Civil Code §1947.3 provides that "a landlord or landlord's agent may not demand or require cash as the exclusive form of payment of rent or deposit of security," subject to certain exceptions. CC §1947.3(a)(1). Cash payment may be required if a past check has been drawn on insufficient funds or the tenant has stopped payment. CC §1947.3(a)(2).

DRAFTING TIPS:

- It is usually advisable to require that rent be paid by check, money order, or other negotiable instrument. Not dealing in cash helps to avoid lost payments and also facilitates the landlord's accounting. Anecdotal reports indicate that some trial courts interpret the refusal of a cash payment of rent offered within 3 days after the service of a 3-day notice to pay rent or quit as precluding the landlord from successfully prosecuting an unlawful detainer action, even if the lease prohibited cash payments.
- The agreement should also specify the types of payments that will not be accepted. Some landlords prefer not to accept cash; most will not accept credit cards, third-party checks, etc.
- To avoid problems under CCP §1161(2) (see §8.38), the rental agreement should provide that rent payments will be applied to the earliest period for which rent is due.
- Many rental agreements provide that repeated tenders of checks for insufficient funds is a ground for terminating the lease or the rental agreement. To meet the requirement that a breach be material, the number of such defaults that would justify terminating the tenancy should be specified.

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§4.31 (b) "Labor-for-Rent" Arrangements

Landlords sometimes enter into "labor-for-rent" arrangements under which the landlord agrees to offset a tenant's rent in return for specified labor. This practice, which seems so convenient, is fraught with problems and should probably be avoided unless the landlord can consistently and accurately monitor the number of hours the tenant works. For discussion of rent credits for resident managers and eviction of employees, see §§4.45-4.48.

If the tenant-employee does not exercise discretion or independent judgment in performing the labor, and if the labor is valued at less than $1150 per month, the tenant's minimum wage, hours, and working conditions (among other things) are regulated by 8 Cal Code Regs §11050. See 8 Cal Code Regs §§11050(1)(B)(1), 11050(2)(F). The amount of rent that the landlord may charge is also limited. 8 Cal Code Regs §11050(10)(E). See §4.47. If the employee is a resident manager, the landlord may be able to charge the employee a higher rent than the landlord could charge another employee (*e.g.,* a caretaker), as long as any credit given for rent on the unit is not used to meet the landlord's minimum wage obligation to the manager. Lab C §1182.8. See §4.47.

Labor-for-rent arrangements may produce disastrous results for landlords. When a landlord requests that certain labor be performed at a specified rate of compensation in exchange for an offset against rent, but the landlord and tenant disagree over the amount of work actually performed, the landlord may face insurmountable problems proving the amount of rent owed by the tenant. Determining the exact amount of rent due also poses problems when the landlord decides to serve a 3-day notice to pay rent or quit, because the notice must specify the amount of rent due. *Baugh v Consumers Assocs.* (1966) 241 CA2d 672, 50 CR 822.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.32 (2) Date of Payment

§4.32 (2) Date of Payment

The rental agreement should specify the date on which the rent payment is due each month.

DRAFTING TIP: Rent is not due in advance unless this practice has been established by custom and usage. See CC §1947. Accordingly, the rental agreement should specify an advance due date for receipt of rent. Landlords can also avoid this problem by using printed lease forms, which invariably state that rent is due in advance on a specified day of each calendar or rental month. See §§1.40, 1.81-1.84.

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§4.33 (3) Mode of Delivery

Landlords should not specify the manner in which the rent is to be delivered. If the tenant remits rent in the manner specified by the landlord, the landlord bears the risk of loss. See CC §1476. Thus, if the rental agreement specifically permits payment by mail, the landlord must bear the loss for a payment lost in the mail. Although a check or money order lost in transit would not constitute payment of the obligation, a tenant might have mailed (or claim to have mailed) cash. If the rental agreement specifically permitted payment by mail, the landlord presumably would bear the loss of the cash in transit.

Civil Code §1947.3 provides that "a landlord or landlord's agent may not demand or require cash as the exclusive form of payment of rent or deposit of security," subject to certain exceptions. CC §1947.3(a)(1). Cash payment may be required if a past check has been drawn on insufficient funds or the tenant has stopped payment. CC §1947.3(a)(2).

DRAFTING TIP: In a written lease, inclusion of the landlord's zip code in the address designated for payment could be regarded as specific permission to pay by mail. To avoid this problem, the lease might provide that (a) the tenant bears the risk of loss or delay of any payment made by mail; and (b) the landlord must receive mailed rent payments by the date specified for payment.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.34 b. Establishing Rent for Vacant Units

§4.34 b. Establishing Rent for Vacant Units

Some rent control ordinances have restricted the landlord's ability to establish rent for a vacant dwelling or unit. This type of restriction, commonly known as "vacancy control" (see §7.4), is now outlawed in all jurisdictions by the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535) (see §§4.21, 7.25).

The Costa-Hawkins Act contains limitations on when owners of rental dwellings or units (in cities previously subject to the vacancy control type of rent control) may bring a vacant unit to market rents and, as of January 1, 2000, restricts owners who terminate certain government subsidies for tenants from re-renting a unit for more rent than the market rate set under the government program.

The vacancy decontrol benefits accrue only if the prior tenancy was not terminated by a notice under CC §1946 or §1946.1, or by a change in terms of the tenancy noticed under CC §827, unless the change is one that was permitted in the amount of rent or fees. See CC §1954.53(a)(1). (Note: CC §§1946 and 1946.1 require either a 30-day or 60-day notice for the termination of a month-to-month tenancy (see §8.69); CC §827 requires a 30-day notice for most changes in the terms of a month-to-month tenancy, and a 60-day notice for specified residential rent increases (see §§3.65-3.65B).)

The Costa-Hawkins Act also contains an exception if the owner had contracted with a public entity for direct or other assistance in producing lower income housing pursuant to Govt C §65915. The benefits will not accrue to any owner who terminates a Section 8 contract, and the inability to increase to market rent lasts a full 3 years. See CC §1954.53(a)(1)(A).

WARNING: As originally enacted, the Costa-Hawkins Act is difficult to understand, and experts disagree concerning its scope and meaning. Practitioners should be extremely cautious before advising a landlord that any particular rental unit has become exempt from the rental amount controls of a local ordinance.

Although landlords in all rent control jurisdictions were granted the right to rent vacant apartments at full market rents by the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535), that statute as originally passed and with subsequent amendments imposed limitations on that right. For owners in jurisdictions that enacted the vacancy "control" type of rent control, a landlord may not rent a vacant unit at market rents and must rent the unit at the previous tenant's rent if:

(1) the preceding tenant's tenancy was terminated by a notice from the landlord under CC §1946 or §1946.1;

(2) the preceding tenant moved because the tenant did not wish to comply with a change in the terms of the tenancy imposed by the landlord pursuant to a notice given under CC §827, unless the increased financial obligations were permitted by the local rent control ordinance;

(3) the preceding tenant vacated because the owner terminated a contract or recorded agreement with a government agency under which the tenant received a government subsidy for the payment of the contract rent;

(4) the preceding tenant vacated because the owner failed to renew or terminated a government contract or recorded agreement that provided for a rent limitation to a qualified tenant (3-year limitation on rent restrictions in this situation); or

(5) the dwelling unit has been cited by a proper governmental agency as having serious health, safety, fire, or building code violations that existed for at least 60 days before the vacancy and had not been abated by the time of the vacancy and had remained unabated for at least 60 days.

With regard to item (5), CC §1954.53(f)(3) specifically provides that the 60-day limit may be extended by the government agency that issued the citation. It is understood that landlords who have encountered delays or problems beyond their reasonable control in abating any such violations may obtain relief from the government agency.

PRACTICE TIP: Most agencies enforcing building codes are understanding if an owner is moving diligently to correct problems and will, if requested to do so and the owner can demonstrate diligence, provide the necessary relief. In some jurisdictions, these delays may occur because of permit delay problems in the agencies themselves, and it

would not be fair to penalize a landlord who has promptly applied for necessary permits but cannot do the work because the permit has not been issued or the completion of the work is delayed because of the delay in issuance of the permit. It is therefore very important to maintain a good relationship with local inspectors, keep good records, and obtain necessary relief if the 60-day period is about to run.

Landlords who wish to terminate a government subsidy contract must give the tenant 90 days' prior written notice of the termination, and the tenant is obliged only to pay the tenant's portion of the rent during the 90-day period. CC §1954.535.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.35 c. User Fees

§4.35 c. User Fees

When landlords wish to market rental units at a lower rent (*e.g.,* when a landlord owns a large rental complex and must fill vacancies quickly to maintain adequate cash flow), they sometimes label certain charges as "user fees" rather than as "rent." For example, the landlord might provide a parking space to tenants who pay a user fee, rather than including "rent" for the parking space in the overall rent.

Although this approach is an excellent marketing tool, it will probably cause problems in any jurisdiction that has implemented rent controls. Many rent-controlled jurisdictions consider all charges for services or facilities related to the dwelling unit to be subject to the ordinance's monetary controls. Leases which separate rental charges for refrigerators or washers and dryers may also have difficulty in unlawful detainer actions if they include these charges as rent in a 3-day notice to pay rent or quit because they may be considered personal property and not fixtures. In those cases, the landlord should argue that they are fixtures as a matter of law, or, under an additional rent clause, a proper part of the rent.

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§4.36 d. Rent Increases

Market conditions will obviously affect a landlord's decision whether to impose a rent increase. In rent-controlled jurisdictions, the provisions of those ordinances will govern the permissible amounts and frequency of rent increases (see chap 7). Notice requirements are dictated by state law for month-to-month and other tenancies that do not have a fixed term (see §§3.65-3.65B).

If a tenancy is for a fixed term (*e.g.,* a two-year tenancy), the lease governs the landlord's ability to raise the rent, and may also specify the manner of giving notice of the increase. In the absence of government regulation, the parties may agree to automatic rent increases at stated intervals in the lease. In rent-controlled jurisdictions, the rent control ordinance will probably limit the landlord's ability to schedule rent increases in the rental agreement or lease.

DRAFTING TIPS:

- In a rent-controlled jurisdiction, rent increase provisions should state only that the rent may be increased to the maximum amount permitted under applicable ordinances. Even though the ordinance allows periodic rent increases, if a lease for a term of years does not provide for such increases, the lease contract will supersede the increases that would have been allowed under the local ordinance.
- The rental agreement should provide for other increases to which the landlord may be entitled during the term (*e.g.,* rent increase for a capital improvement pass-through).

A step-increase lease that was entered into before a rent control ordinance became effective may be exempt from the ordinance under federal and state constitutional prohibitions against impairment of contracts. US Const art I, §10; Cal Const art I, §9. But see *Rue-Ell Enters., Inc. v City of Berkeley* (1983) 147 CA3d 81, 194 CR 919 (city may require one-year reduction in rents on existing commercial leases, measured as a percentage of the tax savings realized by landlord as a result of Proposition 13 (Cal Const art XIIIA)).

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§4.37 5. Federally Required Lead Disclosures and Abatement

The federal Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 USC §§4851-4856) and its implementing regulations (24 CFR pt 35 and 40 CFR pt 745, subpt F) went into effect for owners of buildings containing more than four dwelling units on September 6, 1996 (24 CFR §35.84(a)), and for owners of buildings with four or fewer dwelling units on December 6, 1996 (24 CFR §35.84(b)). All owners of *residential property built before 1978* must make certain disclosures to new tenants in writing. 24 CFR §35.80.

The tenant is required to acknowledge receipt of the disclosure statement, which should be kept by the owner for as long as the tenant is in the building, or for three years, whichever is longer. 24 CFR §35.92. For further discussion and a disclosure form to include in the rental agreement, see §§1.29, 1.77. On California legislation, see §4.16B.

An EPA pamphlet that includes the required disclosure statement is available from the U.S. Environmental Protection Agency or the National Lead Information Clearinghouse at (800) 424-LEAD. In addition, several organizations have obtained and copied the EPA pamphlet. These include the California Apartment Association and its local affiliates. See Directory.

All existing tenants must be given this disclosure information when they renew their leases. What this means for month-to-month tenants is unclear, but the safer practice is to give all renewing tenants the required notice.

Practitioners who have an opportunity to discuss this issue with their landlord clients should suggest that owners take steps to remove or encapsulate lead paint when units become vacant. Doing such work in occupied units is extremely difficult and expensive.

In federally assisted housing, the landlord must repair deteriorated lead-based paint and control dust associated with it, in addition to making the required disclosures to tenants. 24 CFR §35.92. See also related transitional regulations for dust testing, effective September 15, 2000, in 65 Fed Reg 54858 (Sept. 15, 2000).

WARNING: Those most at risk from lead and other environmental hazards are pregnant women and children six years of age or younger. Landlords should be cautioned, however, that antidiscrimination laws (see chap 2) apply, and a landlord may not refuse to rent a dwelling unit to a pregnant woman or a family with children under six years of age.

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§4.38 6. Restrictions on Use of Premises

To prevent the tenant from using the premises for certain purposes or performing certain activities on the premises, the landlord must enumerate each prohibited use or activity in the rental agreement. See §§1.55, 1.57-1.64. The agreement need not specifically prohibit uses or activities that are prohibited by law, *e.g.,* maintaining a nuisance under CCP §1161(4), or that are inconsistent with use of the premises as a residence.

DRAFTING TIP: With an increase in the number of tenants who have computers and who use their computers at home for business purposes, the paragraphs of the lease covering liability issues and insurance coverage become more important. The landlord may want to require that tenants obtain insurance coverage for their own equipment (see §4.43B), to make the tenant responsible for the cost of maintaining telephone lines in the unit, and to restrict the number of telephone lines that may be installed in the unit.

Other prohibitions frequently sought by landlords have been regulated by legislation. For example, a landlord is prohibited from refusing to rent to a tenant who possesses water filled furniture (CC §1940.5; see §1.63), and from refusing to rent to a tenant who owns a seeing-eye dog or signal dog for the hearing impaired (CC §54.1(b)(6)(A); see §1.62).

Landlords should be cautioned, however, that a court may grant a tenant relief from forfeiture based on breach of an immaterial or unreasonable provision. See *Hignell v Gebala* (1949) 90 CA2d 61, 71, 202 P2d 378. In addition, unreasonable restrictions may be prohibited by local rent or eviction control ordinances. See §7.54.

In rent control jurisdictions where attempts by tenants to sublease their rent controlled apartments often create problems, the landlord should consider adding a provision in the lease that the named original tenant must use the premises as his or her principal and primary residence and make the unit the place to which the tenant returns on a regular basis except for temporary absences such as absences for military service, vacations, hospitalizations, family or friend emergency or care, Peace Corps service, academic sabbatical or other reasonable temporary or seasonal periods of absence, such as travel for education or work related assignments. See San Francisco Residential Rent Stabilization And Arbitration Board Rules and Regulations §1.21; Santa Monica Rent Control Board Regulation §3304. Before adding such a provision, landlords should determine if it might violate any relevant local rent or eviction control ordinances. For further discussion, see §§7.23A, 7.24, 7.38A.

For covenants restricting changes in use for commercial tenancies, see CC §§1997.010-1997.270, discussed in California Eviction Defense Manual §19.10 (2d ed Cal CEB 1993).

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§4.39 7. Waiver of Tenant's Rights

Older printed lease forms often contained unenforceable waivers of tenants' rights. A common provision was the waiver of tenants' rights and remedies regarding the dwelling's habitability under CC §1941. Any waiver or modification of the rights conferred by CC §§1941-1942 is void as contrary to public policy (CC §1942.1), except under the narrow circumstances described in the following paragraph.

In *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, the leading case on the warranty of habitability, the court held that the warranty generally cannot be waived; consequently, the tenant generally may not waive the right to withhold rent if repairs are needed. 10 C3d at 625 n9. See also *Knight v Hallsthammar* (1981) 29 C3d 46, 54, 171 CR 707, 711. The *Green* court noted, however, that a waiver might be valid if reached by arm's-length bargaining between landlord and tenant. *Green v Superior Court, supra*. The court referred to the first paragraph of CC §1942.1, which states that the lessor and lessee may provide that the tenant will be responsible for improvements, repairs, or maintenance of the rented premises, as part of the consideration for the rental. Given the unequal bargaining power between the residential landlord and tenant, however, it is unlikely that a court would uphold such a lease provision, particularly if it appeared as a "standard" clause in all leases offered by the landlord. (For discussion of additional pitfalls in labor-for-rent arrangements, see §4.31.)

Civil Code §1953 prohibits the tenant's waiver of several rights, such as (a) the right to sue the landlord for future injuries, (b) rights granted by CC §1950.5 with respect to security deposits (except as allowed by CC §1950.5(g); see §§8.173E-8.173F), (c) the right to notice and hearing as required by law, and (d) procedural rights during litigation concerning the tenancy.

DRAFTING TIPS:

- Despite these prohibitions on tenant waivers, proper drafting can limit a landlord's liabilities. One such method is to require written notice from the tenant of defective conditions about which the landlord would have no knowledge.
- The tenant may agree that certain conduct on the part of the landlord does not constitute a waiver of the landlord's rights. For example, the agreement might provide that the landlord's acceptance of rent does not constitute a waiver of any breach by the tenant. See §1.75. The rental agreement might further provide that the only way the landlord may waive a right is by a document signed by the landlord or the landlord's duly authorized agent.

WARNING: Many rent control ordinances contain very broad prohibitions against tenant waivers of any rights under the rent control ordinance. These often may prohibit enforcement of private agreements resolving disputes regarding rent levels or other problems.

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§4.40 8. Parties to Lease; Occupants; Guests

Landlords should identify in the rental agreement all persons who will reside in the rental unit, so that all persons claiming a right to possession of the premises can be named and served in any proceeding to regain possession of the premises. See §§1.45-1.46, 13.70. The lease should name each occupant and specify (1) that the rental is limited to the named persons, and (2) that substitute or additional occupants are prohibited without the landlord's prior consent. To further protect against claims to possession by nontenants, the lease should include provisions limiting the length of time that a tenant may permit guests, boarders, and lodgers to remain on the premises without violating the occupant limitation provision. See §1.46.

If more than one adult will occupy the rental unit, each should be named as a party to the lease. Each adult should execute the lease, assuming joint and several liability for all obligations under it. See §1.46. If the landlord consents to additional occupants after execution of the lease, the landlord should either obtain a new lease signed by all the occupants as "cotenants," or have the new occupants sign a separate agreement by which they assume joint and several liability as "subtenants" for all obligations under the lease.

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§4.40A a. Assignment and Subletting

The landlord must consider whether (a) assignment and subletting are to be prohibited completely, (b) the right will be substantially limited but in compliance with local regulations imposing restrictions on blanket prohibitions (see, *e.g.,* San Francisco Residential Rent Stabilization and Arbitration Ordinance §§37.2(g) and 37.9(a)(2)), or (c) to permit the tenant to transfer his or her interest only with the landlord's prior consent (which should always be required to be in writing). Case law used to be uncertain as to whether an owner of commercial property could completely prohibit assignment or subleasing, but this issue was resolved with enactment of CC §§1995.210-1995.260, which does not apply to residential dwellings. Arguably, a landlord should be able to prohibit residential lease transfers completely unless such a provision is expressly prohibited by federal, state, or local law. See detailed discussion of assignment and subletting in §§3.49-3.59A, 5.28-5.32, 7.62. See also §§1.3-1.3D, 1.7-1.7B. On assignments in commercial tenancies, see Office Leasing: Drafting and Negotiating the Lease, chap 24 (Cal CEB 1996). See also California Eviction Defense Manual §§19.8-19.9 (2d ed Cal CEB 1993).

If transfers are prohibited completely by the rental agreement, the landlord may not use the remedy provided in CC §1951.4 (see §§3.59, 8.15).

DRAFTING TIP: If assignment and subletting are permitted with the landlord's consent, the lease should specify what conditions will result in denial of consent, such as the subtenant's failure to meet the specified financial standard; to complete the landlord's standard application or pay the screening fee; or to provide a favorable recommendation from a previous landlord, due to, *e.g.,* having avoided previous eviction proceedings.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.40B b. Vacancy Decontrol and Roommates

§4.40B b. Vacancy Decontrol and Roommates

Knotty problems may arise in rent-controlled jurisdictions about when a vacant apartment exists so that the landlord may increase the rent to market level. Despite the existence of vacancy decontrol on the state or local level (see chap 7), landlords often found that they were unable to raise the rent because the original tenant, who had vacated the premises, took in roommates who then became protected tenants for whom no rent increase was permitted. This problem was addressed by the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535) (see §§7.25-7.28). The Act supersedes any contrary rules adopted by local rent control boards.

The Act in CC §1954.53(d) expressly provides that an owner may increase the rent by any amount allowed under the section to a sublessee or assignee when the rental agreement prohibits assignment and subletting, or prohibits assignment and subletting without the owner's consent, and the original occupant or occupants who took possession pursuant under the rental agreement with the owner no longer permanently reside there. Section 1954.53(d) further provides that acceptance of rent will not operate as a waiver of a landlord's right to enforce a covenant against subletting, unless the landlord has received written notice that the original tenant has sublet the apartment and the landlord thereafter accepts rent.

DRAFTING TIP: In rent-controlled jurisdictions, landlords should consider adding a provision to their rental agreements prohibiting assignment altogether or adjusting the rent if the unit is sublet or assigned. See *Cobb v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2002) 98 CA4th 345, 119 CR2d 741, discussed in §§7.25, 7.28.

A landlord in a rent controlled city may encounter difficulties in renting to more than one person and permitting revolving roommates. In *DeZerega v Meggs* (2000) 83 CA4th 28, 99 CR2d 366, *e.g.*, the landlord entered into a lease agreement with one master tenant that prohibited subleasing, but permitted the master tenant to have roommates who completed and submitted to the landlord various application forms setting forth required information about the individual. Only the master tenant paid rent. When the master tenant gave the landlords a 30-day notice and moved out, the roommates remained. The landlords attempted to evict the roommates, alleging the basic rule of law that termination of a master lease will terminate all subleases. The court of appeals held that the roommates were entitled to the "just cause" eviction protections of the local rent control ordinance. The landlords ended up with the roommates as their tenants.

Although it is unclear from the opinion what circumstances would have altered the outcome, landlords should attempt to protect themselves from this situation when renting to more than one individual tenant. First, if there is an absolute prohibition against subleasing and local law permits such an absolute prohibition, the landlord should not allow roommates or a substitution of roommates or any subleasing. Second, the landlord may want to consider a covenant to prohibit partial terminations and to require that any termination of the hiring must be signed by all tenants. Again, if there is such a provision it must be enforced. Third, each original occupant should sign the lease and any permitted subtenant must be obliged to sign a subleasing agreement that at a minimum requires the subtenant to abide by the terms and conditions of the original lease and prohibits further subleasing. Third, if subleasing occurs without the landlord's prior consent, the landlord should enforce the no-subleasing covenant or reach an agreement with the sublessees after the fact. Failure to do so may create the type of problem the landlords faced in *DeZerega*.

If there have been multiple and serial roommates, the landlord may be left with only the remedy of a Costa-Hawkins rent increase after an original tenant vacates, because it may be impossible to evict unless the landlord has just cause to do so under the local ordinance.

DRAFTING TIP: In approving any nonoriginal occupants, it is advisable, and some local ordinances attempt to so require, that the landlord advise the nonoriginal occupants that their rights to the rent controlled rent amount are different from the original tenant, and that if the original tenant no longer permanently resides in the unit the landlord may be able to raise the rent of the remaining occupants. Also, a statement that the landlord will not accept rent from the nonoriginal occupants is advisable, as is a statement that any acceptance of rent does not waive the landlord's right to increase the rent if the original occupant no longer permanently resides in the unit.

See *Cobb v San Francisco Residential Rent Stabilization & Arbitration Bd., supra,* discussed in §§7.25, 7.28.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.41 9. Options to Renew

§4.41 9. Options to Renew

Options to renew a tenancy arise only in fixed-term tenancies; periodic tenancies are renewed automatically at the end of each rental period. See §1.9. Options to renew are common in commercial leases because commercial tenants generally have strong economic motives for renewing a lease (*e.g.,* maintaining the goodwill attached to a particular location, obtaining a reasonable return on investments in permanent fixtures, avoiding the costs of moving and ordering preprinted business forms with a new address). Although renewal options are relatively unusual in residential leases, an option to renew might be important to residential tenants in certain situations. For example, a tenant who wants to make a substantial investment improving a unit, but could never hope to own the unit, would probably want an option to renew his or her lease. An option to renew might also be advantageous to a tenant who wishes to keep a child in a local school through graduation. Similarly, options to renew are important in areas (*e.g.,* some coastal developments in Orange County) where landowners grant ground leases, rather than sell fee interests in the property.

An option to renew must set forth the major terms of the renewal tenancy. A common drafting error is for the landlord to specify the length of the renewal term, but to provide that all other terms of the renewal tenancy will be negotiated when the tenant exercises the option to renew. An option drafted in this manner is unenforceable for uncertainty, because there is no way to resolve disputes if the landlord and tenant fail to agree on the remaining terms. See *Ablett v Clauson* (1954) 43 C2d 280, 272 P2d 753.

Even if the amount of the renewal rent is the only term left to the future agreement of the parties, the option may be unenforceable. In *Chaney v Schneider* (1949) 92 CA2d 88, 206 P2d 669, the court enforced an option that provided that the parties would agree on the renewal rent (as well as other terms) when the option was exercised. The court also held that the superior court properly may determine a reasonable rent if the parties are unable to agree. Most attorneys in California relied on the decision in *Chaney* as authority for the rule that an option is enforceable if the renewal rent is the only term that the parties must determine at the time of exercise. Although the California Supreme Court criticized the *Chaney* decision for enforcing an option in which all terms were left to future agreement, it did not question the enforceability of an option in which only the renewal rent is left to future agreement. *Ablett v Clauson* (1954) 43 C2d 280, 286, 272 P2d 753 (explaining the theory on which courts rely to enforce renewal options). In *Etco Corp. v Hauer* (1984) 161 CA3d 1154, 208 CR 118, however, the court held that an option agreement that leaves the renewal rent to the future agreement of the parties is unenforceable for uncertainty unless the agreement provides an ascertainable standard by which rent can be determined if the parties fail to agree. 161 CA3d at 1162.

To minimize problems of unenforceability, and still maintain flexibility, landlords may grant options to renew that leave future rent to the agreement of the parties, but that include an ascertainable standard (*e.g.,* the prevailing fair market rent for comparable units in the building when the option is exercised) or specific remedies (*e.g.,* arbitration) for establishing the rent if the parties fail to reach agreement.

Another dangerous, but common, error is for the landlord to draft an option to renew that provides simply: "Tenant has the right to renew this lease for an additional five years." Many landlords believe that this language creates an option to renew for a specified term, with all other terms subject to good faith negotiation when the option is exercised. Without proof that a different meaning was intended, however, the courts interpret such language as creating a right to renew the tenancy for the specified term on the same terms and conditions as the original tenancy, including the amount of rent. See, *e.g., Penilla v Gerstenkorn* (1927) 86 CA 668, 261 P 488. Assuming continued inflation, an option drafted in this manner will generally produce a windfall for the tenant.

An estoppel certificate may affect the enforceability of an option to renew. In *Miner v Tustin Ave. Investors, LLC* (2004) 116 CA4th 264, 10 CR3d 178, the tenant sued to enforce an option to renew (after accepting an estoppel certificate when the property was sold), and the trial court granted a summary judgment in favor of the new owner. The court of appeal, however, concluded that the lease and estoppel certificate constituted the contract to be interpreted and, read together, were ambiguous on the question whether an option existed. Because neither party offered extrinsic evidence to explain the ambiguity, the court construed the ambiguous contract against the owner, whose predecessor had drafted both documents, and reversed the summary judgment.

DRAFTING TIP: The lease must specify the time at which the tenant may exercise the option, and the manner of

exercise. To avoid problems of proof, the option should provide that service of exercise of the option must be made by certified mail, return receipt requested, to a specified address. The option should also require that the certified mail receipt itself be postmarked by a postal station to prevent the tenant from filling in, perhaps "inaccurately," the date of mailing. Any subsequent estoppel certificate should clarify the continued viability of the option.

For further discussion of options to renew, see Office Leasing: Drafting and Negotiating the Lease, chap 10 (Cal CEB 1996).

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10. Utility Charges and Ratio Utility Billing

§4.41A a. Jurisdiction

It is becoming extremely common for landlords to charge tenants for utility charges not directly billed to tenants from the local utility. This billing is generally done through the use of individual submeters or allocation formulas, commonly known as "Ratio Utility Billing System" (RUBS). Because California law has required, since 1997, that all apartment units in the service territories of utilities regulated by the California Public Utilities Commission ("CPUC") be individually metered by the local utility for gas and electricity (see Pub Util C §2791(c)), the majority of activity in landlord-tenant utility billing disputes involve water and sewer billing.

Water and sewer tenant utility billing is not directly regulated by any California statute. Tenants' rights groups have argued in the past that the CPUC should have jurisdiction over these utilities. However, in its decision for Investigation No. 98-12-012, the CPUC held that it has no jurisdiction in the vast majority of landlord-tenant billing relationships. In its decision, the CPUC focused on the dedication to the public principles established by several cases, including *Story v Richardson* (1921) 186 C 162. Using the dedication doctrine, the CPUC ruled that a landlord would have to actively and intentionally dedicate itself to the public in order to fall under the jurisdiction of the Commission.

Gas and electric tenant utility billing is allowed under CC §1940.9 and is regulated by the CPUC and several California statutes, including Pub Util C §739.5, and the tariff provisions of most gas and electric utilities (*e.g.,* San Diego Gas & Electric Rule 19, available online at http://www.sdge.com/tm2/pdf/ELEC_ELEC-RULES_ERULE19.pdf). The relevant statutes and tariff provisions establish a specific billing scheme that must be used. See §§4.41C-4.41D.

PRACTICE TIP: Lacking direct regulation or guidance from the CPUC or statutory law, it is important to ensure that all facets of a landlord-tenant billing system are agreed to in writing by the tenant, including billing methods (see §§4.41C-4.41D) and miscellaneous charges (see §4.41E). For forms, see §1.56.

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§4.41B b. Water and Sewer Billing Methods

Water and sewer billing is generally performed utilizing one of three billing methods: submetering, hot-water metering, or Ratio Utility Billing System (RUBS). Traditional submetering occurs when all the water consumed by a tenant is measured by a submeter, in which case bill calculations are relatively simple as consumption is multiplied by a water and sewer rate to derive a monthly total. In older properties where building construction makes it infeasible to install one submeter that measures all water consumed by a tenant, a landlord may install a submeter on the hot-water line to the tenant's unit. The tenant is then billed a portion of the landlord's water and sewer bills based on the percentage of hot water the tenant consumes compared to the total amount of hot water consumed by all tenants residing at the property. Finally, in properties where no submeters are installed, tenants are commonly billed using a RUBS formula. Under a RUBS system, tenants are billed a portion of the landlord's water and sewer bills based on specific criteria, such as square footage ratios or number of occupants in each unit. Additionally, landlords frequently pay for a portion of the water and sewer bills before they are allocated to the tenants to account for common area usage.

The billing method chosen by the landlord may determine the applicability of environmental regulations (such as safe drinking water laws) or other consumer laws and regulations. See, *e.g.,* Policy Memorandum published by the federal Environmental Protection Agency, 68 Fed Reg 74233 (2003). See http://www.epa.gov/fedrgstr/.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.41C c. Gas and Electricity Charges

§4.41C c. Gas and Electricity Charges

As discussed above, Pub Util C §739.5 establishes specific criteria for gas and electric submetering charges. Under Pub Util C §739.5(a), a landlord is exempt from CPUC regulation if it charges "each user of the service at the same rate which would be applicable if the user were receiving gas or electricity, or both, directly from the gas or electrical corporation." Additionally, §739.5(a) establishes a submetering discount for landlords that is designed to cover some of the costs associated with the system.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.41D d. Other Charges

§4.41D d. Other Charges

A landlord operating a water or sewer billing program frequently chooses to charge tenants a variety of additional fees designed to cover the landlord's costs associated with operating the billing program or to encourage timely payments. Specifically, landlords commonly charge tenants administrative, set-up, or move-out fees associated with the billing program. In addition, the landlord typically charges late fees if the tenant fails to make timely payments. Conversely, a landlord operating a gas or electric submetering program may only charge the specific amounts authorized by Pub Util C §739.5 and the tariffs of the providing utility (thereby eliminating the ability to charge additional fees).

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.41E e. Miscellaneous Regulatory Issues

§4.41E e. Miscellaneous Regulatory Issues

The California Department of Weights and Measures ("Department") asserts jurisdiction over submetering equipment under Bus & P C §§12500-12548 and the regulations promulgated thereunder by the Department (although its jurisdiction is questioned by some billing companies, as there is no case law directly on point). Under Bus & P C §§12500.5 and 12501.1, all submeters installed in California must be approved by the Department prior to their installation.

As discussed in §4.41A, there is no statewide regulatory scheme governing water and sewer landlord-tenant billing practices. However, it is important to recognize that local or federal regulations may affect a landlord's ability to operate billing programs. For example, the City of Santa Clara has an ordinance that prohibits landlords from using a Ratio Utility Billing System (RUBS). Some cities prohibit a landlord from billing gas and electricity or water unless the building has a submeter for each unit. Other issues may arise that affect a landlord's ability to implement billing programs, such as rent control or subsidized housing. The water billing method chosen by the landlord may determine the applicability of federal environmental law to the property. See §4.41B.

PRACTICE TIP: Many third-party utility billing providers that property owners contract with have legal departments that can provide relevant information on RUBS. Local utility regulation departments would have information about ordinances or regulations that require submeters or other preconditions for using RUBS.

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11. Other Provisions

§4.42 a. Attorney Fees

Landlords must be aware that they may be liable for the attorney fees of a tenant who prevails in a landlord-tenant dispute. Even if the lease provides that only the landlord is entitled to attorney fees in an action to enforce the lease, a prevailing tenant can also recover fees. CC §1717. See §§13.25-13.34, 13.40.

In rent-controlled jurisdictions, or if a landlord wishes to avoid the threat of affirmative lawsuits, it is often wise to remove the attorney fee clause. Although many practitioners favor keeping the clause for specified disputes to limit the occasions in which a tenant could recover, having no attorney fee clause in the agreement is probably wise as a general practice. Limiting attorney fees to unlawful detainers is of limited value when one considers the likelihood of actually collecting from a tenant who has defaulted on rent payments. Also, in some instances, CC §1717 overrides the terms of a fee clause that conflict with §1717. See *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830, discussed in §13.27.

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§4.43 b. Landlord's Right of Entry

The circumstances and manner in which a landlord may enter an occupied rental unit are limited by CC §1954. See §§1.30, 1.66, 3.2-3.4. The legislature substantially amended the notice procedures in 2002 and 2003. See §§3.3-3.3A. Unless there is an emergency or the tenant has abandoned or surrendered the premises, the entry may be made only after reasonable written notice to the tenant and during normal business hours. CC §1954. Amendments to §1954, effective January 1, 2003, permit the mailing of a notice, but provide that the presumption of reasonableness of the notice will not apply unless the notice is mailed at least 6 days before the entry. A written notice may also be personally delivered to the tenant or left on, near, or under the usual entry door of the premises in a manner in which a reasonable person would discover it. Oral notice is allowed in limited situations. See CC §1954(d)(2)-(3), discussed in §3.3. The tenant may not waive in the rental agreement the rights conferred by CC §1954 (CC §1953(a)(1)), but may consent to the entry, without written notice and outside of normal business hours, at the time of entry.

Landlords have at least a limited implied right to be assured that the tenant is not violating any laws. Unless the tenant can otherwise provide reasonable assurances, the landlord may enter and inspect the premises for this purpose. See *Sachs v Exxon Co., U.S.A.* (1992) 9 CA4th 1491, 1498, 12 CR2d 237 (commercial landlord's right to enter premises and conduct environmental testing in reasonable and unobstructive manner). Landlords, however, should not use the right of entry to harass the tenant. Effective January 1, 2004, a tenant has additional remedies (including a $2000 penalty for each act) for a landlord's wrongful acts committed for the purpose of influencing the tenant to vacate the dwelling, including abusing the right of entry granted by CC §1954. See CC §1940.2, explained in §8.150A.

One of the major problems for landlords with CC §1954 is that it does not define "normal business hours." The minimum acceptable range is probably 8 a.m. through 6 p.m., Monday through Friday. Unfortunately, these hours are usually the least convenient for the nonprofessional landlord who is employed in another business that maintains standard office hours, or for real estate brokers who find, for the same reason, that it is most advantageous to show property on Saturdays and Sundays.

DRAFTING TIP: To avoid this controversy, the landlord might invoke the spirit of CC §1954, which appears to permit the landlord and tenant to establish hours for inspection that are reasonably convenient for both parties. See rental agreement provision in §1.66, allowing the normal business hours to include Saturdays.

It is unclear whether "normal business hours" will be interpreted as including weekend hours. For definitions of "business days" and "holidays" applicable to the performance of acts required by law or contract, see CCP §§12a-13b and CC §§7, 9.

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§4.43A c. Late Fees

Late fee provisions (as liquidated damages in rental agreements and leases) are governed by CC §1671. See CC §1951.5. For the supreme court's analysis of legislative intent concerning CC §1671, see *Ridgley v Topa Thrift & Loan Ass'n* (1998) 17 C4th 970, 73 CR2d 378, discussed extensively in California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 8 (4th ed Cal CEB 2009).

Attorneys for landlords argue that a charge to compensate landlords for costs occasioned by the late payment of rent by a residential tenant may be added to a rental agreement as liquidated damages provided the precise provisions of CC §1671(d) are met and the parties agree that the amount in fact bears a reasonable relationship to the actual costs and damages incurred by the landlord because of the late payment. (In commercial tenancies, the presumptive validity of the late charge is arguably established by CC §1671(b).) See §§8.39-8.40. Tenant attorneys assert in either situation, however, that such fees (at least in actions for possession) are governed entirely by the unlawful detainer statutes and are, therefore, nonrecoverable. See CC §1671(a); *Jack v Sinsheimer* (1899) 125 C 563, 566, 58 P 130.

The contention that late fees are always void was rejected by the appellate department of the Los Angeles Superior Court in *Orozco v Casimiro* (2004) 121 CA4th Supp 7, 17 CR3d 175. However, in that case the court overturned the trial court's judgment for possession and statutory damages in favor of the landlord because the landlord had sought a $50 late fee on a $601 per month rent and had failed to plead and prove that damages on account of the late payment of rent were impracticable or extremely difficult to prove. The court did not state that the written agreement between the parties contained the standard language of CC §1671 although it seems likely that it did not and there is no indication whether the pleading and proof requirement would have been required had the lease contained the necessary agreement of the parties. See form clause in §1.41. The opinion is instructive in that at least this court believed that landlords wishing to collect a late fee in an unlawful detainer action must plead and prove that actual damages were impracticable or extremely difficult to prove and that the amount was reasonable.

PRACTICE TIP: With respect to the reasonableness of an amount, attorneys should pay particular attention to the actual dollar amount demanded and determine whether the landlord wishes to run the risk of including the late charge in an unlawful detainer action. Additionally, in counseling a landlord on the amount to be placed in a lease, the suggestion that using no more than the amount authorized as a late fee in residential mortgages by CC §2954.4 might provide a safe harbor.

In any event, attorneys for landlords should caution their clients that a liquidated damages clause may not be used to penalize a tenant unreasonably for the late payment. See *Kraus v Trinity Mgmt. Servs.* (2000) 23 C4th 116, 124 n7, 96 CR2d 485 (see also superseded court of appeal opinion in *Kraus* at 57 CA4th 709, which affirmed trial court's judgment that liquidated damages for early termination of lease were unlawful).

NOTE: The issue of late fees is one that continues to surface in landlord-tenant matters. Several tenants' attorneys have successfully argued that if a landlord has consistently charged "excessive" late fees that were paid by the tenant, then those "excessive" sums must be credited to rent payments, thus invalidating a 3-day Notice to Pay Rent or Quit. Although no reported California case warrants the application of excessive late fees to rent, landlord attorneys should be aware of the argument.

For further discussion on whether late fees may be demanded in a 3-day notice to pay rent or quit, see §§8.39-8.40.

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Source: Real Property/California Landlord-Tenant Practice/4 Counseling the Landlord/§4.43B d. Insurance

§4.43B d. Insurance

Given the age of some properties, increased hazards due to earthquakes or a deterioration of a neighborhood, many form leases now warn tenants that the tenant may want to carry renter's insurance since an owner's policy may not cover all losses suffered by a tenant. Some practitioners advise that landlords may want to require that tenants maintain their own policies to cover the tenant's personal property located in a rental unit, particularly if there is any indication that the tenant may be bringing items of high value such as art, jewelry, high-end computer equipment, or bicycles.

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§4.44 VI. COPING WITH DRUG-RELATED AND FIREARM ACTIVITY ON THE PREMISES

Landlords potentially face serious consequences if a tenant is suspected of dealing drugs or using firearms on the rented premises. Landlords have typically found it difficult to evict tenants who are believed to be engaged in drug-related or firearm activities on the premises. Notwithstanding their limited right of entry to inspect for criminal activity (see §4.43), landlords must be cautious in this area. Landlords may find some assistance under CC §3479 (which defines "nuisance" to include the illegal sale of controlled substances), CC §§3485-3486 (which define "nuisance" to include illegal conduct involving weapons or ammunition or the manufacture, cultivation, possession for sale, or sale of controlled substances), and CCP §1161(4) (which allows an eviction action based on the nuisance activities defined in CC §§3485-3486). For further discussion, see §§1.58, 8.59.

A landlord may face liability, and potentially even a forced sale of the property, under the Narcotics Nuisance Abatement Act (Health & S C §§11570-11587). Health and Safety Code §11570 defines as a nuisance "[e]very building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance" specified in the Act. Under Health & S C §§11571, 11571.5, a district attorney, city attorney, or private citizen may bring an action to abate such a nuisance against both the landlord and the tenant. Thus, neighbors or other tenants who are bothered by drug dealing on the premises may bring an action to abate the activity. Preliminary injunctive relief is available and an abatement order after trial may result in severe penalties for the property owner, including

- closure of the building for 1 year,
- requiring the owner to reside in the property until the nuisance is abated,
- relocation assistance to innocent tenants,
- making the injunctive order applicable to subsequent owners and requiring disclosure of the order to prospective purchasers and commercial lessees,
- monetary penalties not exceeding $25,000, and
- attorney fees.

See Health & S C §§11573, 11573.5, 11581. In 2009, the legislature added Health & S C §§11571.1 (see Stats 2009, ch 244, §7), which declares that the state law is not preemptive of local ordinances relating to drug abatement and that state law remedies are not intended to prevent a tenant from asserting relief against forfeiture under CCP §1179.

In addition to or in lieu of an abatement action, any city attorney in Los Angeles, Long Beach, Palmdale, San Diego, or Oakland may bring an unlawful detainer action against the offending tenant, which must be based on an arrest report or other action or report by a regulatory or law enforcement agency. CC §3486(a). This eviction remedy will sunset in 2014. CC §3486(h).

In *Lew v Superior Court* (1993) 20 CA4th 866, 25 CR2d 42, neighbors individually filed separate nuisance complaints against the landlord in small claims court, claiming that they were disturbed by drug dealers working from and around the landlord's property. The small claims court consolidated the actions and awarded the plaintiffs $218,325. The court of appeal upheld the award, relying on Health & S C §11570 and its definition of drug-related activity as a nuisance. The court also allowed the plaintiffs to recover for mental suffering, because a finding that an activity constitutes a nuisance permits recovery of damages for discomfort and annoyance.

If a locality were to enact ordinances giving the police or other agency powers to compel landlords to deal with alleged drug abuse in rented property, landlords should still be very cautious and review the provisions of such an ordinance very carefully, particularly in jurisdictions with eviction controls. In *Cook v City of Buena Park* (2005) 126 CA4th 1, 23 CR3d 700, the Court of Appeal held unconstitutional on due process grounds a local ordinance in a non rent control jurisdiction giving the local police chief discretion to force a landlord to evict tenants suspected of illegal drug activity. The Court found that the landlord was given insufficient information or time to prevail in an eviction action and was required to prevail in the action to avoid criminal penalties.

In 2007, CC §3485 was added to California general nuisance law, and in 2009, it was amended and expanded. It

authorizes any city attorney in Los Angeles, Long Beach, San Diego, Oakland, or Sacramento to bring an unlawful detainer action against a tenant who unlawfully possesses or uses weapons or ammunition on the premises. In 2009, CC §3486 was added to California general nuisance law to replace former Health & S C §11571.1. It authorizes any city attorney in Los Angeles, Long Beach, Palmdale, San Diego, Oakland, or Sacramento to bring an unlawful detainer action against a tenant who unlawfully manufactures, sells, possesses, or uses controlled substances on the premises.

The action must be based on an arrest report or other law enforcement agency report. CC §§3485(a), 3486(a). Before bringing the action, the city attorney must first give 30 calendar days' written notice to the landlord and tenant about the nuisance activity, and the landlord must either bring an unlawful detainer action and provide the city attorney with the details of the action or assign the right to bring the unlawful detainer action to the city attorney. The notice to the tenant must meet statutory requirements regarding content and translation into specific languages. It must also include prescribed information about the nature of the unlawful detainer action, potential defenses, and where to find legal assistance to defend the action. CC §§3485(a)(1), 3486(a)(1). The statute requires each participating jurisdiction to report specific information about evictions on an annual basis to the California Research Bureau. CC §§3485(g), 3486(g). This eviction remedy will sunset in January 2014, except for in Los Angeles County, where the law as it pertains to controlled substances will remain in effect indefinitely, except as specified. CC §§3485(h), 3486(h). See Stats 2009, ch 244, §3, re-enacting CC §3486, effective January 1, 2014, only for Los Angeles County if certain conditions are met.

PRACTICE TIP: Neighbors may fear retaliation and may not be willing to be called as witnesses for the landlord. As long as CC §§3485-3486 exist (they are both scheduled to sunset in 2014), a landlord who needs evidence to support the unlawful detainer action may either inquire from the local police department about whether the tenant has been arrested for the illegal activities or invite the city attorney to formally request that the landlord bring an eviction action.

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§4.45 VII. PROPERTY MANAGEMENT

Many landlords find that the services of a property manager are extremely helpful and that a professional manager can maximize income and protect the owner's investment in the property. There are also risks associated with hiring a manager, however, and formal contracts must be negotiated for the work. For properties consisting of 16 units or more, a resident manager, janitor, housekeeper, or other "responsible person" is required. 25 Cal Code Regs §42. Local ordinances may impose parallel or more stringent obligations. Whether this required resident manager performs functions other than providing emergency services and a direct link to the property owner varies depending on the interest and abilities of the landlord.

Preparing or reviewing a property management agreement is not a simple task because these agreements blend elements of real property and employment law. Most property management companies have their own standard agreements.

At a minimum, a property management agreement should clearly specify the manager's duties, which typically include the following:

- locating tenants for vacancies;
- collecting rents;
- maintaining and improving the property;
- solving tenant problems;
- handling lease renewals;
- keeping records;
- purchasing supplies;
- hiring staff;
- paying bills, including loan payments, and taxes;
- handling property insurance; and
- preparing financial statements.

PRACTICE TIP: A property manager who enters into a lease or rental agreement as the lessor (not as agent for the landlord) can bring unlawful detainer actions in his or her own name. Paragraph 3 of the Judicial Council Unlawful Detainer Complaint Form provides for someone other than the landlord to appear as plaintiff. See §9.31. A delegation of this duty must be clearly spelled out in the property management agreement.

Civil Code §§1961-1962.7, which apply to any dwelling structure of one or more units, require the landlord to notify the tenant of the names of the manager and owner or agent for service of process and receipt of notices and demands. If the landlord fails to comply with this requirement, in any dispute arising out of the tenancy the tenant may effect service of process by registered or certified mail at the address at which rent is paid. CC §1962.7.

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A. Resident Property Managers

§4.46 1. Employee or Independent Contractor?

Large residential complexes are usually managed by a person who lives in the apartment building and is employed as a manager-caretaker by either the property owner or a management firm retained by the landlord. If the manager is hired by the landlord directly, a resident manager or other onsite person may be either an employee or an independent contractor. If the owner exercises control only over the result of the work, and not over the means for achieving the result, the manager may be an independent contractor. See *Tieberg v Unemployment Ins. Appeals Bd.* (1970) 2 C3d 943, 88 CR 175. Most resident managers do not exercise sufficient independence and discretion to qualify as independent contractors.

If the manager is an employee of the owner, the attorney must counsel the landlord on laws governing resident apartment manager wages and work hours (8 Cal Code Regs §11050(3)-(4); see §4.47), social security payments and deductions, income tax withholding, unemployment insurance, disability insurance withholding, and workers' compensation insurance. See generally Advising California Employers and Employees, chaps 1-2, 5, 7-8 (Cal CEB 2005). If the landlord retains a management firm, the landlord should insist that the resident manager be employed by the firm, rather than by the landlord, so that the landlord will not bear the costs and responsibilities of an employer.

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§4.47 2. Compensation

Whether employed by the owner or by a management firm, an apartment building manager who is required to live on the premises is subject to many state employment regulations affecting the amount of rent that may be applied toward an employer's minimum wage obligations and the amount of rent that may be charged.

If the manager's monthly compensation is $1150 or less, and the manager does not exercise independent judgment or discretion in his or her duties, the employment relationship is probably governed by 8 Cal Code Regs §11050, which applies to apartment-house employees (see 8 Cal Code Regs §§11050(1)(B)(1), (2)(P)(3), as modified by Lab C §1182.8).

The maximum rent and rent credit for apartment-house employees are strictly controlled. If a rent credit is used to meet part of the landlord's minimum wage obligation to an employee (under a voluntary written agreement), the credit may not exceed two thirds of the fair market rental value of the apartment (but no more than $381.20 per month for a single person, or $563.90 per month for a couple (effective January 1, 2002; adjusted yearly) when both are employed by the landlord). See 8 Cal Code Regs §11050(10)(C). If the employee *must* live in the apartment building as a condition of employment, the landlord may charge him or her only two-thirds of the fair market rental value of the apartment, but not to exceed the credits respectively allowed for a single person or a couple employed by the landlord. 8 Cal Code Regs §11050(10)(E).

A landlord may charge a resident manager up to two-thirds of the fair market rental value of the apartment (without the ceiling imposed by 8 Cal Code Regs §11050(10)(C)) if no rent credit is used to meet the landlord's minimum wage obligation to the manager (under a voluntary written agreement). Lab C §1182.8.

If a resident manager is not required to live in the apartment building, but chooses to do so, the landlord may apparently charge the full fair market rental value of the apartment. See 8 Cal Code Regs §11050(10)(E), which limits the rent that may be charged only if the employee is required to reside on the premises as a condition of employment. Labor Code §1182.8 provides that an employer does not violate any applicable order of the Industrial Welfare Commission (*i.e.,* 8 Cal Code Regs §11050), as it relates to rent and rent credits, by charging a resident manager two-thirds of the apartment's fair market rental value, subject to the conditions discussed above. If 8 Cal Code Regs §11050(10)(E) does not apply because the manager is not required to live on the premises, then no statute or regulation appears to restrict the maximum rent that may be charged to the manager. The amount of rent credit that the landlord can use to satisfy his or her minimum wage obligation to the manager, however, would be limited by 8 Cal Code Regs §11050(10)(C).

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§4.48 3. Termination and Eviction

A person who as compensation occupies premises belonging to the landlord/employer generally has no right to remain in possession after the employment relationship has been properly terminated. *Eichhorn v De La Cantera* (1953) 117 CA2d 50, 255 P2d 70. This principle has been applied to the employment termination of a tenant-employee. *Karz v Mecham* (1981) 120 CA3d Supp 1, 174 CR 310. See also CCP §1161(1), which provides that a person is guilty of unlawful detainer if he or she became the occupant of the premises as an employee but continues in possession after the employment relationship is lawfully terminated. This provision should apply even in rent-controlled jurisdictions that regulate evictions. See *Tapp v Lieberman* (1983) 145 CA3d Supp 19, 23, 193 CR 514, in which the court held that San Francisco's rent control ordinance was inapplicable to a nonresident tenant who leased units and provided them to his employees only for the duration of their employment and further held that the ordinance was inapplicable to the tenant's employees. See also *Chan v Antepenko* (1988) 203 CA3d Supp 21, 250 CR 851 (property manager entered into occupancy as a licensee of the owners and could not, by refusing to vacate on expiration of his employment, convert his status into that of a tenant who would be entitled to protection of San Francisco's rent ordinance).

Termination of the employment relationship might not terminate the manager's right to occupancy, however, if the manager occupied the apartment before assuming the position of manager. In that instance, the tenancy must also be terminated, something that may not be possible in jurisdictions with rent control ordinances that restrict evictions.

The threshold issue for the owner is whether to hire an existing tenant as a manager. The attorney should advise the owner of the various advantages and disadvantages of such a choice, including the potential inability to remove the individual if the employment is terminated. A management agreement with an existing tenant must be carefully drafted to accommodate all situations and should include a provision stating what the rent will be if the manager reverts to the status of tenant.

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§4.49 B. Landlord's Liability for Acts of Manager

A landlord will almost always have some liability for acts committed by the property manager within the scope the manager's employment or agency. See CC §2338. If the landlord authorizes or ratifies a wrongful act, the landlord may be liable for punitive damages. See CC §2339; *Farvour v Geltis* (1949) 91 CA2d 603, 205 P2d 424.

If the manager is an employee of a management firm that, in turn, is the agent of the landlord, the landlord still may be liable for the manager's acts but should have indemnification rights against the management firm, unless they were expressly waived in the management agreement. See CC §2351 (lawfully appointed subagent represents the original principal; original agent is not liable for acts of subagent). See also *Bond v Pitzer* (1958) 163 CA2d 1, 5, 328 P2d 1009 (CC §2351 applied to exempt apartment manager from liability for tort of subordinate employee).

Even if the manager is an independent contractor, the landlord may be liable for the manager's acts or omissions if the landlord negligently hired an incompetent manager. See *Golden v Conway* (1976) 55 CA3d 948, 128 CR 69.

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§4.50 C. Making Repairs; Code Compliance

Landlords should be advised to respond promptly to requests for repairs and to maintain good records of all requests for repairs as well as all responses to such requests. Maintaining consistent and regular business records is critical if there is a dispute about whether an owner or a manager received a request from a tenant to correct a problem within a rental unit and whether the repairs were made. Such record keeping is much more difficult for smaller owners who may manage only one or two units and are somewhat informal in their relationships with their tenants. However, if a dispute occurs or if a need to evict a tenant arises, having good written records will be invaluable to the owner if the owner has in fact met all of the owner's responsibilities. See chap 3.

If an owner receives a formal complaint from a city official charged with enforcing state or local building codes, the practitioner should advise the owner that such a citation is extremely serious even if the problem appears to be minor. There are increasingly severe consequences for an owner's failure to correct defects that are the subject of a notice of violation from a local building or housing inspector. These consequences include the inability to demand rent, collect rent, or commence an unlawful detainer action after a rent default (CC §1942.4(a)), obtain the benefits of vacancy decontrol in rent control jurisdictions (CC §§1954.52(d), 1954.53(f)), or take interest, taxes, depreciation, and amortization paid on the property as deductions from income for state income tax purposes (Rev & T C §§17274, 24436.5). When substandard housing is unsafe to occupy, a local enforcement agency may obtain judicial appointment of a receiver to manage the property and remediate the violations or take other appropriate action, including demolition. *City of Santa Monica v Gonzalez* (2008) 43 C4th 905, 76 CR3d 483. In addition, a long-term failure to comply with housing or building codes may also subject an owner to penalties, sanctions, and attorney fees and costs. See, *e.g., City of Santa Paula v Narula* (2003) 114 CA4th 485, 8 CR3d 75. For further discussion, see §§3.10-3.11D.

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§4.51 D. Security Deposit Issues on Termination of Tenancy

Civil Code §1950.5 mandates that if either the landlord or the tenant terminates the tenancy, the tenant must be given the opportunity to have an inspection of the rental unit no earlier than two weeks before the end of the tenancy so that the tenant has an opportunity to correct any defects that might result in a deduction from the tenant's security deposit. See details in §4.28. Landlords are required to give tenants a notice of their right to request such an inspection, their right to be present during the inspection, and the date and time of the inspection. In addition, the landlord must give to the tenant at the inspection a written list of defects or must leave such a list in the rental unit at the end of the inspection. The inspection option does not apply if the tenancy is terminated by the tenant's default in the payment of rent (CCP §1161(2)), the tenant's breach of a covenant or condition of the rental agreement (CCP §1161(3)), or the tenant's committing waste or nuisance or subletting in violation of the agreement (CCP §1161(4)). See CC §1950.5(f)(1), (q).

The tenant may decline the opportunity to have such an inspection.

PRACTICE TIP: Landlords must keep a record of the result of the inspection, including details about areas that were not able to be inspected (*i.e.,* under a carpet or behind pictures on the wall or behind any wall-attached cabinet or entertainment unit). This record keeping may be difficult, since the list must be left at the time of the inspection. Short lists can simply be copied by hand, although using a multicopy form with treated paper or reverting to carbon paper may be desirable.

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§4.52 VIII. PRESALE AND DEVELOPMENT ISSUES

It is beyond the scope of this treatise to discuss sales and development of property that had once been rental property. With increasing frequency, however, practitioners who advise landlords are called upon to advise an owner undertaking a conversion of the property to condominiums, selling the property to multiple owners who will own as tenants-in-common, or selling the entire parcel as a rental property. The efforts to sell rental properties to those who will own and occupy them seem to occur most frequently in jurisdictions with stringent limits on owner move-ins and escalating home purchase prices.

Some rent control ordinances provide a just cause for eviction (see chap 7) in connection with a condominium conversion. See, *e.g.,* San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.9(a)(9).

Disclosure during a sale is a critical part of any transaction. Standard real estate sale forms often provide that a buyer will assume title subject to all tenant rights. Those rights are often difficult to explain in rent control jurisdictions. In localities where there are many sales of apartment buildings and where apartments are being converted to tenancies in common or condominiums, rent control ordinances provide added protections to tenants. In San Francisco, for example, in 2008, the city amended its ordinance to require both buyers and sellers of buildings in which tenants reside to deliver to those tenants statements of basic tenant rights under the ordinance and under state law. see San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.9(j).

In addition, if the buyer is making the purchase in order to occupy all or some of the rental property, local rent control ordinances must be consulted to determine if such occupancy is allowed. In this regard, a buyer may need to determine, and therefore a seller may need to disclose, whether there have been prior evictions from the property, a fact which may impact a buyer's right to occupy. In addition, prior evictions may affect a buyer's right to increase rents in accordance with a local ordinance. See, *e.g.,* Oakland Mun C §8.22.080. In some jurisdictions, sellers who transfer a building in which one or more of units is to be delivered vacant must disclose the specific legal grounds for the termination of any tenant from the vacant unit. See, *e.g.,* San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.10A(i). For a discussion of purchasing real property subject to leaseholds, see California Real Property Sales Transactions §§4.73-4.75 (4th ed Cal CEB 2007).

The conversion of buildings with five or more units to condominiums or the sale of such buildings to five or more tenancy-in-common owners is subject to regulation by the California Department of Real Estate. That state agency must issue a permit, often referred to as a White Paper, approving the division of the property into five or more interests. Although there is yet a reported appellate case, practitioners should be aware that evictions have been denied, even if the owner has complied with all other laws and local ordinances, when such a permit has not been issued. See *Bohbot v Santa Monica Rent Control Bd.* (2005) 133 CA4th 456, 34 CR3d 827.

For further discussion of the eviction of tenants in anticipation of a condominium conversion, see California Eviction Defense Manual §17.14 (2d ed Cal CEB 1993).

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5

Counseling the Tenant

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I. COUNSELING INDIVIDUAL TENANTS
- A. Overall Strategy
  - 1. Developing a Tenant Profile: The "Big Picture" §5.1
  - 2. Devising a Strategy §5.2
    - a. Litigation as an Option §5.3
    - b. Settlement as an Option §5.4
- B. Limited Scope Representation
  - 1. Applicable Law §5.4A
  - 2. Checklist: Tenant Fee Agreement §5.4B
- C. Enforcing Tenant's Rights During Tenancy
  - 1. Defeating Rent Increase §5.5
    - a. Retaliation Prohibited §5.6
    - b. Discrimination Prohibited §5.7
    - c. Improper Service of Notice of Rent Increase §5.8
    - d. Landlord in Breach of Warranty of Habitability §5.9
  - 2. Remedies for Uninhabitable Conditions; Preserving Evidence §5.10
    - a. Informing Building or Health Inspector of Conditions §5.11
    - b. Contacting the Landlord §5.12
    - c. "Repair-and-Deduct" Remedy §5.13
    - d. Petitioning Rent Control Board for Rent Decrease §5.14
    - e. Rent Withholding §5.15
    - f. Action for Breach of Implied Warranty of Habitability §5.16
  - 3. Redressing Illegal Landlord Entry
    - a. Possible Remedies §5.17
    - b. Changing Locks §5.18
  - 4. Protection Under Anti-SLAPP Statute §5.18A
- D. "Breaking" a Lease §5.19
- E. Lockouts and Other "Self-Help" Evictions §5.20
  - 1. Recovering Possession §5.21
  - 2. Amount of Damages §5.22
  - 3. Joining Claims §5.23
- F. Legal Eviction Procedure
  - 1. Unlawful Detainer Action Required §5.24
    - a. Required Notices §5.24A
    - b. Summary Remedy §5.24B
    - c. Unlawful Detainer Judgment §5.24C
  - 2. Stipulated Judgments §5.25
  - 3. Effect on Tenant's Creditworthiness §5.25A
  - 4. Landlord Actions In Propria Persona §5.26
  - 5. Representing Occupant Not Named in Eviction Action §5.27
- G. Roommates §5.28
  - 1. Landlord's Consent §5.29
  - 2. Nature of Relationship; Right to Evict §5.30
  - 3. Effect of Local Rent Control Ordinance §5.31
  - 4. Written Occupancy Agreement §5.32

II. COUNSELING TENANT ORGANIZATIONS
- A. Attorney's Role §5.33
- B. Right to Organize on Premises §5.33A
- C. Strategy and Tactics §5.34
  - 1. Obtaining Information About Landlord §5.35
  - 2. Petitioning the Landlord §5.36
  - 3. Picketing and Publicity §5.37
  - 4. Rent Strikes §5.38
  - 5. Lawsuits Against Landlord §5.39
  - 6. Negotiations §5.40
  - 7. Agreement Negotiated Between Landlord and Tenant Union
    - a. Parties; Effectiveness §5.41
    - b. Form: Sample Collective Bargaining Agreement §5.42

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I. COUNSELING INDIVIDUAL TENANTS

A. Overall Strategy

§5.1 1. Developing a Tenant Profile: The "Big Picture"

The attorney should begin counseling a tenant client by obtaining information on the larger factors affecting the tenant's life apart from the legal details immediately at issue; essential questions are these:

(a) What are the tenant's overall goals in terms of the future of the tenancy? That is, does the tenant wish to remain in the unit but only if some problem is corrected, such as a habitability defect or entries by the landlord? Or does the tenant want to vacate the unit but needs some time to do so.

(b) How would the tenant's total relationship with the landlord be described?

(c) How do the tenant's goals about the future of the tenancy fit the overall circumstances of the tenant's life, both financially and emotionally?

(d) What does the tenant really need?

EXAMPLE: A tenant whose problem was a rent increase that the attorney is able to have rescinded will not be pleased with the attorney's services if a notice of termination follows the next month (even though the tenant could probably defeat the retaliatory eviction under CC §1942.5(c) (see §8.109)). Accordingly, the attorney should discuss the advantages of relocation; the tenant may have outgrown the unit, or may genuinely be overextended financially, and might therefore benefit from taking the opportunity to move to larger or more affordable accommodations. In such cases, the attorney does the tenant no favor by winning the right to possession of a home that is no longer suitable for the tenant's overall needs. The better solution may be to offer the landlord the business opportunity of a voluntary surrender at an agreed on future time, including a mutual waiver of all claims (including rents otherwise payable to the date of surrender).

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§5.2 2. Devising a Strategy

The attorney's goal should be to devise a strategy for resolving the tenant's immediate problem that minimizes the risk of:

- jeopardizing the tenant's "security of tenancy" (*i.e.,* the tenant may remain in the rental unit);
- prompting the landlord to increase the amount of rent that the tenant currently pays; and
- aggravating the emotional strain that inevitably arises in a dispute over the tenant's home.

It is the attorney's obligation to raise those issues, even if the client does not.

EXAMPLE: A tenant consults an attorney about the landlord's failure to make repairs and the attorney determines that the landlord has probably violated the implied warranty of habitability (see §3.16). Under these circumstances, the tenant may have the right to stop paying rent until the repairs are made. See §3.32. Before advising the tenant to withhold rent, however, the attorney should consider the risk involved and discuss this with the tenant. If the tenant withholds rent, the landlord sues to evict, and a jury or court finds that the tenant failed to sustain the burden of proving that the landlord breached the implied warranty, the tenant will be evicted. On the other hand, if the defects are so serious that the attorney can reasonably conclude that the landlord has little chance of prevailing, rent withholding is likely to promote corrective action by the landlord.

Faced with any risk of eviction, the tenant may prefer to continue paying the rent and to file an action against the landlord for damages (and, perhaps, for specific performance) for breach of the implied warranty. See §§3.35-3.41. The landlord then might serve a 30-day notice of termination on the tenant (see §8.69), however, if the tenancy is month-to-month and eviction controls are not in effect. Although the tenant should be able to defeat the notice on the ground that it was given in retaliation for suing the landlord (see §8.109), resolving the problem through litigation will be expensive.

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§5.3 a. Litigation as an Option

Litigation may be the only viable strategy open to a tenant, and it can be an important method of establishing or defending tenant rights. In most cases, however, litigating landlord-tenant disputes simply is not feasible economically for either the landlord or the tenant. The tenant may have little to gain in an action against the landlord, unless the landlord's actions:

- effectively evicted the tenant;
- caused actual injury to the tenant or to his or her property; or
- were so egregious that the tenant might recover substantial punitive damages.

If the tenant loses the action, he or she will probably have incurred substantial attorney fees in the process and may be liable for the landlord's attorney fees as well if the lease or rental agreement contains an attorney fee provision. See §1.74.

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§5.4 b. Settlement as an Option

Although litigation is sometimes the only tool with which to achieve the tenant's goals, the attorney's counseling objective should generally be a negotiated settlement (or a new lease), whether or not litigation is pending. Settlement not only resolves the immediate problems but also gives the tenant "security of tenancy" and an assurance that the rent will not be increased. Although any single tactic may appear to have a narrow goal (*e.g.,* the tenant withholds rent to force the landlord to make repairs, or the tenant brings a suit for damages to collect money from the landlord), the tactic also might be the catalyst for a negotiated settlement that protects the tenant's broader, long-range interests. In a dispute over the landlord's failure to make repairs, for example, a fair settlement might be as follows:

(1) The landlord does some or most of the demanded repairs on a specified timetable (and suffers rent abatement for failure to meet the timetable);

(2) The parties enter into a two-year lease at the present rent; and

(3) The tenant releases the landlord from all liability for past damages for breach of the implied warranty of habitability.

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B. Limited Scope Representation

§5.4A 1. Applicable Law

Limited scope representation (sometimes called "unbundling") is a "relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks the attorney will perform for the person." Cal Rules of Ct 3.35(a). It is increasingly used in landlord-tenant and family law cases. In most limited scope representation, the attorney and the client agree on which specific tasks the attorney will perform, which will thus be within the scope of the representation, and they agree that the client represents himself or herself as to services that the attorney does not agree to provide. Less commonly, attorney and client agree that the attorney will handle one or more discrete issues from start to finish, and the client will assume responsibility for the other issues.

NOTE: The applicable Cal Rules of Ct 3.35-3.37 and accompanying Judicial Council Forms MC-950, MC-955—MC-956, and MC-958 became effective January 1, 2007.

Although tenants traditionally have been unable to afford full service representation, unlawful detainer actions are a prime area for unbundled services, both for tenants and landlords. Because of the procedural complexities of unlawful detainer law, the benefits of paying for some professional assistance become more obvious to litigants, as it significantly increases the likelihood of success, and can save a litigant both time and money. As a result, tenant assistance can be a profit center for attorneys who can efficiently prepare a case for presentation and effectively coach the litigant. Since the laws governing this area of practice are highly localized and complex, this is a prime area where a qualified attorney can provide valuable assistance to a self-representing litigant.

Since most unlawful detainer courts are high in volume, relatively little time is allocated to each case. Therefore, a litigant with a well-organized presentation enhances his or her chances for success. Law and procedure can vary from one jurisdiction, or even venue, to another, and this can often be baffling to litigants. By steering the litigant through the procedures and deadlines, an attorney can significantly increase the likelihood of success. By actually representing a litigant on a limited basis for the more technical aspects of the claim or defense, the attorney provides an invaluable service which is demonstrably beneficial to the client.

WARNING: An attorney must disclose to the client in writing the absence of professional liability insurance at the outset of the attorney-client relationship when it is reasonably foreseeable that the total amount of time to be used in representing the client will exceed 4 hours. An attorney who does not provide this notice must inform the client in writing within 30 days of the date that the attorney subsequently knows or should know that he or she no longer has the insurance. Cal Rules of Prof Cond 3-410.

The benefits to representation in court for tenants are obvious in cases in which the tenant has a legal defense. Practitioners report that with increasing numbers of immigrants and seniors renting property to tenants, there is a pool of low- and middle-income landlords who also require assistance to navigate the often confusing and technical local ordinances governing evictions and habitability. Attorneys who develop models for effective landlord-tenant assistance will find a ready market for their services.

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Source: Real Property/California Landlord-Tenant Practice/5 Counseling the Tenant/§5.4B 2. Checklist: Tenant Fee Agreement

§5.4B 2. Checklist: Tenant Fee Agreement

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Services that lend themselves to limited scope assistance *for the tenant* in the unlawful detainer context include:

- Identifying available defenses and the evidence required to prove them.
- Preparing (or, at a minimum, reviewing) all responsive pleadings and exhibits that will be filed in court (whether law and motion or answer to complaint), as a case can be thrown out for insufficient facts (or mistakes) in pleadings (see California Eviction Defense Manual 13.1 (2d ed Cal CEB 1993)), and the stakes are high for tenants who have valid defenses but lose the unlawful detainer action.
- Explaining state law that allows only parties to review court files and copy pleadings in the court file in unlawful detainer actions. Parties must always bring identification to court to examine the file. See CCP §1161.2.
- Determining whether pretrial discovery is required and whether counsel must assist in taking depositions or preparing interrogatories or requests for production of documents.
- Organizing the documentary evidence in a binder in the order of presentation, together with any foundational requirements.
- Scripting of the elements of the presentation.
- Scripting of cross-examination questions for the opposing side and other witnesses.
- Preparing an evidence binder for the judge.
- Providing copies of statutes or other legal authorities, and/or drafting a trial brief.
- Attending or coaching the client for settlement conferences, including helping the client analyze the financial and other costs/benefits of any particular settlement option or term.
- Coaching the client on how to make an oral motion at the end of trial for relief from forfeiture because of hardship, including a complete list of facts and authorities required for that motion.
- Appearing in court to represent the client, particularly if more technical issues are presented, such as habitability defenses and the like.

Many attorneys use checklists to memorialize their discussions with the client and define the scope of the limited representation. The checklists are then attached to and incorporated into the written fee agreement. (For discussion on need for written fee agreement, see §4.2.) If the parties change the scope of the representation after entering into the initial agreement, the checklist should also be revised or replaced to document the changes. For a compilation of resources on limited scope representation, see the California Courts website at http://www.courtinfo.ca.gov/programs/equalaccess/ethiss.htm#limited.

WARNING: Because it is necessary to specifically define the scope of the attorney's services in writing, counsel should not use a full service fee agreement when providing limited scope representation. For sample forms and checklists, see Fee Agreement Forms Manual, chap 9 (2d ed Cal CEB 2007). Even if the attorney will provide full services, a written retainer agreement should be used. See §4.2. If it becomes necessary during the case for counsel to substitute in as counsel of record under a full service agreement, the form Substitution of Attorney—Civil (Without Court Order) (Judicial Council Form MC-050; Mandatory) must be used.

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C. Enforcing Tenant's Rights During Tenancy

§5.5 1. Defeating Rent Increase

In the absence of rent control, a landlord generally may change any term (including the rent) of a month-to-month tenancy by giving the tenant 30 days' notice of the change. CC §827(a), (b)(2). If the rent increase exceeds 10 percent of the rent charged in the previous 12 months, however, 60 days' notice is required in residential tenancies. CC §827(b)(3). A 60-day notice is not required if the increase is caused by a change in the tenant's income or family composition as determined by a recertification (see §§1.36, 2.16) required by statute or regulation for government-assisted housing. See CC §827(b)(3). See §§3.65-3.65B. The landlord's power is limited, however, as discussed in §§5.6-5.9. Additionally, if the landlord raises the rent to pass through certain utility costs to the tenants, the increase may violate Pub Util C §739.5. See *Hillsboro Props. v PUC* (2003) 108 CA4th 246, 133 CR2d 343 (mobilehome park's assessed annual rent increases, although authorized by municipal rent control ordinance, increased rates for submetered utilities in violation of Pub Util C §739.5).

When evaluating the options available to challenge a rent increase, the tenant's attorney must consider and discuss with the client the risks involved and the potential impact on the tenant's relationship with the landlord. A tenant who simply refuses to pay the rent increase, believing it to be invalid for one of the reasons discussed in §§5.6-5.9, risks eviction. On the other hand, if the tenant pays the increased rent, reserving the right to challenge the validity of the notice or the increase, the burden will be on the tenant to institute an action against the landlord to recover damages. Furthermore, if the rent increase is substantial, the tenant may not be able to afford the option of paying the increase and challenging it later. The tenant also must understand that he or she may be liable for the landlord's attorney fees if litigation is unsuccessful.

The tenant's attorney also should evaluate the problem with a view toward negotiation. The tenant may be willing to pay increased rent (even if the increase was imposed improperly) if, for example, the landlord makes certain repairs, replaces dilapidated furniture or appliances, or provides a parking space for the tenant. If the increase was clearly (or even arguably) improper, a letter to the landlord that points out the defects in the increase, but also states that the tenant is willing to accept the increase if certain concessions are made, may secure benefits for the tenant that outweigh the burden of the rent increase.

PRACTICE TIP: If improper service was the only defect in the increase, the attorney's letter to the landlord should probably state that the increase was defective, but not spell out the landlord's mistakes. If the attorney specifies the procedural errors, the landlord can use the information to serve another notice correctly.

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§5.6 a. Retaliation Prohibited

The landlord may not increase the rent to retaliate against the tenant because the tenant:

- utilized the "repair-and-deduct" remedy (CC §1942.5(a));
- reported housing code violations to a city agency (CC §1942.5(a));
- joined a tenants' union (CC §1942.5(c)); or
- "lawfully and peaceably exercised any rights under the law" (CC §1942.5(c)).

See §8.109.

A tenant may be protected against a landlord's adverse action even if retaliation is not the sole, or dominant, motive behind it. See §8.129-8.132. Retaliation must be found to be a "motivating factor" prompting adverse activity (such as a desire to punish the tenant for engaging in a protected activity). See *Mt. Healthy City Sch. Dist. Bd. of Educ. v Doyle* (1977) 429 US 274, 287, 50 L Ed 2d 471, 97 S Ct 568. But see *Western Land Office, Inc. v Cervantes* (1985) 175 CA3d 724, 220 CR 784.

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§5.7 b. Discrimination Prohibited

The Unruh Civil Rights Act (CC §51) (Unruh Act) prohibits discrimination on any "arbitrary" basis and thus might prohibit a landlord from increasing the rent of one or more tenants when not increasing the rent of other tenants. See *In re Cox* (1970) 3 C3d 205, 216, 90 CR 24. See also *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 732, 180 CR 496. See §§2.22, 2.57. However, a city may deny a rental subsidy to a lessee of city property that discriminates on the basis of sexual orientation. *Evans v City of Berkeley* (2006) 38 C4th 1, 40 CR3d 205. If the tenant can establish that the landlord arbitrarily increased the tenant's rent because of his or her race, sex, color, religion, ancestry, national origin, disability, medical condition, marital status, including gender identity, appearance and behavior, sexual orientation, or other protected characteristic, the tenant may be able to enjoin the increase and even recover damages for the discrimination. See §§2.57-2.59. Persons protected under the Unruh Act include those who are perceived to have any particular characteristic of the listed classes in the Act or who associate with persons who have, or are perceived to have, any such characteristic. CC §51(e)(5). Moreover, it is not necessary for a person to demonstrate that a request for nondiscriminatory treatment was made and refused in order to state a claim under the Unruh Act. *Angelucci v Century Supper Club* (2007) 41 C4th 160, 59 CR3d 142. But see *Reycraft v Lee* (2009) 177 CA4th 1211, 99 CR3d 746 (tenant's guest failed to establish standing under California Disabled Persons Act (CC §54.3) when she did not follow mobilehome park rules in seeking access to facilities).

A tenant who seeks damages under CC §52 for a violation of the Unruh Act because of a violation of the Americans With Disabilities Act of 1990 (ADA) (42 USC §§1210-12213) is not required to prove intentional discrimination. Civil Code §51(f) added ADA violations to the protection of the Unruh Act. The ADA does not necessarily require a showing of intentional discrimination. Civil Code §52 provides statutory damages for all categories of discrimination covered by CC §51 even if the particular discrimination is not required to be proved intentional. *Munson v Del Taco, Inc.* (2009) 46 C4th 661, 94 CR3d 685.

"Arbitrary" has been defined (in cases *not* decided under the Unruh Act) to include an action by a landlord "when it lacks substantial support in the evidence, and when the facts do not reasonably justify the conclusion." *Guntert v City of Stockton* (1974) 43 CA3d 203, 210, 117 CR 601; *Hollon v Pierce* (1967) 257 CA2d 468, 478, 64 CR 808. Some tenants' attorneys argue that, as case law under the Act evolves, the courts may interpret the Act as prohibiting a landlord from raising rent or taking other action adverse to the tenant for any "arbitrary" reason. For example, if the landlord serves a rent increase notice that states a reason for the increase (which it need not do), and the stated reason is false or "lacks substantial support in the evidence," the increase could be considered arbitrary and thus invalid under the Unruh Act. To date, however, decisions under the Act have concerned only arbitrary discrimination based on class characteristics.

PRACTICE TIP: If the tenant suspects discriminatory practices in the landlord's choice of tenants to whom the rent increase is applied, the tenant may be able to obtain production of rental records for other tenants in the building. See *Department of Fair Employment & Hous. v Superior Court* (2002) 99 CA4th 896, 121 CR2d 615 (DFEH entitled to obtain rental records, including current and former tenants' rental applications; the state's interest in preventing discrimination outweighs the intrusion on privacy interests of third party tenants).

Housing discrimination issues may also be brought before the Fair Employment and Housing Commission under the FEHA (Govt C §§12900-12996). The Commission has authority to award emotional distress damages in housing discrimination cases. *Konig v FEHC* (2002) 28 C4th 743, 123 CR2d 1. For further discussion, see chap 2.

In an en banc decision, the Ninth Circuit ruled in *Fair Hous. Council v Roommates.com, LLC* (9th Cir 2008) 521 F3d 1157 that a website operator whose on-line questionnaire required subscribers to disclose their sex, family status, and sexual orientation engaged in discrimination under the Fair Housing Act (FHA) (42 USC §§3601-3631) and was not entitled to immunity under the Communications Decency Act of 1996 (47 USC §§230-231).

WARNING: As it becomes more common for tenants to post "roommate wanted" advertisements online, tenants should be advised of potential liability for publishing information online that violates fair housing laws. See §§2.30-2.31.

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§5.8 c. Improper Service of Notice of Rent Increase

Procedures for raising rent must be followed strictly. Landlords often serve a rent increase notice by simply mailing the notice to the tenant. That procedure is allowed under amendments to CC §827(b) (see §§3.65-3.65B) allowing rent increase notices in residential tenancies to be served by:

- Personal delivery to the tenant; or
- First-class or express mail under CCP §1013.

All other notices under CC §827(a) must be served "in the manner prescribed by Section 1162 of the Code of Civil Procedure." Code of Civil Procedure §1162(3) permits service by mail only if the landlord cannot ascertain the tenant's places of residence and business, or if a person of suitable age and discretion cannot be found at either location. Furthermore, a landlord who serves the notice by mail must also post a copy of the notice on the property and deliver a copy to a person residing on the property (if one can be found). CCP §1162(3).

A rent increase might be effective even if notice was improperly served if the tenant actually received the notice or paid the increased rent. Actual receipt of the notice may cure any defects in the manner of service. No court has so held in any reported case, but several cases have indicated that actual receipt of a 3-day or 30-day notice to vacate cures the defect in service. See, *e.g., Valov v Tank* (1985) 168 CA3d 867, 214 CR 546; *Wilcox v Anderson* (1978) 84 CA3d 593, 148 CR 773. See also §8.66. Similarly, a tenant who pays the increased rent without protest or reservation of the right to challenge the notice probably has accepted a modification of the rental agreement and has waived the right to complain of defects in the manner of service of the notice.

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§5.9 d. Landlord in Breach of Warranty of Habitability

If a landlord has breached the implied warranty of habitability (see *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704), the tenant has the right to cease paying any rent, including the rent increase, until a court determines a "reasonable rent" for the premises. See §§3.36, 5.13. If the tenant asserts this right, the landlord might be persuaded to rescind or reduce the rent increase.

If the defects are serious and continuing, and the landlord refuses to correct them, the landlord risks a substantial penalty. The city may sue the landlord for violation of the city housing code and obtain a substantial verdict (a fine of $1000 per day imposed on a landlord for serious, continuing housing code violations was held constitutional in *City & County of San Francisco v Sainez* (2000) 77 CA4th 1302, 92 CR2d 418). The city's action does not foreclose the tenants from also suing for actual damages, including damages for emotional distress (see *McNairy v C.K. Realty* (2007) 150 CA4th 1500, 59 CR3d 429), and fines up to $100 per day under CC §789.3.

A tenant who signs and delivers an estoppel certificate stating that the premises are in good repair may be prohibited from claiming a breach of the warranty of habitability unless the problem arises after the estoppel certificate is signed. See *Plaza Freeway Ltd. Partnership v First Mountain Bank* (2000) 81 CA4th 616, 96 CR2d 865 (commercial tenant who signed and delivered estoppel certificate as required under lease was bound by certificate's declarations even though they failed to list option to renew as permitted by lease, and gave wrong termination date for initial lease). See also *Miner v Tustin Ave. Investors, LLC* (2004) 116 CA4th 264, 272, 10 CR3d 178 (an estoppel certificate signed by the tenant created an ambiguity because, although the tenant failed to list the option, the estoppel certificate stated that the lease remained in full force and effect, and the lease contained the right to the option; held: the option was not extinguished, distinguishing *Plaza Freeway*).

PRACTICE TIP: Many residential landlords deliver an estoppel certificate to tenants during escrow or just before escrow is opened. Unless the rental agreement specifically requires that the estoppel certificate be completed, signed, and returned, it is dangerous to do so under *Plaza Freeway Ltd. Partnership v First Mountain Bank, supra,* because the tenant will not be permitted to contradict the statements in the estoppel certificate even if they are erroneous.

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§5.10 2. Remedies for Uninhabitable Conditions; Preserving Evidence

When the landlord fails to make necessary repairs to the premises, the tenant has several remedies. See §§3.9-3.10, 3.12, 3.15A, 3.16, 3.32, 3.35, 5.11-5.16. The tenant's attorney must determine which course of action or legal remedy is best suited to having the repairs made at minimal expense and risk to the tenant. See §§3.45-3.48. In any case, the attorney should always document the conditions in the following ways:

(a) Take photographs of the problem (three copies should be made for future use as trial evidence). Video may also be useful at trial, depending on the nature of the defects (*e.g.*, if the problem is a roof leak, have photos taken of the water-stained ceiling, walls, and carpets, as well as any personal property damage, and also of, *e.g.*, dripping water, buckets, tarps draped around the room).

(b) Instruct the client to itemize losses and estimated costs of repair or replacement on paper, together with receipts (*e.g.,* for dry-cleaning bills) and copies of written estimates (*e.g.,* for repair or replacement of electronic equipment, furniture, clothes, books, restoration of water-damaged photographs).

(c) If the defective conditions are substantial and causing personal injuries so severe that the tenant must leave, as is sometimes required in toxic mold situations (see §3.11B), engage an appropriate expert to inspect and conduct tests before the tenant vacates, so that access to the unit will not be difficult. Crucial evidence is sometimes destroyed during remedial work that is done shortly after the tenant leaves.

(d) Obtain copies of all previous communications between the tenant and the landlord, managers, or building inspectors.

(e) Always have the client review any correspondence from the attorney to the landlord for accuracy. Misstating or overstating the situation may anger, rather than persuade, the landlord.

(f) While the tenant is still residing in the unit, attempt to have the premises inspected by the appropriate Building and Safety Department, Code Enforcement Unit, and/or Health Department. A certified copy of a citation from a governmental agency is excellent evidence at trial or during negotiations with a recalcitrant landlord.

(g) If the unit is subject to rent control, consider filing a petition for a rent decrease based on lack of habitability or removal of amenities. A landlord faced with a reduction in rent or government citations has a financial incentive to fix substandard conditions.

For further discussion of gathering and preserving evidence of defects that make a rental unit uninhabitable and selecting appropriate experts, especially if there is substantial personal injury or property damage due to mold exposure, see Handling Mold Litigation in California (Cal CEB Action Guide September 2009).

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§5.11 a. Informing Building or Health Inspector of Conditions

If the tenant's unit is in need of structural repairs and, as a result, the building does not meet building code requirements, the attorney should consider calling the applicable city or county building inspection department. Inspectors might exert enough pressure to force the landlord to make most or all of the repairs. These departments, however, are often understaffed and overworked, as is their ultimate enforcement arm, the city or county attorney. Many sophisticated landlords know this, and may avoid or manipulate the code-enforcement system (*e.g.,* by performing a few inexpensive or cosmetic repairs, and promising to "get to" the more expensive ones). See also §3.10.

PRACTICE TIP: The attorney should consider hiring an expert witness, such as a retired building inspector or an instructor from a local owner-builder center to inspect the premises and to write a report. If this inspection is performed competently and is well presented, the report can be provided to the official city inspector, both to bolster the tenant's case and to bring attention to items that city personnel might otherwise have overlooked.

If the defects present an immediate threat to the tenant's health or safety, contacting the city or county health department may produce better results. However, inconvenience that results from repairs and maintenance done by the landlord that does not substantially interfere with the tenant's right to live in the premises does not entitle the tenant to a rent decrease. *Golden Gateway Ctr. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1999) 73 CA4th 1204, 87 CR2d 332. When major disruptions have continued for a lengthy period, the tenants may be entitled to a rent decrease but must individually petition the local rent control board. *Ocean Park Assocs. v Santa Monica Rent Control Bd.* (2004) 114 CA4th 1050, 8 CR3d 421 (major disruptions ongoing for almost 3 years, but the rent board could not reduce rents on behalf of individual tenants who did not file their own decrease petitions). Inadequate heat in winter may cause children or the elderly to become sick, and rats in the building or around garbage cans can spread disease throughout the neighborhood. In such situations, the health department might respond more quickly and firmly than the building inspection department. For further discussion, see chap 3.

If the landlord responds to the tenant's complaints to government agencies about numerous code violations by suing the tenant, the tenant may be able to file a special motion to strike under CCP §425.16 on the ground that the landlord's suit is a strategic lawsuit against public participation (SLAPP). See §5.18A.

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§5.12 b. Contacting the Landlord

The owner is required to disclose the name, address, and telephone number of the person or entity to whom rent payments are to be made and of those who are authorized to receive service of legal process. CC §1962. See §1.21A. As a result, an attorney who decides to deal directly with the landlord should first deliver a letter to the landlord and other designated person or entity, specifying the defects that should be fixed, the date by which the tenant expects the repairs to be completed, and the remedies that might be invoked if the defects are not fixed by the stated date. A letter setting forth such information should satisfy the notice requirements for the "repair-and-deduct" remedy (CC §1942) or for assertion of a breach of the implied warranty of habitability. See *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704; §3.17.

PRACTICE TIP: The attorney's letter should warn the landlord of the dangers of filing an unlawful detainer action and should discourage the landlord from initiating litigation over the right to possession without first discussing the situation with the attorney. It may also be appropriate to suggest to the landlord that the claim be tendered to the landlord's property insurance carrier for contribution, if not full coverage. The tenant's attorney, however, should be careful about providing legal advice to the landlord, particularly about the potential for insurance coverage for (or defense of) an affirmative suit by the tenant. Not all claims will be covered by the landlord's property insurance. *Swain v California Cas. Ins. Co.* (2002) 99 CA4th 1, 120 CR2d 808 (insurer not required to defend landlord policyholder against tenant's suit for wrongful eviction under general liability insurance policy).

The letter should be delivered personally to the landlord (or the landlord's agent, as defined in CC §1962(a)). A copy of the letter should also be sent to the landlord as required in the "Notice" provision in the lease, which commonly provides that notice must be given to the landlord at a specified address (not always the address of the property manager) via certified mail, return receipt requested. If the lease contains no specified method for providing notice to the landlord, a copy of the letter should be sent via regular first class mail, which is known to be highly reliable. First class mail is generally faster than return-receipt mail, and it avoids the problem of a landlord who is unavailable, or who fails or refuses to sign for a return-receipt letter. If the landlord has a fax number or an e-mail address at home or at work, those methods of delivery should also be used.

If the attorney anticipates a lack of response or fears a retaliatory response, he or she should consider sending courtesy copies of the letter to:

- the manager's supervisor and management company;
- all owners of record of the property (available from the county assessor or recorder);
- the local rent control agency or board, if applicable;
- the city or county building department;
- the landlord's attorney if one is involved; and
- the client (if the attorney writes the letter) or the attorney (if the tenant writes the letter).

Sending multiple copies lets the landlord know that others are aware of the problem and reduces the chances that the landlord will falsely claim not to have received the letter.

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§5.13 c. "Repair-and-Deduct" Remedy

The statutory "repair-and-deduct" remedy (CC §1942) may be satisfactory for some defects. The remedy is limited, however, to repairs that cost no more than one month's rent. CC §1942(a); see §3.12. Furthermore, the remedy may be asserted only twice in a 12-month period, although it may be asserted in consecutive months. Tenants might be able to undertake repair of major common defects (*e.g.,* a central heating system) by pooling their rents, but this approach has not been sanctioned yet by statute or case law.

Tenants considering the repair-and-deduct approach must also consider their potential liability for the repairs. If repairs are made improperly, the tenant might be responsible for any injury to the landlord's property. Moreover, if repairs are made negligently to common areas or equipment, the tenant might be liable for injuries to third parties (*e.g.,* other tenants, guests, passersby). For example, negligently performed repairs to a central heating system might cause a fire, or repairs to a roof might cause a leak and ruin a tenant's furniture.

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§5.14 d. Petitioning Rent Control Board for Rent Decrease

In some rent-controlled jurisdictions, a tenant may petition the local rent control board for a decrease in rent on the ground that a decrease in services or a failure to maintain the property in a habitable condition decreases the fair rental value of the property. See §§7.39-7.40. In *Sterling v Santa Monica Rent Control Bd.* (1985) 168 CA3d 176, 214 CR 71, the court of appeal upheld the authority of the Santa Monica Rent Control Board to order a rent decrease for code violations and uninhabitable conditions, rejecting the contention that state law preempts local regulation of the problem. See also *Richman v Santa Monica Rent Control Bd.* (1992) 7 CA4th 1457, 9 CR2d 690. Individual tenants must petition the rent control board for the rent decrease; the rent control board may not reduce rents on behalf of individual tenants who do not file their own petitions. *Ocean Park Assocs. v Santa Monica Rent Control Bd.* (2004) 114 CA4th 1050, 8 CR3d 421. However, inconvenience that results from repairs and maintenance done by the landlord that does not substantially interfere with the tenant's right to live in the premises does not entitle the tenant to a rent decrease. *Golden Gateway Ctr. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1999) 73 CA4th 1204, 87 CR2d 332.

As of August, 2006, a San Francisco landlord must have "just cause" to remove or sever housing services such as parking or storage. San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.2(r). The San Francisco Rent Control Board declined in March, 2007 to adopt regulations to implement this legislation, thereby leaving it up to the courts to interpret the provisions. The Rent Board did, however, amend Regulation 12.20(a) to allow landlords to evict for a tenant's breach of an obligation or covenant of the tenancy after a substantial decrease in housing services involving garages, storage space, or access to common areas, so long as the tenant received a commensurate rent reduction for loss of the service.

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§5.15 e. Rent Withholding

If necessary repairs will cost more than one month's rent, rent withholding (see §3.32) may be a suitable option. An attorney who recommends rent withholding should advise the tenant to put the rent money in a separate bank account.

PRACTICE TIP: Some attorneys recommend that tenants place the funds in the attorney's client trust account. Others are reluctant to do so, and prefer that the funds remain beyond the control of the attorney to minimize any ethical dilemmas that may arise (*e.g.,* when the attorney represents to a court that the funds are available, but a tenant then decides to vacate and demands that the attorney return the funds).

If the landlord responds with an eviction action, which the tenant wins with the defense of breach of the implied warranty of habitability, the money in the account will provide a fund for immediate payment of the "reasonable rent" determined by the court. A tenant who is not prepared to tender immediately the rent set by the court will be evicted despite the successful defense.

Withholding rent involves a substantial risk for the tenant. If the landlord sues to evict for nonpayment of rent and the tenant fails to prove a breach of the implied warranty, the tenant will probably be evicted. Even if the rent was withheld in good faith, the defense was raised in good faith, and the tenant is now willing and able to pay the rent, these facts will not provide a defense to eviction. Such facts may be relevant and helpful, however, on a motion for relief from forfeiture under CCP §1174(c) or §1179. See §§13.49, 13.56.

WARNING: An additional factor that tenants and their attorneys should consider is the possibility that an eviction lawsuit will be picked up by the Unlawful Detainer Registry from the court file or a credit report. See §5.25A. See also §4.9.

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§5.16 f. Action for Breach of Implied Warranty of Habitability

If the risk of eviction is unacceptable to the tenant, the attorney should consider suing the landlord for damages for breach of the implied warranty of habitability, including damages for emotional distress (see *McNairy v C.K. Realty* (2007) 150 CA4th 1500, 59 CR3d 429), and for nuisance. See §§3.35-3.48A. The tenant will continue paying rent and accordingly cannot be evicted for nonpayment. Moreover, filing a lawsuit will often bring the landlord's insurance carrier into the picture, providing another source of funds for resolution of the dispute. In a jurisdiction without eviction controls, there is a danger that the landlord will serve a 30-day or 60-day notice of termination (of a month-to-month tenancy; see CC §§1946, 1946.1) in retaliation for the action. Such retaliation, however, is barred by CC §1942.5(c) and, under some circumstances, may violate the Unruh Act (CC §51). See §§5.6-5.7, 8.118-8.121.

An affirmative lawsuit may put much greater pressure on a landlord than rent withholding. Although rent withholding may cost the landlord rent for the entire period of withholding, an affirmative lawsuit raises the stakes much higher, making it possible for the tenant to recover actual damages (including damages for emotional distress and for "discomfort and annoyance" or personal injuries if the complaint alleges a cause of action in tort), punitive damages (if the landlord's conduct was willful, oppressive, or malicious), an order for specific performance of the implied warranty or abatement of the nuisance, and (possibly) attorney fees. See §§3.35-3.47. Willfulness may be shown if the landlord knew of an unsafe or hazardous condition and made no reasonable effort to attempt correction. See *Rick's Elect., Inc. v Cal OSHA Appeals Bd.* (2000) 80 CA4th 1023, 95 CR2d 847. Furthermore, if the suit attracts the attention of the media, the resulting publicity may put additional pressure on the landlord to negotiate.

PRACTICE TIP: A tenant for whom such a lawsuit is not feasible could instead file in small claims court, which can order specific performance and award damages of up to $7500 (CCP §§116.220(a)(1), (b), 116.221). However, because collateral estoppel precludes the issue decided in small claims court from being relitigated (*Pitzen v Superior Court* (2004) 120 CA4th 1374, 16 CR3d 628), it may be unacceptably risky to have a tenant litigate a complex issue without counsel as required at the first stage of small claims court.

Before filing any action, a thorough review of the lease or rental agreement is crucial. Some landlords attempt to limit their liability for personal injuries by including mandatory arbitration clauses in their leases. A California court of appeal invalidated such a provision that required the tenant to submit to binding arbitration personal injury suits against the landlord. See *Jaramillo v JH Real Estate Partners, Inc.* (2003) 111 CA4th 394, 3 CR3d 525. See also *Gatton v T-Mobile USA, Inc.* (2007) 152 CA4th 571, 61 CR3d 344 (high degree of substantive unconscionability arising from a class action waiver rendered an arbitration provision unenforceable). See also *Stiener v Apple Computer, Inc*. (ND Cal 2008) 556 F Supp 2d 1016, action stayed pending appeal (ND Cal, Apr. 28, 2008, No. C-07-04486 SBA) 2008 US Dist Lexis 90335 (class arbitration waiver unconscionable, and therefore unenforceable; because waiver could not be severed from arbitration agreement, arbitration agreement was held unenforceable). On enforcing or invalidating arbitration clauses in real property agreements, see California Real Property Remedies and Damages, chap 14 (2d ed Cal CEB 2002).

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3. Redressing Illegal Landlord Entry

§5.17 a. Possible Remedies

A landlord's right to enter premises occupied by the tenant is strictly circumscribed by CC §1954, which sets forth the reasons for which the landlord may enter, the hours during which the landlord may enter, and options for giving advance notice before entering. The legislature substantially amended the notice procedures in 2002 and 2003. See §§3.2-3.4, 4.43. Nevertheless, illegal entry by landlords continues to be a common problem for tenants. The only express statutory remedy that allows for the recovery of damages and penalties for a "significant and intentional violation of CC §1954" is in CC §1940.2. See §8.150A. Proving an intentional violation is difficult.

Almost invariably, filing suit to stop violations of CC §1954 is simply not feasible financially. The landlord's actions are irksome to the tenant, but potential damages generally are not substantial enough to warrant the costs of a lawsuit. The attorney might consider filing suit, however, if the violations of CC §1954 are clear on the facts, if there is clear evidence that the landlord was warned and ignored the warning, and if the lease or rental agreement provides for attorney fees. Even if the agreement provides for fees only in favor of the landlord, a tenant who prevails may be able to recover fees under CC §1717. See §1.74.

PRACTICE TIP: Less expensive and faster than a lawsuit is an effort to persuade the landlord to stop the illegal entries. The tenant's attorney might begin this process by sending the landlord a letter that (1) explains CC §1954 (with a copy of the statute enclosed), (2) points out the landlord's potential liability for violation, and (3) puts the landlord on notice that the tenant may take legal action if the violations continue.

Another inexpensive alternative is for the tenant to sue the landlord in small claims court for damages for past violations of CC §1954. Although small claims courts have no authority to enjoin future violations of §1954, a modest damages award might persuade the landlord to stop violating the statute.

If despite warnings in writing from the tenant, the landlord again violates §1954, the tenant can sue for damages or, in the case of a continuing violation, for injunctive relief. In addition to relief under CC §1940.2, one or more of the following causes of action might be invoked in repeated, extreme, or abusive situations, although there are no reported decisions approving their use for a violation of §1954:

- breach of implied covenant of quiet enjoyment if landlord's illegal entry physically interferes with tenant's use (see §§3.5-3.7);
- invasion of privacy (see 5 Witkin, Summary of California Law, *Torts* §§651-692 (10th ed 2005));
- relief from harassment under CCP §527.6;
- trespass (see 5 Witkin, Summary, *Torts* §§693-698);
- intentional infliction of emotional distress (see *Newby v Alto Riviera Apartments* (1976) 60 CA3d 288, 297, 131 CR 547); and
- a derivative statutory tort based on CC §1954 itself.

Before recommending or pursuing any remedy for the illegitimate entries, the attorney must consider the risk of making the landlord angry. If the tenant has no lease, and if no local ordinances restrict evictions, the landlord might respond with a 30-day or 60-day notice to vacate (if a month-to-month tenancy; see CC §§1946, 1946.1) or a notice that the tenant's rent will be increased (see CC §827). Civil Code §1942.5(c) appears to prohibit such retaliation, but litigating the point may be more than the tenant could handle and may be risky. The landlord's probable response to the available remedies should determine the tenant's choice of which of them to pursue, and the tenant may know enough about the landlord's personality to advise the attorney on which approach will be most productive.

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§5.18 b. Changing Locks

The tenant almost certainly will suggest another remedy for the landlord's unauthorized entries: changing the locks. Even if the tenant does not raise this option, the attorney should advise the tenant that changing the locks might violate a lease or rental agreement provision prohibiting alteration of the premises without the landlord's permission. Violation of the rental agreement is a ground for eviction under CCP §1161 and under most eviction control ordinances (see §7.54), but there is a chance, of course, that a court would allow as a defense the landlord's violation of CC §1954. (It is unlikely that changing the locks would be considered waste under CCP §1161(4) because the action probably would not substantially or permanently diminish the market value of the property. See *Rowe v Wells Fargo Realty Servs.* (1985) 166 CA3d 310, 212 CR 374.

Changing the locks also presents a significant, and potentially dangerous, practical problem. In an emergency (*e.g.,* a fire), even an officious landlord needs entry. If changed locks prevent the landlord from entering or substantially delay his or her entry, the tenant could be liable for any increased damage that occurs. A tenant who insists on changing locks or modifying existing locks should consider installing a small chain lock that opens with a key. This should keep the landlord from wandering in, but, because the chain can be broken fairly easily, will not prevent the landlord from entering in a real emergency.

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§5.18A 4. Protection Under Anti-SLAPP Statute

An important defense tool for retaliatory lawsuits brought by landlords against tenants is the anti-SLAPP statute (CCP §425.16), forbidding "strategic lawsuits against public participation." (See Making and Opposing Special Motions to Strike Under the California Anti-SLAPP Statute (Cal CEB Action Guide March 2009).) See also *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377, cited in §10.38A, in which the tenant successfully defeated an unlawful detainer action on a motion to strike under §425.16. See also *Dowling v Zimmerman* (2001) 85 CA4th 1400, 103 CR2d 174, cited in §13.40A, in which the defendant attorney defeated the landlord's defamation action by showing that the action was brought against the tenants and their attorney because they exercised their protected rights of free speech. The tenant attorneys in both *Ketchum* and *Dowling* were entitled to recover awards of fees and costs under the mandatory provisions of CCP §425.16(c). Partial attorney fees are recoverable if the defendant prevails on some but not all of the claims attacked in its motion to strike. *ComputerXpress, Inc. v Jackson* (2001) 93 CA4th 993, 113 CR2d 625. However, defendants must achieve a practical benefit with the anti-SLAPP motion. See *Mann v Quality Old Time Serv., Inc.* (2006) 139 CA4th 328, 42 CR3d 607 (one cause of action eliminated by anti-SLAPP motion, thereby narrowing the scope of the lawsuit, limiting discovery, reducing potential recoverable damages, and altering the settlement posture of the case; attorney fees awarded) and *Endres v Moran* (2006) 135 CA4th 952, 37 CR3d 786 (attorney fees denied where defendants' success in striking one cause of action did not affect factual allegations or change possible recovery or work involved in trying case).

A suit for declaratory and injunctive relief that challenges the landlord's entitlement to charge market rate for rentals restored to residential use after Ellis Act evictions (see chap 7) is not a SLAPP suit; the suit is based on the alleged act of charging unlawful rent, not on the landlord's act of filing documents with the local rent control board. *Santa Monica Rent Control Bd. v Pearl Street, LLC* (2003) 109 CA4th 1308, 135 CR2d 903. Likewise, a lawsuit brought by a former tenant against a landlord who fraudulently evicted the tenant under a rent control ordinance in order to have a family member occupy the premises was not subject to an anti-SLAPP special motion to strike. *Clark* v *Mazgani* (2009) 170 CA4th 1281, 89 CR3d 24. The tenant's complaint was not based on the landlord's protected activities in initiating and prosecuting the eviction but on the removal of the apartment from the rental market and fraudulent eviction of the tenant. In *Delois v Barrett Block Partners* (2009) 177 CA4th 940, 99 CR3d 609, the landlord, without filing suit, entered into a settlement agreement with the tenant requiring the tenant to vacate the property. After the landlord raised the tenant's rent for breaching the settlement agreement, the tenant vacated and sued the landlord in tort and contract, alleging he was forced to vacate his unit in violation of the local rent control act. The landlord brought an anti-SLAPP motion claiming that its actions were protected because they arose from a settlement agreement that was entered into to avoid litigation. The court held that the landlord's actions were not the basis of the plaintiff's lawsuit but merely preceded it and denied the anti-SLAPP motion.

However, an anti-SLAPP motion may be used to challenge a petition for injunctive relief under CCP §527.6 (landlord petitioned for injunctive relief against civil harassment by tenant who demonstrated with others at the landlord's church). *Thomas v Quintero* (2005) 126 CA4th 635, 24 CR3d 619.

An addition to the anti-SLAPP statutes, CCP §425.18, operative October 5, 2005, limits the use of anti-SLAPP motions to strike in SLAPPback malicious prosecution actions by setting different standards and procedures for motions to strike in those actions. The legislature adopted the separate procedure to protect the exercise of free speech and to minimize the misuse in SLAPPback suits of the existing anti-SLAPP procedure in CCP §425.16.

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§5.19 D. "Breaking" a Lease

Under some circumstances, a tenant may have a valid need to "break" a lease, *e.g.,* when in the middle of the lease term the tenant's employment is transferred to another city. The lease may provide for such a contingency. See §§1.73, 1.85. If it does not, however, the tenant cannot terminate the lease obligation. A tenant who does so is in breach of the lease and will be responsible for any damages caused by the breach. The attorney's advice to a tenant who has no choice but to breach the lease should focus on minimizing the damages caused by the breach and, if possible, on avoiding litigation that may subject the tenant to liability for the landlord's attorney fees.

Under CC §1951.2(a)(1), a tenant who breaches a lease is liable for past-due rent following the breach. The landlord may recover rent coming due from the time that the tenant vacates until the date of judgment, less any rental loss that the tenant proves "could have been reasonably avoided." CC §1951.2(a)(2). Civil Code §1951.2(a)(3) authorizes recovery of "the worth at the time of award" of rent due for the remaining term of the lease (after the date of judgment), less rental value that the tenant proves "could be reasonably avoided," but only if the lease expressly provides for such recovery or if the landlord relets the premises before judgment and proves that in reletting he or she "acted reasonably and in a good-faith effort to mitigate the damages." CC §1951.2(c)(2). The landlord also may recover "[a]ny other amount necessary to compensate the lessor for all the detriment proximately caused" by the tenant's breach, which apparently includes any expenses incurred in reletting the premises, such as advertising, credit checks, and cleaning. CC §1951.2(a)(4).

In an appropriate case, a landlord may be able to recover selling expenses. See, *e.g., Millikan v American Spectrum Real Estate Servs. Cal., Inc.* (2004) 117 CA4th 1094, 12 CR3d 459, in which the court ruled it was foreseeable that a landlord would sell leased property rather than bear the burden of a vacant building indefinitely after the tenant had abandoned the lease. A commercial tenant is not entitled to credit for profits generated by a landlord who takes over ownership and/or management of the business. *Lu v Grewal* (2005) 130 CA4th 841, 30 CR3d 623.

Civil Code §1951.4(b) gives the landlord a more drastic remedy if it has been written into the lease: The landlord may hold the tenant liable for the rent as it comes due during the balance of the term, apparently with no obligation to make any effort to relet the premises. This remedy is allowed only if the lease gives the tenant the right to sublet or assign his or her interest, either on reasonable conditions or subject to the landlord's consent (when the lease provides that the landlord may not unreasonably withhold such consent). CC §1951.4(b). The remedy is not available if the landlord has terminated the tenant's right to possess the premises. CC §1951.4(b). See §8.15.

PRACTICE TIP: To minimize the landlord's damages, a tenant who breaks a lease should make efforts to assist the landlord in reletting the premises because, under CC §1951.2(a)(2)-(3), the tenant is not liable for any loss proved to have been reasonably avoidable. For example, the tenant could find two or three creditworthy, responsible applicants and convey information about them to the landlord. A tenant who presents to the landlord qualified applicants who can move in and begin paying rent as soon as the tenant leaves may be able to prove that the landlord failed to mitigate damages if they are rejected. If the landlord accepts one of the applicants, the tenant's liability for damages should be minimal.

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§5.20 E. Lockouts and Other "Self-Help" Evictions

Landlords sometimes attempt to shortcut the eviction process by resorting to "self-help." A self-help eviction can take many forms: changing the lock on a unit, adding a lock without providing keys to the tenant, cutting off utilities, and forcibly entering the rental unit and refusing to permit the tenant to reenter. These practices have one thing in common: to oust the tenant from possession without complying with the legal requirements for eviction.

Many remedies are available to a tenant who has suffered a self-help eviction. A landlord who changed the locks or cut off utilities with the intent to terminate the tenancy is liable to the tenant for actual damages, a statutory penalty not to exceed $100 for each day of violation or part thereof (but not less than $250), and attorney fees. CC §789.3(c). See §§8.147-8.149. Effective January 1, 2004, a tenant has additional remedies (including a $2000 penalty for each act) for wrongful and illegal acts committed by a landlord for the purpose of influencing the tenant to vacate the dwelling. CC §1940.2. See §8.150A. A landlord who used force to enter the premises and to prevent the tenant from reentering is guilty of forcible entry and detainer and may be liable for actual and statutory damages of up to $600 if the action was malicious. CCP §1174(b); see *Jordan v Talbot* (1961) 55 C2d 597, 12 CR 488. See also §§8.138-8.146. Forcible entry or detainer may also subject the landlord to criminal liability. Pen C §§418, 602.5. See §8.152. Finally, the ouster may give the tenant a cause of action for the common law tort of wrongful eviction. See §8.150.

PRACTICE TIPS:

- Each remedy has different merits, and the tenant's attorney should consider carefully which one or which combination of remedies best fits the circumstances of the case and the client's needs. The attorney should also bear in mind that, if the tenant recovers possession but is in default in payment of rent, restoration of the premises to the tenant probably will be temporary unless the illegal eviction can serve as leverage with which to negotiate an acceptable resolution (or prevention) of an unlawful detainer action.
- It appears that a landlord does not escape liability for an illegal eviction simply by restoring possession to the tenant; CC §789.3 is not qualified in any way that suggests that restoration of the premises "cures" the landlord's unlawful act. The attorney may be able to gain bargaining power for the tenant by reminding the landlord of this fact. The attorney might propose in a letter, for example, that the tenant will release the landlord from liability for the eviction if the landlord restores possession to the tenant immediately, waives some or all of the past-due rent, and permits the tenant to pay any remaining past-due rent in installments over a reasonable period of time.

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§5.21 1. Recovering Possession

The attorney for a tenant whose primary need is to recover possession of the premises quickly and at minimal expense might consider taking the following actions:

(a) Call the police department to determine if it has a unit specializing in landlord-tenant or consumer disputes. Some large, urban police departments have such units. Advise the police of the client's situation, and ask them to enforce the provisions of Pen C §§418 and 602.5. Although police departments are frequently reluctant to file charges in civil disputes of this kind, they might be inclined to remind the landlord that the law is being violated, and to encourage the landlord to readmit the tenant to the premises.

(b) Write the landlord a firm letter, advising that "self help" evictions are illegal and that potential damages are accumulating while the tenant remains out of possession. Copies of CC §789.3 and the decision in *Jordan v Talbot* (1961) 55 C2d 597, 12 CR 488, may be enclosed for effect. The letter should be hand-delivered, and should specify a date and time by which the landlord should readmit the tenant or indicate his or her intention not to do so. A copy of the letter should also be sent via regular first class mail, or, if the landlord has a fax number or an e-mail address at home or at work, by those delivery methods. Courtesy copies should also be sent to:

- the manager's supervisor and management company, where applicable;
- all owners of record of the property (available from the county assessor or recorder);
- the local rent control agency or board, if applicable;
- the district attorney's office;
- the client, if the attorney writes the letter, or the attorney, if the tenant writes the letter; multiple copies let the landlord know that others are aware of the problem and may be called upon to enforce the client's rights.

If those informal tactics fail and litigation becomes necessary, the tenant's attorney may bring a forcible entry and detainer action (CCP §§1159-1160) against the landlord to recover possession (see §§8.138-8.146). Civil Code §789.3 may also be invoked if the landlord has changed the locks, removed the tenant's property, or cut off utility service to deny the tenant possession of the premises. See §§8.147-8.149. It is not clear which of these statutes provides the most efficient method of restoring the tenant to possession. Forcible entry and forcible detainer are summary actions, involving a 5-day summons and priority on the trial calendar. CCP §§1167-1167.5, 1179a. Nevertheless, delay tactics by the landlord are possible, including the demand for a jury trial, which could delay the trial several weeks. Under CC §789.3(d), on the other hand, the tenant suing for a violation of CC §789.3 may seek "appropriate injunctive relief" while the action is pending. Courts hearing limited civil cases may issue temporary restraining orders and preliminary injunctions. CCP §86(a)(8). Such relief may put the tenant back into possession even faster than a forcible entry and detainer action. Some courts are reluctant, however, to issue an injunction that disturbs the status quo pending trial, thus effectively resolving the contested issue of possession. See *Martin v Danziger* (1913) 21 CA 563, 132 P 284, discussed in §5.38.

If a lockout occurs after the tenancy has been terminated (*e.g.*, after expiration of a 3-day or 30-day notice), an action seeking restoration of the premises will serve only to delay the eviction, unless the tenant has a valid defense to an unlawful detainer action. Furthermore, if the tenant has no legal right to possession because the tenancy has been terminated, a court might not consider injunctive relief to be "appropriate" under CC §789.3. On the other hand, a tenant's attorney can argue that the purpose of CC §789.3 is to prevent self-help evictions, and that denying the tenant the right to regain possession effectively sanctions a landlord's resort to self-help. A landlord who evicts the tenant under a writ of possession that is later found to be invalid, however, is not liable for forcible entry and detainer. *Glass v Najafi* (2000) 78 CA4th 45, 92 CR2d 606. Similarly, a landlord who has a valid writ of possession may proceed to evict a tenant who files a bankruptcy after the unlawful detainer judgment. *Lee v Baca* (1999) 73 CA4th 1116, 86 CR2d 913, cert denied (2000) 529 US 1020. But see *Westside Apartments v Butler (In re Butler)* (Bankr CD Cal 2002) 271 BR 867 (CCP §715.050 is preempted by federal bankruptcy law and is therefore unconstitutional). See further discussion of *Lee* and *Butler* in chap 14; their inconsistent holdings may be affected by higher federal courts interpreting the Bankruptcy Code.

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§5.22 2. Amount of Damages

Compensatory damages to cover injuries sustained by the tenant should be recoverable whether the action is brought under CCP §§1159-1160 (see §8.144), CC §789.3 (see §§8.149-8.150), or as a common law tort (see §6.131). The client should be instructed to keep all receipts and to document all expenses and inconveniences in a running diary of the event. Actual damages could arguably include such out-of-pocket costs as:

- hotel bills;
- reasonable restaurant expenses;
- taxi or rental car reimbursement (if the client's vehicle or keys are locked inside the premises);
- laundromat costs (if laundry facilities locked inside premises);
- exercise club fees (if personal fitness equipment locked inside premises);
- reasonable clothing purchases;
- lost wages for missed work time as a result of the incident;
- moving costs (movers, boxes, insurance, locator fees, *etc.*); and
- fees for professional counseling services for emotional distress.

A tenant cannot recover for negligent infliction of emotional distress if the tenant bases the claim on the landlord's negligent performance of contractual duties. The tenant may only recover economic losses caused by the landlord's breach of contract. *Butler-Rupp v Lourdeaux* (2005) 134 CA4th 1220, 36 CR3d 685.

Punitive damages also may be recovered under all three actions, but the maximum and minimum amounts vary. In forcible entry and detainer actions, statutory damages may be awarded if malice is shown, but such damages are limited to $600 (see CCP §1174(b)); there is no minimum recovery. Civil Code §789.3(c)(2) establishes both a maximum and minimum recovery: up to $100 for each day of violation, but not less than $250 in total. Although the $100-per-day figure represents a limit on damages (and a court may limit the total statutory penalty if it concludes that the full penalty would be excessive (see, *e.g., Hale v Morgan* (1978) 22 C3d 388, 149 CR 375)), this remedy might be better for the plaintiff than the other remedies because (a) it is not based on actual damages (which might be difficult to prove), and (b) it gives the attorney a statutory figure on which to base an argument to the factfinder. In tort actions, there is no maximum or minimum award of punitive damages.

Only CC §789.3 provides for attorney fees to the prevailing party. Attorney fees are usually not recoverable in forcible entry and detainer or tort actions unless they are provided for in the lease or rental agreement (and thus are recoverable under CC §1717. See §§13.25-13.33.

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§5.23 3. Joining Claims

If each remedy for a self-help eviction has its own advantages, should the tenant's attorney simply join all of them in one action? It appears to be possible for the attorney to join in one action a cause of action for wrongful eviction (see §8.150) and a cause of action for violation of CC §789.3 (see §§8.147-8.149). In fact, CC §789.3(d) expressly contemplates the pursuit of other available remedies. Because of its summary nature, however, an action for forcible entry or detainer may not include other causes of action. See §8.137. For this reason, a judgment obtained in such an action probably would not preclude a later action alleging causes of action that could not be raised in the forcible entry and detainer action. See *Vella v Hudgins* (1977) 20 C3d 251, 142 CR 414.

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F. Legal Eviction Procedure

§5.24 1. Unlawful Detainer Action Required

Tenants often believe that if they miss their rent payment or their lease expires, their landlord may walk in, throw them out, and padlock the premises. To allay these fears (or, conversely, to correct the impression that a tenant is entitled to longer notice than is statutorily required), the attorney should briefly explain eviction procedure to a tenant who is, or may be, facing eviction.

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§5.24A a. Required Notices

Tenants should be advised that they cannot be evicted without receiving at least: (1) a 3-day notice to pay or quit (CCP §1161(2)), a 3-day notice to perform covenant or quit (CCP §1161(3)), a 3-day absolute quit notice (CCP §1161(3)), or a 30-day or 60-day notice to terminate tenancy (if a month-to-month tenancy; see CC §§1946, 1946.1); plus (2) a summons and complaint; and (3) the 5-day sheriff's notice required by CCP §§1174(d) and CCP §715.010(b)(2). See §§8.26-8.84, chaps 9-13. A notice under CCP §1161 is not necessary if a fixed-term lease expires by its own terms. See §§1.8, 8.2.

The tenant should also receive a notice mailed by the court clerk stating that an unlawful detainer action has been filed, giving the case number of the lawsuit, and providing specified information on legal services organizations that might advise on the defense of the action for low-income persons. CCP §1161.2(c).

The attorney should also explain what the notices will look like (so that the tenant will recognize them when received), what information the notices will contain, and what effects they will have. The tenant should be instructed to notify the attorney immediately after receiving a summons and complaint, because an answer must be filed within 5 calendar days, not counting legal holidays (unless the last day for filing is a Saturday or Sunday, in which case it is extended through the next court day). CCP §1167. Although the only notice that justifies panic is the 5-day sheriff's notice to vacate (which is often printed in red ink) (see §13.69), the tenant should be cautioned that any notice is very serious and that a summons and complaint represent a court action and should be answered in a timely manner.

WARNING: If a 3-day notice to pay rent or quit does not give an address that allows the tenant to personally deliver the rent (*e.g.*, the notice lists a post office box but no street address) and the tenant mails the rent to that address, the rent is conclusively presumed to have been paid on the date posted if the tenant shows proof of mailing. See CCP §1161(2), discussed in §8.37B.

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§5.24B b. Summary Remedy

If an unlawful detainer action is already underway, or appears to be imminent, the attorney should inform the tenant of the usual timetable for such actions in the jurisdiction in which the suit will be filed. Under CCP §1170.5, unlawful detainer actions generally must be set for trial within 20 days after the date of the request to set the case for trial. See chap 11. This requirement probably minimizes variation among jurisdictions in the amount of time that elapses before an unlawful detainer action is tried. The attorney should inform the tenant about the date that the trial is likely to occur, using both "worst case" and "usual case" scenarios.

PRACTICE TIP: Tenants who consult an attorney about a pending or imminent unlawful detainer are stressed and may not remember information given to them orally. It is helpful to have a short written explanation of the procedures in an unlawful detainer, complete with timetables for each stage. The tenant should be encouraged to take this document home and read it at a less stressful moment.

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§5.24C c. Unlawful Detainer Judgment

The attorney should caution the tenant to prepare for the worst. Even if the tenant seems likely to prevail, unlawful detainer actions are notoriously unpredictable. Although some judges diligently attempt to apply the law, others tend to gloss over defenses and ask simply, "Did the tenant pay the rent?" Juries, of course, are inherently unpredictable, but careful voir dire examination and clear, precise jury instructions can help to some extent in obtaining a desirable outcome. See §§12.41-12.63.

A tenant facing eviction and a judgment for damages will be legitimately concerned about liability for a money judgment. The landlord might try to enforce the judgment by garnishing the tenant's wages, however modest, or by executing against the tenant's automobile or other property. Generally, however, when a tenant breaches a lease by failing to pay rent, the landlord's primary goal is to regain possession of the premises, and money damages are decidedly of secondary importance. A tenant's attorney should recognize that a landlord will often waive a portion or even all of the tenant's money obligations in exchange for an enforceable agreement by the tenant to vacate the premises on or before a specified date.

PRACTICE TIP: Tenants should be advised to obtain tenants' insurance if they can qualify for it and can afford it. Insurance will protect the tenant in case of theft and damage to personal property and will also provide protection against liability to third parties or the landlord in many cases. If the landlord sues in unlawful detainer or in an action for damages or a cross-claim based on a habitability dispute, the claim should be tendered to the tenant's insurance carrier for contribution or full coverage.

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§5.25 2. Stipulated Judgments

A common mechanism for assuring a landlord that the tenant will vacate the premises (which is often the landlord's primary goal when the tenant is behind in rent payments; see §5.24) is to enter into a stipulated judgment. A stipulated judgment typically includes the tenant's monetary obligations, provides that the tenant will vacate by a specified date, and also specifies a date on which the landlord may have the sheriff or marshal physically evict the tenant if the tenant fails to vacate as agreed. In order to ensure case records remain restricted 60 days after the complaint is filed (CCP §1161.2), thereby protecting the tenant from being reported by credit reporting agencies, a dismissal should be part of the stipulated judgment, with a provision for the trial court to retain jurisdiction under CCP §664.6 for enforcement of settlement. See §9.19 for a stipulated judgment form.

PRACTICE TIP: In Los Angeles County, many courts will also seal the file if both parties agree. Tenant attorneys should routinely request that this be done to protect tenants.

The advantage to the landlord of a stipulated judgment is that it avoids the expense of trial and obtains the assurance that the premises will be vacated by a certain date. The tenant benefits in being able to bargain for sufficient time in which to locate new space and to complete the move. The tenant might also persuade the landlord to stipulate that judgment will be entered only if the tenant fails to vacate by the agreed-on date, *i.e.,* that if the tenant vacates as agreed, there will be no outstanding judgment on record that could be reported by a credit bureau. See §§5.25A, 9.18.

Signing a stipulated judgment is a serious step for a tenant. Once the stipulation is signed, the tenant will have no right to further hearings, and the sheriff or marshal will have the authority to enforce the writ of possession. A stipulated judgment may have a serious impact on the tenant's credit rating, so the tenant's attorney should try to avoid entering into one whenever possible.

After a stipulated judgment has been signed, if the tenant or another person who claims a right to possession retains an attorney, this attorney has limited means to circumvent the judgment. If the attorney's client did not sign the stipulation, but has a legitimate claim to possession, then the client may be able to defeat eviction under a "claim of right." See §5.27. If the client signed the stipulation, the attorney may attempt to have the stipulation nullified on the ground that it constitutes an uninformed or unintentional waiver of the client's right to due process. When a person enters into a stipulated judgment without the advice of counsel, some courts will not enforce the judgment without an express, written waiver of the person's right to due process, notice, and a hearing. See also *Little v Sanchez* (1985) 166 CA3d 501, 213 CR 297 (stipulated judgments voidable when obtained by extrinsic fraud, and facially void when tenant waives due process rights with respect to future action by landlord).

A stipulated judgment has a collateral estoppel effect only as to those issues actually resolved in it. In *Landeros v Pankey* (1995) 39 CA4th 1167, 46 CR2d 165, the court held that the tenant was not barred from bringing an action for damages for breach of the warranty of habitability by the fact that a previous unlawful detainer action resulted in a stipulated judgment and vacation of the premises by the tenants. For discussion, see §12.37.

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§5.25A 3. Effect on Tenant's Creditworthiness

Tenants and their attorneys should consider the likelihood that an eviction lawsuit will be picked up by the Unlawful Detainer Registry and may make it difficult for the tenant to rent another unit. The tenant may correct misleading and incomplete information in the Registry's report, however. *Schoendorf v Unlawful Detainer Registry, Inc.* (2002) 97 CA4th 227, 118 CR2d 313. The Unlawful Detainer Registry may report truthful credit reports from public records. *U.D. Registry, Inc. v State* (2006) 144 CA4th 405, 50 CR3d 647. Credit reporting agencies are not required to do more than check the trial minutes and the register of actions, but they must exercise reasonable diligence in examining court records to determine whether an adverse judgment has, in fact, been entered against a tenant. See *Dennis v BEH-1, LLC* (9th Cir 2007) 504 F3d 892 (although parties to unlawful detainer filed stipulation that no judgment would be entered, court's register of civil actions noted that judgment was entered; register subsequently showed that dismissal in tenant's favor was entered). If the defendant prevails in the unlawful detainer within 60 days after the complaint is filed by either dismissal or judgment, access to the eviction lawsuit court file is permanently blocked to persons other than the parties and their counsel. CCP §1161.2. For further discussion, see §4.9.

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§5.26 4. Landlord Actions in Propria Persona

A landlord who cannot afford an attorney, or who believes the eviction to be straightforward, may choose to act as his or her own counsel in a limited civil case, on the assumption that the action will be uncontested, or that any defense raised by the tenant will be patently frivolous. A tenant who has access to the advice of counsel may have a distinct advantage over the pro per landlord. The landlord may believe the case to be a simple one, but may not realize that service of required notices or pleadings was defective, or that a tenant who missed a rent payment still may have a defense to eviction. When confronted with a demurrer or an answer that alleges several affirmative defenses (*e.g.,* breach of the warranty of habitability), a landlord may consider negotiation with the tenant as an alternative.

Counsel for tenants should anticipate certain problems in dealing with a landlord who is not represented by counsel. By the time that a landlord-tenant dispute reaches the litigation stage, relations between the landlord and tenant obviously have broken down. An angry landlord, especially one who wants to make an example of a tenant, may resist making even minor concessions or may even refuse to talk with the tenant's attorney. When both parties are represented by counsel, however, their attorneys can suggest rational settlements that angry clients could not have reached on their own. Furthermore, a landlord who is inexperienced in eviction or debt collection may assume that he or she will be able to collect any money judgment by garnishing the tenant's wages or by other means. The tenant's attorney may have a difficult time convincing the landlord of the futility of proceeding against a judgment-proof tenant.

Tenants who wish to represent themselves in a limited civil case might be advised to read Portman & Brown, California Tenants' Rights (16th ed 2005) and Warner, Everybody's Guide to Small Claims Court (15th ed 2003).

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§5.27 5. Representing Occupant Not Named in Eviction Action

In an action to regain possession of real property, unless a prejudgment claim of right to possession has been served on occupants in accordance with CCP §415.46, any occupant not named in the judgment for possession who occupied the premises on the date the action was filed may object to enforcement of the judgment against him or her by filing a claim of right to possession under CCP §1174.3. On evicting unnamed occupants, see §§9.51-9.55, 13.65, 13.70-13.73.

When the claimant has no defense to eviction, asserting a claim to possession permits the Unlawful Detainer Registry to pick up the claimant's name and report him or her out as a tenant against whom an unlawful detainer has been filed. If a judgment is subsequently issued against the claimant, both the Unlawful Detainer Registry and other credit-reporting agencies will so report, thereby causing the claimant difficulty in renting other housing. See §§2.9, 4.9, 5.25A. The claimant may correct misleading and incomplete information in the Registry's report. *Schoendorf v Unlawful Detainer Registry, Inc.* (2002) 97 CA4th 227, 118 CR2d 313.

At times, a tenant who asserts a claim of right has a legitimate claim to possession and a defense to eviction. For example, a claimant who is a sublessee either approved by the landlord or permitted under the master lease has a legitimate claim to possession and is entitled to receive a 3-day notice so that he or she may cure a default in the payment of rent. If the landlord failed to serve the notice and the sublessee is willing and able to cure the default, the sublessee can establish a defense to eviction. Furthermore, if an unlawful detainer judgment against the original tenant was premised on nonpayment of rent, the claimant might be able to establish breach of the warranty of habitability as a defense to eviction (if the defense was not litigated on the merits by the defendant in the unlawful detainer action). See §§3.32, 13.70.

Valid claims of right may also arise from persons taken in by the original tenant as roommates. Whether or not the lease or rental agreement between the landlord and the original tenant prohibited additional occupants, such persons may not be evicted without notice and a hearing if they were in possession on the date that the unlawful detainer action was filed. See CCP §715.020(d). Furthermore, a landlord who has accepted rent from an occupant may have created a month-to-month tenancy with that occupant and, absent breach by that tenant, probably cannot terminate the tenancy except on 30 days' or 60 days' notice. See CC §§1946, 1946.1. See also §§1.7, 1.9, 8.69.

When representing a tenant who asserts a claim of right, the attorney must determine whether the claim is legitimate and whether the claimant has a valid defense to eviction. If the claim is not legitimate, the attorney cannot ethically advise the claimant to assert it or assist the claimant in asserting it. See Cal Rules of Prof Cond 3-200.

PRACTICE TIP: Although from the tenant's perspective, assertion of the claim has the advantage of postponing eviction, the attorney should consider that doing so might anger the landlord to the extent of seeking reasonable rental value from the claimant for the period of delay, or even damages for trespass, notwithstanding that these actions seem unlikely given the landlord's primary objective of recovering possession of the rental unit as quickly as possible.

If the claim of right is legitimate, but the claimant has no apparent defense to eviction, the only advantage of pursuing the claim is to delay the eviction. For a claimant who knew nothing of the proceedings until seeing the sheriff's notice, a delay of a week or two may provide sufficient time to locate other housing. The attorney may be able to buy even more time for the claimant by offering to stipulate to the eviction if the date of eviction is postponed. Because a stipulation allows the landlord to avoid the cost of a hearing, the landlord may be willing to allow the tenant a short amount of additional time to vacate. When the claimant has no defense to eviction, however, asserting a claim to possession presents the risk that the landlord will seek statutory damages against the claimant for malicious holding over under CCP §1174(b). See §12.32.

If the claimant has a reasonably sound defense to eviction, the landlord may be receptive to settlement negotiations when faced with the cost and delay of a hearing on the claim of right to possession and the strong possibility that (1) the claimant will prevail, and (2) the landlord either will be unable to evict the claimant (if the lease is for a term of years or if eviction controls are in effect) or will be required to begin again with another termination notice.

Under such circumstances, the attorney might consider a settlement providing, for example, that the tenant will vacate by a specified date if the landlord pays the tenant's moving expenses, plus an amount that will cover any deposits on a new rental.

When a claimant has a valid defense to eviction and desires to continue the tenancy, the attorney should make certain that the claimant is prepared to cure any defaults that prompted the eviction of the person named in the unlawful detainer judgment. For example, if the judgment was premised on nonpayment of rent, the client should place in a separate account funds sufficient to cover all rent due, including rent due from the date that the tenant notified the sheriff of his or her claim, to the date of the hearing on the order to show cause.

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§5.28 G. Roommates

To ease the burden of rising rent and utility costs, tenants often desire to share housing. When a group of tenants jointly applies for occupancy, the landlord probably will demand that each tenant execute the lease or rental agreement and agree to be jointly and severally liable for the obligations under the lease. Under this arrangement, each tenant is in privity with the landlord, and only the landlord can terminate the tenancy and evict one or more of the tenants. See §§1.7-1.7B.

A single tenant occupying a rental unit who desires to take in additional occupants should be advised of:

- the necessity or advisability of obtaining the landlord's consent (see §5.29);
- the advantages and disadvantages of having the roommates execute a lease with the landlord (see §5.30);
- the possible effects of any local rent control ordinance (see §5.31); and
- suggestions for minimizing the practical problems that can arise among roommates (see §5.32).

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§5.29 1. Landlord's Consent

Often a lease or rental agreement restricts occupancy to the person or persons named in the original lease and requires the landlord's consent for any additional or substitute occupants. See §1.46. In this situation, the tenant should be advised to obtain the landlord's consent before taking in additional occupants. Failure to do so probably would constitute a material breach of the lease justifying eviction, even in a jurisdiction with eviction protections (see §§7.53, 7.62).

A landlord may be unable to enforce such a lease restriction, however, if formerly the practice had been to permit the tenant to choose roommates or subtenants without giving notice to the landlord and without obtaining the landlord's consent. A landlord who was aware of the changes in subtenancy and continued to accept the rent without objection may have waived the right to enforce this restriction or may be estopped from asserting it. See *Kern Sunset Oil Co. v Good Roads Oil Co.* (1931) 214 C 435, 444, 6 P2d 71; *Thriftimart, Inc. v Me & Tex* (1981) 123 CA3d 751, 754, 177 CR 24; *Schultz v Superior Court* (1956) 143 CA2d 781, 782, 300 P2d 275.

However, if a roommate or subtenant vacates, the tenant may have to obtain written consent from the landlord for a new roommate or subtenant in light of the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535). Acceptance of rent by the landlord does not waive or otherwise prevent enforcement of a covenant prohibiting sublease or assignment unless the landlord has received written notice from the tenant who signed the agreement, and the landlord has thereafter accepted rent. CC §1954.53(d)(4). This would not apply if the new roommate is the original tenant's spouse *or domestic partner,* and the city in which the unit is located provides that a tenant may install his or her spouse or domestic partner regardless of language in a lease that limits occupancy of a rental unit. Santa Monica and West Hollywood, for example, provide such protection in their Municipal Codes. Under the Los Angeles Rent Stabilization Ordinance, tenants in rent-controlled units may move in one adult tenant beyond the number of occupants listed on the rental agreement, but the landlord has the right to approve or disapprove the prospective additional adult tenant, provided approval is not unreasonably withheld. See Los Angeles Rent Stabilization Ordinance §151.09.A.2(b).

In West Hollywood, a "surviving tenant" (domestic partner, spouse, or certain relatives who live with the named tenant for at least one year before the tenant's death) is protected from eviction if the tenant dies. *Pick v Cohen* (2000) 83 CA4th Supp 6, 100 CR2d 839. This rule is counter to the one in *Miller & Desatnik Mgmt. Co. v Bullock* (1990) 221 CA3d Supp 13, 18, 270 CR 600, that under CC §1934, a month-to-month tenancy is terminated by notice of the tenant's death; further, the tenancy ends 30 days after the deceased tenant's last rent payment.

Even if the rental agreement does not prohibit additional occupants, the tenant probably should notify the landlord of the intent to take in roommates. Trying to conceal the fact from the landlord may create ill will and provoke a termination of a periodic (*i.e.*, month-to-month) tenancy when the landlord discovers the additional occupants. The tenant may be able to set the stage for cooperation from the landlord by providing information about the prospective tenants in advance, *e.g.,* their names, places of employment, and any other information that might allay the landlord's concerns.

When the landlord has consented to the tenancy of a "roommate" and the original tenant vacates, the landlord may not evict the remaining person without "just cause" if a rent control law requiring just cause exists in the jurisdiction. *DeZerega v Meggs* (2000) 83 CA4th 28, 99 CR2d 366. See §4.40B.

For further discussion of the various problems arising in roommate situations with assignment or subletting, see §§3.49-3.59A, 4.40-4.40B, 5.30-5.32, 7.28, 7.53, 7.55, 7.62.

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§5.30 2. Nature of Relationship; Right to Evict

A roommate who enters into a lease or rental agreement with the landlord (*e.g.,* the original lease is amended to include the roommate as a tenant, or the roommate and the original tenant both sign a new lease) probably will be jointly and severally liable for the full amount of the rent under the agreement (unless the lease expressly limits the tenant's liability to a pro rata share of the rent; see CC §§1659-1660) and will be in direct privity with the landlord. For the original tenant, the advantage of having each roommate sign the lease is that the roommates take on direct liability for rent. If the roommates do not execute a lease or rental agreement, the original tenant will continue to bear full responsibility for the lease obligations. The disadvantage is that the original tenant loses control over the composition of the household and has no right to insist on the eviction of one or more of the roommates. Because there is no landlord-tenant relationship between the tenants, only the landlord can terminate the tenancy and evict one or more of the roommates.

If the roommates do not sign a lease or rental agreement, they are probably "lodgers" of the original tenant. See §1.7. Although they are not in privity with the landlord and, strictly speaking, are not "tenants," they are probably entitled to the protections of state landlord-tenant law, including the prohibitions against "self-help" evictions (see §§5.20-5.21, 8.137-8.153) and the right to notice and hearing (through unlawful detainer proceedings) before termination of their right to occupy the rental property. Presumably, unlawful detainer proceedings could be instituted by either the landlord or the original tenant. (If the landlord decided to evict all the occupants, he or she probably would be required to name the roommates in an unlawful detainer action to avoid having the roommates assert a post-judgment claim to possession. See §5.27.) The advantage of this arrangement is that the original tenant retains control over the co-occupants and if personality conflicts or other problems arise probably can "evict" the roommate for reasons that would not trigger eviction by the landlord.

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§5.31 3. Effect of Local Rent Control Ordinance

Local eviction controls might possibly extend to a tenant's eviction of a roommate. See §7.54. Given the underlying purpose of rent control and eviction control ordinances to secure to tenants reasonable rents and protection against arbitrary eviction, the courts might interpret eviction protections as extending to persons such as roommates, even though they are not per se "tenants." The tenant's attorney must review carefully the definitions and exemption provisions of any ordinance in effect in the jurisdiction in question.

Some rent control ordinances may define "landlord" and "tenant" broadly enough that the original tenant would be "landlord" under the ordinance and the roommate would fit the definition of "tenant." Other ordinances might exempt from the ordinance's coverage rental units in residential property where the landlord shares kitchen or bath facilities with the tenant and the landlord occupies a unit in the same property as his or her principal residence. Still others specifically exempt roommate evictions by providing that a landlord who resides in the same rental unit with a tenant may evict the tenant without just cause.

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§5.32 4. Written Occupancy Agreement

A written agreement between tenant and roommates might provide a foundation for eviction (even in a jurisdiction with eviction protections), and will serve other practical purposes. Under most eviction control ordinances, a landlord may evict a tenant for breach of the rental agreement. See §7.57. If eviction protections are extended to roommates, a roommate's breach of a provision in the agreement with the original tenant (as opposed to the tenant's lease or rental agreement with the landlord) might justify eviction by the original tenant. An agreement that formalizes "house rules" also forces the occupants to discuss and resolve many issues that can arise in group living arrangements (*e.g.,* how and when the roommates will contribute their share of rent and utilities, division of responsibilities for cleaning and other household chores, use of common areas, use of other occupants' property (*e.g.,* stereos, televisions, vacuum cleaners), entitlement to parking space, and the minimum notice a roommate must give before moving out).

The agreement between roommates and an original tenant who desires to maintain the lease solely in his or her name should provide that the roommates may not pay their portion of the rent directly to the landlord. A landlord who accepts rent from a roommate might have created a month-to-month tenancy with that roommate, eliminating the original tenant's right to evict the roommate. See §1.9. For a sample agreement, see Portman & Brown, California Tenants' Rights (16th ed 2005).

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II. COUNSELING TENANT ORGANIZATIONS

§5.33 A. Attorney's Role

Tenant organizations take many forms and reflect diverse goals. Some organizations are ad hoc and short-lived, *e.g.,* a handful of tenants in the same building with a landlord who won't provide enough heat, or a larger group of tenants fighting a rent increase with a rent strike and fearing mass eviction. The size and complexity of the problems facing these groups may vary, but their primary objectives are short term: to resolve the immediate problem in their favor, and then disband and resume their normal lives. Class action lawsuits have become a fairly common tool to achieve these tenant objectives. See, *e.g., Little v Sanchez* (1985) 166 CA3d 501, 213 CR 297; *Rich v Schwab* (1984) 162 CA3d 739, 209 CR 417.

Other tenant organizations have broader, more permanent goals. Some groups wish to form a tenant union, which will deal with the landlord on behalf of all its members, and to negotiate a collective bargaining agreement that establishes binding procedures for resolving disputes with the landlord. Still others consist of tenants from several different buildings, who have joined together to deal with neighborhood or citywide problems, such as high rents or deteriorating housing. See Baar, *Rent Control in the 1970s: The Case of the New Jersey Tenants' Movement*, 28 Hastings LJ 631 (1977).

The attorney's proper role varies with the nature and objectives of the tenant organization. For example, if the group has only short-term goals, the attorney's responsibilities will not vary significantly from the traditional attorney's role in representing an individual client: to handle litigation, negotiate with the landlord or the landlord's attorney, and try to resolve the underlying dispute in the tenants' favor while protecting the tenancies.

If the group has long-term goals, however, the attorney should think more carefully about an appropriate role. The group's objectives may be achieved more quickly or easily through political solutions (such as rent control) than legal ones. If so, litigation might not directly achieve the group's goals, but might serve as a vehicle for publicizing and dramatizing certain issues in the community. If the group is not well established and must develop leaders whom the members will respect, the attorney probably should advise the leaders privately and present a low profile at group meetings and negotiations. Playing a traditional attorney's role can sometimes do more harm than good to a budding tenant organization.

The attorney should keep in mind that the group might not have given sufficient thought to the type of tenant organization that it wants to be or to the full range of goals that it wants to achieve. The attorney should urge such tenants to convey their thoughts and decisions regarding these questions so that the attorney can devise a strategy that will serve the group's interests.

The leaders of the tenant group may find it helpful to read Portman & Brown, California Tenants' Rights (16th ed 2005).

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§5.33A B. Right to Organize on Premises

In response to reported problems that landlords have interfered with residential tenant organization meetings on the premises, the legislature enacted CC §1942.6. It provides that any person entering the premises on the invitation of a tenant to provide information about tenants' rights "or to participate in a lessees' association or association of tenants or an association that advocates tenants' rights" shall not be either criminally or civilly liable for trespass. The meeting may occur "during reasonable hours" or otherwise under "emergency circumstances." The statute provides that it is declaratory of existing law. See discussion on picketing and unsolicited assembly or organizing in §5.37. Presumably, any court action brought by the landlord in violation of §1942.6 would also be subject to attack under the anti-SLAPP statute, CCP §425.16. See §5.18A.

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§5.34 C. Strategy and Tactics

Whether the tenant group's goals are long term or short term, the group must develop an overall strategy for dealing with the landlord. Before filing a lawsuit, calling a press conference, or withholding rent, the group and the attorney must consider the effect of these actions on the group's ultimate objective.

The strategy should generally be designed to put enough pressure on the landlord to force negotiation with the group and agree to terms acceptable to the group. The choice of tactics depends on:

- applicable law and the remedies that it provides for the tenants' problems;
- the personalities of the landlord and the tenants;
- the landlord's vulnerability to certain tactics; and
- the tenants' vulnerability to possible countermeasures by the landlord.

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§5.35 1. Obtaining Information About Landlord

Before deciding what tactics to use, the group should obtain as much information about the landlord as possible. What kind of personality does this particular landlord have? Hot-tempered, reasonable, timid, stingy, greedy, or politically ambitious? What types of people might best put pressure on the landlord (*e.g.,* members of his or her church, building inspectors, business acquaintances)? Other information can be useful when dealing with either an individual or a corporate landlord. Is the landlord sensitive to pressure from political figures or government agencies, or to attention from the media? What is the landlord's financial situation, and how critical is cash flow to the landlord's operation? Is the building for sale? Is the landlord averse to hiring lawyers?

Because attorneys often deal with government and private agencies or organizations, they are in a good position to inform the tenants about how to obtain helpful information from these sources. When seeking information regarding a landlord, the following sources can be useful:

(a) *Tax assessor*. The county tax assessor keeps track of each parcel of property by address and can furnish the name and address of the person who pays the property tax. The assessor can also provide the assessed value of the property and the amount of the tax, which might be useful in negotiations. Some county assessors keep an alphabetical list of taxpayers that discloses the location of all real property that the landlord owns in the county. If the attorney has access to DataQuick, information concerning all property owned by the landlord in the county can be obtained quickly and without leaving the attorney's office. With this information, the tenants can try to expand their organization to include tenants in the landlord's other buildings.

(b) *Secretary of State*. The office of the California Secretary of State in Sacramento will provide the names of the officers of any corporate owner of the building.

(c) *County recorder; title insurance company*. The county recorder's office has records of mortgages, deeds of trust, liens recorded against the property, and the names of prior owners. Although the attorney or the tenants can inspect recorded documents, this procedure can be time-consuming. Generally, a title insurance company will obtain the information from the county recorder's office, and provide it on request for a fee.

(d) *Real estate broker*. A friendly real estate broker might provide information on whether the building has been listed for sale recently. If the building has been listed for sale, a "multiple listing" book can provide useful information regarding the landlord's income and expenses on the building.

(e) *Building inspection department*. The city or county building inspection department can be a good source of information on the condition of the building and the landlord's efforts to repair it. Because the landlord must obtain a permit to make alterations, the attorney can find out when the landlord last made substantial repairs. The attorney also can determine whether tenants have complained to the department about the condition of the building and examine any inspection reports on the building. Such reports are public records open to inspection. Govt C §6253.

(f) *Local rent board*. The local rent control agency or board should maintain a file on the property that contains:

- the owner's identity, by name and address;
- any other regulated properties under the same ownership;
- the identity of the management company, if known;
- any penalties imposed or claims made against the owner;
- rent histories for the property;
- legal rent ceilings for the property; and
- any housing services provided with the property.

Public records may be inspected during normal office hours of the state or local agency; a copy of records that are not exempt from disclosure must be made available for photocopying on payment of duplicating costs or a statutory fee, if applicable. Govt C §6253. The public agency has 10 days to decide if the request seeks disclosable public records and to notify the requester of the agency's determination and the reasons therefor. The agency must also state the estimated date and time when the records will be made available. Govt C §6253. If the government agency has the public record in an electronic format, it must provide a copy of the electronic record on payment of the cost of production, subject to several exceptions. Govt C §6253.9. The government agency may withhold any public record if the record is exempt or if, in the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure. Govt C §6255. Also, a denial, in whole or in part, of a written request for inspection or copies of public records must be in writing. Govt C §6255(b).

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§5.36 2. Petitioning the Landlord

Preparation and submission of a formal petition to the landlord concerning the group's grievances has several advantages. The drafting process forces the tenants to specify their demands. In addition, the need to sign the petition encourages the tenants to make a commitment. Finally, the petition informs the landlord that the tenants are united, aware of their rights, and determined to achieve their demands.

The petition should be polite, but firm, and should clearly set out the tenants' demands. Threats of rent strikes should probably not be explicit, because this might antagonize the landlord and discourage discussion. The tenants may wish to make a general allusion to possible remedies, however, to suggest what the landlord might face if the dispute is not settled by negotiation. The petition should conclude with a request for a meeting between the tenants and the landlord, not the landlord's manager. If the tenants' attorney will attend the negotiating session, then the petition (or an accompanying letter) probably should disclose that fact. This information will eliminate the possibility that the landlord will be surprised at the attorney's presence and walk out of the meeting.

PRACTICE TIP: The attorney's involvement in drafting a petition should probably be limited. Too much reliance on the attorney at this early stage may harm the group. Moreover, if the language of the petition reveals that an attorney wrote it, the landlord might conclude that an outside agitator is the true instigator of the dispute, rather than the tenants. Although the attorney should counsel the tenants on the tone and content of the petition, the tenants should draft the petition themselves, even if the result is unsophisticated.

Presumably, any court action brought by the landlord in retaliation for the tenants' petitioning the landlord with valid grievances would be subject to attack under the anti-SLAPP statute, CCP §425.16. See §§5.18A, 5.37.

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§5.37 3. Picketing and Publicity

Picketing and other means of gaining publicity for the tenants' grievances can often be useful tactics for a tenant union. Such actions help to sustain the group's spirits, and often put a shy or prominent landlord in a mood to negotiate. Legal problems can arise, however, and the attorney should be prepared to advise the group on how it can avoid trouble.

There are few reported cases in California on publicity-seeking activities by tenant unions. In *Golden Gateway Ctr. v Golden Gateway Tenants Ass'n* (2001) 26 C4th 1013, 111 CR2d 336, the supreme court held that a tenants' association does not have a constitutional right to distribute leaflets door to door in a privately owned apartment complex. The court distinguished *Robins v Pruneyard Shopping Ctr.* (1979) 23 C3d 899, 153 CR 854, aff'd (1980) 447 US 74, 64 L Ed 2d 741, 100 S Ct 2035, based on the "public character" of the *Pruneyard* shopping center. The apartment complex, in contrast, specifically restricted public access, allowing entry only to residential tenants and their invitees. Similarly, in *Albertson's, Inc. v Young* (2003) 107 CA4th 106, 118, 131 CR2d 721, the court held that a free-standing market whose customers come to purchase groceries and leave was not the functional equivalent of a traditional public forum and could, therefore, prohibit solicitation of signatures at the entrance to the store. In *Fashion Valley Mall, LLC v NLRB* (2007) 42 C4th 850, 69 CR3d 288, however, the court ruled that a shopping mall could not prohibit persons from urging customers to boycott a store in the mall because the mall was a public forum in which persons can exercise their right to free speech under Cal Const art I, §2. But see CCP §527.3, which limits a court's ability to enjoin peaceful picketing and other labor union activities, and CC §1942.6 on the right to assemble for a tenant association meeting on residential premises if an occupant invites the meeting (discussed in §5.33A).

In addition, there are a number of decisions from other states. In New York, tenants have been enjoined from peaceful, truthful picketing and other publicity on the ground that the tenants should have sued the landlord instead, because the dispute was based on a contract. *Roosevelt Hosp. v Orlansky* (Sup Ct 1977) 400 NYS2d 663; *Springfield Bayside Corp. v Hochman* (Sup Ct 1964) 255 NYS2d 140. In another New York decision, however, the court held such reasoning to be unconvincing, because denying a tenant the right to picket unduly restricted his or her right of free speech. *Dicta Realty Assocs. v Shaw* (Sup Ct 1966) 270 NYS2d 342.

In *Hibbs v Neighborhood Org. to Rejuvenate Tenant Hous*. (Pa 1969) 252 A2d 622, the Pennsylvania Supreme Court reversed an injunction against tenants' picketing at a landlord's home because the landlord kept his place of business secret. See also *Carey v Brown* (1980) 447 US 455, 65 L Ed 2d 263, 100 S Ct 2286 (statute prohibiting peaceful residential picketing, but allowing picketing in other areas, violates equal protection clause of Fourteenth Amendment). In *Jacobs v Clark County Sch. Dist.* (9th Cir 2008) 526 F3d 419, the Ninth Circuit refused to find that a school district's requirement that students wear uniforms violated the First Amendment rights of students to communicate written messages on their clothing or to engage in expressive conduct via their choice of clothing.

An ordinance prohibiting all picketing that occurs in front of a residence and that is focused on that residence was upheld on its face in *Frisby v Schultz* (1988) 487 US 474, 101 L Ed 2d 420, 108 S Ct 2495. Rejecting the argument that the ordinance was facially overbroad in its regulation of free speech, the court was careful to state that the ordinance as written did not prohibit all picketing in residential neighborhoods or picketing in front of a residence used for a business or public meeting. See also *Klein v San Diego County* (9th Cir 2006) 463 F3d 1029, which upheld an ordinance outlawing picketing within 300 feet of a residence because it functioned as a narrower prohibition than the ordinance at issue in *Frisby*. On the constitutionality of restrictions on the right to picket, see *Hill v Colorado* (2000) 530 US 703, 147 L Ed 2d 597, 120 S Ct 2480 (upheld content-neutral ordinance creating bubble around facility to separate customers from protestors); *Madsen v Women's Health Ctr., Inc.* (1994) 512 US 753, 129 L Ed 2d 593, 114 S Ct 2516 (state court injunction provisions restricting activities of antiabortion protesters held partially constitutional and partially unconstitutional); *Foti v City of Menlo Park* (9th Cir 1998) 146 F3d 629 (ban on signs on public property that exempted open house signs and safety, traffic, and public informational signs was content-based and, therefore, violation of First Amendment); and *City of San Jose v Superior Court* (1995) 32 CA4th 330, 38 CR2d 205 (ordinance that outlawed picketing within 300 feet of targeted residence held constitutional).

The Rhode Island Supreme Court held that a landlord had no cause of action for invasion of privacy against a tenant group that handed out leaflets at the landlord's church and fraternal organization, accusing him of "slum-landlordism." *Kalian v People Acting Through Community Effort, Inc.* (RI 1979) 408 A2d 608. In *Inganamort v Merker* (NJ Super Ct Ch Div 1977) 372 A2d 1168, the court refused to enjoin tenants from distributing leaflets in the building to other tenants, because the tenants had rights "incidental" to their lease to do so. In California, a tenant who demonstrated with others at the landlord's church because of the landlord's alleged patterns of improper evictions and refusal to make needed repairs was served with a petition for injunctive relief under CC §527.6. The tenant's anti-SLAPP motion was denied by the trial court, but permitted by the court of appeal. *Thomas v Quintero* (2005) 126 CA4th 635, 24 CR3d 619.

The attorney must consider California's libel, slander, and trespass laws when advising the group on their publicity-seeking activities. California also has criminal statutes prohibiting picketing at a courthouse with intent to interfere with or obstruct justice or to influence a judge or a witness (Pen C §169); obstruction of a sidewalk, street, or public place (Pen C §647c); sit-ins (Pen C §647(j)); stalking (Pen C §§646.91-646.91A); and unlawful assembly (Pen C §§407-409). When advising tenant groups about these laws, the attorney must keep in mind Cal Rules of Prof Cond 3-210, which provides that a member of the California Bar "shall not advise the violation of any law, rule or ruling of a tribunal unless the member believes in good faith that such law, rule or ruling is invalid."

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§5.38 4. Rent Strikes

A rent strike by most or all of the tenants in a building can place significant pressure on the landlord, especially if the landlord needs regular rent payments to meet mortgage payments, so the prospect of a rent strike may put the landlord in the mood to negotiate. See §§3.16-3.48 on the circumstances under which tenants may withhold rent. Nevertheless, because unlawful detainer litigation is unpredictable, a rent strike is risky. If the landlord succeeds in evicting only one tenant, that victory may frighten the other tenants into paying their rent and abandoning the tenant union. The group must be warned of the risks involved in a rent strike not just to individual tenants, but to the group itself. If the group's first act is a rent strike that results in the eviction of one or more tenants, the group may never recover its unity or morale.

A group that decides to call a rent strike should collect rent from its members as rent becomes due, and keep the funds in a trust account with a financial institution. (Although a trust account often is called an "escrow account," it is not a true escrow account because the group retains the right to withdraw the funds at will.) The attorney should advise the group to designate at least two members who must sign together to make withdrawals from the account. All members of the union should be required to deposit their rent in the account. If one or more members are given a "free ride," morale will suffer and the group may disintegrate.

Although tenants who withhold rent or participate in a rent strike are not required by law to maintain a separate rent account, the account may help persuade the judge that the tenants are not trying to avoid paying rent, but instead are responsibly trying to resolve a legitimate dispute. In addition, the account may help demonstrate to the judge that a protective order is unnecessary. See §§11.56-11.61. Having a rent fund available might be particularly helpful if the tenants lose the unlawful detainer action and then seek relief from forfeiture under CCP §1174(c) or §1179. See §§13.49, 13.56. If the tenants successfully defend an unlawful detainer action by proving the landlord's breach of the implied warranty of habitability (see §§3.32, 10.64), they must pay a "reasonable rent" to avoid eviction. The trust account could provide such funds.

The landlord probably cannot compel the tenants to release the account funds. In *Dorfmann v Boozer* (DC Cir 1969) 414 F2d 1168, 1171, a landlord obtained an injunction compelling a tenant union to turn such funds over to him, but the court of appeals reversed the trial court's decision, holding that the legislature had already set up a comprehensive statutory scheme for eviction and attachment, which the landlord could not undercut by obtaining injunctive relief. No California court has decided whether a landlord may obtain injunctive relief to compel tenants to release such funds. In *Martin v Danziger* (1913) 21 CA 563, 132 P 284, however, the court held that in an action to determine the right to possession of real property, an injunction is improper if its effect is to oust one party from possession while the litigation is pending. 21 CA at 566. The *Martin* decision might support an argument that an injunction is improper if it effectively resolves a contested issue (*e.g.,* the landlord's right to the rent specified in the lease) while litigation on that issue is still pending.

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§5.39 5. Lawsuits Against Landlord

One or more members of a tenant organization might have personal causes of action against the landlord that are not shared by the other members. For example, the landlord might have locked one tenant out, committed one or more retaliatory evictions, or breached the implied warranty of habitability with respect to certain tenants only. Under such circumstances, the tenant organization itself might have standing to file suit for injunctive relief on behalf of the affected members. See *Crescent Park Tenants Ass'n v Realty Equities Corp.* (NJ 1971) 275 A2d 433 (tenants' association has standing to sue over matters of common interest to tenants). A tenant association could sue in its own name (CCP §369.5), but it is unclear whether it could recover damages in addition to damages awarded to individual members. Nonetheless, a lawsuit costs a landlord attorney fees (unless the landlord's insurer has a duty to defend the landlord), and exposes the landlord to liability for damages. Therefore, a legitimate suit can be an added inducement to the landlord to settle the underlying dispute.

If substandard residential housing substantially endangers the health and safety of residents or the public, a local enforcement agency may give the owner a notice to repair or abate. If the owner fails to comply with the notice, the tenants or a tenant association may file an action seeking judicial appointment of a receiver to manage the property and remediate the violations. Health & S C §§17980.6, 17980.7. The receiver may collect rents, manage the building, and use rents and loans to rehabilitate the building. The receiver may also make relocation payments to tenants who must move during repairs.

If a lawsuit against the landlord affects tenants' rights to possession, they may record a lis pendens against the property, putting potential purchasers and encumbrancers on notice of the pending action. See CCP §405.20; *Parker v Superior Court* (1970) 9 CA3d 397, 88 CR 352. The notice could affect the landlord's ability to sell or mortgage the building, and therefore might encourage him or her to negotiate with the tenant association. However, if the landlord moves to expunge the lis pendens, and the court finds that the recording of the lis pendens was improper, the tenants could be liable for the landlord's attorney fees and costs. CCP §405.38. On lis pendens procedures, see California Real Property Remedies and Damages, chap 13 (2d ed Cal CEB 2002).

As in an action on behalf of an individual tenant, the attorney should never file an action on behalf of a tenant organization solely for delay or harassment. To do so may lead to disciplinary action against the attorney (Cal Rules of Prof Cond 3-200) and to an action for malicious prosecution of a civil action. See *Weaver v Superior Court* (1979) 95 CA3d 166, 156 CR 745; *Tool Research & Eng'g Corp. v Henigson* (1975) 46 CA3d 675, 120 CR 291. (On the issue of alleging malicious prosecution for an attorney's failure to investigate before taking over a case, the *Tool Research & Eng'g Corp.* decision was overruled in *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 254 CR 336). The tort of abuse of process does not apply to the mere filing of a lawsuit (*Oren Royal Oaks Venture v Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 C3d 1157, 232 CR 567; *Seidner v 1331 Greenfield Owners Ass'n* (1980) 108 CA3d 895, 904, 166 CR 803), or to the recording of a lis pendens (*Woodcourt II Ltd. v McDonald Co.* (1981) 119 CA3d 245, 249, 173 CR 836).

In *Rubin v Green* (1993) 4 C4th 1187, 17 CR2d 828, the supreme court held that the litigation privilege set forth in CC §47(b) protects a law firm representing mobilehome park tenants concerning park defects from being sued for communicating with tenants concerning an anticipated lawsuit.

If the landlord sells the building while litigation is pending, the suit may be maintained against the successor landlord. See *Rosales v Thermex-Thermatron, Inc.* (1998) 67 CA4th 187, 78 CR2d 861.

PRACTICE TIP: Before filing a lawsuit against the landlord, the attorney should consider carefully the effect of the lawsuit on the tenant organization. When suit has been filed, tenants often begin to rely too heavily on the lawsuit and their attorney to solve their problems. Their other efforts may slacken, including their efforts to reach a negotiated settlement, and the group may gradually fade away. The attorney should discuss this problem with the tenants before filing suit, and encourage the group to schedule meetings or other activities that will continue while the litigation is pending. If it appears that the group's cohesiveness will suffer when an action is filed on behalf of the group, the attorney might suggest that each tenant file his or her own action for damages (up to $5000) against the landlord in small claims court. However, because collateral estoppel precludes the issue decided in small claims court from being relitigated (*Pitzen v Superior Court* (2004) 120 CA4th 1374, 16 CR3d 628), it may be unacceptably risky to have a tenant litigate a complex issue without counsel as required at the first stage of small claims court.

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§5.40 6. Negotiations

Without the exercise of tact and restraint, a tenants' attorney who is experienced in negotiations with other attorneys and opposing parties can easily dominate a negotiating session with a landlord. If the attorney dominates the session, the effectiveness of the union and its leaders might diminish substantially.

Before a negotiating session begins, the attorney should discuss the following questions with the tenant group:

(a) Who will do the talking?

(b) What role will the attorney play?

(c) What demands will the tenants make?

(d) Which of these demands may be "traded away"?

(e) What is the minimum settlement that the tenants will accept?

A "dress rehearsal" in which the group's negotiators assume the roles of the various participants can bring the main issues into focus and provide some negotiating experience. The attorney should advise the tenants to avoid unnecessarily threatening or antagonizing the landlord, but should also remind them to make the landlord realize their power and intention to take legal or other action against the landlord if he or she fails to come to an agreement with them.

Finally, it is usually a good idea for the attorney to help the tenants prepare an agreement in advance, which the parties will sign at the meeting if they come to an agreement. If an agreement is not prepared until after the meeting, the landlord could change his or her mind, deny certain concessions made at the meeting, or try to extract additional concessions from the tenants.

PRACTICE TIP: Because the landlord will feel most comfortable in his or her own "territory," the negotiating session should not be held in the landlord's office. If the landlord sends a manager or other agent who has no authority to reach an immediate, binding agreement at the negotiating session, the tenants should walk out. By sending someone else to meet with the tenants, the landlord is probably merely trying to "feel out" their position and is not yet ready to negotiate in good faith.

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7. Agreement Negotiated Between Landlord and Tenant Union

§5.41 a. Parties; Effectiveness

A settlement between a tenant union and a landlord may take the form of a collective bargaining agreement. Such an agreement is similar to a labor union's collective bargaining agreement in that it involves three parties: the landlord, the tenant, and the tenant union. Such an agreement is only as effective as the continued willingness of the union to make it effective. If the tenants have little inclination to continue the union, the attorney probably should recommend that each tenant sign a new lease, rather than use a collective bargaining agreement.

The sample collective bargaining agreement presented in §5.42 has been reproduced with permission from Nolo Press, publishers of Portman & Brown, California Tenants' Rights (16th ed 2005).

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Source: Real Property/California Landlord-Tenant Practice/5 Counseling the Tenant/§5.42 b. Form: Sample Collective Bargaining Agreement

§5.42 b. Form: Sample Collective Bargaining Agreement

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COLLECTIVE BARGAINING AGREEMENT

I
Parties

The parties to this Agreement are _____, hereinafter called "Landlord," and _____, hereinafter called "Union." The property covered by this Agreement is located at _____.

II
Purpose

It is the general purpose of this agreement to provide a better means of communication between Landlord and his tenants, through Union, their bargaining agent, to assure a continuous, harmonious relationship and an orderly method of resolving differences and grievances, which will result in a stable tenancy, reduced expenses through greater tenant concern, and a better community.

III
Dismissal of Pending Lawsuits

All lawsuits currently pending between Landlord and Union or Landlord and any member of Union shall be dismissed, including the following: _____

IV
Recognition of Union

Landlord recognizes Union as the sole collective bargaining agent for its members who are tenants at the property covered by this Agreement on all matters relating to their tenancies, the building, and their dealings with Landlord in his capacity as owner.

V
Union Security

Landlord shall in no way discriminate against or take reprisals against any person because of his involvement or sympathy with Union. Nor shall Landlord promise or give any benefits to any person conditioned on such person's quitting, failing to join, or refusing to assist Union in any way.

VI
Tenant Responsibilities

Union agrees and recognizes that each tenant has certain obligations and responsibilities, including the following, and Union agrees to take no action to discourage tenants from complying with these obligations and responsibilities:

1. To pay rent promptly when due (except where provided otherwise by law, this Agreement, or agreement between Landlord and a tenant;

2. To pay for and correct any damage to the premises or Landlord's furnishings caused by any intentional or negligent act of a tenant or any person occupying the premises with his permission, excepting damage due to normal wear and tear;

3. To place his garbage and refuse inside the containers provided therefor;

4. To refrain from acts which unduly disturb his neighbors;

5. To obey all state and local laws and regulations relating to the occupancy of residential property;

6. To comply with his obligations under his lease or rental agreement.

VII
Leases [*or Rental Agreements*]

A standard form Model Lease or Model Rental Agreement Is attached to this Agreement and labeled "Exhibit A."

Within 7 days of this Agreement, Landlord shall offer to sign such Model with each tenant who is a member of Union. Landlord shall make the same offer to each new member of Union within 7 days of being notified of such membership by Union.

The provisions of this Agreement shall be considered incorporated into and a part of each such Model signed.

VIII
Rents

1. Rents. The following monthly rentals shall apply to the following units:

Apartment number (specify furnished or unfurnished) Rent

_____

2. *Appliances*. Landlord shall, without extra charge furnish every apartment with a satisfactory stove and refrigerator, which he shall maintain in good working order.

3. *Utilities*. Landlord shall provide and pay for the following utilities, without adding to the monthly rent: gas, electricity, water, garbage collection, trash removal, and sewer charges.

4. *Late Charges*. No late charges or fines shall be imposed.

5. *Rent Increases*. There shall be no rent increases during the term of this Agreement.

6. *Back Rents*. Back rents in the amount of _____ now held by Union shall be disposed of as follows:

_____

IX
Repairs and Maintenance

1. *Maintenance*. Landlord shall maintain the building and grounds in a decent, safe and sanitary condition, and shall comply with all state and local laws, regulations and ordinances concerning the maintenance of residential property. In addition, as specific maintenance problems have arisen in the past, Landlord specifically agrees to provide the following maintenance services:

Example: (a) Check the coin-operated washing machine and dryer at least once a week to see that they are in good operating condition; (b) repair broken mailboxes upon notice by affected tenants.

2. *Security*. Landlord shall take reasonable measures to maintain security in the building and grounds to protect the tenants and their guests from burglary, robbery and other crimes.

3. *Repairs*. Landlord shall complete the following repairs by the following dates:

Repair	Date

4. *Failure to Comply*. Union shall have the right to inspect the building at reasonable times to insure compliance with this Section. if any repair is not completed by the date specified, or if Landlord fails to comply with any maintenance duty for 7 days or longer, the tenants of the building may thereafter, until completion of repairs or resumption of maintenance, pay their rent into a bank account held by Union. Union shall use the money to make the repairs or perform the maintenance, remitting the balance to Landlord after repairs are completed and maintenance resumed. This remedy shall be in addition to any remedies provided by law or contract for tenants receiving inadequate maintenance or repair.

X
Grievance Procedure

1. The term "grievance" shall mean any dispute between Landlord and a tenant or between Landlord and Union involving the interpretation, application, or coverage of this Agreement or any lease or rental agreement, except that any claim for personal injuries exceeding $500 shall not be considered a "grievance" subject to this procedure.

2. Any tenant having a grievance may present his grievance, by himself or through Union, to Landlord or his agent.

3. If the grievance has not been resolved to the satisfaction of the tenant within 10 days after being presented, a grievance meeting shall be held between the tenant, Union and Landlord within the next 5 days, or as soon thereafter as the parties may agree. At such meeting, the parties shall attempt to resolve the grievance to everyone's satisfaction.

4. If Landlord has a grievance against any tenant, or against Union, he may present such grievance to Union, which shall attempt to resolve the grievance as soon as possible.

5. If Landlord's grievance has not been resolved to his satisfaction within ten days after it has been presented to Union, the grievance meeting provisions of subsection 3 above shall apply.

6. If the grievance meeting produces no resolution of the grievance, the aggrieved party may then file suit in any court of competent jurisdiction for final determination of the matter in dispute.

XI
Enforcement

The provisions of this Agreement may be enforced through appropriate legal action by Landlord, Union, or any affected person. As the amount of damages attributable to violation of any provision of this Agreement be difficult to ascertain, the parties agree that these provisions may be specifically enforced by an appropriate court.

XII
Severability

In the event that any provision of this Agreement is deemed invalid by any court of law, it Is mutually agreed that such determination shall not affect any other provisions of this Agreement and the Agreement shall remain binding on all parties hereto.

XIII
Union's Right to Information

In order to enable Union to maintain a continuing interest in the present and future condition of the building and to adequately represent the interests of the tenants, Landlord shall furnish Union with information and allow Union to examine Landlord's records and books, upon reasonable notice by Union, relating to the following matters:

1. Expenses of maintaining the building;

2. Income received from the building;

3. All other financial information relating to the building including mortgages or deeds of trust on the building; and

4. All taxes affected by the building.

XIV
Duration

This Agreement shall remain in full force and effect from the date it is signed by both Landlord and Union and until _____.

On _____, Landlord and Union shall be in negotiations for a new agreement to go into effect at the expiration of this Agreement. Such negotiations shall continue in good faith until a new agreement is reached or this Agreement

expires.

WHEREFORE, We, the undersigned, do hereby execute and agree to this Agreement.

	For the Landlord:		*For the Union:*
1	Signature: _____ Title: _____ Date of signature: _____	1	Signature: _____ Title: _____ Date of signature: _____
2	Signature: _____ Title: _____ Date of signature: _____	2	Signature: _____ Title: _____ Date of signature: _____

Comment: This agreement is included for illustrative purposes only. When drafting a collective bargaining agreement, attorneys representing tenant unions must consider the particular needs and demands of the union members, as well as the historical relationship between the tenants and their landlord. Attorneys should make certain that the agreement addresses all points necessary to confirm any settlement reached by the parties. CEB thanks Nolo Press for its cooperation in permitting reproduction of the agreement.

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6

Mobilehome Tenancies

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I. INTRODUCTION §6.1

II. APPLICABILITY OF MOBILEHOME RESIDENCY LAW (MRL) §6.2
- A. Type of Structure §6.3
  - 1. Mobilehomes §6.4
  - 2. Recreational Vehicles §6.5
  - 3. Factory-Built Housing §6.6
  - 4. Commercial Modulars §6.7
  - 5. Multifamily Manufactured Homes §6.8
- B. Location of Mobilehome §6.9
  - 1. Installation in Park §6.10
  - 2. Installation on Individual Lot §6.11
- C. Parties to Rental Agreement §6.12

III. OTHER LAWS AFFECTING MOBILEHOMES
- A. State Legislation Specific to Mobilehomes §6.13
- B. Landlord-Tenant Statutes §6.14
- C. Antidiscrimination Statutes §6.14A
- D. Local Ordinances Regulating Mobilehomes §6.15
- E. Public Rental Assistance Programs §6.15A

IV. DECISIONAL LAW GOVERNING MOBILEHOME TENANCIES
- A. Implied Warranties §6.16
- B. Retaliatory Eviction Protections §6.17
- C. Adults-Only Restrictions §6.18

V. CREATION OF TENANCY
- A. Types of Tenancies §6.19
- B. Resident and Mobilehome Admissions Criteria §6.20
- C. Lease or Rental Agreement §6.21

VI. MOBILEHOME PARK RENTAL AGREEMENT
- A. Legal and Practical Considerations §6.22
  - 1. Term of Agreement; Initial Disclosures
    - a. Homeowner's Options §6.23
    - b. Reporting and Disclosure Requirements §6.24
    - c. Limits on Renewal §6.25
  - 2. Rent and Rent Increases §6.26
    - a. Notice of Rent Increase §6.27
    - b. Methods of Rent Increase in Long-Term Agreements
      - (1) Objective Factors §6.28
      - (2) Pass-Throughs §6.29
    - c. Inclusion of Utilities or Taxes in Rent §6.30
    - d. Statutory Limitations on Rent, Fees, and Charges §6.31
    - e. Impact of Local Rent Control Regulations §6.32
  - 3. Fees, Service Charges, and Utilities §6.33
    - a. Permissible Fees
      - (1) Common Area Landscaping and Maintenance Fees §6.34
      - (2) Fees Imposed by Governmental Entities §6.35
    - b. Limitations on Fees

(1) Supplying Lease §6.36
(2) Pets §6.37
(3) Occupancy §6.38
(4) Installation, Development, and Initial Landscaping §6.39
(5) Awards Against Management §6.40
(6) Enforcing Park Rules and Regulations §6.41
c. Amortization of Fees §6.42
d. Utilities Charges §6.43
4. Security Deposits §6.44
5. Park Rules
a. Adoption and Amendment of Rules §6.45
b. Limitation on Park Rules §6.46
6. Park Management Responsibilities §6.47
7. Fixtures and Alterations §6.48
8. Uses and Changes of Use, Zoning, or Master Lease
a. Disclosures §6.49
b. Change of Use
(1) Definition §6.50
(2) Implementation §6.51
(3) Failure to Follow Procedures §6.52
c. Sale of the Park §6.53
9. Sale or Lease of Mobilehomes
a. Management Rights and Duties §6.54
b. Form: Information for Prospective Homeowners §6.54A
c. Limitations on Right to Withhold Approval §6.55
d. Failure to Execute Rental Agreement §6.56
e. Management's Role in Sales or Listings §6.57
f. Seller Disclosures §6.57A
g. Required Removal of Mobilehome After Sale §6.58
10. Cotenants, Sublessees, and Subsequent Tenants §6.59
a. Cotenants §6.60
b. Sublessees §6.61
B. Statutory Remedies in Mobilehome Park Tenancies
1. Termination of Tenancy
a. Scope of MRL §6.62
b. Permissible Grounds §6.63
(1) Failure to Comply With Laws §6.64
(2) Conduct Constituting Substantial Annoyance §6.65
(3) Conviction for Specified Crimes §6.66
(4) Failure to Comply With Park Rules and Regulations §6.67
(5) Nonpayment of Rent or Charges for Services or Utilities §6.68
(6) Condemnation of Park §6.69
(7) Change of Use of Park; Closure of Park §6.70
c. Impermissible Grounds
(1) Grounds Established by MRL §6.71
(2) Retaliation §6.72
(3) Expiration of Stated Term §6.73
(4) Lapsed or Suspended Permit to Operate §6.73A
d. Notices of Termination §6.74
e. Special Concerns When Secured Lenders Are Involved §6.75
2. Eviction; Execution of Judgment; Lien Enforcement
a. Procedures for Eviction §6.76
b. Execution of Money Judgment Against Mobilehome §6.77
c. Prohibition on Acquiring Lien or Security Interest in Mobilehome §6.78
d. Warehouse's Lien
(1) Definition §6.79
(2) Warehouse's Lien Procedure §6.80
(a) Termination Notice §6.81
(b) Response Options to Termination Notice §6.82
(3) Foreclosing a Warehouse's Lien §6.83
e. Judicial Declaration of Abandonment (CC §798.61) §6.84
3. Additional Remedies
a. By Tenants
(1) Public Nuisance §6.85
(2) Management's Willful Violations and Illegal Business Practices §6.86

(3) Other Remedies §6.87
b. By Management §6.88
c. Attorney Fees and Penalties §6.89
C. Form: Mobilehome Park Rental Agreement
1. Initial Information
a. Form: Park Name/Address and Space Number/Address §6.90
b. Form: Identity of Homeowner and Residents §6.91
c. Form: Identity of Park Owner and Management §6.92
d. Term
(1) Form: Beginning of Term §6.93
(2) Form: Length of Term §6.94
e. Form: Amount of Rent §6.95
f. Form: Services §6.96
g. Form: Facilities §6.97
h. Form: Chart Showing Fees for Utilities and Services §6.98
i. Deposit
(1) Form: Amount §6.99
(2) Form: Payment of Deposit Amounts §6.100
j. Form: Zoning and Land Use Disclosures §6.101
k. Form: Mobilehome Ownership Information §6.102
l. Form: Other Information §6.103
2. Form: Agreement to Lease §6.104
3. Form: Term of Agreement §6.105
4. Rent and Rent Increases
a. Form: Indexed Rent Increases (Long-Term Rental Agreement Only) §6.106
b. Form: Due Date of Rent Payments; Notice of Increase §6.107
c. Form: Tender of Rent §6.108
d. Form: Charges for Late Payment of Rent §6.109
5. Form: Fees, Service Charges, and Utilities §6.110
6. Form: Security and Default Deposits §6.111
7. Form: State Law and Park Rules; Procedure for Amending Park Rules §6.112
8. Form: Park Management Responsibilities for Physical Facilities, Services, Utilities, and Compliance With Law §6.113
9. Form: Fixtures: Ownership, Maintenance, and Liability §6.114
10. Form: Right of Entry §6.115
11. Form: Changes in Zoning, Use Permits, or Master Lease §6.116
12. Form: Sale or Subletting of Mobilehome §6.117
13. Form: General Prohibitions (Residential Use, Guests, Abandonment, Subletting, and Assignments or Encumbrances) §6.118
14. Form: Termination and Eviction §6.119
15. Form: Waivers §6.120
16. Form: Notices §6.121
17. Form: Consultation With Homeowner §6.122
18. Form: Liability Indemnification §6.123
19. Form: Management's Right to Make Payments §6.124
20. Form: Ownership of Mobilehome §6.125
21. Form: Multiple Mobilehome Ownership §6.126
22. Form: Enforcement of Agreement §6.127
23. Form: Attorney Fees §6.128
24. Miscellaneous Provisions
a. Form: Time of the Essence §6.129
b. Form: Interpretation and Severability §6.130
c. Form: Entirety of Agreement §6.131
d. Form: Alterations or Amendments §6.132
25. Acknowledgments.
a. Form: Acknowledgment Is Voluntary; Caveat §6.133
b. Form: Inspection Made to Corroborate Management's Representation of Space and Facilities §6.134
c. Form: Receipt and Understanding of Mobilehome Residency Law §6.135
d. Form: Charges for Month-to-Month Agreement §6.136
e. Form: Charges for Term Agreement §6.137
f. Form: Acceptance of Commercial Goods or Services Not Required §6.138
g. Form: Consent to Entry §6.139
h. Form: Attachments §6.139A
26. Form: Execution §6.140

VII. RULES AND REGULATIONS
A. Importance §6.141
B. Checklist: Common Provisions §6.142

VIII. MANAGEMENT-TENANT RELATIONS
A. Tenant Organizations §6.143
B. Management Organizations §6.144

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§6.1 I. INTRODUCTION

Legal representation of an owner or occupant of a mobilehome or manufactured home, or of a landlord with a mobilehome or manufactured home on his or her property, requires knowledge of the various special laws dealing with mobilehomes and mobilehome parks and a determination of which of these and other general laws may apply. The most important law affecting the landlord-tenant relationship in a mobilehome tenancy is the Mobilehome Residency Law (MRL) (CC §§798-799.10). Among other matters, the MRL regulates the following:

- Contents of the rental agreement;
- Types of charges that can be imposed;
- Grounds for eviction; and
- Eviction procedures.

An attorney representing either a landlord or a tenant of a mobilehome must first determine whether the MRL applies. See §§6.2-6.12 for discussion of application and provisions of the MRL.

In addition to the MRL, numerous other laws regulate one or more aspects of mobilehomes. The most significant include the Manufactured Housing Act of 1980 (Health & S C §§18000-18153), which regulates construction and alteration of manufactured homes, mobilehomes, and recreational vehicles, registration, titling, sales practices, escrows, and dealers; the Mobilehome Parks Act (MPA) (Health & S C §§18200-18700), which regulates the construction and operation of mobilehome parks; and the Special Occupancy Parks Act (Health & S C §§18860-18874), which regulates the construction and operation of recreational vehicle parks.

Mobilehomes, recreational vehicles, park trailers, recreational vehicle parks, and mobilehome parks are regulated by the California Department of Housing and Community Development (HCD). Health & S C §§18015-18160 (mobilehomes, manufactured homes, park trailers, and recreational vehicles); Health & S C §§18200-18700 (mobilehome parks); and Health & S C §§18860-18874 (recreational vehicle parks). Enforcement of mobilehome park and special occupancy regulations may be assumed by a local city, county or city and county. Health & S C §18300(b). Consequently, an attorney representing a mobilehome owner or a person on whose land a mobilehome is located must also be familiar with HCD regulations. Health and Safety Code §18151 provides for a "Mobilehome Ombudsman" within the HCD to help resolve disputes involving the MRL, except for disputes involving rental agreements, leases, or rents.

Title 25 of the California Code of Regulations includes HCD regulations (25 Cal Code Regs §§1000-5668) that add specificity to the substantive and procedural requirements of the Mobilehome Parks Act (div 1, ch 2) and of the Special Occupancy Parks Act (div 1, ch 2.2); construction requirements for factory-built housing and mobilehomes (div 1, ch 3); mobilehome occupational licensing regulations (dealer and manufacturer licensing and sales practices (div 1, ch 4)); and regulations on registration and titling of manufactured homes, mobilehomes, and commercial modulars (div 1, ch 5).

The Recreational Vehicle Park Occupancy Law (RVPOL) (CC §§799.20-799.79) and CC §§1866-1867 govern the landlord-tenant relationship in a recreational vehicle park (see Health & S C §18862.39). The RVPOL regulates the content of registration agreements and rental agreements (CC §§799.43, 799.45), removal of "occupants'" recreational vehicles (see CC §799.28, defining "occupant"), terminating tenancy of a "tenant" (see CC §799.32, defining "tenant"), and terminating tenancy of a "resident" (CC §799.31, defining "resident"). The RVPOL does not apply to mobilehomes or manufactured homes (CC §799.41). The Manufactured Housing Act of 1980 (Health & S C §§18000-18153), and the Special Occupancy Parks Act (Health & S C §§18860-18874), contain statutory requirements for recreational vehicles, park trailers, and recreational vehicle parks, other than matters covered by the RVPOL.

Although numerous laws govern such matters as the sale, construction, safety standards, taxation, and registration of mobilehomes, this chapter primarily discusses regulation of the landlord-tenant relationship in mobilehome park tenancies.

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§6.2 II. APPLICABILITY OF MOBILEHOME RESIDENCY LAW (MRL)

A mobilehome tenancy subject to the Mobilehome Residency Law (MRL) (CC §§798-799.8) creates a landlord-tenant relationship that is significantly different from that in conventional rental tenancies. The MRL contains many provisions that regulate the landlord-tenant relationship in mobilehome tenancies, the most significant of which regulate the contents of the rental agreement (CC §798.15) and the termination of the tenancy (CC §§798.55-798.60). To determine whether the MRL applies to the tenancy, the attorney first must review the definitions in the MRL (CC §§798.2-798.12) on the type of structure in which the tenant resides (see §§6.3-6.8), the type of community or park in which the residence is located (see §§6.9-6.11), and the type of legal relationship, if any, that the tenant has with the mobilehome park owner (see §6.12).

The MRL defines the terms "mobilehome" (CC §798.3), "mobilehome park" (CC §798.4), "park" (CC §798.6), "rental agreement" (CC §798.8), "homeowner" (CC §798.9), "resident" (CC §798.11), and "tenancy" (CC §798.12). Each of these definitions is crucial in determining whether specific aspects of the mobilehome park landlord-tenant relationship is subject to the MRL.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.3 A. Type of Structure

§6.3 A. Type of Structure

Before giving any legal advice or undertaking any representation, the attorney must determine the type of structure in which the tenant resides. The familiar silver trailer towed behind the 1950 family sedan has been replaced by a wide variety of manufactured residences, ranging from compact motorized homes to two-story, 2000-square-foot mobilehomes and even multifamily manufactured homes (Health & S C §18008.7; see §6.8).

In response to these changes, the legislature no longer treats or classifies mobilehomes as vehicles. See Health & S C §18008. Mobilehomes may be:

- Installed on permanent foundations (Health & S C §18551);
- Taxed as personal property (Rev & T C §5810); and
- Subject to special landlord-tenant laws when installed and used in mobilehome parks (CC §§798-799.8).

The MRL applies, however, only if the structure is a mobilehome as defined in CC §798.3. CC §798.1. See §6.4.

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§6.4 1. Mobilehomes

A mobilehome (often called a "manufactured home") is defined in the Mobilehome Residency Law (MRL) (CC §§798-799.10) as a structure "designed for human habitation and for being moved on a street or highway" under a Vehicle Code permit. CC §798.3. The Vehicle Code permit requirements apply, with narrow exceptions, to loads over 102 inches wide (Veh C §35100) or 40 feet long (Veh C §35400). The MRL definition of "mobilehome" explicitly excludes recreational vehicles (as defined in CC §799.29 and Health & S C §18010; see §6.5), except as provided in CC §798.3(b), trailers or other recreational vehicles located in recreational vehicle parks governed by CC §§799.20-799.79, and commercial modular units (as defined in Health & S C §§18001.8, 18015.1; see §6.7).

The MRL definition of "mobilehome" specifically includes both manufactured homes (as defined in Health & S C §18007) and mobilehomes (as defined in Health & S C §18008). See CC §798.3. The Health & S C definitions of "mobilehome" and "manufactured home" were amended, effective January 1, 2008. The definition of "manufactured home" in Health & S C §18007 is limited to single-family units constructed on or after June 15, 1976, which comply with building standards imposed on that date by the US Department of Housing and Urban Development. Under Health & S C §18008, "mobilehome" is defined as a single-family unit built before June 15, 1976, and which complies with state standards in effect at the time of construction. The changes in definitions, however, are intended by the Legislature to have no substantive effect with respect to the treatment of these units by any law. See Health & S C §§18000(b)(4), 18007(b) and 18008(b). Notwithstanding these new statutory distinctions, this chapter will use the term "mobilehome" when referring to mobilehomes or manufactured homes.

NOTE: The Health and Safety Code definition regulates the physical standards, sale, taxation, and registration of mobilehomes; the Civil Code definition controls only which units are subject to the MRL.

Although the terms "mobilehome" and "manufactured home" are often used interchangeably, the term "factory-built housing" as defined in Health & S C §19971 does not include mobilehomes as defined in Health & S C §18008. Presumably, factory-built housing would not come within the definition of "mobilehome" in CC §798.3 either, and factory-built housing installed within a mobilehome park would not be subject to the MRL. See §6.6.

Another factor that may be significant is how the mobilehome is installed (*i.e.,* whether it rests on piers or related methods of attachment to the ground under Health & S C §18613, or is permanently affixed to a foundation system under Health & S C §§18551 and 18551.1). In most cases, this distinction is irrelevant because the MRL relates to whether the residence is a mobilehome without regard to whether or not it is attached or affixed. As a practical matter, however, a court might treat the forfeiture of a lease involving a mobilehome that is permanently affixed differently from one that is sited on piers.

Permanent affixation of mobilehomes must conform to park rules and regulations (Health & S C §18611), and such rules rarely address permanent affixation. A mobilehome that is not permanently affixed to a foundation system in a mobilehome park is personal property for most purposes, and not real property. For example, such a mobilehome is not susceptible to mechanics' liens for work related to the park and is foreclosed against or executed on as personal property. Health & S C §18037.5; CCP §700.080.

Special provisions govern the disposition of mobilehomes abandoned in mobilehome parks. See CC §§798.56a, 798.61, discussed in §§6.79-6.84. Note that a claim of exemption or homestead protection attaches to a mobilehome as a residence and not as a vehicle or other form of personal property. CCP §704.710. Foreclosures on mobilehomes are governed by Health & S C §18037.5. On execution of a judgment against a mobilehome, see §6.77. This hybrid legal structure has many other consequences beyond the scope of this chapter.

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§6.5 2. Recreational Vehicles

Recreational vehicles and park trailers comprise a range of structures or vehicles that may look like mobilehomes when installed, but are not mobilehomes as defined in the Mobilehome Residency Law (MRL) (CC §§798-799.10). A recreational vehicle may be a motorhome, a slide-in camper, a travel trailer, a truck camper, or a camping trailer (with or without motive power) that is designed for human habitation for recreational, emergency, or other occupancy. Health & S C §18010. A park trailer is designed for recreational or seasonal occupancy only. Health & S C §18009.3.

Recreational vehicles and park trailers located in recreational vehicle parks (or in the recreational vehicle portion of a mobilehome park) are subject to the Recreational Vehicle Park Occupancy Law (RVPOL) (CC §§799.20-799.79). This law governs the contents of registration agreements and regulates the removal of recreational vehicles and park trailers of defaulting occupants, tenants, and residents. In addition, CC §§1866-1867 permit summary removal of vehicles, including recreational vehicles.

The RVPOL distinguishes among "occupants," "tenants," and "residents":

- "Occupants" have occupied space in a recreational vehicle park for 30 days or less (CC §799.28).
- "Tenants" have been occupants in the park for more than 30 consecutive days (CC §799.32).
- "Residents" are tenants who have occupied the recreational vehicle park for 9 months or more (CCP §799.31).

Under the RVPOL, a defaulting occupant need be given only 72 hours' notice of termination. CC §799.55. A tenant who has resided in the park for less than 9 months must be given at least 30 days' notice of termination. CC §799.66. Tenancies of residents who have resided in the park continuously for 9 or more months may be terminated only in accordance with the MRL (see CC §798.56) if the recreational vehicle occupies a site in a mobilehome park for the time periods set forth in CC §798.3(b) and otherwise only in accordance with CC §799.70, which governs recreational vehicles in recreational vehicle parks.

Pursuant to CC §1866, special occupancy park management may summarily evict an occupant and remove a vehicle. In recreational vehicle parks, if the occupant fails to leave a campsite, camping cabin, lot, or other rental unit at the posted check-out time, park management may summarily evict if a series of specified conditions are met. CC §1867 permits special occupancy park management to require an occupant to move from one space to another if an imminent danger, as defined, is present.

In interpreting the definition of a recreational vehicle, the attorney may encounter two other structures that may appear to fit the MRL definition of "mobilehome." Special factors determine whether either should be treated as other than a recreational vehicle subject to the RVPOL. First, many travel trailers that have been installed in mobilehome parks for many years are no longer mounted on wheels, because the wheels have either deteriorated or been removed along with their axles. Even though they are lived in permanently, rather than being used for recreational or emergency use, these trailers are subject to the MRL if they meet the timing and location factors in CC §798.3(b); otherwise, they are subject to the RVPOL. Second, a park trailer is a newer, travel trailer that either may be up to 14 feet wide with up to 400 square feet of living space or may have "pop-out" rooms that, if permanently extended, would result in more than 400 square feet of living space (Health & S C §18009.3). It is not constructed to the applicable federal or state standards (Health & S C §§18007, 18008, 18027.3). Some park trailers even have lofts, but they can be occupied in parks or rented by park owners only if they comply with Health & S C §§18009.3 and 18033.

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§6.6 3. Factory-Built Housing

Factory-built houses are prefabricated or modular homes, not mobilehomes, manufactured homes, or recreational vehicles. They are defined in Health & S C §19971 as residential buildings or dwelling units manufactured in such a manner that concealed parts or processes cannot be inspected before installation at the building site without disassembly, damage, or destruction of the parts. Factory-built housing conforms to state building code requirements, rather than to federal mobilehome standards. The definition in Health & S C §19971 specifically excludes mobilehomes, recreational vehicles, and commercial coaches. Mobilehomes affixed to permanent foundations also should not be considered to be factory-built housing.

Health and Safety Code §18611 permits installation of factory-built housing in mobilehome parks under the following conditions:

- The housing is no more than two stories high and consists of no more than four dwelling units per structure.
- The housing is placed on lots specially designated for that purpose.
- The permit to construct the park is issued on or after January 1, 1982.
- A special zoning designation or use permit is obtained for the purpose of installing factory-built housing.

Factory-built housing is not covered by the MRL because such housing does not come within the definition of "mobilehome," even when it is located in a mobilehome park, and because "tenancy," by definition, covers sites with mobilehomes. CC §798.12.

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§6.7 4. Commercial Modulars

Another form of manufactured structure intended for human occupancy, a commercial modular or coach, may be used only for industrial, professional, or commercial purposes. Health & S C §18001.8. Some commercial coaches are used for residential purposes, such as dormitories. Commercial coaches are not subject to the MRL, however, because they are explicitly excluded by CC §798.3(a).

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§6.8 5. Multifamily Manufactured Homes

"Multifamily Manufactured Homes" are a type of manufactured home that may be placed in mobilehome parks by park management or even homeowners. These are similar to manufactured homes (see §6.4), but they are equipped for two dwelling units including a dormitory or efficiency unit, or three or more dwelling units. Health & S C §18008.7. All provisions of law that apply to manufactured homes apply equally to multifamily manufactured homes. Health & S C §18008.7. Practitioners representing park management should ensure that parks that would not welcome multifamily manufactured homes have entry criteria in their rules and regulations that govern the use of these structures in a manner that is not unreasonable, arbitrary, or inconsistent with any other relevant statute. The rules on what types of multifamily homes can be placed in what types and ages of parks are in Health & S C §§18551.1 and 18611.

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§6.9 B. Location of Mobilehome

After ascertaining that a residential structure is a mobilehome as defined by the Mobilehome Residency Law (MRL) (CC §§798-799.10), the attorney must determine whether it is located in a park. The MRL specifies three types of "parks."

(1) A "mobilehome park," which is "an area of land where two or more mobilehome sites are rented, or held out for rent, to accommodate mobilehomes used for human habitation." CC §798.4.

(2) A mobilehome "subdivision, cooperative, or condominium" or a "resident-owned mobilehome park," to which most of the provisions of the MRL apply by virtue of CC §799.1, if the resident does not have an ownership interest in the subdivision, cooperative, or condominium, or resident-owned park; for those with the requisite ownership interest, only article 9 of the MRL applies, unless otherwise explicitly stated. See §6.11. (It is unclear, however, why CC §799.1 states that article 9 of the MRL (commencing with CC §799) applies only to "rights of a resident," but does not mention "obligations of management or owners.")

(3) A "manufactured housing community," which according to CC §798.6 is defined in Health & S C §18210.7, and which is similar to a rental or ownership mobilehome park, except that the manufactured homes must have been constructed after June 15, 1976 (when federal standards took effect), or the mobilehomes must have two or more units in them.

The type of installation should not be a relevant factor in determining the type of park because:

- The MRL applies only to the rental of a space or site within a mobilehome park for a mobilehome (CC §798.12).
- Health & Safety Code §18551.1 explicitly permits installation of mobilehomes in certain mobilehome parks on foundation systems that are subject to the requirements of Health & S C §18551.

For a mobilehome to be installed on a foundation system, Health & S C §18551 requires that the mobilehome owner either:

- Hold title to, or be in the process of purchasing, the real property where the mobilehome will be installed; or
- Hold a lease for 35 years or more, or for a mutually agreed-on term (if less than 35 years), if the lease is transferable and subject only to revocation for specified cause.

If a mobilehome is located in a mobilehome park, the MRL's restrictions on management and various tenant protections apply (including the special eviction protections), as well as state-mandated construction and operation requirements. Local ordinances may also govern use of the mobilehome park, tenant relocation requirements when a park is converted to a different use, and limitations on rent increases.

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§6.10 1. Installation in Park

To be subject to all of the provisions of the Mobilehome Residency Law (MRL) (CC §§798-799.10), a mobilehome must be installed or affixed in a mobilehome park. Under the MRL, a mobilehome park is "an area of land where two or more mobilehome sites are rented, or held out for rent, to accommodate mobilehomes used for human habitation." CC §798.4. This definition is similar to the definition of "mobilehome park" in the Mobilehome Parks Act (MPA) (Health & S C §§18200-18700; see Health & S C §18214), which governs health and safety requirements in mobilehome parks. The attorney can determine whether the mobilehome is located within a mobilehome park by contacting the local enforcement agency or the Department of Housing and Community Development (HCD) because all mobilehome parks must receive an annual permit to operate (Health & S C §18506). All parks are listed on HCD's website, which differentiates mobilehome parks from special occupancy parks and provides other information. See Directory for web address.

The MRL does not define "recreational vehicle park," which is instead defined in the Recreational Vehicle Park Occupancy Law (RVPOL) (CC §§799.20-799.79), with a cross-reference to Health & S C §18652.39, where it is defined as an area of land, or a separate designated section within a mobilehome park, where two or more lots are rented or held out to rent to owners or users of recreational vehicles, park trailers, or tents. CC §799.30.

Mobilehomes are often found, however, in an area within a mobilehome park set aside for recreational vehicles or older travel trailers, or within an area that is not clearly defined. Although the courts have not clarified this situation, it appears that the mobilehome and its resident should be treated as being in a mobilehome park, rather than in a recreational vehicle park, because placement in that area was an act of the park's management rather than of the tenant. Note that many travel trailers in mobilehome parks have explicit protection under CC §798.3(b) and that placement of travel trailers and other recreational vehicles within a mobilehome park developed after January 1, 1982 (and after 75 percent of the spaces have been rented for the first time) is prohibited unless the recreational vehicles are located only within designated areas. CC §798.22.

Yet another situation that sometimes creates confusion concerning application of the MRL to residents or owners of mobilehomes, park trailers, or recreational vehicles in mobilehome parks or recreational vehicle parks arises when the residents and the property are subject to the Employee Housing Act (Health & S C §§17000-17062.5). The definition of "mobilehome park" in Health & S C §18214(b) excludes areas zoned for agricultural purposes where two or more lots are rented or leased to accommodate 12 or fewer manufactured homes, mobilehomes, or recreational vehicles used for housing agricultural employees. This exclusion expressly applies only to Health and Safety Code permit and fee requirements for owners. The Health & S C §18214 definition is not cross-referenced in the MRL definition, and the MRL would therefore apply in these situations. On the other hand, a similar exclusion exists in Health & S C §18215's definition of "recreational vehicle park," and because the RVPOL specifically cross-references Health & S C §18215 (CC §799.30), the RVPOL would not apply to these accommodations. A special rule, in CC §798.13, exempts from the MRL any areas owned, operated, or maintained by the state for the purpose of providing employee housing or space for a mobilehome owned or occupied by a state employee. However, 60 days' notice of termination for any reason is required.

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§6.11 2. Installation on Individual Lot

Because the Mobilehome Residency Law (MRL) (CC §§798-799.10) defines a mobilehome park as an area of land where two or more mobilehome sites are rented or held out for rent (CC §798.4), a single mobilehome placed on a single rented property is not subject to, or protected by, the MRL. CC §798.1.

The term "area of land" may seem rather vague, however, when the attorney encounters more complicated situations. For example, it may be more difficult to determine whether a mobilehome is located in a mobilehome park when it is situated on rented space in a conventional subdivision, cooperative, or condominium. If the development does not sell out immediately, however, and the developer rents two or more isolated lots to individuals with their own mobilehomes, the rented area arguably is a mobilehome park subject to the MRL. It can be even more complicated when two owners each own one lot within such a subdivision ("an area of land"), and they both rent their respective lots to persons who reside in their own mobilehomes. In addition, special rules in CC §§799-799.8 apply to subdivisions, cooperatives or condominiums for mobilehomes and resident-owned mobilehome parks. In such common-interest subdivisions, the mobilehome owner owns title to the land on which the mobilehome is located, owns shares in a stock cooperative with an exclusive occupancy right for the mobilehome space, or owns the airspace over the mobilehome space. Before these sections were enacted, it was unclear whether such developments were mobilehome parks at all because sites are not merely held out for rent.

Civil Code §799.1 provides that article 9 of the MRL governs the rights of a resident of a subdivision, cooperative, condominium for mobilehomes, or resident-owned mobilehome park, who has an ownership interest in the space, subdivision, cooperative, condominium, or resident-owned park in which his or her mobilehome is located or installed. A resident of a subdivision, cooperative, condominium for mobilehomes, or resident-owned mobilehome park, who merely rents or leases a space on which his or her mobilehome is located or installed, and who does not have an ownership interest in that subdivision, cooperative, condominium for mobilehomes, or resident-owned mobilehome park, is governed by articles 1-8 of the MRL (CC §§798-798.88).

There is no case law interpreting the applicability of the MRL to traditional common interest subdivisions, but it may be of some guidance to examine determinations of the Department of Housing and Community Development (HCD) regarding applicability of the Mobilehome Parks Act (MPA) (Health & S C §§18200-18700; see Health & S C §18214) to mobilehome parks. As the administrative agency regulating the licensing and physical operation of mobilehome parks, the HCD considers such areas to be mobilehome parks subject to the MPA only if they include a significant number of rented spaces or lots. See also 77 Ops Cal Atty Gen 214 (1994). Application of the MRL should be analogous to HCD's application of the MPA.

Another potential issue impacting the rights of homeowners and park owners is the nature of the park owner's legal interest in the park real property. If the park owner is a ground lessee, its rights and ability to sublet to homeowners is limited by the terms of the ground lease. It may be merely a concessionaire. In *Qualls v Lake Berryessa Enters., Inc.* (1999) 76 CA4th 1277, 91 CR2d 143, the park operator was merely a licensee of the county, operating a park on land owned by the federal Bureau of Reclamation. This limited the rights of a homeowner to sue a neighbor for trespass and nuisance, but allowed the homeowner to sue the park operator for breach of contract when the park operator changed lot lines to accommodate the neighbor's larger mobilehome.

When interpreting other complicated situations, the attorney may wish to examine whether HCD required the owners to obtain a mobilehome park permit and appropriate zoning from the local government agency. HCD commonly issues such orders when an owner leases space for two or more mobilehomes on a single lot or on adjoining lots outside a subdivision for mobilehomes governed by CC §§799-799.8. Attorneys may order departmental determinations by mail from the office of the General Counsel, Department of Housing and Community Development. See Directory for address.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.12 C. Parties to Rental Agreement

§6.12 C. Parties to Rental Agreement

Once an attorney decides that a residence is a "mobilehome" (see §§6.3-6.8) located in a "mobilehome park" (see §§6.9-6.11), ascertaining whether the tenancy is subject to all provisions of the Mobilehome Residency Law (MRL) (CC §§798-799.10) is based on what parties entered into the rental agreement with the mobilehome park management. As defined in the MRL, a "[t]enancy is the right … to the use of a site within a mobilehome park on which to locate, maintain, and occupy a mobilehome." CC §798.12. A "homeowner," whose legal relationship with the park management is subject to the MRL, is defined by CC §798.9 as "a person who has a tenancy in a mobilehome park under a rental agreement." In some situations, a tenant's residency in a mobilehome will distinguish that tenant as the homeowner, regardless of actual ownership of the residence. In other situations, the actual owner of the mobilehome will be considered to be the homeowner, no matter who resides in it. Consider the following three situations:

(1) *Resident owner of mobilehome*. When the owner of a mobilehome leases space from mobilehome park management on which to reside in the mobilehome, the legal relationship between the owner and the management is subject to the MRL. The resident owner is a "homeowner" as defined by CC §798.9, who has a "tenancy" as defined by CC §798.12.

(2) *Nonresident owner of mobilehome*. When a mobilehome owner rents space from mobilehome park management, and sublets the mobilehome to another person who resides in it, the legal relationship between the nonresident owner and the management is subject to the MRL. The owner is a "homeowner" under CC §798.9 and has a "tenancy" under a rental agreement with the park management as defined by CC §798.12. Because the nonresident owner would be required to move the mobilehome if evicted from the park, he or she would be entitled to the special notice and pleading requirements of CC §§798.55-798.60 regarding termination of the tenancy.

NOTE: In this situation, the actual resident of the mobilehome is a "resident" as defined in CC §798.11, but is not a "homeowner" as defined in CC §798.9. A resident who is not a homeowner is entitled to many of the protections of the MRL, but the special restrictions on termination of the tenancy apply only to the rental agreement between the park management and the homeowner, and not to the agreement between the resident and the homeowner. If eviction of the resident is necessary, the park management must rely on the nonresident homeowner to evict the tenant or, when a notice to the homeowner does not result in that requested action, it may terminate the tenancy of the nonresident homeowner, as permitted under CC §798.56, in order to evict the resident.

(3) *Nonowner resident of mobilehome*. Any person who enters into an agreement with mobilehome park management to "locate, maintain, and occupy" a mobilehome and mobilehome site is a "homeowner" as defined in CC §798.9, regardless of the actual ownership of the mobilehome. Note, however, that management has the right to require that a mobilehome purchaser be the registered owner of the mobilehome (CC §798.75). Otherwise, the purchaser may be an "unlawful occupant." Thus, when a person who is not the registered owner of the mobilehome enters into an agreement with the park management, if permitted under management policy, to "locate, maintain, and occupy" the mobilehome, he or she is a "homeowner" entitled to the full protection of the MRL, including the special controls on termination of the tenancy. To prevent subleasing, many park management attorneys draft a rental agreement clause that requires at least one prospective homeowner of a sited mobilehome to take title as a registered owner and to reside in the mobilehome on a permanent or full-time basis, except as permitted by CC §798.23.5 (see §6.61) in cases of "medical emergency" or "medical treatment."

NOTE: However, when a nonowner resident rents a mobilehome from the park management, the legal relationship between the resident and the management is not subject to the special eviction requirements of the MRL because no tenancy has been created as defined in CC §798.12. A "tenancy" is defined in CC §798.12 as the right of a homeowner to "locate, maintain, and occupy" a mobilehome, not merely the right to reside in one. Eviction of a resident who leases both the mobilehome and the space would be governed by conventional landlord-tenant notices and rights (CCP §§1161-1179a), because such a resident does not bear the additional burden of owning the mobilehome and having to move it on eviction.

PRACTICE TIP: Because some courts may not distinguish between a nonowner resident who rents a mobilehome with the space and a resident who leases only a mobilehome from the park, many attorneys still provide the notice and follow the cause standards set forth in the MRL. The MRL procedure for termination of tenancy must be followed if the resident is leasing the mobilehome from the mobilehome park owner and has entered into a rental agreement that provides for "good cause" termination under CC §798.56. On termination and eviction generally, see §§6.62-6.84.

Rent for the mobilehome is considered to be rent for the lot it occupies, *i.e.*, the premises. Health & S C §18214(a). Thus, the park management may not circumvent any locally imposed rent ceiling under a rent control ordinance by purporting to "split" or separately charge rent for the lot and mobilehome. On the other hand, a mobilehome park landlord's rental of a "park-owned" mobilehome may not fall within the ambit of the local rent control law if the ordinance protects only mobilehome homeowners. See §6.32.

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III. OTHER LAWS AFFECTING MOBILEHOMES

§6.13 A. State Legislation Specific to Mobilehomes

In addition to the Mobilehome Residency Law (MRL) (CC §§798-799.10), several other state laws regulate various aspects of mobilehomes. See §6.1. The most important of these laws are the Mobilehome Parks Act (MPA) (Health & S C §§18200-18700) and the Special Occupancy Parks Act (Health & S C §§18860-18874), which regulate the construction and operation of mobilehome parks and recreational vehicle parks, the requirements for installing or affixing mobilehomes inside and outside of mobilehome parks, and standards for "substandard" mobilehomes, accessory structures, and park common areas. Regulations of the Department of Housing and Community Development (HCD) under the MPA are found in 25 Cal Code Regs §§1000-1758. Other legislation regulating mobilehomes includes the Manufactured Housing Act of 1980 (Health & S C §§18000-18153), which regulates the registration, titling, and sales of mobilehomes. The preemptive nature of the HCD statutes was reaffirmed in *County of Santa Cruz v Waterhouse* (2005) 127 CA4th 1483, 26 CR3d 543. See §6.15. For another detailed discussion of the preemptive nature of HCD and the state's authority, see *Sequoia Park Assocs. v County of Sonoma* (2009) 176 CA4th 1270, 98 CR3d 669.

In addition, local fire departments and districts may enforce local fire codes within a park, including ordinances related to fire hydrants, parking, weed abatement and, starting January 1, 2010, combustible brush and vegetation that create an imminent fire hazard, hazardous material storage, and open fires or burning. Health & S C §18691; Stats 2009, ch 586.

Mobilehome owners and mobilehome park operators are subject to the Methamphetamine Contaminated Property Clean-Up Act of 2005 (Health & S C §§25400.10-25400.47) and are responsible for the costs of remediation of methamphetamine storage areas and laboratories. Health & S C §§25400.19-25400.47.

Requirements governing mobilehome park operations also may be found in other codes. A number of Vehicle Code sections apply to mobilehomes and, thus, to mobilehome park operations. See, *e.g*., Veh C §21107.9, which permits cities and counties to impose and enforce speed limits in mobilehome parks after complying with specified procedures, including posted notices. Certain rules governing the conversion of mobilehome parks to another use may also apply. See, *e.g.,* Govt C §§65863.7, 66427.4, especially a provision in Govt C §65863.7(j) that triggers the protection of the MPA (Health & S C §§18200-18700) if a park closes or changes use as a result of an order by an enforcement agency.

Under Pub Util C §739.5, park owners who submeter their residents for utility services may not charge a rate that exceeds the rate that would be applicable if the resident were receiving utilities directly from the utility provider. A state Public Utilities Commission (PUC) administrative decision on utility pass-through fees was acknowledged by a court of appeal in *Rainbow Disposal Co. v Escondido Mobilehome Rent Review Bd.* (1998) 64 CA4th 1159, 75 CR2d 746, as the controlling authority for a rent board decision that denied rent increases based on certain utility-related capital costs; the PUC decision held that the mastermetering discount to park owners who submeter their residents under Pub Util C §739.5 covered the owners' costs of maintenance and improvements related to the utility systems. See also *Hillsboro Props. v PUC* (2003) 108 CA4th 246, 256, 133 CR2d 343. In addition, in 2004, the PUC in *Yucaipa Mobilehome Residents' Ass'n v Knollwood Mobilehome Estate, Ltd.* (CPUC Decision 04-05-056, Oct. 28, 2004; http://www.cpuc.ca.gov/published/final_decision/37078.htm) overruled the local rent review commission and ordered that the $111,445 in trenching costs for a trench containing water lines (not subject to the PUC) and master metered electric and gas lines (subject to PUC rules) be apportioned out of the rent increase pass-through because the latter costs were included in the approved utility fees as costs related to the repair and maintenance of the submetered gas and electric utility systems. It also prescribed the method of allocation by noting that the trench was three feet deep rather than two feet deep because of the electric line requirements, and therefore the electrical line work caused the bulk of the costs (at pp. 16-17). The park resident association's request for attorney fees was denied because fees are authorized only for intervenors under Pub Util C §§1801-1812 (at pp. 20-21). Additional clarity as to costs which may

be passed through in rent occurred as a result of a two-phase PUC hearing process, resulting in Decision 04-04-043 (costs for serving the common areas, the submeter, the pedestal, and other specified costs) and Decision 04-11-033.

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§6.14 B. Landlord-Tenant Statutes

The extent to which state statutes governing conventional landlord-tenant relationships apply to mobilehome park tenancies has not been conclusively established, although their application usually appears to be appropriate. Such laws include not only those beneficial to tenants (*e.g.*, statutes on "repairing and deducting" (CC §1942) and "lock out" (CC §789.3)), but also those beneficial to landlords (*e.g.,* abandonment procedure (CC §1951.3). Security deposits for mobilehome tenancies are governed by CC §798.39 (see §6.44), and the abandonment of a mobilehome in a mobilehome park is governed by CC §798.61 (see §6.84). The applicability of the retaliatory eviction law (CC §1942.5) to mobilehome park residencies was firmly established by *Rich v Schwab* (1998) 63 CA4th 803, 75 CR2d 170 (see §§6.17, 6.72).

In *Palmer v Agee* (1978) 87 CA3d 377, 150 CR 841, the court held that the 60-day notice procedure of the Mobilehome Residency Law (MRL) (CC §§798-799.10) preempted the 3-day, pay-or-quit procedure of CCP §§1159-1179a. This decision, however, should not be relied on to support the MRL's preemption of other tenant remedies. The basis of the decision was the court's interpretation of the legislature's intent in the MRL to protect mobilehome park tenants. 87 CA3d at 384. The court found that elimination of a tenant protection, such as the lengthy opportunity to cure a rent default provided in the MRL, was contrary to such an intent. The court noted that the MRL is a remedial statute, which must be liberally construed to protect its beneficiaries: mobilehome owners. In 1979, however, the legislature overruled the interpretation of the court of appeal by amending CC §798.56 to provide that the homeowner need be given only 3 days to cure a default in the payment of rent, utilities, and reasonable incidental service charges. (The legal owner, the registered owner (if different from the homeowner), and junior lienholders all have 30 days in which to cure the homeowner's default.) Even if the default is not cured within the 3 days, however, the homeowner still must be given 60 days' notice to sell or remove, at the homeowner's election, the mobilehome from the park. CC §798.55(b)(1). Both the 3-day and 60-day notices may be given at the same time. CC §798.56(e).

There are several other reasons for concluding that general landlord-tenant statutes also apply to tenancies subject to the MRL. First, as for any statute, the MRL can preempt only matters that are explicitly covered by its provisions. Areas of law that the MRL does not address (or that do not conflict with its provisions) must be considered to apply to the mobilehome tenancy relationship. *Mobilepark W. Homeowners Ass'n v Escondido Mobilepark W.* (1995) 35 CA4th 32, 41 CR2d 393; *Gregory v City of San Juan Capistrano* (1983) 142 CA3d 72, 191 CR 47, overruled on other grounds in *Fisher v City of Berkeley* (1984) 37 C3d 644, 686 n43, 209 CR 682.

Second, cases in which the courts have interpreted statutes governing the landlord-tenant relationship distinguish between conventional tenancies and mobilehome tenancies only when a specific distinction is required by statute. See, *e.g.*, *Rich v Schwab, supra,* a retaliatory eviction case in which the court held that the retaliatory eviction protections of CC §1942.5 applied to MRL tenancies because mobilehome parks were not explicitly excluded from §1942.5 and because the MRL is intended to provide more, rather than less, protection to mobilehome park tenants, and *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 743 n11, 180 CR 496, a case concerning discrimination against families with children in which the court distinguished between conventional housing and mobilehome parks by acknowledging the "adults-only" rules in the MRL.

Third, it is generally assumed that the legislature is aware of other statutes when it enacts new laws. To preempt other laws, the legislature would have had to address them directly in the MRL, by clarifying or modifying their provisions in relation to the new mobilehome requirements. In fact, to eliminate any ambiguity, the legislature provided in CC §798.60 that the statutory scheme in the MRL governing termination for cause "shall not affect any rights or proceedings" relating to unlawful detainer (see CCP §§1159-1179a) "except as otherwise provided herein." The legislature also modified conventional lease and termination notice requirements because of the special burdens of mobilehome ownership.

Another example of this lack of clarity is the questionable applicability of CC §1946.7, which became operative September 27, 2008. The section was added to the general landlord-tenant laws and allows a tenant who is a victim of domestic violence, sexual assault, or stalking to provide a written notice of lease termination within 60 days of specified court orders or police reports and be liable only for a maximum of 30 days' rent from the date of the written notice,

unless the unit is re-rented during that period. While it would be consistent with the remedial nature of the MRL to acknowledge the special needs of the victims in these circumstances, the MRL expressly requires 60 days' notice of termination (CC §798.59), and the new law does not expressly state that it is applicable to MRL notices. On the other hand, CC §798.59 specifically addresses only the time for a homeowner notice of termination; it does not expressly specify the obligation to pay rent for up to 30 days after providing that notice. Ultimately, clarification on this law's applicability to MRL homeowners may require further action by the legislature or a judicial interpretation.

Code of Civil Procedure §1161(4) was also amended, effective September 27, 2008, to add a provision that a person's commission of domestic violence, sexual assault, or stalking of a resident on the premises creates a rebuttable presumption affecting the burden of proof that the person has committed a nuisance and is subject to the 3-day notice to quit authorized by §1161(4). Given the clear specificity and limitations on the permitted grounds for eviction in CC §798.56, this amendment likely does not create a new basis for eviction under the MRL.

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§6.14A C. Antidiscrimination Statutes

A panoply of fair housing laws, both federal and state, that prohibit discrimination in housing accommodations apply to mobilehome owners and park establishments. See, *e.g., U.S. v Plaza Mobile Estates* (CD Cal 2003) 273 F Supp 2d 1084. See generally chap 2. These laws protect a number of classes of individuals, such as disabled persons (see §§2.19-2.28), and also require mobilehome owners and parks to make reasonable accommodations that promote the disabled person's full use and enjoyment of the premises. See, *e.g., Jankowski Lee & Assocs. v Cisneros* (7th Cir 1996) 91 F3d 891, cited with approval in *U.S. v California Mobile Home Park Mgmt. Co*. (9th Cir 1997) 107 F3d 1374, 1381.

A district court's dismissal of an action that alleged, inter alia, discrimination and retaliation based on the plaintiff's gender, and that was therefore subject to the federal Fair Housing Act, 42 USC §§3601-3631, was reversed in *Edwards v Marin Park, Inc.* (9th Cir 2004) 356 F3d 1058. The district court had held that the plaintiff's complaint failed to allege her engagement in a specifically protected activity with adequate specificity. The court of appeals held that her allegation that defendant "targeted … a disproportionate number of women" met the relaxed pleading standards of Fed R Civ P 8(a) for pleading discrimination claims, even though she was expressly seeking relief for retaliation, not discrimination. 356 F3d at 1062.

Civil Code §798.20 prohibits discrimination on the basis of race, color, religion, sex, marital status, national origin, ancestry, familial status (except for parks designated for seniors), source of income, disability, or sexual orientation for membership in any private club or organization that is a condition for tenancy in a park. CC §798.20(a). Sex discrimination includes discrimination on the basis of pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, gender, gender identity and gender-related appearance and behavior. Govt C §12926(p); Pen C §422.56.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.15 D. Local Ordinances Regulating Mobilehomes

§6.15 D. Local Ordinances Regulating Mobilehomes

Currently, more than 100 local jurisdictions have enacted mobilehome rent regulation or rent mediation ordinances (see §7.11) and ordinances governing displacement of residents, relocation payments for residents, management requirements, and other requirements or restrictions related to local public health, safety, and welfare. These ordinances may affect more than just the amount of rent that park managements may charge; they often govern other areas of the landlord-tenant relationship as well, such as the grounds for eviction (see §§7.53-7.76). Practitioners should be sure to check for local ordinances applicable to a given mobilehome park.

Some cities and counties have enacted ordinances regulating the physical operation of a park which are directly or indirectly governed by the Mobilehome Parks Act (MPA) (Health & S C §§18200-18700) and the Department of Housing and Community Development (HCD) regulations. These ordinances relate to issues such as paving roads or driveways, manufactured home size and siding standards, and set-backs or separations between manufactured homes. In *County of Santa Cruz v Waterhouse* (2005) 127 CA4th 1483, 26 CR3d 543, the court of appeal held that a county ordinance regulating the installation of two-story manufactured homes in a mobilehome park was preempted by the applicable HCD laws. It also held that localities were limited to the authority specifically enumerated in Health & S C §18300. Local ordinances regulating change of use or conversion of parks to resident ownership have been successfully challenged because of state preemption. See §6.51.

The decisions challenging and interpreting rent control ordinances fall into several categories and depend on whether they are facial challenges or as-applied challenges. The as-applied challenges may deal with due process violations in administration, ripeness, illegal pass-throughs, or other federal or state law violations.

In *Yee v Mobilehome Park Rental Review Bd.* (1998) 62 CA4th 1409, 73 CR2d 227, *e.g.,* a court of appeal upheld a rent control ordinance of the City of Escondido and denied compensation to a mobilehome park owner for an alleged regulatory taking, reaffirming that rent control ordinances are like zoning and do not create a compensable taking unless all beneficial uses of a property are denied. Rental agreements for mobilehomes located in mobilehome parks are exempt from local rent control ordinances if they meet certain criteria. CC §798.17. Under CC §798.21, a further exemption from local rent control is provided for mobilehome space located in a mobilehome park that is not the principal residence of the homeowner and has not been rented by the homeowner to another party, unless the homeowner, a realtor, or a mobilehome dealer actively and in good faith markets the mobilehome for sale.

A facial challenge in *Hacienda Valley Mobile Estates v City of Morgan Hill* (9th Cir 2003) 353 F3d 651 claimed a "taking" because, with vacancy control of rents, the seller of a mobilehome allegedly obtained a "premium" in value because the government restricted rents available to the buyer. The district court held that a premium challenge was a facial rather than an as-applied challenge, relying on *Levald Inc. v City of Palm Desert* (9th Cir 1993) 998 F2d 680. The court of appeals held that if the case were a facial challenge, it would be barred by the statute of limitations because the case was brought nine years after the ordinance was enacted. It also held that the as-applied taking challenge was not ripe under the *Williamson County* test (*Williamson County Reg'l Planning Comm'n v Hamilton Bank* (1985) 473 US 172, 186, 87 L Ed 2d 126, 139, 105 S Ct 3108) because the plaintiff had not pursued state remedies and had not demonstrated that recourse to these remedies would be futile. See also *Carson Harbor Village, Ltd. v City of Carson* (9th Cir 2004) 353 F3d 824, for a similar ripeness decision, and *Ventura Mobilehome Communities Owners Ass'n v City of San Buenaventura* (9th Cir 2004) 371 F3d 1046, which found lack of ripeness in both the facial and as-applied challenges, dismissed the plaintiff's due process claim as a disguised taking claim, and dismissed the equal protection claims because it found that the ordinance was rationally related to a legitimate state interest. Whether or not federal or state courts are the correct forums for facial or as-applied challenges of a rent control ordinance is an issue that spawned a series of federal and state court lawsuits between one jurisdiction and one park owner, culminating in a decision in *Los Altos El Granada Investors v City of Capitola* (9th Cir 2009) 583 F3d 674. The court held that a litigant may reserve federal claims for hearing in federal court and that a state court rejection of those claims does not have preclusive effect on the federal court action.

The opposite result initially occurred in *Cashman v City of Cotati* (9th Cir 2004) 374 F3d 887. Plaintiff park owners

challenged a recently enacted rent control ordinance with vacancy controls as a facially unconstitutional regulatory taking because it did not substantially advance the city's interests, since park tenants could impose a premium on a sale price based on the rent control ordinance and then keep the premium. The district court rejected this assertion, and also concluded that the facial challenge was barred by the statute of limitations because the recently amended ordinance had the "same effective and operative provisions" as the older ordinance. The Ninth Circuit reversed, finding that the recently amended ordinance was a separate, new enactment It thus held that the case was timely filed. It also held that the ordinance was facially unconstitutional because it did not provide a mechanism to prevent the capture of a premium, and that the city did not present sufficient evidence showing that the premium did not occur, thus not demonstrating that it was substantially advancing a legitimate government interest. Despite the *Cashman* decision, the court in *MHC Fin. Ltd. Partnership v City of San Rafael* (ND Cal, Dec. 5, 2006, No. C00-3785) 2006 US Dist Lexis 89195, in rejecting the City's summary judgment motion and allowing for further hearings on both regulatory takings and private takings theories, found that a similar "premium" may violate the park owner's substantive due process rights. The court also ruled against the City's defenses of res judicata and statute of limitations because the court found that the City had made substantive changes to its ordinance.

Later, in *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, the Supreme Court held that a Fifth Amendment taking no longer could be based on whether the government regulations "substantially advance a legitimate government interest." This takings test was overruled in the context of regulatory takings because, as commonly applied, it did not address the effect of a regulation on private property but, instead, only its underlying validity. 161 L Ed 2d at 891. As a result of the *Lingle* decision, and in response to Cotati's petition for rehearing and rehearing en banc, the Ninth Circuit withdrew its prior opinion and affirmed the District Court's decision. See *Cashman v City of Cotati* (9th Cir 2005) 415 F3d 1027. See also *Galland v City of Clovis* (2001) 24 C4th 1003, 103 CR2d 711 (discussed in §§7.14-7.14A; supreme court restricted park owners' ability to recover under 42 USC §1983 for lost rent and other damages resulting from due process violations). See also *Los Altos El Granada Investors v City of Capitola, supra*.

Since *Lingle v Chevron U.S.A., Inc., supra,* several decisions have addressed both facial and as-applied constitutionality issues and takings. In *Stardust Mobile Estates, LLC v City of San Buenaventura* (2007) 147 CA4th 1170, 55 CR3d 218, the court dismissed the takings claims by citing *Lingle* but also independently finding that there was no regulatory taking under the three-prong test of *Penn Central Transp. Co. v New York City* (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646. In addition, while the court upheld a 50 percent of CPI rent indexing standard, it did remand for consideration of whether facts existed for a modification of the base rents, generally known as a "*Vega* adjustment." 147 CA4th at 1191. See also *Vega v City of W. Hollywood* (1990) 223 CA3d 1342, 273 CR 243; *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 784, 66 CR2d 672; *MHC Fin. Ltd. Partnership v City of San Rafael* (ND Cal, Dec. 5, 2006, No. C00-3785) 2006 US Dist Lexis 89195 (distinguishing *Lingle* to find triable substantive due process claim). For further discussion of "as-applied" due process challenges under *Kavanau*, see §7.14.

In a subsequent decision in a companion case to *MHC Fin. Ltd. Partnership, supra,* also unpublished, *MHC Fin. Ltd. Partnership v City of San Rafael* (ND Cal, Jan. 29, 2008, No. C00-03785) 2008 WL 440282, the court avoided the *Lingle* test by, among other things, finding that there was a substantial loss in value functionally equivalent to an unconstitutional taking as result of the rent control ordinance. It also held that the ordinance violated the takings clause protection espoused in *Kelo v City of New London* (2005) 545 US 469, 162 L Ed 2d 439, 125 S Ct 2655, by virtue of the transfer of premium value to the residents. The 98-page opinion also allowed arguments as to whether there were due process violations, characterizing this issue in the *Lingle* decision as "dicta," but ruled that the San Rafael ordinance did not violate the federal due process clause.

In *Equity Lifestyle Props., Inc. v County of San Luis Obispo* (9th Cir 2008) 548 F3d 1184, the appeals court rejected a claim related to a rent indexing formula of 60 percent of CPI, upheld vacancy controls, and denied various takings, due process, and equal protection claims. The takings (as-applied) claim was rejected as not being ripe because Equity Lifestyle had not first attempted, under *Kavanau*, to obtain relief through the state process to compensate for rent control losses. The facial challenge was rejected for lack of standing because the injury was suffered by the previous landowner, not the plaintiff, and because the claim was filed outside the statute of limitations. The substantive due process claim was rejected because the court found that the rent control ordinance was "rationally related to a legitimate public purpose." 548 F3d at 1194. However, in the 2008 US District Court decision in *MHC Fin. Ltd.*

Partnership, supra, the court rejected the *Kavanau* adjustment as being an inadequate remedy and held that the plaintiff park owner should not be required to seek this or any other state court remedy prior to filing the federal claims, holding that the remedy was both futile and inadequate as it did not provide for a fair return. (For additional discussion of state remedies and the *Kavanau* adjustment, see §6.51.)

In *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367, the state court companion case to *Equity Lifestyle Props. Inc. v County of San Luis Obispo, supra,* the court held that the 12-month leases that allowed for rent increases upon 90 days' notice were facially valid because the lease provision expressly included the caveat "as allowed by state and local laws," which the court held incorporated the local rent control ordinance's rent increase restrictions. The court declined to review the lower court's determination that plaintiff MHC's takings claims were not ripe because MHC had not pursued the hardship remedies under the ordinance, but it reversed and remanded due to the failure of the rent board to allow MHC to cross-examine witnesses at the rent board hearing on MHC's proposed rent increase.

In *MHC Operating Limited Partnership v City of San Jose* (2003) 106 CA4th 204, 130 CR2d 564, plaintiff MHC, owner of Westwinds Manufactured Home Community, claimed it was denied a fair return because the hearing officer misinterpreted and misapplied the rent control ordinance to the evidence. The court established the standard of review as a "substantial evidence test" because no fundamental vested right was affected by the administrative hearing, and exercised independent review of the ordinance interpretations by the administrative hearing officer. It accorded the hearing officer deference with respect to the officer's interpretation of the ordinance. It then found that there was substantial evidence for the hearing officer's determination, and that MHC failed to carry its burden of showing that the hearing officer's construction of the ordinance was neither reasonable nor lawful. 106 CA4th at 220.

A second round of litigation involving the same parties was initiated by MHC in federal court, alleging eight "counts" of substantive and procedural defects. The District Court dismissed or declined to exercise jurisdiction over all the "counts," and in *MHC, Inc. v City of San Jose* (9th Cir 2005) 420 F3d 1022, the Court of Appeals affirmed. It held that the fair return challenges were barred by res judicata of the state court decision (citing *San Remo Hotel, LP v City & County of San Francisco* (2005) 545 US 323, 162 L Ed 2d 315, 125 S Ct 2491) and that other claims were unripe (because MHC had not pursued and exhausted its administrative remedies) or were barred by the statute of limitations.

In *Karrin v Ocean-Aire Mobile Home Estates* (1991) 1 CA4th 1066, 2 CR2d 581, an Oxnard mobilehome rent control ordinance allowed park owners to pass through capital improvement costs (with the consent of more than 50 percent of the tenants). The court held this provision to be invalid because it conflicted with CC §798.31, which prohibits owners from charging tenants "a fee for other than rent, utilities, and incidental reasonable charges for services actually rendered." The majority held that the park owners could have sought a rent increase to cover capital expenses in lieu of seeking the pass-through. Rent stabilization ordinances commonly provide landlords a means for recovering capital improvement costs. See §7.35.

In *Hillsboro Props. v PUC* (2003) 108 CA4th 246, 133 CR2d 343, the city of Novato allowed a rent increase to include the pass-through of costs related to trenching and conduit for streetlights and $23,884 related to the repair and replacement of electrical pedestals. A tenant appealed this to the PUC, which held that it had jurisdiction and that the pass-through of these costs violated Pub Util C §739 because the tenants were being charged more for utilities than direct metered consumers (*e.g.,* the cost of submetered utilities should include utility repairs). See http://www.cpuc.ca.gov/Published/Final_decision/9424.htm. See also Directory on how to obtain PUC Decisions. The appellate court held that the PUC decision and order did not usurp the city's rights under its rent control ordinance or constitutional authority and that the PUC had jurisdiction under Pub Util C §739 to review the allowed charges and to determine whether or not they should be included in the discounted utility rates (as opposed to a separate amortized fee or in increased rent), and to order the park to provide refunds.

See also *Morgan v City of Chino* (2004) 115 CA4th 1192, 9 CR3d 784, in which the court held that due process and the city's rent control ordinance merely require the city to take into account the costs related to capital improvements (along with other expenses and income) when determining whether the owner is receiving a fair rate of return, rather than granting a rent increase to allow recovery of the cost of a capital improvement and a fair rate of return on that expenditure. It specifically held that if existing rents are adequate to provide a fair rate of return on the overall development, even after a capital expenditure, then there is no due process obligation to raise rents to cover the cost of that improvement.

In *Robinson v City of Yucaipa* (1994) 28 CA4th 1506, 34 CR2d 291, the court held that CC §798.31 did not preempt

an ordinance that allowed mobilehome park owners to pass capital improvement costs through to tenants as part of their rent rather than as a separate fee. The court distinguished *Karrin* on the basis that the ordinance in that case expressly provided that such charges were not to be considered part of the rent and were to be billed separately.

In *Cacho v Boudreau* (2007) 40 C4th 341, 53 CR3d 43, the supreme court ruled that the Mobilehome Residency Law (MRL) (CC §798.49(d)(4)) does not preempt local rent control ordinances to the extent that they allow mobilehome park owners to separately charge park residents for property taxes imposed on park land.

See also *H.N. & Frances C. Berger Found. v City of Escondido* (2005) 127 CA4th 1, 25 CR3d 19, in which the court reviewed a rent board decision to approve a rent increase based on averaging three different rent increase rates proposed by experts. The court held that this formula was invalid, not because of the formula itself, but because two of the three rates were not within the range of reasonable rents based on a fair rate of return standard.

In *Village Trailer Park, Inc. v Santa Monica Rent Control Bd.* (2002) 101 CA4th 1133, 124 CR2d 857, the court of appeal ruled that the local rent control board was authorized to determine whether the park's long-term leases were subject to, or exempt from, the rent control ordinance. Even though it was a question of law interpreting the state MRL statute, the initial determination could be made by the board, with judicial review of its decision. The court also approved several remedies and punishments, including determining that the landlord is not entitled to advance notice of the rent control ordinance violations before being assessed for violations, that the board could award the tenant interest on the excess rents collected by the park, and that the board could withhold annual rent increases to induce the landlord to comply with the ordinance.

The *Village Trailer Park* decision also invalidated the park's effort to add an arbitration clause "with respect to the provisions of this agreement and tenancy in the community" to the lease in order to avoid access to, or oversight by, the rent control board. The court held that not only would this allow every landlord to "announce a personal exemption from the law," undermining the legitimate exercise of local government authority, but the local ordinance voids any provision in a rental agreement which purports to waive a tenant's right to pursue a claim under the ordinance. An arbitration clause in a conventional rental housing lease, its ostensible authority being CC §§1942.1 and 1953, was invalidated in *Jaramillo v JH Real Estate Partners, Inc.* (2003) 111 CA4th 394, 3 CR3d 525, the court of appeal holding that the clause was both unconscionable and a contract of adhesion despite public policy in favor of arbitration as a speedy and less expensive means of dispute resolution. See §1.30.

Hillsboro Props. v City of Rohnert Park (2006) 138 CA4th 379, 41 CR3d 441 addressed remedies when a rent control ordinance is found unconstitutional. The park owner sought a rent increase as compensation for rent increases lost during a period in which the ordinance was in effect. The city's ordinance allowed rent increases to achieve a fair rate of return, but plaintiff only claimed an increase for the retroactive loss under the so-called "Kavanau adjustment" (*Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 66 CR2d 672; see §§7.14, 7.14B). The court of appeal sustained the city's refusal to consider the adjustment because plaintiff did not prove he was denied a fair rate of return. See also *Equity Lifestyle Props., Inc. v County of San Luis Obispo* (9th Cir 2007) 505 F3d 860 (discussion of due process adequacy of the *Kavanau* adjustment). For further discussion, see Baar, *Fair Return Standards Under Mobilehome Park Space Rent Controls: Conceptual and Practical Approaches*, 29 CEB Real Prop L Rep 333 (Sept. 2006).

In *Griffith v County of Santa Cruz* (2000) 79 CA4th 1318, 94 CR2d 801, the court of appeal upheld a local rent control ordinance that regulated recreational vehicle parks. The park owner alleged that the statutory ban on commercial rent control applied because a recreational vehicle park was a commercial activity and CC §1954.25 explicitly exempted only mobilehome parks. The court held that "mobilehome" in the MRL explicitly included "recreational vehicles" and that the Recreational Vehicle Park Occupancy Law (RVPOL) (CC §§799.20-799.79) treated 9-month recreational vehicle park residents like MRL homeowners. Therefore, the park was more like a residential activity than a commercial activity.

In addition to the traditional facial and as-applied challenges, rent litigation unsuccessfully challenged the procedural aspects of the adoption and amendment of a rent control ordinance. In *MHC Fin. Limited Partnership Two v City of Santee* (2005) 125 CA4th 1372, 23 CR3d 622, the court of appeals reversed a trial court decision dealing with the ordinance's adoption. The rent control ordinance was adopted by the City Council after presentation of an initiative petition, and then amended with retroactive effect by the Council to correct inadvertent and insignificant errors. The Court found that adoption of the second ordinance did not violate any applicable laws and that the council had the authority to amend the legislatively-adopted ordinance even though it arose from an initiative petition.

In *TG Oceanside, LP v City of Oceanside* (2007) 156 CA4th 1355, 68 CR3d 320, the local rent control ordinance allowed three options for rent increases:

(1) A "permissive adjustment" based on the Consumer Price Index (CPI);

(2) An "alternative adjustment" based on net operating income; or

(3) A "special adjustment," which a park owner could seek if it contends that neither of the above options provides a just and reasonable return on investment and if it adequately rebuts the presumption that the other options provide a just and reasonable return.

In *TG Oceanside, LP*, the park owner did not attempt to rebut the adequacy of the permissive or alternative adjustments, but merely sought the special adjustment based on an assertion that it was entitled to a "return on investment" standard rather than one based on costs of operation. The court held that the first two options met constitutional requirements for local rent regulation, and that the park owner was required to comply with the ordinance to prove their inadequacy rather than merely substituting a different return-on-investment standard.

In *Guggenheim v City of Goleta* (9th Cir 2009) 582 F3d 996, the court ruled that the park owners were entitled to just compensation as a result of a facial challenge. The court found ripeness in favor of the claimants because it held that, in a facial challenge, there was no requirement to actually seek and be denied just compensation in state court, noting that this requirement often results in a ruling on the merits in state court, which has a preclusive effect on a later federal court action. The court also ruled that the ordinance produced a detrimental economic impact on the claimants, and it characterized the government action as being a "discount" that was a form of "expense-shifting" in which a few persons provide an otherwise public benefit to many other private individuals. The court rejected, after significant analysis, the due process and equal protection claims by the park owners and remanded for further proceedings to determine compensation for the taking.

For further discussion regarding local rent control ordinances and utility rates, see §§6.32, 6.43.

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§6.15A E. Public Rental Assistance Programs

Many park owners have sought and obtained funds from various federal, state, and local programs for construction or rehabilitation loans or grants, operating cost reductions, or rent write-downs. All of these programs generally include special restrictions on rents, on types of renters who are eligible, on grounds for lease termination and eviction, and other procedures that otherwise are included in the Mobilehome Residency Law (MRL) (CC §§798-799.10). Some of these residency restrictions resulting from affordable housing programs have been challenged as being inconsistent with other laws generally applicable to specific housing activities. However, because of the overriding purposes of the affordable housing finance laws, they generally have been upheld. See, *e.g., City of Oceanside v McKenna* (1989) 215 CA3d 1420, 264 CR 275 (owner-occupancy restriction upheld); *Barrientos v 1801-1825 Morton LLC* (9th Cir 2009) 583 F3d 1197 (HUD rules related to property owners opting out of Section 8 program and allowing rents to exceed rent control levels do not preempt local rent controls).

Some of the state programs that have financed mobilehome parks include the Mobilehome Park Purchase Fund (Health & S C §§50780-50786.5), the Rental Housing Construction Program (Health & S C §§50735-50771.3), the Multifamily Housing Program (Health & S C §§50675-50675.14), and the Farmworker Housing Grant Program (Health & S C §§50517.5-50517.11). The most common sources of local government funding for mobilehome parks and their residents, in order to provide replacement housing for relocation or to increase the supply of affordable housing, are city or county redevelopment agencies. See Health & S C §33334.2(e)(10), and the time restrictions in Health & S C §§33334.3 and 33413.

PRACTICE TIP: It is critical for management to include the applicable terms and conditions of the transactional documents or CC&Rs in the lease or rental agreement, or management will not be able to terminate the tenancy of a resident who is not eligible for the assistance or is violating any other provision of the assistance (such as leasing out the premises). See §6.67.

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IV. DECISIONAL LAW GOVERNING MOBILEHOME TENANCIES

§6.16 A. Implied Warranties

The implied warranty of habitability doctrine, first enunciated in *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, is discussed in detail in §§3.16-3.48. The decision in *Green* clearly applies to the landlord-tenant relationship under the Mobilehome Residency Law (MRL). The problem of habitability arises less frequently in mobilehome parks because the residence is usually owned by the tenant, but habitability issues do arise with respect to the park management's responsibility to maintain common areas, to provide utilities, and to deliver other services affecting quiet enjoyment, peaceable possession of the premises, or necessities of life. See *Secretary of HUD v Layfield* (1978) 88 CA3d Supp 28, 152 CR 342, and *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707, in which the courts extended the warranty of habitability to common areas. Habitability issues (often called "failure to maintain" cases in the industry) could arise in a mobilehome park, for example, as a result of park management's failure to remedy health and safety violations promptly or reasonably (*e.g.,* leaking effluent, improper drainage from the lots of adjoining mobilehome owners or residents, utility black-outs or brown-outs, water pollution, standing water, and hazardous conditions caused by residents or facilities). On the tort responsibility of property owners and managers, see CC §1714. The standards to be applied would be those of the Mobilehome Parks Act (MPA) (Health & S C §§18200-18700) and the MRL obligations in CC §798.15 rather than local building codes.

Under CC §798.84, mobilehome park homeowners must give the park owner 30 days' notice of intention to sue before filing an action based on the owner's "alleged failure to maintain the physical improvements in the common facilities in good working order or condition or alleged reduction of service." This notice is not, of course, required for commencement of an action alleging common law or statutory claims that do not arise under the MRL. Trial judges may deal with the omission of such notice as a "plea in abatement" that merely forestalls prosecution of the action for the statutory 30-day period. Mobilehome park residents other than homeowners are presumably not subject to this limitation and can invoke the implied warranty of habitability under *Green* and its progeny. To the extent that physical defects violate the MPA and the Department of Housing and Community Development (HCD) regulations, residents may also seek correction using the Unfair Business Practices Act (Bus & P C §§17200-17208). See *People v McKale* (1979) 25 C3d 626, 159 CR 811; but see *Farmers Ins. Exch. v Superior Court* (1992) 2 C4th 377, 383, 6 CR2d 487. For discussion, see §6.86.

The substantial failure of management to properly maintain physical improvements in the common area and a substantial violation of a mobilehome park rule are deemed public nuisances, which may be remedied by a civil action or abatement. This action may be brought by a park resident, the park management, or in the name of the people of the State of California by a district attorney, county counsel, city attorney or city prosecutor, or the Attorney General. See CC §798.87; Health & S C §18402.

If HCD or a local enforcement agency identifies and cites defects or violations of the Mobilehome Parks Act and the park does not correct them within the specified time period, HCD or the local enforcement agency may suspend the park's permit to operate (Health & S C §§18510-18518) and issue a notice to residents stating that, until the permit is reinstated, the park owner cannot demand or collect rent, because Health & S C §18214(a) defines "mobilehome park" as "any area where two or more lots are rented or leased, held out for rent or lease." In *Espinoza v Calva* (2008) 169 CA4th 1393, 87 CR3d 492 (cited in §§3.11E, 10.62), the court of appeal reversed an order for payment of past due rent, holding that the absence of a certificate of occupancy in conventional housing rendered the lease illegal and void.

In the case of *Patarak v Williams* (2001) 91 CA4th 826, 111 CR2d 381, the court held that residents were entitled to actual damages and $44,000 in penalties for the owner's willful violations of the MRL as a result of the failure of the septic system and lease violations. The landlord claimed that the acts were not "willful" and therefore she was not liable for the penalties imposed pursuant to CC §798.86. The court upheld the trial judge's determination that "willful" does not require intent to violate the law or to injure another and that it was equivalent to "deliberate." It ruled that:

- The penalties were appropriate because although the landlord "did not have the specific intent to achieve septic

system failures, these occurrences resulted not from accident or simple negligence" (91 CA4th at 830).
- The legislature did not intend that the section require "oppression, fraud or malice" as part of "willfulness" (91 CA4th at 831).

Park management may also have obligations with respect to resident safety and quiet enjoyment. In *Andrews v Mobile Aire Estates* (2005) 125 CA4th 578, 22 CR3d 832, two renters made dozens of complaints against each other to management and police, eventually resulting in a physical altercation. The court held that the park had a contractual duty to intervene under several theories: CC §1927 created an implied covenant of quiet enjoyment in the lease agreement; the implied covenant of good faith and fair dealing required management to make a reasonable effort to try to maintain peace; and the lease itself said that the park "will try to maintain the peace and quiet…." It also held that the MRL did not preclude appropriate responses by the management, citing CC §798.56(b). But see *Castaneda v Olsher* (2007) 41 C4th 1205, 63 CR3d 99 (supreme court affirmed summary judgment in favor of mobilehome park owner because facts known to owner did not make violent gang episode sufficiently foreseeable as to require owner to evict offending tenants or be liable for failing to take action). For further discussion of implied warranties and landlord duties and liabilities, see chap 3.

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§6.17 B. Retaliatory Eviction Protections

The retaliatory eviction protections of statutory and common law, interpreted and reaffirmed in *Barela v Superior Court* (1981) 30 C3d 244, 178 CR 618, also apply to tenancies that are subject to the Mobilehome Residency Law (MRL). See *Rich v Schwab* (1998) 63 CA4th 803, 75 CR2d 170. Even if the protections against retaliatory eviction in CC §1942.5 did not apply to mobilehome tenancies, the supreme court's reaffirmation in *Barela* of the common law protection against retaliation for tenants' exercise of rights guaranteed by law would clearly apply to an eviction under the MRL.

In *Rubin v Green* (1993) 4 C4th 1187, 17 CR2d 828, a law firm representing mobilehome park tenants wrote to the park owner about defects in the park. The park owner then filed an action against the tenants' law firm, seeking to enjoin the firm from "stirring up animosity" among the tenants and from soliciting nonclient tenants. The supreme court held that the owner's action should be dismissed. Concerning the "stirring up animosity" claim, the court held that the litigation privilege granted by CC §47(b) protects the law firm from liability for communications concerning an anticipated lawsuit, *i.e.*, meeting and discussing the lawsuit with potential clients. Concerning the solicitation claim, the court held that the evils accompanying retaliatory suits based on litigation-related communications would be promoted by permitting the landlord's action to go forward. To the extent that any allegations of solicitation have merit, the court held that the state bar disciplinary system is adequate to deal with the problem. See also *Edwards v Marin Park, Inc*. (9th Cir 2004) 356 F3d 1058, discussed in §6.14A.

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§6.18 C. Adults-Only Restrictions

Historically, mobilehome parks were often considered to be retirement communities or adult communities. In *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 180 CR 496, the California Supreme Court held that the Unruh Civil Rights Act (CC §51) prohibits discrimination against families with children in residential rental housing. In a footnote to that decision, however, the court acknowledged the existence of provisions in the Mobilehome Residency Law (MRL) that permit mobilehome park management to require mobilehome owners to comply with regulations limiting residence to adults only. 30 C3d at 743 n11. The legislature amended CC §§798.76 and 799.5 in 1992 to require that any mobilehome park rule or regulation limiting residency based on age requirements for housing for older persons comply with the federal Fair Housing Amendments Act of 1988 (Pub L 100-430, 102 Stat 1619; see 42 USC §§3604, 3607). In 1996, the legislature further amended CC §798.76 to require that it comply with later amendments to the federal Fair Housing Act adopted in Pub L 104-76, 109 Stat 787. For discussion of California law on families with children and senior communities, see §§2.22-2.25.

In *Colony Cove Assocs. v Brown* (1990) 220 CA3d 195, 269 CR 234, the court rejected constitutional and statutory challenges to a mobilehome park owner's requirement limiting residence to people 55 years of age or older, but "grandfathering" all present residents. The court held that compliance with the federal exemption from "familial status" discrimination (see 42 USC §3604(b)-(c)) for "older persons" (defined as 55 years of age or older; see 42 USC §3607)) was not required. (Compare *Colony Cove* with *Gibson v County of Riverside* (CD Cal 2002) 181 F Supp 2d 1057, 1094 n34, cited in §§2.25-2.25A.) The legislature's 1992 amendment to CC §798.76 required compliance with federal law in enforcement of any rule limiting residence to adults. It is an open question, therefore, whether the park owner would have the burden of proving compliance with the federal "older persons" exemption, if noncompliance with federal law were asserted as an affirmative defense in an unlawful detainer action. Management's attorney could argue that the basis for the *Colony Cove* decision remains controlling and that the amendment to CC §798.76 merely clarified that the legislature's phrase ("to adults") was not preempted by the federal bar against "familial discrimination." Residents' counsel could argue that the amendment to CC §798.76 was substantive and must be read plainly to require proof of compliance with the federal exemption, and that interpretation of the statute is unnecessary because the legislature's words are clear and unambiguous. In light of the 1992 amendment to CC §798.76, the decision in *Schmidt v Superior Court* (1989) 48 C3d 370, 256 CR 750, in which the supreme court upheld a mobilehome park's rule limiting occupancy to persons 25 years of age and older, no longer appears to be good law.

In *U.S. v City of Hayward* (9th Cir 1994) 36 F3d 832, a park owner dropped its "adults-only" policy in response to a federal prohibition against discrimination based on familial status. Acting under its rent control ordinance, the city ordered the park owner to reduce its rents, on the ground that ending the "adults-only" policy was a reduction in services, and the value of those services should be deducted from the rent. The federal government sued the city to compel it to rescind its order, arguing that the city had violated the Fair Housing Amendments Act (42 USC §§3601-3631), by penalizing the owner for complying with federal law. The court ruled for the United States, holding that the "adults only" policy was illegal discrimination that had no value as a housing service. See also *U.S. v City of Hayward* (ND Cal 1996) 1996 WL 61114 (consent decree).

In *Covey v Hollydale Mobilehome Estates* (9th Cir 1997) 116 F3d 830, modified (9th Cir 1997) 125 F3d 1281, the court of appeals held that discrimination against families with children that allegedly occurred in 1993 had to be adjudicated under the regulations in effect in 1993 that required "significant facilities and services" for seniors. This distinction was critical because the park probably would have qualified as a seniors-only park at the time of trial based on later 1995 HUD rules. See §2.25A.

In *Taylor v Rancho Santa Barbara* (9th Cir 2000) 206 F3d 932, plaintiff was prohibited from occupying a mobilehome he purchased in a senior mobilehome park because he was 35. Citing the due process and equal protection clauses of the Fourth and Fifth Amendments of the U.S. Constitution, he challenged the authorization of seniors parks in the MRL and in the Fair Housing Act (see §§2.25-2.25C). The court affirmed that the MRL did not arbitrarily give disparate treatment to mobilehome parks for older persons, and that the federal and state Acts did not violate the equal protection clause because the laws were rationally related to legitimate state interests.

The Attorney General ruled, in 87 Ops Cal Atty Gen 148 (2004) that a local government may adopt a zoning ordinance or issue a conditional use permit to promote the development and preservation of senior parks despite the prohibition in Govt C §65008 on local government actions to discriminate on the bases of, among other things, age. The opinion notes that Health & S C §18300(g), in the Mobilehome Parks Act (MPA) (Health & S C §§18200-18700), authorizes local governments to exercise their authority to establish "senior mobilehome parks" and that this is a more specific section than the general prohibition in the Government Code Planning and Zoning Law. Practitioners should be aware that this Opinion does not address the restrictions related to local government actions and mobilehome parks in Govt C §§12955(*l*) and 12955.9, or applicable federal nondiscrimination laws.

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V. CREATION OF TENANCY

§6.19 A. Types of Tenancies

The four most common types of mobilehome park tenancies are entered into between park management and

- a resident of an owner-occupied mobilehome;
- a resident of a park-owned mobilehome;
- a nonresident owner of a mobilehome who rents it to a resident tenant; and
- a resident who has an ownership interest in the park that is a subdivision, cooperative or condominium for mobilehomes, or a resident-owned mobilehome park.

See §§6.9, 6.12.

The first type of tenancy, that of a resident of an owner-occupied mobilehome, is the most frequently encountered situation in mobilehome parks. In these tenancies, the park management rents space to the mobilehome owner or a subsequent purchaser of the mobilehome. All the provisions of the Mobilehome Residency Law (MRL) (CC §§798-799.10) apply to such tenancies, including the special tenancy termination requirements. See §§6.62-6.84.

In the second type of tenancy, in which a tenant rents a park-owned mobilehome and space from park management, the MRL does not apply and the rental agreement with the tenant in this arrangement need not be the same as for a tenant who owns his or her own mobilehome. However, use of consistent leases (except for the special termination clauses) will probably enhance tenant relations and simplify park management by eliminating distinctions that could result in charges of illegal or arbitrary discrimination.

In the third type of tenancy, rental of a mobilehome by a nonresident owner, the nonresident mobilehome owner enters into a lease or rental agreement with the park management, but then rents the mobilehome to another tenant. The agreement between the park management and the mobilehome owner is subject to the MRL, but the agreement between the owner and the actual occupant of the mobilehome is governed by conventional landlord-tenant statutes (see CCP §§1159-1179a). The MRL does not prohibit subletting, but it does acknowledge it in CC §§798.23.5, 798.70, and 799.1.5. The arrangement to sublet the space, however, is generally subject to prior permission under the rental agreement between the management and the nonresident mobilehome owner. If subleasing is permitted by the rental agreement, the sublease and the subtenant may also be regulated by the rental agreement. It is the mobilehome owner who is primarily bound by the agreement to park requirements—unless an alternative arrangement is made between the mobilehome owner and park management. See *Rancho Santa Paula Mobilehome Park v Evans* (1994) 26 CA4th 1139, 32 CR2d 464 (it was unreasonable for park management to bar subleasing under new park rule after having permitted it on previous occasions). See §6.12.

Even if the rental agreement prohibits subleasing, CC §798.23.5 permits a mobilehome owner to sublet for specified time periods in cases of "medical emergency" or "medical treatment." See §6.61.

The fourth type of tenancy is, of course, not a tenancy at all but a right of ownership subject to the documents and laws governing the specific type of park. However, the relationship between homeowners and management sometimes is analogous to those of tenants and management. As the number of these parks continues to increase, acts or omissions by management or residents are governed by increasing numbers of provisions in article 9 of the MRL and the applicable rules, regulations, and laws.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.20 B. Resident and Mobilehome Admissions Criteria

§6.20 B. Resident and Mobilehome Admissions Criteria

A mobilehome park management's right to discriminate among persons applying for tenancy generally is subject to the same restrictions that apply to other residential landlords. See chap 2. The Fair Housing Act of 1968 includes mobilehome sites in its definition of "dwelling" (see 42 USC §3602(b); *U.S. v Grooms* (MD Fla 1972) 348 F Supp 1130). The Mobilehome Residency Law (MRL) (CC §§799-799.10) also contains some additional limitations on tenant selection:

- Civil Code §798.20 prohibits discrimination on the basis of race, color, religion, sex, marital status, national origin, ancestry, familial status (except for parks designated for seniors), disability, source of income, or sexual orientation in any private club or organization that a prospective tenant must join to obtain tenancy in a mobilehome park. See CC §798.20(a). Sex discrimination includes discrimination on the basis of pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, gender, gender identity and gender related appearance and behavior. Govt C §12926(p); Pen C §422.56.
- Civil Code §798.76 permits park management to require that the purchaser of a mobilehome that will remain in the park comply with any rule or regulation limiting residence to older persons. (For similar rules that apply in mobilehome subdivisions or resident-owned parks, see CC §799.5.)
- Civil Code §798.34 provides that a homeowner living alone may share housing with one person, to be treated as a guest, and a person may share housing with any adult who provides live-in health care and supportive care under a written plan prepared by the homeowner's physician. (For similar rules that apply in mobilehome park subdivisions or resident-owned mobilehome parks, see CC §799.9.)
- Civil Code §798.33(a) applies to lease agreements entered into, modified, or renewed on or after January 1, 2001, and provides that no lease agreement may prohibit a homeowner from keeping specified types of domestic pets, subject to reasonable rules and regulations. These rules are subject to the "reasonable accommodation" requirements of the federal Fair Housing Act; see §2.27.

Federal law and case law, however, may place limits on the creation or maintenance of adults-only mobilehome parks. See §§2.22-2.25, 6.18. For discussion of the limitations on tenant-selection standards that may be considered when a potential tenant buys a mobilehome from an existing tenant, see §§6.54-6.56. Although the tenant's "ability to pay rent" is a permissible standard of review, the method park management uses to determine ability to pay may run afoul of antidiscrimination laws. See *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 278 CR 614; §§2.21, 2.57. Several 1999 amendments to the Fair Employment and Housing Act prohibit discrimination based on source of income and require aggregation of a household's income. See §§2.9B, 2.20, 2.48-2.49.

Castaneda v Olsher (2007) 41 C4th 1205, 63 CR3d 99 extensively addressed general principles related to whether landlords could discriminate in renting on the basis of suspected gang membership by potential tenants. The decision notes that if the mobilehome park owner had refused to rent on the basis of suspected gang affiliations, the owner might have been subject to liability for violating CC §798.74, which does not include gang affiliation as a permitted basis for rejecting a rental applicant.

Park management can limit the type and size of mobilehomes that will be permitted in the park, if the restrictions are set forth in the park's rules and regulations or rental agreement, at least as to existing homeowners. Many parks permit only certain sizes of mobilehomes (*e.g.,* double-wide mobilehomes or the largest mobilehome that can be accommodated on the lot) or mobilehomes with certain physical characteristics (*e.g.,* eaves, wood sidings, unitized awnings, composition roofs). These distinctions conform all mobilehomes in a park to specific aesthetic standards that affect the in-place value of other mobilehomes in the park. Although such requirements have generally been accepted in the past, their legality might be challenged as a violation of the Unruh Civil Rights Act (CC §51), if they are not reasonable.

Some mobilehome park owners operate so-called closed parks that permit persons to become resident homeowners only if they purchase particular brands of mobilehomes or mobilehomes from specific dealers. Such practices have

been questioned as illegal restraints on trade or "tying" agreements. *People v Mobile Magic Sales* (1979) 96 CA3d 1, 157 CR 749; *Jomicra, Inc. v California Mobile Home Dealers Ass'n* (1970) 12 CA3d 396, 90 CR 696. They also may violate unfair business practices statutes, such as Bus & P C §§17200-17209. See *People v McKale* (1979) 25 C3d 626, 159 CR 811. Management also may not, as a condition of resale or approval of a buyer, require a selling homeowner to authorize management, or any other person, dealer, or broker, to act as seller's agent in the sale of a mobilehome. CC §798.71(c).

In *SC Manufactured Homes, Inc. v Liebert* (2008) 162 CA4th 68, 76 CR3d 73, plaintiff mobilehome dealer alleged that a mobilehome park and specified dealers were involved in an illegal tying arrangement and alleged violations of the Cartwright Act (Bus & P C §§16720-16770) and the Unfair Competition Law (Bus & P C §§17200-17210), as well as tortious interference with prospective economic advantage. After a detailed analysis of the underlying facts, applicable laws, and judicial decisions, the court held that the facts did not support the causes of action. Management also may not require a first right of refusal for a mobilehome sold in the park to a third party in rental agreements entered into or renewed on or after January 1, 2006. CC §798.19.5.

An applicant's unwillingness to accept a particular rental agreement cannot be used to deny residency. See CC §§798.17-798.18; §6.21. Civil Code §798.75(b), however, provides that a mobilehome purchaser in the park who fails to sign the "rental agreement" has no right of tenancy. See *Mobilepark W. Homeowners Ass'n v Escondido Mobilepark W.* (1995) 35 CA4th 32, 41 CR2d 393.

Note that CC §798.37 prohibits mobilehome park management from requiring that a homeowner or prospective homeowner "purchase, rent, or lease goods or services for landscaping from any person, company, or corporation."

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§6.21 C. Lease or Rental Agreement

The basis of the relationship between the homeowner and the mobilehome park management is the lease or rental agreement, which is defined in CC §798.8 as the agreement between the homeowner and management. This agreement, unlike other landlord-tenant agreements, must be in writing, must include an attached copy of the Mobilehome Residency Law (MRL) (CC §§798-799.10), and must contain a list of provisions set forth in CC §798.15. The agreement cannot waive rights granted to the homeowner by the MRL. CC §798.19.

Because mobilehome parks, mobilehome tenants, and park management firms differ from place to place, leases and rental agreements differ according to management goals, styles, and needs. In drafting and executing a rental agreement, however, park management should follow some simple rules. The form should be self-explanatory so that park managers have little trouble filling out the lease with the tenant. In addition, the document should be as simple and unambiguous as possible, to prevent differences of opinion over the contents.

Practitioners should exercise extreme caution in advising park management concerning the form and content of the rental agreement and should consult any applicable local ordinances or federal or state laws that may apply, as well as public agency loan and grant documents, regulatory agreements, and conditions, covenants, and restrictions.

Because ambiguous terms are construed against the drafter (usually the landlord) and may open the door to admission of parol evidence, practitioners must exercise caution when drafting all residency documents. Moreover, residents' counsel often argue that mobilehome park rental agreements constitute classic examples of "adhesion" contracts imposed on unsophisticated consumers. Care should therefore be taken to avoid ambiguity, inconspicuous terms, and unfair surprise.

Park management should be certain that both parties complete all signatures and acknowledgments on the form and initial any changes in the rental agreement. Both the management and the tenant must be given fully executed copies of the agreement. In addition, the tenant should be given copies of the MRL and all park rules and regulations. Civil Code §798.16(b) requires that management return an executed copy of the rental agreement to the homeowner within 15 business days after management has received the rental agreement signed by the homeowner. To avoid later disputes, all park requirements should be explained in advance to potential and renewing tenants.

A mobilehome park rental agreement is exempt from local rent control provisions if it meets the criteria specified in CC §798.17(b). CC §798.17(a). See also §798.21. In *Mobilepark W. Homeowners Ass'n v Escondido Mobilepark W.* (1995) 35 CA4th 32, 41 CR2d 393, the court held that a municipal ordinance regulating mobilehome park leases was preempted by CC §798.17 and that the ordinance was an invalid attempt to amend a statewide initiative. But see *Equity Lifestyle Props., Inc. v County of San Luis Obispo* (9th Cir 2007) 505 F3d 860, for a discussion regarding whether a residency document was a "12-month rental agreement" or merely a month-to-month agreement subject to the rent control ordinance.

In *Rothman v Vedder Park Mgmt.* (9th Cir 1990) 912 F2d 315, mobilehome park tenants claimed that the park owner violated the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC §§1961-1968) by using fraudulent and extortionate tactics to get them to sign their leases. The court rejected this claim, holding that the complaint failed to allege facts showing fraud or extortion.

However, in *People v Beaumont Invs., Ltd*. (2003) 111 CA4th 102, 3 CR3d 429, the court of appeal sustained judgments of $525,000 in restitution and $525,000 in civil damages in favor of the residents of two mobilehome parks and against the two mobilehome parks and a mobilehome dealer who entered into long-term leases favorable to the park management and then sold the new mobilehomes subject to these leases. The park management, which offered the "option" of new long-term leases for those not wanting to assume the dealer's leases, claimed that these long-term leases exempted the park spaces from local rent controls, but the trial court and the court of appeals found that these were unfair business practices and did not exempt the spaces from the local rent control ordinance. The damages included repayment of several years of "excess" rent payments.

Local ordinances, rules, and regulations may not prohibit or limit the duration of rental agreements or leases in mobilehome parks and manufactured housing communities newly built or held out for rent after 1992. Govt C

§65852.11.

A mobilehome park owner must disclose in writing to any applicant for a space that the mobilehome may be subject to a school facilities fee, if the pad was built after September 1, 1986, and no other mobilehome has occupied the pad. CC §§798.82; 799.8.

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VI. MOBILEHOME PARK RENTAL AGREEMENT

§6.22 A. Legal and Practical Considerations

Sections 6.23-6.89 address the legal and practical considerations that underlie the form mobilehome park rental agreement set forth in §§6.90-6.140, which is for use in connection with mobilehome park tenancies. Practitioners should be aware that rental agreements for manufactured housing subdivisions or resident-owned parks or recreational vehicle parks would differ in some particulars.

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1. Term of Agreement; Initial Disclosures

§6.23 a. Homeowner's Options

Civil Code §798.15(a) requires that the term of a mobilehome park rental agreement be stated, and CC §798.18 requires that a homeowner be offered one of the following three options:

- A 12-month lease;
- A shorter-term lease, including a month-to-month lease, if the homeowner requests such a term; or
- A longer-term lease (of more than 1 year), if mutually agreed on by the homeowner and management.

In effect, the homeowner has the option to choose the duration of the rental agreement, at least for a period of 1 year or less.

PRACTICE TIP: This option to chose the term of the rental agreement is such a crucial requirement of the Mobilehome Residency Law (MRL) (CC §§798-799.10) that counsel should include in the rental agreement an acknowledgment by the homeowner that the option was given. See §§6.136-6.137 for form acknowledgments. Many park landlords and their attorneys take the position that these choices need be offered only to existing residents, because a new buyer technically is not yet a "homeowner" as defined in the MRL.

See also §6.105.

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§6.24 b. Reporting and Disclosure Requirements

Offering rental agreements to mobilehome homeowners for a term of more than 5 years is subject to the reporting and disclosure requirements of the Subdivided Lands Act (Bus & P C §§11000-11200) if such agreements are offered as a mandatory prerequisite to tenancy. Bus & P C §11000.

Civil Code §798.74.5 imposes notice obligations on park management. If it has been advised that a mobilehome is for sale, management must provide a statutory notice entitled "INFORMATION FOR PROSPECTIVE HOMEOWNERS," as specified in CC §798.74.5(a) (see form in §6.54A), to prospective purchasers within 2 business days of a request.

Additionally, park management must provide each prospective homeowner with a completed, written disclosure about the condition of the mobilehome park. The disclosure must be delivered at least 3 days before execution of either a rental agreement or a statement that the parties have agreed to the terms and conditions of the rental agreement. CC §798.75.5(a). The management must update the information annually, or in the event of a material change, at the time of the change. The form is set forth in CC §798.75.5(b).

For seller disclosures required on the sale of a mobilehome, see CC §§798.74.4, 1102.6d, cited in §§6.54, 6.57A, subject to the requirements and exemptions in CC §§1102-1102.3a.

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§6.25 c. Limits on Renewal

Under CC §798.18(c), no rental agreement for a term of 12 months or less may allow either party to extend or renew the agreement unilaterally for an additional term longer than 12 months. In addition, under CC §798.17(g), no rental agreement of more than 1 year in length which qualifies as being exempt from rent control may contain a unilateral option to renew.

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§6.26 2. Rent and Rent Increases

Rent increases in mobilehome parks are one of the most sensitive management relations problems. It is essential that management understand the legal restrictions on rent increases for mobilehome parks.

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§6.27 a. Notice of Rent Increase

Civil Code §798.30 requires that a minimum 90-day notice be given of an increase in rent. This period is strictly construed. In *Rich v Schwab* (1984) 162 CA3d 739, 209 CR 417, the court held that a 58-day notice was void under the previous law, which required 60 days notice.

PRACTICE TIP: Park management should review local rent regulation ordinances and public agency financing restrictions before preparing any rent increase notice. See §§6.15, 6.32.

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b. Methods of Rent Increase in Long-Term Agreements

§6.28 (1) Objective Factors

Management commonly ties annual rent increases in long-term rental agreements to objective factors such as the median income figures issued by the U.S. Department of Housing and Urban Development or the California Department of Housing and Community Development, or to a percentage of the Consumer Price Index issued by the U.S. Department of Labor for specific areas, states, or the entire country. See §6.106.

However, even an objective factor such as "a percentage of the Consumer Price Index" can be qualified by a subjective factor, such as unique or extraordinary circumstances in which such increases would not result in a reasonable rate of return because of unusually low base rents assumed from a prior owner whose financial situation allowed it to keep rents below market levels. See *Concord Communities, LP v City of Concord* (2001) 91 CA4th 1407, 111 CR2d 511, in which the court of appeal held that a city's finding that base rents were not significantly below market was not supported by substantial evidence.

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§6.29 (2) Pass-Throughs

One method of increasing rent is by passing through to the homeowner certain costs, including increases in taxes and insurance and the cost of capital improvements to the mobilehome park.

WARNING: In passing through costs to the homeowner, the management must be careful not to violate CC §798.31, which limits the fees park management may charge. See §6.106.

In *Vance v Villa Park Mobilehome Estates* (1995) 36 CA4th 698, 42 CR2d 723, the court held that a lease that provided for rent increases in the amount of certain "pass-throughs" for increases in the cost of government services and improvements, property taxes, and insurance, did not impose "disguised fees" that would be barred by CC §798.31. The provision was not "unconscionable" because the tenant had the right, under CC §§798.17 and 798.18, of refusing the lease and choosing instead a 12-month lease or month-to-month tenancy. See also *Cacho v Boudreau* (2007) 40 C4th 341, 53 CR3d 43 (CC §798.49(d)(4) does not preempt local ordinances that allow mobilehome park owners to separately charge park residents for property taxes imposed on park land).

In *Dills v Redwoods Assocs.* (1994) 28 CA4th 888, 33 CR2d 838, mobilehome owners challenged a park owner's rent increase because it included an amortized portion of a capital improvement expense (to repair roads in the park). The lease provided for capital improvement pass-throughs as part of "base rent adjustments." The court held that the rent increase was not barred by CC §798.31 because capital expenditures have otherwise been a traditionally recoverable component of rent, and nothing in CC §798.31 prohibits the imposition of rent broken down into separately calculated base rent and capital expense components. The court both distinguished and disapproved *Karrin v Ocean-Aire Mobile Home Estates* (1991) 1 CA4th 1066, 2 CR2d 581, discussed in §6.15, rejecting "the inevitable implication of its ruling that [CC §798.31 proscribes] any effort to recover capital costs explicitly as opposed to an implicit component of rent." 28 CA4th at 893.

See also *Robinson v City of Yucaipa* (1994) 28 CA4th 1506, 34 CR2d 291, discussed in §6.15, in which the court analyzed the validity under CC §798.31 of local ordinances that permitted pass-throughs of capital improvement costs, and *Rainbow Disposal Co. v Escondido Mobilehome Rent Review Bd.* (1998) 64 CA4th 1159, 75 CR2d 746, which rejected a mobilehome park owner's effort to pass through certain utility maintenance and capital improvement costs that were already compensated under Pub Util C §739.5.

In *Carson Harbor Village, Ltd. v City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 CA4th 281, 82 CR2d 569, the court sustained several trial court determinations related to pass-throughs, including the finding that the board reasonably could allocate an operating expense—remediation of contaminated wetlands—over three years, because to do otherwise would be inconsistent with the intent of the rent control law. It also ruled that attorney fees related to that remediation could not be treated as regular operating expenses used as the basis of setting rents. Other decisions related to pass-throughs are discussed in in-depth in paragraph 6.15.

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§6.30 c. Inclusion of Utilities or Taxes in Rent

Some mobilehome parks include many utilities or service fees in the rent. If any of these utilities or fees are later eliminated or billed separately without an equal reduction in rent, such an action would be considered to be an increase in rent requiring 90-days' written notice under CC §798.30. A 60-day notice would be required under CC §798.32 if the charge was not described in the rental agreement. Under CC 798.41(a), commencement of a separate billing procedure does not constitute a "rent increase" under a local ordinance if the base rent is simultaneously reduced by the same amount.

Some parks include in the monthly rent one-twelfth of the annual prorated increase in park property taxes and other government fees. Other parks include a requirement that the homeowner pay on a prorated basis all federal, state, local, or other taxes (other than property taxes or income taxes) that are levied on the use and occupancy of the park. See, *e.g.*, *Cacho v Boudreau* (2007) 40 C4th 341, 53 CR3d 43, cited in §6.15.

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§6.31 d. Statutory Limitations on Rent, Fees, and Charges

Civil Code §798.18(b) requires that a homeowner be offered a lease establishing charges during the first 12 months of a one-year lease for rents, service charges, or utility fees that are the same at the inception of the lease as those that he or she would have been offered on a month-to-month basis. This statute would not prevent an increase in a month-to-month homeowner's rent during the first 12 months, even though a rental agreement was offered without provision for increase, as long as the initially offered terms were the same. In addition, CC §798.18(b) does not affect more than one homeowner at a time. If one lot is near a transformer, and the other is near the recreation center, management does not have to offer both at the same rent.

PRACTICE TIP: Attorneys representing management should warn their clients to show new homeowners that the month-to-month and one-year rental agreements have identical charges. The minimal benefit of differential charges is far outweighed by the costs that could accrue as a result of civil litigation because of a violation of CC §798.18(b).

Management may charge a fee for a rental agreement with a term longer than 12 months, however, if the fee is mutually agreed on. CC §798.31.

Civil Code §798.51 prohibits charging homeowners or residents a cleaning deposit to use the park clubhouse or recreation hall for resident organization meetings or for any of the purposes stated in CC §798.50 or §798.51, even if guests or visitors will attend the activity, if the meeting or activity is hosted by a homeowner or resident and all park homeowners or residents are permitted to attend. Park management cannot require the hosts to obtain liability insurance, unless alcoholic beverages are to be served in the common area facility; however, management may enforce rental agreement or park rules governing consumption of alcoholic beverages in the facility and may also enforce rules restricting vehicle parking or maximum occupancy for the clubhouse or recreation hall.

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§6.32 e. Impact of Local Rent Control Regulations

Unless exempted, rent increases under mobilehome rental agreements are subject to local rent control ordinances (comprehensively covered in chap 7). Civil Code §§798.17 and 798.21 exempt from local rent regulation

- any mobilehome space rental agreement that has a term of more than 12 months, and
- any mobilehome space that the homeowner does not use for his or her principal residence (as defined in §798.21) and has not rented to another party, but local rent control applies for as long as the homeowner, a licensed real estate agent, or a mobilehome dealer actively and in good faith markets the mobilehome for sale if the homeowner has moved out.

Civil Code §§798.17 and 798.21 provide other specified protections for the homeowner, including the right to contest informally a determination by the park owner that the park space is not being used by the homeowner as his or her principal residence.

In addition, any newly built mobilehome space that was initially offered for rent after January 1, 1990, is exempt from local rent control ordinances. CC §§798.7, 798.45. Many local ordinances prohibit park owners from requiring a tenant to sign any rental agreement (*i.e.,* one with a term of more than 12 months) that would exempt the tenancy from local rent control. See §6.15.

Long-term tenants of mobilehome parks (*i.e.,* 9 months or more) residing in recreational vehicles are protected by local rent control ordinances. See *Griffith v County of Santa Cruz* (2000) 79 CA4th 1318, 94 CR2d 801 (discussed in §6.15).

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§6.33 3. Fees, Service Charges, and Utilities

The Mobilehome Residency Law (MRL) (CC §§798-799.10) limits fees and charges to rent, utilities, and "incidental reasonable charges for services actually rendered." CC §798.31. For services to be actually rendered, the homeowner must request the service or at least be willing to accept it. A park owner may not impose a charge for a service the homeowner did not want and the benefits of which the homeowner did not receive. *Greening v Johnson* (1997) 53 CA4th 1223, 62 CR2d 214. Any other fees or charges (*e.g.*, for guests or pets) must be explicitly permitted by statute. See, *e.g.*, CC §§798.33-798.34, which regulate fees for pets and guests. Even if the park owner renders a service, a fee may not be charged unless the service is listed in the rental agreement or the homeowner has been given at least 60 days' written notice before management imposes the charge. CC §798.32(a). Thereafter, the fees and charges must be listed separately in periodic billings, and any fees for a specified duration must have an expiration date listed in each billing. CC §798.32(b). Under CC §798.36(b), park owners may charge a reasonable fee for cleaning or clearing a resident's lot if the resident fails to do so after notice. Owners may remove and store resident personal property after specified determinations and procedures, and may charge the residents actual and reasonable costs of removal and storage. Disposal and sale are permitted if the property is not claimed and costs are not reimbursed within 60 days after notice. The cost related to removal and storage also may be collected under CC §798.56 in a nonpayment notice.

PRACTICE TIP: The statutory requirements in CC §798.36(b) related to initial notice, removal, storage, notice subsequent to removal, and sale are very detailed and extensive. Attorneys representing park management should ensure that their clients comply with these requirements if they choose to utilize this process.

Civil Code §798.25(e) provides that a new fee added by an amendment to the park's rules and regulations (that has not been expressly agreed on by the homeowner and management in the written rental agreement or lease) is void and unenforceable. An uncodified finding by the legislature (Stats 1999, ch 323, §2) provides that the intent of §798.25(e) is to prohibit park owners from imposing new fees and charges by amending park rules and regulations; it is not intended to limit the authority of owners to impose fees and charges under CC §§798.30-798.44.

For charts and forms indicating permissible fees for utilities and services, see §§6.98 and 6.110.

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a. Permissible Fees

§6.34 (1) Common Area Landscaping and Maintenance Fees

A fee may be charged for common area landscaping and maintenance, just as for any other common area service. Park rules may impose reasonable landscaping and maintenance requirements for individual sites (CC §798.37), and a reasonable fee may be charged for management's performance of those services if the homeowner fails to perform them after having been served with a 14-day notice to perform (CC §798.15(g)).

However, for leases entered into or extended on or after January 1, 2001, management is solely responsible for maintenance or removal of trees on spaces or in common areas, and repair of root damage to driveways installed by management and foundation systems, unless the homeowner voluntarily agreed otherwise in a pre-2001 rental agreement. CC §798.37.5.

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§6.35 (2) Fees Imposed by Governmental Entities

If certain new or increased fees or assessments imposed by a state or local entity are billed by the number of spaces in the park, management may separately charge homeowners for such amounts under CC §798.49, unless they are excluded under CC §798.49(d). These fees may be imposed on homeowners after 60 days notice under CC §798.32; they are exempted from operation of local rent control ordinances by CC §798.49.

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b. Limitations on Fees

§6.36 (1) Supplying Lease

Park management may not charge a fee for supplying a homeowner with a lease for a term of 12 months or a lesser period. CC §798.31. A fee may be charged, however, for a lease of more than 1 year if the fee is mutually agreed to. CC §798.31.

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§6.37 (2) Pets

Management may not charge a fee merely because a homeowner keeps a pet in the park, unless special services or facilities are provided for the pet. CC §798.33. If a fee is charged, it must reasonably relate to the cost of the services or maintenance of the facility and the number of pets kept in the park. Because the statute requires a pro rata division of the cost per pet, a flat fee not related to the number of pets would violate the statute.

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§6.38 (3) Occupancy

Under CC §798.34(c), no fee may be charged for occupancy by an adult who provides live-in health care to a senior homeowner under a written treatment plan prepared by the homeowner's physician. A homeowner may not be charged a fee for guests who do not stay with the homeowner for more than 20 consecutive days or a total of 30 days in a calendar year. CC §798.34. In addition, management may not charge a fee based on the number of members in a homeowner's immediate family (including the homeowner, his or her spouse, parents, children, and minor grandchildren). CC §798.35. A homeowner living alone who wishes to share his or her mobilehome with one person may not be charged a fee. CC §798.34(b).

Civil Code §798.34(d) authorizes a senior homeowner (defined as 55 years of age or older) who is living in a mobilehome park reserved for "older persons" (55 years of age or more under 42 USC §3607) to share his or her mobilehome with any person over 18 years of age if that person is a parent, sibling, child, or grandchild of the senior homeowner and requires live-in health care, live-in supportive care, or supervision pursuant to a written treatment plan prepared by a physician. Management is prohibited from charging a fee for this person, who shall have no rights of tenancy; and management shall not be required to manage, supervise, or provide for the person's care (except to make "reasonable accommodations" for a disability). This person also must comply with the park rules and regulations, and a violation of the rules and regulations by this person is expressly deemed a violation by the homeowner. (See also CC §799.9, for mobilehome subdivisions and resident-owned parks.)

A mobilehome park landlord may be required to assume reasonable financial burdens to accommodate the disabled child of a tenant. *U.S. v California Mobile Home Park Mgmt. Co.* (9th Cir 1994) 29 F3d 1413. Making reasonable accommodation does not, however, require park management to waive guest and parking fees for the caretaker of a resident's handicapped daughter, if the resident does not show that use of the caretaker's automobile is necessary to provide services to the daughter. *U.S. v California Mobile Home Park Mgmt. Co.* (9th Cir 1997) 107 F3d 1374.

Both CC §798.35 and CC §798.34(d) restrict rights and privileges based on "blood relationships"; these types of restrictions by government entities were held to be unconstitutional in *City of Santa Barbara v Adamson* (1980) 27 C3d 123, 164 CR 539. In addition, CC §798.34(d) restricts the residency of children based on their ages, which may violate the federal Fair Housing Act. No reported cases have challenged either of those statutes.

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§6.39 (4) Installation, Development, and Initial Landscaping

No fee may be charged for the entry, installation, or hook-up of a mobilehome (except as required by local ordinance or state regulations) nor a fee for the development of the park as a whole. CC §798.37. Management may not charge a homeowner for initial landscaping on the space nor require the homeowner to purchase, rent, or lease goods or services from any person or entity for that landscaping or for remodeling or maintenance. If a park provides landscaping, remodeling, or maintenance services, however, the homeowner may voluntarily pay for such services on the space. The rental agreement in this chapter includes an acknowledgment that the homeowner has not been required to accept these services. See form in §6.138. For tree care fees, see §6.48.

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§6.40 (5) Awards Against Management

Management may not charge a homeowner any fee or increase in rent based on the cost to management of any fines, penalties, money damages, or fees assessed or awarded by a court of law against management for a violation of the Mobilehome Residency Law (MRL), including attorney fees and costs. CC §798.39.5(a). The burden is on the homeowner to prove that the increase or fee is a violation of CC §798.39.5(b).

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§6.41 (6) Enforcing Park Rules and Regulations

Under CC §798.36, management is prohibited from charging a fee for enforcing park rules and regulations. This does not prohibit management from charging a homeowner for the cost of actual services rendered to remedy a violation of a rule or regulation (*e.g.*, failure to maintain the homeowner's landscaping), but merely forbids charging all homeowners a general fee to pay the cost of enforcing rules or correcting their breach by one or a few residents. No fee for correcting a violation can be charged until the homeowner has been given 14 days written notice to correct the specified condition (the notice must include an estimate of the charges if management makes the correction).

On legislation limiting the ability of park management to increase certain fees by a unilateral amendment to park rules and regulations, see CC §798.25(e), discussed in §6.33. For authority to clean lots and charge costs of removal and storage, see CC §798.36(b), discussed in §6.33.

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§6.42 c. Amortization of Fees

The legislature clearly intends to limit the amount and nature of fees that may be charged to homeowners in mobilehome parks. In general, it is in the management's interest to "amortize" the cost of services within rent as much as possible. When particular services are used by only a few homeowners or residents, however, the charges should be separately stated or billed. Civil Code §798.31 requires that the costs be "reasonable" according to the service provided. Management's inability to justify the reasonableness of such costs may have severe consequences, for example:

- An eviction based on a homeowner's failure to pay a fee could be defended against on the basis of improper fee charges; or
- An improper fee could be challenged as a violation of the Mobilehome Residency Law (MRL) (CC §§798-799.10), including the homeowner's request for the court to award attorney fees and levy the penalty provisions of CC §798.86.

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§6.43 d. Utilities Charges

When management provides both master meter and submeter utility service, the amount of utility charges is controlled by CC §798.40(a), which requires park management to post in a conspicuous place the "prevailing residential utilities rate schedule" published by the utility. In addition, the billing notice must separately state the cost of each charge, along with the opening and closing readings of the homeowner's meter. If a third-party billing agent prepares utility bills, CC §798.40(b) requires management to disclose specified information about that agent in each resident's billing. When a rental agreement does not provide otherwise, management may bill separately for utility fees and charges. Procedures, amounts, and other requirements are prescribed by CC §798.41.

Public Utilities Code §739.5 establishes certain requirements and rights regarding mastermeter customers and users. Under Pub Util C §739.5(a), park owners who submeter their residents for utility services may not charge a rate that exceeds the rate that would be applicable if the resident were receiving utilities directly from the utility provider. Under Pub Util C §739.5(g), the PUC must accept and respond to complaints regarding those obligations and rights. Under Pub Util C §739.5(h), the PUC may not deny eligibility for the California Alternative Rates for Energy (CARE) Program on the basis that some residential units in the park are not submetered. Under CC §798.43.1, park management must give annual notices to submetered homeowners and park residents about potential eligibility for the CARE Program.

A special rule applies to parks regulated by the MRL who supply and charge for liquefied petroleum gas (LPG). If the management of a park does not permit mobilehome owners or park residents to purchase LPG from someone other than the management, the management may not sell the LPG at a cost that exceeds 110 percent of the actual price it paid for the LPG and it also must post, in a visible location in the park, the actual price it paid. CC §798.44(a).

This rule also applies when federal, state, or local law directly or indirectly (*e.g.,* through set-back requirements) prohibits homeowners from purchasing LPG, even if management permits the residents to buy their own LPG. CC §798.44(e).

NOTE: A service characterized as a utility under CC §798.41 may not be a utility for purposes of CC §798.31, which permits the homeowner to be charged for rent, utilities, and services actually rendered. See §6.33 and *Greening v Johnson* (1997) 53 CA4th 1223, 62 CR2d 214.

In *Rainbow Disposal Co. v Escondido Mobilehome Rent Review Bd.* (1998) 64 CA4th 1159, 75 CR2d 746, the court of appeal held that these rates included normal maintenance and capital expenditures, based on a state Public Utilities Commission decision interpreting Pub Util C §739.5. The court of appeal in *Hillsboro Props. v PUC* (2003) 108 CA4th 246, 133 CR2d 343, further reinforced the PUC's authority by holding that it supersedes a local rent control ordinance when that ordinance's operation resulted in submetered park residents paying more for utility services and park utility improvements than they would have if directly metered. An interrelated issue addressed by the court is what utility-related capital costs cannot be passed on to park residents and which costs must be absorbed by management because the PUC allows park management a "discount" (the difference between the amounts submetered residents pay for utilities and the amount that the master meter park management then pays to the local utility) in order to cover the capital costs the utility otherwise would be responsible for. In 2003, the PUC began both investigatory and rulemaking proceedings to establish a list of items to be included in and excluded form the PUC discount.

Improper termination of utilities at a master meter may expose management to penalties under CC §789.3 if the termination was undertaken with the intent to terminate the tenancy (see §8.147).

PRACTICE TIP: Management should carefully word the notice of utilities termination to avoid this consequence, by stating that termination of utility service is due to nonpayment of utility charges. Civil Code §798.42 establishes special notice requirements for nonemergency utility terminations in rental parks, and CC §799.7 provides analogous protections in manufactured housing subdivisions or resident-owned parks.

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§6.44 4. Security Deposits

Under CC §798.39(a), the management of a mobilehome park may demand a security deposit only on or before the initial occupancy. The deposit may not exceed two months' rent, charged at the inception of the occupancy, in addition to any rent for the first month. This provision applies to all security deposits collected on or after January 1, 1989, and includes special rules related to return of those deposits. The return of deposits collected before that date are governed by CC §§798.39(c)-(d) and 1950.5.

PRACTICE TIP: Although the law does not explicitly require management to do so, it would be wise to treat the deposits as a trust fund and not commingle them with other income.

Civil Code §798.39(f) provides that management is not required to pay interest on security deposits. If funds are used to rectify a default or correct damages, management should give the tenant written notice to replenish the fund. See §6.111. Civil Code §798.39(a) expressly prohibits an increase in the total amount of a security deposit.

Unlike conventional housing security deposits, park residents may demand that park management return the deposit within 5 days after the resident has paid all rent and fees for any 12-consecutive-month period or on resale of the mobilehome, whichever comes earlier. CC §798.39(b). A similar provision applies to security deposits collected before January 1, 1989, on extension or renewal of a rental agreement or lease. CC §798.39(c).

Although improper use of a security deposit may be subject to challenge under the enforcement provisions of the Mobilehome Residency Law (MRL) (CC §§798-799.10) for those aspects that are subject to the MRL, similar enforcement rights (including the right to a statutory penalty) are provided in CC §1950.5 for other security deposit violations. See §§8.173A, 8.174.

NOTE: Civil Code §1950.6 authorizes landlords to charge a nonrefundable "screening fee." See §§1.51, 4.11.

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5. Park Rules

§6.45 a. Adoption and Amendment of Rules

By following the procedure established in CC §798.25, management can adopt new park rules and regulations without homeowners' consent after 6 months' written notice, or 60 days after written notice if they are applicable to recreational facilities. The court limited this right in *Rancho Santa Paula Mobilehome Park v Evans* (1994) 26 CA4th 1139, 32 CR2d 464, by holding that a park owner could not retroactively enforce a new rule that prohibited subleasing against a nonconsenting mobilehome owner. The court held that rules adopted without consent under CC §798.25 must be reasonable, and a prohibition against subleasing, not contained in the lease or not adopted with the homeowner's consent, was unreasonable. It also held that a rule or restriction that affects "the very nature of the holding" and may cause the eviction of the homeowner, when applied retroactively against a homeowner whose lease does not contain that rule or restriction, is unreasonable as contrary to the stated purpose of the MRL. 26 CA4th at 1147.

Under CC §798.25(d), management may avoid the resident consultation requirement and the 6-month notice period when homeowner consent is not granted if the rule amendment is mandated by a change in law, ordinance, or government regulation. In that event, the change is effective upon homeowner consent or not less than 60 days after written notice without homeowner consent.

PRACTICE TIP: Management should encourage homeowners to read the agreement, park rules and regulations, and the Mobilehome Residency Law in their entirety. If changes must be made to the agreement or park rules, they should be interlineated and initialed on both the park management's and tenant's copies. Use of the expedited rule implementation process in CC §798.25(d) requires citation to the applicable law, ordinance, or regulation (including its section number) that necessitates the expedited amendment to the park rules and regulations.

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§6.46 b. Limitation on Park Rules

A park rule is void and unenforceable if it purports to deny homeowners their right to a trial by jury or to mandate binding arbitration of any dispute between management and homeowners, if the rule was adopted unilaterally by management and was implemented without consent of the homeowners. CC §798.25.5.

A mobilehome park owner may not, by means of rental agreement, rule, or regulation, prohibit tenants from displaying political signs in the windows of mobilehomes; such a rule is against the public policy established by the Mobilehome Residency Law (MRL) (CC §§798-799.10). See 74 Ops Cal Atty Gen 122 (1991). This rule was codified by enactment of CC §798.51(e) (and in CC §799.10 for certain joint-ownership or resident-owned parks) regarding the nature, location, size, and duration of the posting of political campaign signs. This rule is not intended to restrict any form of political expression not associated with an election or political campaign. See Stats 2003, ch 249, §4.

For discussion of the decision in *U.S. v California Mobile Home Park Mgmt. Co.* (9th Cir 1994) 29 F3d 1413, holding that a park owner may be required to waive certain rules, regulations, or policies to accommodate disabled residents, see §§6.38, 6.141.

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§6.47 6. Park Management Responsibilities

Civil Code §798.15 requires the mobilehome rental agreement to include a provision stating that park management is responsible for providing and maintaining physical improvements in the common facilities. In the event of a sudden breakdown, the management must act as soon as possible if the problem affects a health or safety condition, and generally within 30 days for other situations. CC §798.15(d). If the management substantially fails on this obligation, a private right of action for a public nuisance or an action by a designated public agency may be filed. See CC §798.87. Rules and regulations governing standards for the physical condition of common areas, and administrative remedies to rectify breach of this responsibility, are found in the Mobilehome Parks Act (MPA) (Health & S C §§18200-18700) and 25 Cal Code Regs §§1000-1758 and include an obligation to post a sign in a conspicuous place in the clubhouse or other public place identifying the name, address, and telephone number of the mobilehome ombudsman. Health & S C §18253.5(a). See §6.13. See also §6.54.

By September 1, 2010, park operators must adopt an emergency preparedness plan that includes the following:

- Posting specified emergency procedures and plans in the clubhouse or other conspicuous place;
- Providing residents with notice on how to access the park's plan; and
- Providing residents with direction to individual emergency preparation information sources.

Failure to comply is deemed an immediate risk to life, health, and safety. Health & S C §18603.

Several other provisions regulate management conduct or options. For example, management has responsibilities under the MRL regarding the maintenance of trees and driveways damaged by tree roots. See CC §§798.26, 798.37.5. See also §§6.34, 6.48. On enforcement of extracontractual duties owed by park management, see §§6.16 and 6.85-6.87. For special rules for the removal of vehicles from a homeowner's or resident's driveway or designated parking space, see CC §798.28.5(b).

Under CC §798.26, park management may not enter a mobilehome without prior written consent of the resident but may enter without consent in the event of an emergency or abandonment. Similar approval is necessary to enter an "enclosed accessory structure" on a lot. Management may enter a mobilehome lot only for specified maintenance at a reasonable time and without interfering with a resident's quiet enjoyment.

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§6.48 7. Fixtures and Alterations

Some physical improvements, *e.g.,* trees that mature and extend into other lots or over common areas and retaining walls and gardens that change ground water flows, may create maintenance problems. Under the Mobilehome Parks Act (MPA) (Health & S C §§18200-18700), management is initially responsible for correcting any violations of the Act, and will be able to seek reimbursement only if the homeowner's obligation is clearly set forth. See §6.114.

Under leases entered into, renewed, or extended after January 1, 2001, CC §798.37.5 mandates that management is solely responsible for the maintenance or removal of all trees, including repair or root damage to streets or foundations. Residents may plant trees only after obtaining written permission from management, and residents may voluntarily (with a specified written agreement) undertake the care of trees located within their park spaces.

NOTE: Under all leases, park management may require that homeowners obtain permits from the Department of Housing and Community Development (HCD) for alterations or improvements to their manufactured homes, or from HCD or the local enforcement agency for improvements to the lot (such as new cabanas, garages, *etc.*), and also obtain park approval of those permits if the improvements would have any impact on park operations. See, *e.g*., Health & S C §§18029, 18500(b). See also CC §798.16(a). This would affect, for instance, the addition of air conditioners or other significant energy using equipment, or fences and patios that may not properly follow lot lines.

Under CC §798.29.6, management must permit a homeowner or resident to install disabled access accommodations on a lot or space if they comply with the applicable building code and are installed with a permit, if required. Management may require that the accommodations installed be removed at the time the mobilehome is removed from the park or pursuant to a written agreement between the current homeowner and management prior to the completion of the resale of the mobilehome in place in the park. (For similar rules that apply in mobilehome park subdivisions or resident-owned mobilehome parks, see CC §799.11.)

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8. Uses and Changes of Use, Zoning, or Master Lease

§6.49 a. Disclosures

Both CC §§798.27 and 798.56 require that specific notice be given to potential homeowners before the start of the tenancy regarding the status of zoning, use permits, or changes in the master lease. The disclosure provisions in §6.101 should suffice, as long as they clearly provide the required notices, as the law is amended periodically. See also §6.57A.

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b. Change of Use

§6.50 (1) Definition

What constitutes a change of use of the mobilehome park, and how management should notify homeowners and other residents of the change, are among the greatest points of contention between management and park residents. That is not surprising, considering the possibility that a homeowner's investment in his or her mobilehome may be completely lost unless the mobilehome can be moved to another park, which may be more or less attractive and costly to the homeowner.

"Change of use" is defined in CC §798.10 as the management's use of any part of the park for other than the rental of sites for mobilehomes, including, but not limited to, changing to forms of space ownership such as condominiums or cooperatives. A "change of use" does not mean the adoption, amendment, or repeal of a park rule or regulation. Nor is it the vacating of one space resulting from the eviction of the tenants of that space. *Keh v Walters* (1997) 55 CA4th 1522, 65 CR2d 42. Some examples of acts that might be considered to be changes of use are the following:

- Closing the park and letting the land revert to open space;
- Seeking to rezone the land to industrial use;
- Allowing a renewable conditional use permit to expire and thus letting the land revert to its original zoning;
- Eliminating spaces for a swimming pool, or vice versa;
- Adding a designated area for recreational vehicles; and
- Adding factory-built housing, manufactured homes, or multifamily manufactured homes that may require a zoning change or conditional use permit under Health & S C §18611.

PRACTICE TIP: As noted in §6.13, a change in use also triggers local government impact requirements. Under Govt C §65863.7(j), a "change in use" also includes the involuntary closure of a park as a result of a local enforcement agency's decision to suspend the park's permit to operate. In that situation, however, providing the notices required by the Mobilehome Residency Law (MRL) (CC §§798-799.10) is not feasible, since the notice of suspension may involve no more than 30 days' notice by the enforcement agency. See Health & S C §§18510-18518.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.51 (2) Implementation

§6.51 (2) Implementation

Implementation of a change of use is governed by CC §§798.27 and 798.56(g). If park management is not careful to observe the minimum requirements of these sections, it may face liability, be unable to evict homeowners at the termination of their rental agreements, or be prevented from proceeding with the change. See *Keh v Walters* (1997) 55 CA4th 1522, 65 CR2d 42. An effort to keep homeowners informed of the change may result in more cooperation as the change occurs. Notice requirements vary, depending on the type of change intended:

- *Change of use that does not require local government use permit or zoning amendment.* Notice to homeowners must be given 12 months before the change. CC §798.56(g)(2). The written notice must disclose and describe in detail the nature of the proposed change of use.
- *Change of use that requires local government use permit or zoning amendment.* Different notices are required at three separate stages of the conversion process (see form in §6.116):
- Management must give the homeowners at least 15 days' written notice that it will appear before a local government board to request a permit for the change in zoning or use. CC §798.56(g)(1). If several hearings are required for such a procedure, management should provide a new 15-day notice for each hearing.
- Management must give homeowners 30 days' written notice of the change in zoning or use. CC §798.27(b).
- If the use permit or zoning change will require termination of the tenancy, management must provide at least 6 months' notice of the termination of the tenancy. CC §798.56(g)(2). This notice may not be given, however, until all required permits have been approved. CC §798.56(g)(2).
- *Change in, or termination of, a master lease.* The Mobilehome Residency Law (MRL) (CC §§798-799.10) explicitly requires management to give 30 days' notice to all homeowners regarding a change in a master lease (under which the management operates the park). CC §798.27(b). However, the rental agreement must clearly disclose any anticipated changes or the termination date of the master lease.

If management intends to change the use of part of the park, the same procedures should apply.

Some local jurisdictions have enacted special mobilehome park conversion ordinances to govern the rights and responsibilities of park owners and homeowners. These may require payment of fair market value to displaced homeowners or the taking of additional steps concerning displacement and relocation. These ordinances may also impose certain physical maintenance or improvement standards as a condition of conversion. See Information Bulletin 2008-10, "Validity of Local Ordinances Relating to Installation of New Manufactured Homes and/or Sale or Conversion of Mobilehome Parks" (Apr. 21, 2008), issued by the state Department of Housing and Community Development, challenging the authority of local governments to impose these standards (http://www.hcd.ca.gov/codes/mp/info_bulls/IB08-LocalOrdinances-4-21.pdf).

A change of use to "resident ownership" may be initiated by the owner of the park or the residents. The consequences of such a conversion on residents, *e.g.*, losing the protection of rent controls and/or not being able to afford to buy into the park, can be significant. Previously, local governments used their authority under Govt C §§66427.4 and 66427.5 to mitigate these impacts both during and after the conversion period. In *El Dorado Palm Springs, Ltd. v City of Palm Springs* (2002) 96 CA4th 1153, 118 CR2d 15, the court of appeal ruled against such ordinances when conversions to resident ownership occur. It held that §66427.4 applied only to changes of use to nonmobilehome park uses that displace the existing park residents and require relocation of mobilehomes, and that §66427.5 applied only to subdivisions created to convert a rental mobilehome park to a resident-owned mobilehome park, without regard to which party initiated the conversion. It also held that the conversion was complete on the sale of the first lot, cutting off the protections of the local rent control ordinance at that time.

The *El Dorado Palm Springs* decision, however, was expressly overruled by the legislature (see Stats 2002, ch 1143, §§2-3) in amending Govt C §66427.5 to require a "survey of support" of the residents (according to prescribed procedures) for submission to the local government. Uncodified legislative findings state:

> SEC. 2. It is the intent of the Legislature to address the conversion of a mobilehome park to resident ownership that is not a bona fide resident conversion, as described by the Court of Appeal in *El Dorado*

Palm Springs, Ltd. v City of Palm Springs (2002) 96 CA4th 1153[, 118 CR2d 15]. The court in this case concluded that the subdivision map approval process specified in Section 66427.5 of the Government Code may not provide local agencies with the authority to prevent nonbona fide resident conversions. The court explained how a conversion of a mobilehome park to resident ownership could occur without the support of the residents and result in economic displacement. It is, therefore, the intent of the Legislature in enacting this act to ensure that conversions pursuant to Section 66427.5 of the Government Code are bona fide resident conversions.

SEC. 3. The changes in law enacted by this act shall not apply to any application for parcel map approval for conversion of a rental mobilehome park to resident ownership approved by the local agency under Section 66427.5 of the Government Code prior to January 1, 2003.

In *Surf & Sands, LLC v City of Capitola* (ND Cal, Feb. 13, 2008, No. 07-05043) 2008 US Dist Lexis 14640, the park owner challenged several city ordinances regulating mobilehome park rents, closures, and conversions. Holding that the challenges to the rent control and closure ordinances were barred by the statute of limitations, the court also held that the challenge to the conversion ordinance was not ripe because the park had not sought compensation through state procedures (see §6.15). It also held that the claim was not ripe because the park had not complied with the prescribed preconversion requirements, such as the resident survey.

In *Sequoia Park Assocs. v County of Sonoma* (2009) 176 CA4th 1270, 98 CR3d 669, the park owner challenged an ordinance that imposed procedural and substantive requirements in excess of those in Govt C §66427.5. While acknowledging the county's laudable goals and that the county's construction of §66427.5 had "some plausibility," the court held that the ordinance was both expressly and impliedly preempted by the state statute and therefore invalid. 176 CA4th at 1301.

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§6.52 (3) Failure to Follow Procedures

Because the legislature requires detailed notices for changes in the status of parks, it might be appropriate for a court to enjoin a change of use, rather than to grant a mere award of statutory penalties or to deny an eviction, if management fails to follow any required procedures. If the park has been expanded, or factory-built housing or a swimming pool has been added, such an injunction would be an expensive penalty for the negligent or intentional failure to give proper notice of the change.

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§6.53 c. Sale of the Park

Under CC §798.80, the owner of a mobilehome park who lists or offers the park for sale must provide written notice by first class mail or personal delivery to a qualified resident organization that has furnished the owner or park manager with written notice that the park residents are interested in purchasing the park. The notice must be given not more than 1 year nor less than 30 days before the listing or offer to sell. Failure to provide the required notice may subject the owner to a civil action under CC §§798.85-798.87, but does not affect the validity of a transfer of title to the park. Specified types of transfers are excepted from the provisions of CC §798.80 under CC §798.80(e)(1)-(7).

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/ 9. Sale or Lease of Mobilehomes/ §6.54 a. Management Rights and Duties

9. Sale or Lease of Mobilehomes

§6.54 a. Management Rights and Duties

Civil Code §798.71(a)(2) gives park management the right to require a homeowner to advise management in writing if his or her manufactured home or mobilehome is for sale.

Civil Code §798.74 gives park management the right to require

- prior approval of a prospective homeowner's purchase of a mobilehome that will remain in the park; and
- notice of the sale by the selling homeowner to management before closing the sale.

Subject to the exception discussed in §6.58, management may not require removal of a mobilehome from the park if sold to a third party during the term of a rental agreement or, beginning January 1, 2004, during the 60-day period of a notice of termination issued under CC §798.55(b). For a discussion of removal of a mobilehome after sale, see §6.58.

Civil Code §§798.73(d) and 798.83 allow management to require a seller to make repairs or improvements to a park space or property owned by management if there is damage that was caused by the actions or negligence of the homeowner or an agent of the homeowner. The management may only require the seller to make repairs, rather than the buyer, and repairable items must be an exterior part of the mobilehome or its accessory structure, and must be based on an enforceable rule, ordinance, statute, or regulation. Within 10 days of a seller's request for a summary of repairs or improvements that management requires, management must provide the list. CC §798.73.5.

Management may withhold approval if the sale would violate a park rule limiting residency to adults. CC §798.76. But see §6.18 for discussion of decisions construing CC §798.76.

Often, the sale of a mobilehome will result in the "pull-out" of the existing mobilehome and its replacement with a new mobilehome. Management may impose reasonable requirements regarding the size, design, electrical amperage requirements, and nature of the new mobilehome (see CC §798.56(d)) if these standards are in the park rules and regulations and are disclosed to the potential purchaser (see CC §§798.24, 798.74.5, 798.75.5). See also 25 Cal Code Regs §1031(c) (requiring park operator's approval for installation of, or alterations to, units that affect the park's electrical, fuel, gas, or plumbing systems). No new mobilehome may be installed in a park unless management signs and approves the plot plan accompanying the installation permit submitted to the Department of Housing and Community Development (HCD) or the local enforcement agency that, among other things, certifies that the home and its installation comply with all applicable laws and regulations. See 25 Cal Code Regs §1020(a)(4)(B). If the park is in a state or local government-established high fire hazard severity area, management should disclose this to the prospective buyer and mandate compliance with the applicable ignition-resistant construction requirements for the home and accessory structures. See 25 Cal Code Regs §§1032(b)-(c), 1322, 1426. For mapping information, see http://www.fire.ca.gov/fire_prevention/fire_prevention_wildland.php; for construction requirements, see the "Wildland Urban Interface" requirements and information at http://www.hcd.ca.gov/codes/mhp/. Because these regulations create only minimum standards (25 Cal Code Regs §§1322, 1426), park management may impose higher ignition-resistant construction requirements for the mobilehome or accessory structures than may be required by laws and regulations, if those requirements are reasonable and are disclosed in the park rules and regulations. CC §§798.24, 798.56(d).

If a prospective purchaser so requests, park management must reveal what information the purchaser must furnish to be accepted as an occupant. Within 15 business days of receiving the information, management must notify, in writing, both seller and purchaser of the management's acceptance or rejection of the purchaser and the reasons for any rejection. During these 15 days, the purchaser must comply with management's request for a personal interview. CC §798.74(a). See lease clause in form 6.117-1.

The size, content, and location of "for sale" and "open house" signs are explicitly regulated by the MRL, CC §798.70. See also CC §799.1.5 for analogous requirements in manufactured home subdivisions and resident-owned parks.

If park management has been advised that a mobilehome is for sale, management must provide a statutory notice entitled "INFORMATION FOR PROSPECTIVE HOMEOWNERS," as specified in CC §798.74.5(a) (see form in §6.54A), to prospective purchasers within 2 business days of a request. On that request, management also must provide a copy

of the park lease or rental agreement, the park rules, and the MRL. CC §798.74.5. This is in addition to the disclosure requirement of CC §798.75.5. See §6.24.

NOTE: Under CC §798.76, any mobilehome park rule or regulation limiting residency based on age requirements for housing for older persons must comply with the federal Fair Housing Amendments Act of 1988 (Pub L 100-430, 102 Stat 1619) (see 42 USC §§3604, 3607), which prohibits discrimination against families with minor children (see §§2.22-2.25, 6.18). Under CC §798.76, mobilehome park rules must also comply with further amendments to the federal Fair Housing Act (Pub L 104-76, 109 Stat 787).

Under CC §798.19.5, a new or renewal rental agreement entered into on or after January 1, 2006, may not include a provision that grants the park owner a first right of refusal for a manufactured home being sold in the park to a third party. However, a separate agreement may be negotiated for this purpose.

See also CC §799.5 for similar provisions on mobilehome subdivisions, cooperatives, condominiums, and resident-owned parks.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.54A b. Form: Information for Prospective Homeowners

§6.54A b. Form: Information for Prospective Homeowners

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INFORMATION FOR PROSPECTIVE HOMEOWNERS

As a prospective homeowner you are being provided with certain information you should know prior to applying for tenancy in a mobilehome park. This is not meant to be a complete list of information. Owning a home in a mobilehome park incorporates the dual role of "homeowner" (the owner of the home) and park resident or tenant (also called a "homeowner" in the Mobilehome Residency Law). As a homeowner under the Mobilehome Residency Law, you will be responsible for paying the amount necessary to rent the space for your home, in addition to other fees and charges described below. You must also follow certain rules and regulations to reside in the park.

If you are approved for tenancy, and your tenancy commences within the next 30 days, your beginning monthly rent will be $_ _[*dollar amount*]_ _ for _ _[*park space number*]_ _. Additional information regarding future rent or fee increases may also be provided.

In addition to the monthly rent, you will be obligated to pay to the park the following additional fees and charges listed below. Other fees or charges may apply depending upon your specific requests. Metered utility charges are based on use.

[*Describe in a list fee(s) or charge(s) and good faith estimate of each fee or charge*]

Some spaces are governed by an ordinance, rule, regulation, or initiative measure that limits or restricts rents in mobilehome parks. Long-term leases specify rent increases during the term of the lease. By signing a rental agreement or lease for a term of more than one year, you may be removing your rental space from a local rent control ordinance during the term, or any extension, of the lease if a local rent control ordinance is in effect for the area in which the space is located.

A fully executed lease or rental agreement, or a statement signed by the park's management and by you stating that you and the management have agreed to the terms and conditions of a rental agreement, is required to complete the sale or escrow process of the home. You have no rights to tenancy without a properly executed lease or agreement or that statement. Civil Code Section 798.75.

If the management collects a fee or charge from you in order to obtain a financial report or credit rating, the full amount of the fee or charge will be either credited toward your first month's rent or, if you are rejected for any reason, refunded to you. However, if you are approved by management, but, for whatever reason, you elect not to purchase the mobilehome, the management may retain the fee to defray its administrative costs. Civil Code Section 798.74.

We encourage you to request from management a copy of the lease or rental agreement, the park's rules and regulations, and a copy of the Mobilehome Residency Law. Upon request, park management will provide you a copy of each document. We urge you to read these documents before making the decision that you want to become a mobilehome park resident.

Date: _ _ _ _ _ _

_ _[*Name of Park Manager*]_ _,
a _ _[*specify entity, e.g., California corporation*]_ _

By: __[*Signature*]__
Name: _ _[*Typed name*]_ _
Its: _ _[*Title*]_ _

Acknowledgment of Receipt by Prospective Homeowner:

Date: _ _ _ _ _ _ __[*Signature of Prospective Homeowner*]__
_ _[*Typed name*]_ _

Comment: This form must be printed in 12-point type or font, is completely separate from the mobilehome park agreement, and is required to be given to prospective purchasers by park management under CC §798.74.5(a) when a mobilehome installed in the park is being marketed for sale. See discussion in §6.54. It became mandatory on October 1, 2004.

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§6.55 c. Limitations on Right to Withhold Approval

Civil Code §798.74 also limits the grounds on which management can withhold approval for a sale to either of the following:

- The purchaser does not have the financial ability to pay the rent and charges of the park.
- Management reasonably determines, based on the purchaser's prior tenancies, that he or she will not comply with the rules and regulations of the park.

The rights of surviving heirs and joint tenants to sell the mobilehome are protected by CC §798.78; the rights of repossessing legal owners are governed by CC §798.79. (Note that CC §798.79 requires a foreclosing legal owner or junior lienholder to fulfill the prior homeowner's rent and other financial responsibilities. (Additional rights and obligations of legal owners and junior lienholders with respect to notice requirements and financial obligations after a default declared by park management are provided in CC §798.56a.) See also *Castaneda v Olsher* (2007) 41 C4th 1205, 1218, 63 CR3d 99, which cautions mobilehome park owners on their duty regarding the selection of tenants and the lack of authority to withhold approval of tenants because of suspicion of gang affiliation.

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§6.56 d. Failure to Execute Rental Agreement

Under CC §798.75(b), a purchaser who fails to execute a rental agreement has no "rights of tenancy." Unfortunately, the reference to "no rights of tenancy" is ambiguous. Does it mean that the purchaser and his or her mobilehome are trespassers? Is the purchaser a tenant at will, subject to a 30-day termination notice? Because CC §798.75 does not acknowledge a landlord-tenant relationship between management and the purchaser, an unlawful detainer action cannot be used to remove the purchaser and the mobilehome. The Mobilehome Residency Law (MRL) (CC §§798-799.10) requires service of an antecedent 5-day notice to quit (see CC §798.75(c)), and it is believed that the proper procedure is to pursue a forcible detainer action (the "unlawful occupant shall be subject to the proceedings set forth in Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure" (CCP §§1159-1179a)) as the proper summary remedy to evict the unlawful occupant. If the purchaser refuses to execute a new rental agreement or to move the mobilehome (see §6.117), an action for ejectment of the purchaser and the mobilehome is also available, but such an action is more time-consuming, costly, and cumbersome than the forcible detainer remedy.

PRACTICE TIP: Because courts and attorneys are generally unfamiliar with forcible detainer procedures, management's counsel should brief all issues carefully for trial.

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§6.57 e. Management's Role in Sales or Listings

Management may not show a manufactured home or mobilehome or list it for sale without first obtaining "the owner's written authorization. The authorization shall include the terms and conditions of the showing or listing." CC §798.71(a)(1). Although this language is ambiguous, it presumably means the registered owner's authorization, rather than the legal owner's. Management also may not prohibit the listing or sale of a manufactured home or mobilehome in the park, and may not, as a condition of approval of the buyer, require that the selling homeowner, the homeowner's estate, or joint tenant authorize the management, or any other specified broker, dealer, or person, to act as the agent in the sale of a home. CC §798.71(b)-(c). Beginning January 1, 2010, park management may not require a homeowner who is replacing a mobilehome on a space in the park to use a specific broker, dealer, or other person as an agent in the purchase or installation of the mobilehome. CC §798.71(d).

The extent of management's involvement in any sale is also limited, unless management or its agent is licensed as a "salesperson" or a "dealer" under Health & S C §§18045-18066.5. This limitation is generally interpreted to mean that management may provide service in a sale, but may not involve itself in the "business" of selling mobilehomes without a license. In general, if the service fee accrues to the park, the management's assistance is considered to be a "service"; if the fee accrues to the manager, the assistance is viewed as a "business." For more specific licensing requirements, management should contact the local office of the Department of Housing and Community Development.

Management may not charge a purchasing or selling homeowner, heir, joint tenant, or personal representative a transfer or sales fee as a condition of the sale, unless management performs a service in the sale. CC §798.72. See also *People v Mel Mack Co.* (1975) 53 CA3d 621, 126 CR 505. No such services may be performed without a written request by the homeowner or his or her agent. In *Vance v Villa Park Mobilehome Estates* (1995) 36 CA4th 698, 42 CR2d 723, the court held that a provision in a lease increasing rent on assignment did not constitute a transfer fee in violation of CC §798.72.

If the park manager assists the seller in the sale of the mobilehome, management should be careful that there is no suggestion of illegality in the use of "net listings." In a net listing, the seller sets the price at which he or she is willing to sell the property, and the agent's compensation is any amount received over the specified figure. Net listings are strictly regulated under Health & S C §§18014.5 (defining "net listing") and 18060.5(i) and (*l*) (establishing the written disclosure requirements for licensed mobilehome dealers or persons acting as dealers without a license). See California Real Property Sales Transactions §§2.63 and 2.136 (4th ed Cal CEB 2007) for discussion of brokers' net listings.

Management should not use sales of mobilehomes to avoid the application of rent controls. One park owner was found liable for over $1 million in restitution and penalties as a result of forcing buyers to assume "sham" leases of a local mobilehome dealer who never lived in the park but executed long-term leases with mandatory built-in rent increases significantly in excess of those allowed by the local rent control law. See *People v Beaumont Invs., Ltd*. (2003) 111 CA4th 102, 3 CR3d 429.

PRACTICE TIP: In the event of misrepresentation or fraud or several other specified statutory violations in the purchase or sale of a mobilehome or manufactured home, the seller or buyer may be entitled to reimbursement from the Manufactured Home Recovery Fund ("MHRF") for actual and direct losses plus court costs and attorney fees. The substantive and procedural requirements are set forth in Health & S C §§18070-18070.7, and claims against the fund have a 2-year limitations period.

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§6.57A f. Seller Disclosures

Most sellers of manufactured housing units or mobilehomes must disclose to the buyer specific information about the condition of the unit. CC §§1102(b), 1102.6d. The seller of a mobilehome located in a mobilehome park is required by CC §798.74.4 to comply with the mobilehome disclosure requirements in Article 1.5 (commencing with §1102 of the Civil Code, including but not limited to the disclosure statement form in CC §1102.6d. See also §6.24.

Delivery of the disclosure statement may not be waived in an "as is" sale (CC §1102.1(b)), and the requirement explicitly applies to sellers who are not licensed salespersons (CC §1102.1(c)). Transactions exempt from this requirement are listed in CC §1102.2, and requirements related to the timing of the disclosure and required rescission period are in CC §1102.3a.

Even without a disclosure, however, the sale of a substandard mobilehome or manufactured home is illegal. Health & S C §18025. A substandard mobilehome or manufactured home cannot be occupied or used in a park. Health & S C §18550.

Sellers must provide a declaration as part of the sales transaction that there is an operable certified smoke alarm in every sleeping room of a mobilehome or manufactured home. Health & S C §18029.6. Under Health & S C §18031.7(d), hot water tanks must have warnings on them distinguishing those that use natural gas from those that use liquefied petroleum gas. The code also requires that water heaters in mobilehomes or manufactured homes be seismically strapped, anchored, or braced and that regulations be adopted to ensure compliance. Health & S C §18031.7(e)-(g).

Disclosure of a mobilehome's age, condition, and ability to remain in the park created a new issue after September 1, 2008. All new mobilehomes installed, and most existing mobilehomes relocated or altered, in mobilehome parks that are in specified high fire hazard areas must meet new Department of Housing and Community Development (HCD) ignition-resistant construction standards. See 25 Cal Code Regs §§4200-4216.

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§6.58 g. Required Removal of Mobilehome After Sale

Park management may not require the removal of a mobilehome from the park in the event of its sale to a third party during the term of the homeowner's rental agreement or within the 60-day period following a termination notice given under CC §798.55(b)(1). See CC §798.73. As many parks "upgrade" to newer or double-wide mobilehomes and remove substandard units, however, the problem of requiring purchasers to remove mobilehomes that do not conform can be critical. Under CC §798.73, management's discretion in removing homes after sale to a third party is limited to those that are:

- Not "mobilehomes" within the meaning of CC §798.3;
- More than 20 years old (or more than 25 years old if manufactured after September 15, 1971), 20 feet wide or more, and not in compliance with specified construction and safety standards prescribed by the Health and Safety Code following inspection by the appropriate enforcement agency, as defined in Health & S C §18207; or
- More than 17 years old (or more than 25 years old if manufactured after September 15, 1971), less than 20 feet wide, and not in compliance with specified construction and safety standards prescribed by the Health and Safety Code following inspection by the appropriate enforcement agency, as defined in Health & S C §18207.

After receiving notice from a mobilehome owner of the anticipated sale of the mobilehome, park management may require its removal on sale if it is "in a significantly rundown condition or in disrepair." CC §798.73(d). Effective January 1, 2008, management is prohibited from requiring a mobilehome's removal unless management has provided the homeowner with a notice "particularly specifying" the condition that permits requiring removal of the mobilehome. CC §798.73(e).

WARNING: This subjective determination of the condition of the mobilehome may lead to litigation or a frayed relationship between management and the seller, or between management and the seller's friends in the park.

What will constitute a condition that is significant enough to allow removal (as well as adequate specificity of that condition in the notice) will ultimately be decided by the courts. Civil Code §798.73(d) requires that management use "reasonable discretion" and bear the burden of proof in establishing the condition of the mobilehome. In determining whether a mobilehome can be removed because it is in a significantly run-down condition or in disrepair, management may not consider repairs and improvements needed for park space or property owned by management, except for damage caused by the homeowner. CC §798.73(d). Courts are likely to rule that a mobilehome would have to be a serious health hazard to be removed on this basis. See §6.117.

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§6.59 10. Cotenants, Sublessees, and Subsequent Tenants

New homeowners have no statutory right to assume the benefit of an existing rental agreement by subletting, assignment, or otherwise, but a homeowner may rent out or sublet his or her home under CC §798.23.5 in the event of particular exigencies and subject to specified requirements. See §6.61. Although the Mobilehome Residency Law (MRL) (CC §§798-799.10) prescribes the rental application requirements that apply to a new purchaser of a mobilehome remaining in a park (CC §798.74; see §§6.54-6.56), no statutes govern park management's acceptance of cotenants, subleases, or subsequent tenants after sale of a mobilehome. For discussion of sublessees, see §6.61. Civil Code §§798.34-798.35 merely limit fees prescribed for certain co-tenants, guests, or members of a family. It seems clear, however, that management may require guests or additional members of a tenant's family to execute a rental agreement if they remain on the premises as tenants. See also §§6.20, 6.117-6.118.

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§6.60 a. Cotenants

An argument can be made that management cannot require that the pre-existing rental agreement be supplemented with the addition of further persons merely because they are residing on the premises. It is likely that the unstated contemplation of the parties in the first instance was that additional guests would be permissible or even expected to reside in the mobilehome. Assuming that there was no original understanding that additional guests would be required to become bound to the terms of the rental agreement, there may be a "pre-existing duty" issue that would render any demand for additional obligors' agreement to a lease to be unenforceable. It is also arguable that even a demand that additional persons assume the duties of the agreement would be impermissible.

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§6.61 b. Sublessees

Although many park rental agreements prohibit subleasing, mobile-home owners have the right to rent out or sublet their homes if a medical emergency or medical treatment requires an owner to be absent from his or her home and the medical conditions are confirmed by an attending physician. CC §798.23.5. This right is subject to several specific requirements, including generally limiting the term to 6 to 12 months and allowing park management to require approval of a prospective renter or sublessee consistent with CC §798.74, restrictions on the amount of rent the homeowner may charge, and other restrictions.

PRACTICE TIP: Both homeowner and park management attorneys should be careful in implementing this section, given several ambiguities and the financial penalties that may accrue for willful violations. For example, it is unclear whether the "attending physician" must be an M.D., whether the 6-to-12-month terms can be extended or renewed if the medical condition continues, whether maintenance and park fees—in addition to space rent—may be charged by the homeowner, what a "legal representative" is for the purpose of the information to be provided to management, and how to ascertain that the home is the "primary residence."

In other situations, the terms of the rental agreement should probably be renegotiated before a sublessee takes possession, if the right to sublease was not within the scope of homeowners' general rights at the inception of the rental agreement; otherwise, the new occupant could be denied a rental agreement and thus status as a homeowner. On the other hand, a periodic tenancy may be amended on proper notice. Thus, under CC §827 (for the rental agreement) and CC §798.25 (for rules and regulations), some attorneys representing park management argue that management is free to amend both types of residency documents to require additional terms. Although this may be the case for park rules and regulations, counsel representing homeowners argue that CC §827's applicability is preempted by the Mobilehome Residency Law's coverage of rental agreements (periodic and otherwise). See *Gregory v City of San Juan Capistrano* (1983) 142 CA3d 72, 191 CR 47, overruled on other grounds in *Fisher v City of Berkeley* (1984) 37 C3d 644, 686 n43, 209 CR 682. It must be remembered, however, that rules cannot be changed unilaterally unless the amendment is reasonable and management agrees to meet and confer with homeowners, except when the rule change is mandated by a change in a law, ordinance, or regulation. CC §798.25; see §§6.45, 6.112, 6.141-6.143.

PRACTICE TIP: Because this standard is unclear, attorneys should be cautious about advising landlords and tenants concerning unilateral modifications of residency documents.

Management's ability to change the terms of a rental agreement may be critical when a cotenant or sublessee becomes part of an existing long-term lease in which the terms are no longer favorable to management. In *Rancho Santa Paula Mobilehome Park v Evans* (1994) 26 CA4th 1139, 32 CR2d 464, the court held that park management could not retroactively enforce a new rule prohibiting subleasing against a nonconsenting mobilehome owner. The court rejected management's argument that the rule was valid because new park rules can be adopted without the mobilehome owner's consent under CC §798.25. The court held that rules adopted without consent under CC §798.25 must be reasonable and that a prohibition against subleasing, not contained in the lease or adopted with the homeowner's consent, was unreasonable. See also §6.112.

PRACTICE TIP: A landlord may inadvertently assume significant liability for undertaking illegal actions to support a homeowner's eviction of a sublessee or other third party beneficiary of a lease. See *Spinks v Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 90 CR3d 453.

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B. Statutory Remedies in Mobilehome Park Tenancies

1. Termination of Tenancy

§6.62 a. Scope of MRL

The Mobilehome Residency Law (MRL) (CC §§798-799.10) governs the relationship between a park resident (defined by CC §798.11 as "a homeowner or other person who lawfully occupies a mobilehome") and the mobilehome park. "Mobilehomes" are defined at CC §798.3, and "mobilehome parks are defined at CC §798.4. See §§6.1-6.4. The tenancy termination provisions of the MRL (see CC §§798.55-798.60) apply to evictions of persons defined as "homeowners" of mobilehomes installed in mobilehome parks, *i.e.,* those who have entered into rental agreements with the park management to locate mobilehomes within the park. The MRL limits the reasons for termination and requires a longer notice period (see §§6.63-6.74) than in an ordinary termination (see chap 8).

The eviction protections given to homeowners in the MRL do not apply to an occupant of a mobilehome who does not have a tenancy agreement with the park. A resident-subtenant who occupies an installed mobilehome under an agreement with the owner of the mobilehome, rather than with the park management, may be evicted by the mobilehome owner only under the unlawful detainer statutes (CCP §§1159-1179a; see chaps 8-9), and management's remedy is to terminate the homeowner's tenancy and evict the homeowner (in accordance with the MRL and the unlawful detainer statutes) in order to evict the subtenant.

WARNING: An owner of a recreational vehicle or park trailer located in a recreational vehicle park is entitled to eviction protections if the vehicle has been in the park pursuant to a tenancy that is continuous for 9 or more consecutive months. See CC §§798.3(b), 799.70.

Park management's failure to observe the tenancy termination provisions of the MRL strictly may result in dismissal of an unlawful detainer action and force management to begin the 60-day notice procedure over again. Moreover, attorney fees may be assessed against the losing party. CC §798.85.

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§6.63 b. Permissible Grounds

The permissible grounds for eviction of a homeowner are specified in CC §§798.56(a)-(g). See §§6.64-6.70.

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§6.64 (1) Failure to Comply With Laws

Eviction is permitted if the homeowner or resident fails to comply, within a reasonable time after notice of noncompliance by a government agency, with a local ordinance, state law, or regulation relating to mobilehomes. CC §798.56(a). Common examples of this type of noncompliance include:

- Creating or permitting the existence of defective conditions in or around the mobilehome;
- Installing an illegal structure; and
- Creating a nuisance.

Eviction on the ground of failure to comply with the law requires prior notice to the homeowner by a government agency, and management must also allow a reasonable time after notice for repair or correction of the breach. Notice should also be provided to the registered owner of the mobilehome if the mobilehome has been sublet to the resident.

PRACTICE TIP: An attorney recommending use of this ground for eviction should ensure that the homeowner or resident has in fact failed to comply with government orders. Health and Safety Code §18420 and the implementing regulations (25 Cal Code Regs §§1600-1758) provide numerous opportunities for hearings, appeals, and extensions of compliance dates (for causes such as weather conditions, illness, lack of availability of repair persons, or lack of available financial resources) deferring the date of a default in compliance.

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§6.65 (2) Conduct Constituting Substantial Annoyance

Conduct of a homeowner or resident on park premises that constitutes a substantial annoyance to other tenants is also grounds for eviction. CC §798.56(b). This ground for eviction does not give the homeowner an opportunity to cure the breach. Accordingly, this ground should be used only in situations where the homeowner's conduct is so outrageous that it would not be appropriate to give the homeowner a "second chance." Since this ground for eviction requires proof that the homeowner's conduct constituted a substantial annoyance to other residents, it should not be used unless affected tenants are willing to testify at trial. However, given the "unique protection" finding expressed by the legislature in CC §798.55(a), if the "substantial annoyance" is not considered substantial enough by a judge seeking to mitigate this forfeiture, some tenant attorneys argue that the judge could find the tenant should have been given an opportunity to cure the breach.

The intention to provide "unique protection" to mobilehome tenants may influence a court to deny forfeiture or termination of a mobilehome term tenancy or month-to-month tenancy. When subjective grounds are the basis for an eviction (*e.g.,* conduct constituting "substantial annoyance" to other tenants), a higher standard of proof may be required than otherwise anticipated. See CC §798.56(b). Attorneys should be prepared to provide adequate proof of "good cause" for eviction. See §7.54.

PRACTICE TIP: Some park attorneys advise park owners to give the offending homeowner notice and an opportunity to cure even though it is not required under §798.56(b). This documents the occurrences of "substantial annoyance" and makes the unlawful detainer action much more difficult to defend.

A related issue, the basis for determining a park owner's duty and liability to a tenant or third party due to another resident's behavior, is similarly affected by the restrictions in CC §§798.56-798.57. See *Castaneda v Olsher* (2007) 41 C4th 1205, 1219 n4, 63 CR3d 99, discussing the shooting of one park resident by another resident alleged to be a gang member and the burden of a "good cause" eviction. The court affirmed summary judgment in favor of the park owner in a liability action by the injured resident; the court held that facts known to the owner did not make a violent episode sufficiently foreseeable as to require the owner to evict the gang member.

WARNING: There is no indication in *Castaneda* that the court intended to apply the tort standard used in liability actions as a minimum standard for eviction based on substantial annoyance under CC §798.56(b). *Castaneda* deals with traditional tort standards and whether conduct—or potential conduct—is reasonably foreseeable so as to impose liability for harm to a third party, whereas evictions occur within established landlord-tenant law standards, such as whether the conduct—or potential conduct—results in a duty by the owner to mitigate a breach of quiet enjoyment for other tenants. If the same standard were to apply to both, park owners might not be able to exercise the remedy of eviction until harm actually occurred.

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§6.66 (3) Conviction for Specified Crimes

A homeowner or resident may be evicted if convicted of prostitution, certain specified violent crimes, or a felony controlled-substance offense and if the act was committed anywhere in the park, including within a mobilehome. However, the tenancy may not be terminated if the person convicted of the offense permanently vacates the mobilehome. CC §798.56(c).

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§6.67 (4) Failure to Comply With Park Rules and Regulations

Failure of a homeowner or resident to comply with a reasonable park rule or regulation (see §§6.45-6.46, 6.141-6.142) also provides grounds for eviction. CC §798.56(d). This could include violations of park rules applicable only to homeowners receiving assistance under public affordable housing or replacement housing programs. Consistent with loan or grant requirements imposed on the park operator, these may include noncompliance with certain income standards (*e.g.,* the low income housing tax credit program, Health & S C §§50199.4-50199.18), not maintaining employment in certain occupations such as agricultural labor (Health & S C §§17021.6, 50517.5), or violating loan program requirements prohibiting subletting when benefits are specific to individuals, such as federal Section 8 vouchers. Failure of the resident to comply with these requirements may also subject management to potential penalties under the housing programs in which resident compliance is the responsibility of the housing operator. See §6.15A for a discussion of the relationship between the federal Section 8 program and local rent control ordinances if the park owner seeks to terminate participation in the Section 8 program.

The rule or regulation must be reasonable and must be stated (or incorporated) in the rental agreement or later amendments to the agreement. Management must provide the homeowner with a 7-day notice to cure the breach. After three notices have been given in 1 year for the same breach, no written notice to cure the breach is required for a subsequent violation of the same rule or regulation.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.68 (5) Nonpayment of Rent or Charges for Services or Utilities

§6.68 (5) Nonpayment of Rent or Charges for Services or Utilities

Failure of a homeowner to pay rent, utility charges, or reasonable incidental service charges is grounds for eviction. CC §798.56(e). However, rent may not be "due" or "late" if the park's permit to operate is suspended or has lapsed. See §6.16. A 3-day written notice to cure the breach must be given to the homeowner. The legal owner, any junior lienholder, or the registered owner of the mobilehome, if other than the homeowner, has the right to cure the breach on behalf of the homeowner for 30 days, but has that right only twice during a 12-month period. Thereafter, the mobilehome will be subject to eviction. The 3-day notice to cure a default in rent, utility charges, or reasonable incidental service charges is not required if the homeowner has received such a notice at least three times during the preceding 12-month period; in that event, management may give a 60-day, noncurable notice.

NOTE: Under CC §798.56(e)(1), a 3-day nonpayment notice to pay rent or quit (see, *e.g.*, §8.41) must contain the following paragraph at the top of the notice in at least 12-point boldface type and with the blanks filled in.

WARNING: This notice is the _ _[*e.g., first/second/third*]**_ _ three-day (3-day) notice for nonpayment of rent, utility charges, or other reasonable incidental services that has been served on you in the last 12 months. Pursuant to Civil Code §798.56(e)(5), if you have been given a 3-day notice either to pay rent, utility charges, or other reasonable incidental services or to vacate your tenancy on three or more occasions within a 12-month period, management is not required to give you a further 3-day period to pay rent or vacate the tenancy before your tenancy can be terminated.**

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§6.69 (6) Condemnation of Park

If the park is condemned, homeowners and residents may be evicted. CC §798.56(f).

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§6.70 (7) Change of Use of Park; Closure of Park

If there is a change of use of the park or any portion of it, homeowners and residents may be evicted. CC §798.55(g). For discussion of special notice requirements, see §6.51. See also *Keh v Walters* (1997) 55 CA4th 1522, 65 CR2d 42 ("change of use" as implied by this subdivision does not arise when owner merely evicts tenant to create vacant space); *Sequoia Park Assocs. v County of Sonoma* (2009) 176 CA4th 1270, 98 CR3d 669 (authority of cities and counties to enact ordinances related to conversion of parks to resident ownership). With certain exceptions (see, *e.g.,* Govt C §65863.7(f)-(g)), when a government agency causes the closure or change of use, the government agency, and not the park owner, is required to prepare the necessary relocation impact report and provide the relocation benefits, if any. See, *e.g.,* Govt C §65863.7(i). See also §§6.13, 6.50.

If a government agency causes the change of use and requires the park management to provide less than 1 year's notice, the government agency may mitigate the management's liability to the homeowners for the shorter notice. For example, homeowners may be entitled to relocation benefits if the closure is a result of redevelopment agency activity (Health & S C §§33410-33418), activities with certain state or local government financing (Govt C §7260), or a stipulation in an eminent domain action in which the condemning entity agrees to pay relocation benefits to the homeowners. However, a park closure as a result of code enforcement activity because park management has not complied with public health and safety requirements does not impose any relocation obligations on government agencies, because it is the park management's failure to comply with legal requirements that resulted in the closure of a park with less than 12 months' notice. (For analogous obligations of property owners to provide relocation benefits in the event of code enforcement displacement, see Health & S C §§17062, 17980.7.)

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c. Impermissible Grounds

§6.71 (1) Grounds Established by MRL

Civil Code §798.58 expressly prohibits termination of a tenancy for the purpose of making a homeowner's site available for a person who purchases or proposes to purchase, or rents or proposes to rent, a mobilehome from the park owner or its agent. Other impermissible grounds for eviction are not stated in the MRL, but may be found in a variety of other laws. See, *e.g.,* §§6.14-6.18, 6.72. For permissible grounds peculiar to mobilehomes, see CC §798.56. See §§6.64-6.70.

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§6.72 (2) Retaliation

An eviction in retaliation for a tenant's exercise of protected rights would clearly be impermissible. See *Barela v Superior Court* (1981) 30 C3d 244, 178 CR 618; *Rich v Schwab* (1998) 63 CA4th 803, 75 CR2d 170; §6.17. The prohibition against evicting a tenant for complaining about a landlord's breach of the implied warranty of habitability should also apply to mobilehome parks. See *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704; see §6.16.

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§6.73 (3) Expiration of Stated Term

Contrary to the rule in conventional landlord-tenant law (see §8.82), expiration of a rental agreement's stated term is not grounds for eviction. In such a case, the homeowner continues in the tenancy, because the tenancy can be terminated only for the causes specified in CC §798.56 (see §§6.64-6.70), and there is no requirement in the MRL that homeowners sign subsequent rental agreements. See CC §798.55(b).

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§6.73A (4) Lapsed or Suspended Permit to Operate

When a park's permit to operate has lapsed or been suspended, failure of a homeowner or a park tenant to pay space rent to the park operator during the period without a valid permit to operate may not be grounds for eviction. See *Espinoza v Calva* (2008) 169 CA4th 1393, 87 CR3d 492. But a judgment for possession in favor of the park owner may ensue if the lease is declared void as against public policy because of the lapsed or suspended permit. See §§3.11E, 10.62.

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§6.74 d. Notices of Termination

All notices of termination must be in writing and must be served in the manner required by CCP §1162. CC §798.55(b). All notices must be given at least 60 days before the termination date, with copies sent to the legal and registered owners of the mobilehome and junior lienholders within 10 days after notice to the homeowner. The prescribed method of service is set forth in CC §798.55(b).

A conditional right of sale during the 60-day period is authorized by CC §§798.55(b)(1), 798.73. See §§6.54, 6.58. But if the homeowner sells the mobilehome after being served with the 60-day notice, the homeowner must pay all rent and utilities in default. CC §798.55(b)(2).

The specificity of termination notices is governed by CC §798.57. They must state the facts that constitute the grounds for the eviction, rather than offer general allegations. The facts must be specific enough to allow determination of the date, place, witnesses, and circumstances of the grounds for termination. This statutory requirement implies that no facts or grounds other than those set forth in the notice may be raised at trial as a basis for eviction.

A notice of termination resulting from a change of use of the mobilehome park must be preceded by the notices required by CC §798.56(g) (see §6.51). If the attorney does not incorporate valid notices into the unlawful detainer complaint, the complaint may be subject to demurrer. See chap 10.

A 60-day notice of termination based on nonpayment of rent, utility fees, or reasonable incidental service charges must be preceded by a 3-day notice that the homeowner must pay the amount in default or vacate the premises. The 60-day notice may be given at the same time as the 3-day notice, but payment within the 3-day period cures both notices. One purpose of the additional time given by the 60-day notice is to provide the homeowner an opportunity to move the mobilehome off the space (or sell it in place under specified terms). See CC §§798.55(b)(1), 798.73. Language required to be included in the 3-day notice can be found at CC §798.56(e)(1). See §6.68. Under CC §798.56(e), the 60-day notice must also be given to the legal and registered owners of the mobilehome (if not the same as the homeowner) and to any junior lienholders, who may cure the default within 30 days of notice. This cure may be exercised by right only twice each 12-month period during the tenancy. Civil Code §798.56(e)(4), (6), gives legal owners, junior lienholders, and registered owners of a mobilehome who are not financial institutions or mobilehome dealers an additional opportunity to cure a default within 30 calendar days under specified circumstances. See §6.75.

A 60-day termination notice based on the failure of a homeowner or resident to comply with "reasonable" rules of the park must be preceded by a 7-day notice to comply. CC §798.56(d). The breach may be cured within that period, but management is not specifically authorized by statute to serve both notices at the same time. The apparent implication of this difference is that they cannot be served simultaneously. See also §6.119.

A resident who remains in a mobilehome park after service of a notice of termination remains subject to the Mobilehome Residency Law (MRL) (CC §§798-799.10) and park rules and regulations, and no lawful act by management to enforce the MRL or park rules and regulations after service of the notice will waive or otherwise affect the notice of termination. CC §798.55(d)-(e).

NOTE: Special rules in CC §798.78 apply to terminations when the homeowner has died and the mobilehome is owned by an heir, joint tenant, or personal representative of the estate.

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§6.75 e. Special Concerns When Secured Lenders Are Involved

Lenders secured by an interest in the mobilehome (legal owners) have certain specified rights, which include the following:

- The right to be sent the notice (CC §§798.55-798.56) (only the 60-day notice is required, but the 3-day and 60-day notices are typically served on the tenant together and sent to the legal owner together);
- The right to cure on behalf of the tenant (CC §798.56(e)(3));
- The right to pay the arrearages and resell the mobilehome in place in the park to a third party acceptable to park management (CC §798.79);
- The right to advise the park it will pay rent and pay for the unlawful detainer (CC §798.56a); and
- The right to tell the park it will pay the rent and foreclose (CC §798.56a).

These rights do not create a tenancy in the lender, and the lender does not have the rights of a homeowner.

The lender may elect to foreclose on the mobilehome, on the basis of the 60-day notice of termination of tenancy, and pursue its own unlawful detainer action pursuant to CCP §1161a. The foreclosing lender will then have the right to sell the mobilehome in place, subject to the requirements of CC §§798.56a and 798.79.

WARNING: Lenders should be careful to insure they are properly on title to the mobilehome, and that they comply in a timely manner with the strict timelines preconditioning exercise of their rights. Lenders and other parties can obtain a current title report for a mobilehome from the Manufactured Home Registration and Titling Program either online or by mail from the Department of Housing and Community Development. See Directory for address, telephone number, and website.

An assignment of an interest in the mobilehome to a lender may create risks for management, unless:

- Management acts promptly and serves the notice required by CC §§798.56 and 798.57, and the lender or other lienholder performs its obligations under CC §798.56a.
- The lender can sell the mobilehome, less outstanding obligations to the management for the homeowner's rent liabilities, for more than can be obtained from a wholesale buyer or other buyer who will pay more to remove the mobilehome from the park. CC §798.56a. In this case, there is no obligation by the lender to reimburse management for any rent.

The lender is not required to advise the park owner of this possibility until 60 days after the termination notices are served on the tenant by the park. CC §798.56a. Thus, for example, if the lender can obtain a better price for the mobilehome from a third party than could be obtained from sale proceeds on sale of the mobilehome in place (less the delinquent rents and other charges), the lender will waive the duty to pay rent (required to preserve the right to keep the mobilehome in place), and sell for "pull-out." In this case, the park owner may, at best, have a 2-month security deposit (see §6.44) to which to resort. Because the lender is not obligated to advise the park owner of the intent to pay the rents and keep the mobilehome in the park until the expiration of the 60-day termination notice (at which time at least 3 months' rent is then due), the park owner will have no security for damages equal to at least 1 month (assuming application of a 2-month security deposit). Therefore, by the time the lender is required to act, the management is already unsecured by at least 30 days' past rents.

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2. Eviction; Execution of Judgment; Lien Enforcement

§6.76 a. Procedures for Eviction

The unlawful detainer action (see chap 9) is the remedy for enforcing a termination of the tenancy, removing the occupants of the mobilehome, and recovering possession of the space. (Other procedures are required to obtain title to the mobilehome: execution on money judgment, warehouse's lien, or petition for declaration of abandonment of mobilehome. See §§6.77-6.84.)

After all required notices have been given to the homeowner or resident, and if the homeowner or resident does not voluntarily vacate the premises, termination of the homeowner's or resident's tenancy in the park is enforced by an unlawful detainer court action undertaken by management under CCP §§1159-1179a. See §§6.67, 9.35. The unlawful detainer complaint should name all known residents, as well as the "homeowner," for the eviction to apply to them. A prejudgment claim of right of possession should also be served pursuant to CCP §415.46, for the eviction to apply to "all unknown occupants." See chaps 9-13. (Antecedent eviction notices are not required when the abandonment remedy described in §6.84 is utilized; under CC §798.61 at least 60 days' rent must be due, and management must hold a "reasonable" belief that the mobilehome has been abandoned.)

The unlawful detainer provisions should be followed except when the MRL specifically provides other termination requirements. CC §798.60; *Palmer v Agee* (1978) 87 CA3d 377, 150 CR 841. See §§6.14, 6.62. A successful unlawful detainer results in a judgment for possession (under which the sheriff will remove the occupants) and a money judgment. The sheriff will remove the occupants of the mobilehome even if the park does not own the mobilehome.

NOTE: Code of Civil Procedure §1166(c)(1)(B) requires that a copy of the written lease and all addenda or attachments to it be attached to the unlawful detainer complaint. The clear language of this law appears to require attaching even "park rules" and a copy of the MRL, which are incorporated by reference in most park leases or rental agreements.

Lenders secured by an interest in the mobilehome (legal owners) may evict the homeowner and any resident-subtenant under the procedures described in §6.75.

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§6.77 b. Execution of Money Judgment Against Mobilehome

Execution on a money judgment against the mobilehome is one way for the park to satisfy a money judgment against the owner of the mobilehome and to obtain title to the mobilehome. It is not a substitute for the termination of tenancy requirements of CC §§798.55-798.56.

The mobilehome may be vacated by the occupants voluntarily or by eviction of the occupants under a writ of possession issued under an unlawful detainer judgment. After entry of a money judgment, the mobilehome may be seized and sold by park management if it has not been removed from the premises by the homeowner or the lender. The judgment creditor (management) obtains a writ of execution (CCP §699.510), and then the levying officer serves a copy of the writ of execution (CCP §700.010) on the mobilehome occupants or, if no occupants are present, posts the notice of intended sale (CCP §700.080(a)). The notice may be served at the same time as the writ of execution. CCP §700.010. At the time of service or thereafter, a keeper may be placed in charge of the mobilehome (CCP §700.080(b)), and a court order may be obtained to remove any occupant who remains on the property (CCP §700.080(c)). An execution lien is created at the time of levy under a writ of execution. CCP §697.710. The priority of the execution lien creditor is governed by the provisions of Health & S C §18106.

The mobilehome may be sold 10 days after notice of sale. CCP §701.530(b). The execution sale extinguishes any lien subordinate to the execution lien. CCP §701.630. The purchaser at the execution sale acquires the interest of the judgment debtor in the mobilehome, if any. CCP §701.640. The levying officer will provide a certificate of sale to the purchaser. CCP §701.650(a)(1). The lien sale purchaser then files the certificate of sale with the Department of Housing and Community Development. Health & S C §18100.5(d).

Execution of a judgment lien against a mobilehome is a complicated and difficult endeavor. Before seizing the mobilehome, the executing officer will require proof (*i.e.,* a copy of a title report obtained from the state Department of Housing and Community Development) that the mobilehome is owned by the debtor, and payment of a sizable deposit. The issue of whether a "keeper" will be required or the judgment creditor will be permitted to maintain custody until sale must also be resolved with the levying officer (marshal or sheriff). For example, the levying officer may improperly demand a deposit for a keeper, although CCP §700.080(b) provides for a keeper "[i]f the judgment creditor so instructs."

If the management merely wants to relet the premises, the sheriff cannot enforce an unlawful detainer judgment for the space itself. Instead, management must move the mobilehome at its own expense and store it, like other personal property that has been abandoned.

PRACTICE TIP: Local practice varies with respect to the costs of the execution, which may approach or exceed the market value of the mobilehome. Excessive costs of execution may make it impractical to have the levying officer seize and sell the mobilehome. Further, this remedy is not available if the judgment debtor is not the registered owner of the mobilehome. In that case, the only methods for disposing of the mobilehome or removing it from the premises are either to obtain a warehouse's lien under CC §798.56a or to follow the abandonment procedures in CC §798.61. See §§6.79-6.84.

NOTE: The optional provisions of CC §§1980-1991, regarding disposition of personal property remaining on the premises at termination of tenancy, are made inapplicable to mobilehomes by CC §1981(c). Until management obtains a judgment for storage costs, it has the same responsibility for the stored mobilehome as it does for other abandoned personal property. See §§8.154-8.160.

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§6.78 c. Prohibition on Acquiring Lien or Security Interest in Mobilehome

Civil Code §798.38 prohibits mobilehome park management from acquiring any lien or security interest in a mobilehome other than an interest arising from enforcement of a judgment, unless mutually agreed on by the homeowner and management. Any billing and payment on the obligation securing the interest must be kept separate from the current rental obligations. Mobilehome park management may face occupational licensing requirements—and financial penalties for failure to comply—if it is "in the business of" buying and transferring mobilehomes; owners should review their activities with the California Department of Housing and Community Development, Division of Codes and Standards, to obtain advice and information. See Directory for telephone number.

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d. Warehouse's Lien

§6.79 (1) Definition

A warehouse's (or warehouseman's) lien is another means for the park to recover monies owed to it or to obtain title to the mobilehome. It is not a substitute for the termination of tenancy requirements of CC §§798.55-798.56. A warehouse's lien may be granted to the park owner for storage, utilities, unpaid maintenance charges, and costs of dismantling and removing the mobilehome if this is done. CC §798.56a(e). Park management is entitled to a warehouse's lien after appropriate notice if:

- Neither the legal owner nor a junior lienholder exercises one of the options described in CC §798.56a(a) following the homeowner's default on the obligations to park management; or
- The registered owner of a mobilehome that is not encumbered by specified liens fails to comply with a termination notice and is either legally evicted or vacates the premises.

At least 3 months' rent will be due before the park owner is entitled to pursue a warehouse's lien. (Note that antecedent eviction notices are not required when the abandonment remedy described in §6.84 is utilized; under CC §798.61 at least 60 days' rent must be due and management must hold a "reasonable" belief that the mobilehome has been abandoned.)

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§6.80 (2) Warehouse's Lien Procedure

The warehouse's lien may be enforced "either after the date of judgment in an unlawful detainer action or after the date the mobilehome is physically vacated by the resident, whichever occurs earlier." CC §798.56a(e). This procedure is attractive to park management because court proceedings are not required. The remedy dovetails with Commercial Code remedies and is triggered by operation of CC §798.56. Park management is entitled to the lien after the homeowner's default and after giving notice as required by CC §§798.56 and 798.56a if the legal owner and others having specified interests fail to exercise their statutory options. See §§6.79, 6.82. The park's lien is superior to all other liens except the state's lien for taxes and licensing fees on the mobilehome. The park may sell the mobilehome by complying with the steps specified in CC §§798.55, 798.56, and 798.56a (see §§6.81-6.83).

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§6.81 (a) Termination Notice

Management must have served 60-day termination notices on the homeowner, legal owners, and junior lienholders as specified in CC §§798.55, 798.56, and 798.56a. See §6.74. It is recommended that any additional persons or entities involved with the mobilehome or suspected to be owners, lienors, or claimants in any capacity (for example, loan servicing companies) also be served and that their addresses be verified.

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§6.82 (b) Response Options to Termination Notice

The legal owner or junior lienholder must respond within 65 days from the mailing of the 60-day notice if the right to sell the mobilehome in the park is to be preserved and in order to avoid a warehouse's lien. This protects the security interest in the mobilehome's value. The legal owner or junior lienholder must notify the park by certified mail, return receipt requested, that it is selecting one of three options specified in CC §798.56a(a):

Lienholder opts for management to pursue termination. If the lienholder exercises the option to allow management to pursue termination of the homeowner's tenancy, it must offer to reimburse all reasonable attorney fees and other court costs incurred by the park, and must do so before the earlier of 60 calendar days after receipt of written notice from management of these costs or the date the mobilehome is resold. CC §798.56a(a)(3).

Lienholder opts to sell obligation to park. If the lienholder exercises the option to sell the obligation to the park, the park has 15 days following receipt to accept or reject the offer and notify the lienholder by certified mail, return receipt requested; thereafter the lienholder has 10 days to exercise the second or third option and must notify the park by certified mail, return receipt requested. CC §798.56a(a)(1).

Lienholder opts to sell in place. If the lienholder exercises the option to sell the mobilehome in place, the lienholder must fulfill the obligations listed in CC §798.56a(b)(1)-(3). The lienholder must pay the homeowner's "responsibilities and liabilities" (CC §798.56a(b)(1)) for the 90 days immediately preceding the service of the notice of termination of tenancy and must thereafter satisfy the homeowner's responsibilities and liabilities as they accrue until sale to a third party pursuant to CC §798.79. Payment for the 90-day obligation is due within 30 days after the written election, but not later than 65 days after the notice of termination of tenancy was served on the legal owner to preserve the lienholder's rights; other payments are due as they accrue. The lienholder must also undertake and complete certain repairs and corrective actions within specified time periods; this may be difficult when the homeowner still resides in the mobilehome and refuses to cooperate or to leave voluntarily, and the lienholder may request a time extension from park management to accomplish these actions. Failure by the lienholder to comply with any of the statutory substantive or procedural requirements results in park management being entitled to the warehouse's lien and sale of the mobilehome and extinguishment of the lienholder's security interest (as well as being able to sell the mobilehome in place).

If the legal owner or junior lienholder does not respond adequately or at all to the notice provided by management, the lienholder's rights under CC §798.56a are lost and management may either remove the mobilehome from the premises and place it in storage or store it on the premises.

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§6.83 (3) Foreclosing a Warehouse's Lien

The procedure for foreclosing a warehouse's lien, summarized from Com C §§7209-7210, includes the following steps:

- *Components of lien.* The lien must be drafted to include a statement of the elements of the claim, including a statement of the amount due; a description of the mobilehome; a demand for payment within a specified time not less than 10 days after receipt of the notification; a statement that unless the claim is paid within that time, the mobilehome will be advertised and sold at a public sale; and the time and place of any public sale. Com C §7210(b)(2). The sale must be conducted at the nearest suitable location. Com C §7210(b)(4).
- *Delivery of lien.* The lien and notice must be delivered by mail, personal service, or verifiable electronic mail to all persons known to claim an interest in the mobilehome. Com C §7210(a), (b)(1).
- *Location, publication of sale.* The sale must be held at the nearest suitable place to the mobilehome's location, which may be the park office or the mobilehome itself. After expiration of the time in the notice, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held (or if no such newspaper exists, posted at least 10 days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale). The sale must take place at least 15 days after the first publication and must comply with the terms of the notice. Com C §7210(b)(5).
- *Presale satisfaction of lien.* Before any sale, any person claiming an interest in the mobilehome may pay the amount necessary to satisfy the lien and the reasonable expenses incurred. While payment stops the lien procedure, it does not reinstate any right to sell the mobilehome in place, but only the right to remove the mobilehome from the park. Com C §7210(c).
- *Sale and title transfer.* The park owner may purchase the mobilehome at the sale and may credit-bid the debt. Com C §7210(d). A buyer has no right of tenancy and no right to keep the mobilehome in the park, and must remove it after the sale as demanded by the park owner. The park management shall provide the buyer with evidence of the sale, as specified by the California Department of Housing and Community Development (HCD). On request by the buyer, HCD shall register title to the mobilehome in the name of the buyer, whether or not a legal owner or junior lienholder held an interest in the mobilehome. CC §798.56a(e). Commercial Code §7210(e) provides that a bona fide purchaser for value obtains clear title despite noncompliance with the statutory requirements by the warehouse.
- *Park's retention of sale proceeds exceeding lien amount.* The park owner may keep the proceeds of the sale up to but not exceeding the amount of the lien and reasonable expenses, and any balance must be made available to the legal owner along with an accounting of the sale. Com C §7210(f).

NOTE: Review the notice and sale procedures carefully; the warehouse's lien procedures were repealed and re-enacted in 2006 by Stats 2006, ch 254, §49. A pattern of noncompliance by park management with the lien procedure could be asserted as an unfair business practice (see §6.86). Under Com C §7210, the warehouse is liable for damages caused by failure to comply with the requirements for sale and, in case of willful violation, is liable for conversion. Com C §7210(i).

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.84 e. Judicial Declaration of Abandonment (CC §798.61)

§6.84 e. Judicial Declaration of Abandonment (CC §798.61)

An alternative to execution on a money judgment and enforcement of a warehouse's lien, which is available under circumstances specified in CC §798.61, is a petition for declaration of abandonment, under which mobilehome park management sells an abandoned mobilehome and its contents for delinquent rent and other charges if it is abandoned and no rent has been paid for 60 days. For an alternative procedure when a mobilehome is vacated by its resident, see §§6.79-6.83 relating to sale and disposition under a warehouse's lien.

To obtain a judicial declaration of abandonment under CC §798.61, park management must take the following steps:

- *Posting of notice.* After determining that the mobilehome or recreational vehicle (CC §798.61(a)(2)(A)) is "abandoned" (defined as rent unpaid for 60 days, unoccupied, and reasonably believed to be abandoned), management must post a 30-day "notice of belief of abandonment" on the mobilehome and serve it on the homeowner and registered owner(s) at all known or believed addresses by registered or certified mail, return receipt requested.
- *Petition.* Thirty days after posting, management may file a petition as a limited civil case in superior court seeking a judicial declaration of abandonment. Copies of the petition must be posted on the mobilehome and mailed to the homeowner and registered owner(s) by registered or certified mail, return receipt requested.
- *Default judgment.* If no answer is filed, management may take a default and obtain a judgment declaring the mobilehome to be abandoned. Some courts may require a proof to obtain early judgment, and some courts require a noticed motion despite the statute's provisions authorizing a default procedure.
- *Judgment after contested hearing*. If an answer is filed (of course, unlikely), trial should be set. Note that the statute provides that the petition can be defeated if a claimant establishes an ownership interest in the mobilehome. This arguably applies, however, only if the claimant had appropriately claimed an interest in response to the 30-day notice of belief of abandonment; if there was no response to the notice, it is arguable that the abandonment of the mobilehome is a matter that is conclusive and cannot be changed by proof at trial to the contrary. See CC §1951.3. If park management prevails at trial, the court should enter judgment declaring the mobilehome abandoned.
- *Presale inventory and notice.* Within 10 days after entry of judgment, management shall enter the mobilehome to inventory the contents and then file the inventory with the court. At this time, management must post and mail the "notice of intent to sell" the abandoned mobilehome and its contents; this notice must announce the date of sale and must be served and mailed like the "notice of abandonment."
- *Presale acknowledgment of satisfaction of judgment.* At any time before sale of the abandoned mobilehome, the homeowner or resident or heirs and personal representatives—anyone with a right of possession—may remove the mobilehome and possessions after payment of all rent and other charges due, including amounts due under the judgment. If this occurs, management must immediately file an acknowledgment of satisfaction of judgment. (If the claimant wants only the possessions, the Mobilehome Residency Law (MRL) (CC §§798-799.10) does not appear to restrict him or her from removing personal property from the mobilehome before its sale.)
- *Sale.* Not less than 10 days after the notice of sale, management may conduct the sale of the abandoned mobilehome and personal possessions. Publication is not required but is recommended. Management may offset its bid to the extent of amounts due, but any excess received must be turned over to the county treasury. Management must provide the purchaser at the sale with a copy of the judgment of abandonment and evidence of the sale, such as a bill of sale. The sale passes title to the purchaser free of any prior interest, including any security interest or lien, except the liens imposed for taxes and registration.
- *Accounting.* Within 30 days after the date of sale, management must submit to the court an accounting of the moneys received from the sale and the disposition of the money and the inventory of contents.

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3. Additional Remedies

a. By Tenants

§6.85 (1) Public Nuisance

Under CC §798.87, park management's "substantial failure" to keep the physical improvements and common facilities in good order is a "public nuisance," as is a substantial violation of a park rule. Section 798.87(c) provides that park residents or the local district attorney, county counsel, city attorney or city prosecutor, or the State Attorney General may bring a civil action to correct the public nuisance. See also §6.88.

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§6.86 (2) Management's Willful Violations and Illegal Business Practices

Civil Code §798.86 provides damages for violations of the Mobilehome Residency Law (MRL) (CC §§798-799.10) and currently authorizes a penalty not to exceed $2000 for each willful violation of the MRL by management "in addition to damages afforded by law." In *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v De Anza Santa Cruz Mobile Estates* (2001) 94 CA4th 890, 114 CR2d 708, the court of appeal rejected a punitive damages award of $6 million, holding that a plaintiff suing under the MRL is limited to the statutory formula of actual damages, the statutory penalty for each willful violation, and attorney fees and costs. The ambiguity that was litigated in *De Anza* was resolved by an amendment to CC §798.86, adding a new subdivision (b), which limits a homeowner or former homeowner who is a prevailing party in a civil lawsuit to either punitive damages pursuant to CC §3294 or the statutory penalties in CC §798.86(a). On attorney fees, see §6.89.

If management is responsible for willful violations of mobilehome residency standards or mobilehome sales requirements, it may be liable for federal and state civil and criminal penalties under the Manufactured Housing Act of 1980 (Health & S C §§18000-18199). Violations of the Mobilehome Parks Act (MPA) (Health & S C §§18200-18700) could result not only in civil and criminal penalties, but also in suspension of management's permit to operate the mobilehome park. Finally, unlawful business practices may be enjoined and penalized under Bus & P C §§17200-17209. See also *People v McKale* (1979) 25 C3d 626, 159 CR 811; *People v Beaumont Invs., Ltd*. (2003) 111 CA4th 102, 3 CR3d 429 (see §6.21). But see *Kraus v Trinity Mgmt. Servs.* (2000) 23 C4th 116, 96 CR2d 485; *Farmers Ins. Exch. v Superior Court* (1992) 2 C4th 377, 383, 6 CR2d 487.

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§6.87 (3) Other Remedies

To the extent that the repair-and-deduct (see CC §1942), retaliatory eviction (see CC §1942.5), lock-out (see CC §789.3), and security deposit (see CC §1950.5) provisions apply to mobilehome residencies, penalties or actions under these statutes may be pursued (see §§1.51, 4.11, 6.14 and chaps 3-5, 8, and 10). A homeowner or resident who is prevented from exercising rights concerning homeowners' meetings under CC §798.51 may seek appropriate remedies under CC §798.52. Special provisions govern "failure-to-maintain" lawsuits by homeowners against management. The procedures for notices and opportunities to cure are set forth in CC §798.84. On authority to not pay rent if the park's permit to operate lapses or is suspended, see §§6.16, 6.73A.

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§6.88 b. By Management

The substantial violation of a mobilehome park rule is deemed to be a "public nuisance" under CC §798.87 and may be remedied in a civil action. See also §6.85. Civil Code §798.88 permits park management to seek injunctive relief against a homeowner or other resident who commits a "continuing or recurring violation of a reasonable rule or regulation of the mobilehome park." In *Rancho Santa Paula Mobilehome Park v Evans* (1994) 26 CA4th 1139, 32 CR2d 464, the court held that injunctive relief under CC §798.88 was not warranted because the park owner had tried to enforce an "unreasonable" rule.

Management may regulate parking within the park and may remove vehicles under Veh C §22658, if it has posted specified signs. CC §798.28.5.

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§6.89 c. Attorney Fees and Penalties

A homeowner who prevails in an action under the MRL may be awarded attorney fees in addition to other specified damages and damages "afforded by law." CC §§798.85, 798.86. Civil Code §798.85 provides for attorney fees for the prevailing party whether the party prevails on a judgment or dismissal. On procedures for recovery of attorney fees, see chap 13.

A homeowner or prior homeowner who prevails in an action under the MRL may be awarded up to $2000 for each willful violation of the MRL, or punitive damages under CC §3294, in addition to damages allowed by law. CC §798.86(a). See *Patarak v Williams* (2001) 91 CA4th 826, 111 CR2d 381 (upheld award of $44,000 in penalties for willful denial of access to common areas and willful failure to maintain park's septic system).

WARNING: The court in *Palmer v Agee* (1978) 87 CA3d 377, 150 CR 841 (see §6.14), interpreted the meaning of an action arising under the MRL broadly, so that any claim of a right under the MRL could trigger these penalties.

However, in *SC Manufactured Homes, Inc. v Canyon View Estates, Inc*. (2007) 148 CA4th 663, 56 CR3d 79, involving a dispute between a mobilehome dealer and a landlord, the court denied attorney fees because the matter did not arise out of the MRL. See also *Cruz v Ayromloo* (2007) 155 CA4th 1270, 66 CR3d 725, which interprets an attorney fee clause in a lease "if civil action is instituted in connection with this Agreement" holding that it was broad enough to encompass causes of action for both breach of the lease as well as tort causes of action.

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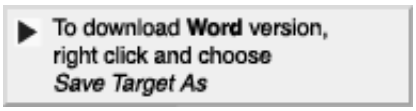
Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/ C. Form: Mobilehome Park Rental Agreement/ 1. Initial Information/§6.90 a. Form: Park Name/Address and Space Number/Address

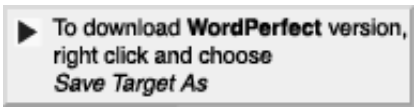
C. Form: Mobilehome Park Rental Agreement

1. Initial Information

§6.90 a. Form: Park Name/Address and Space Number/Address

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§6.90-6.140.





6.90-1 Park name, address; homeowner space number/address

1. Park Name and Address: _ _[*specify*]**_ _.**

2. Homeowner Space Number or Address: _ _[*specify*]**_ _.**

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.91 b. Form: Identity of Homeowner and Residents

§6.91 b. Form: Identity of Homeowner and Residents

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§6.90-6.140.

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6.91-1 Identify of homeowner and residents

3. Homeowner(s): _ _[*name(s)*]_ _**;**

4. **Other Resident(s):** _ _[*name(s)*]_ _**.**

Comment: Both park management and the homeowner should ensure that all residents' names are included in the rental agreement. Under the Mobilehome Residency Law (MRL) (CC §§798-799.10), all persons entering into the rental agreement with management are considered to be "homeowners." Therefore, that terminology is used throughout this form. "Resident," as the term is used in the MRL, includes homeowners as well as others who reside in mobilehomes located within the park. CC §798.11. See also §6.12.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.92 c. Form: Identity of Park Owner and Management

§6.92 c. Form: Identity of Park Owner and Management

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6.92-1 Identity of park owner and management

5. Park Owner's Name, Business Address, and Business Telephone No.: _ _[*specify*]**_ _.**

6. Park Manager's Name and Address: _ _[*specify*]**_ _.**

Comment: Civil Code §798.28 requires that management disclose in writing the name, business address, and business telephone number of the mobilehome park owner, on request by a homeowner. (There is no requirement that this information be disclosed in the rental agreement, but there is no practical reason not to do so.)

Health and Safety Code §18603 requires that a person be "available" in every mobilehome park for operation and maintenance. In every park with 50 or more units, this person or his or her designee must reside in the park and must know how to repair utilities and common facilities.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/ d. Term/§6.93 (1) Form: Beginning of Term

d. Term

§6.93 (1) Form: Beginning of Term

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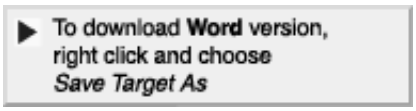

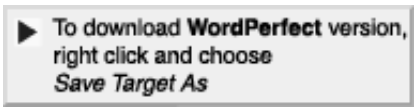

6.93-1 Beginning of term

7. Date When Term Begins: _ _[*specify*]**_ _.**

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§6.94 (2) Form: Length of Term

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6.94-1 Alternative: Term—specified number of months

8. The term of this Agreement shall be for _ _[*specify number of months of tenancy*]**_ _.**

6.94-2 Alternative: Term—month to month

8. The term of this Agreement shall continue on a month-to-month basis.

Comment: Civil Code §798.15(a) requires that the rental agreement state the term of the tenancy. Civil Code §798.18 requires that the homeowner be offered specified options regarding the lease term. See §§6.23-6.25, 6.105.

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§6.95 e. Form: Amount of Rent

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6.95-1 Amount of rent

9. Initial Monthly Rent: $_ _[*amount*]**_ _.**

10. Increased Monthly Rent: $_ _[*amount*]**_ _.**

11. Date of Rent Increase: _ _[*specify date when increase takes effect*]**_ _.**

Comment: Civil Code §798.15(a) requires that the rental agreement state the amount of rent. See §§6.26-6.32, 6.106-6.107.

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§6.96 f. Form: Services

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§6.90-6.140.

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6.96-1 Services

12. Services To Be Provided by Management for Homeowner(s): _ _[*specify services*]**_ _.**

Comment: Civil Code §798.15(f) requires that the rental agreement contain a provision listing the services that management will provide for the term of the tenancy and the fees, if any, to be charged for those services. See chart in §6.98; for fees provisions, see §6.110. Services may include such items as utilities, care of park facilities, gardening, pet care, and special equipment. See §§6.33-6.43, 6.110.

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§6.97 g. Form: Facilities

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6.97-1 Facilities

13. Facilities To Be Provided by Management for Homeowner(s): _ _[*Specify facilities*]**_ _.**

Comment: Civil Code §798.15(e) requires that the rental agreement describe the physical improvements to be provided during the tenancy. Facilities may include, *e.g.*, nonexclusive use of park common areas and lawns, barbecue or public facilities, streets and unrestricted parking areas, recreational facilities, pools, recreational and meeting buildings, laundry facilities, offices, and pet care areas.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.98 h. Form: Chart Showing Fees for Utilities and Services

§6.98 h. Form: Chart Showing Fees for Utilities and Services

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6.98-1 Chart showing fees for utilities and services

14. Fees for Utilities and Services:

	Present Cost	Homeowner Pays Utility Co.	Management Bills Homeowner	Included In Rent	Unavailable
Natural Gas					
Electric					
Water					
Trash					
Sewer					
Cable TV					
Community Room					
Pets					
Guests*					
Landscaping					
Other					
Other					

***In residence over 20 consecutive days or 30 days in a calendar year.**

Comment: Any fees for services to be provided must be set forth in the rental agreement (CC §798.15(f)), although a charge may be made for services actually rendered that are not listed in the rental agreement if the homeowner is given at least 60 days' written notice before the charge is imposed CC §798.32. See §§6.33-6.43, 6.110.

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i. Deposit

§6.99 (1) Form: Amount

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6.99-1 Deposit amount

15. Amount of Deposit: $_ _[*specify amount*]_ _.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.100 (2) Form: Payment of Deposit Amounts

§6.100 (2) Form: Payment of Deposit Amounts

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6.100-1 Payment of deposit

16. _ _[*All/Part*]_ _ of the sum due as deposits will be paid when the rental agreement is executed _ _[*, with the balance to be paid on* _ _[*date*]_ _]_ _.

Comment: The purpose of this form is to permit partial payment of a deposit when the parties sign the rental agreement, with the balance to be paid at an agreed-on time. See §§6.44, 6.111. See also §§1.51, 4.11, 8.167-8.176 on security deposits.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.101 j. Form: Zoning and Land Use Disclosures

§6.101 j. Form: Zoning and Land Use Disclosures

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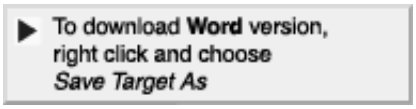

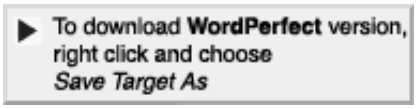

6.101-1 Zoning and land use disclosures

17. Zoning and Land Use Disclosures:

a. The nature of the zoning or land use permit of this park is _ _[*specify*]_ _.

b. The conditional use permit or other permit under which this park operates includes the following conditions and expiration or renewal date(s): _ _[*specify*]_ _.

c. The duration and ending date of any lease under which Management is a lessee for this park or any part of it is _ _[*specify*]_ _.

d. The following change concerning the zoning or use permit has occurred within the past 30 days: _ _[*specify*]_ _.

Comment: This information must be provided as a written notice to all homeowners and prospective homeowners under CC §798.27(a) (although it need not be in the rental agreement). Civil Code §798.27(b) appears to impose an independent and additional notification requirement, set forth in subparagraph d. For further information concerning changes of use, see §§6.49-6.53, 6.116.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.102 k. Form: Mobilehome Ownership Information

§6.102 k. Form: Mobilehome Ownership Information

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6.102-1 Mobilehome ownership information

18. Mobilehome Ownership information:

a. Make of mobilehome: _ _[*specify*]_ _.

b. Model of mobilehome: _ _[*specify*]_ _.

c. Year of manufacture: _ _[*specify*]_ _.

d. License or decal number _ _[*specify*]_ _.

e. Vehicle identification number: _ _[*specify*]_ _.

f. Registered owner(s) name(s): _ _[*name(s)*]_ _.

Address and city: _ _[*specify*]_ _.

Telephone no.: _ _[*specify*]_ _.

Address and city: _ _[*specify*]_ _.

Telephone no.: _ _[*specify*]_ _.

g. Legal owner(s) name(s): _ _[*name(s)*]_ _.

Address and city: _ _[*specify*]_ _.

Telephone no.: _ _[*specify*]_ _.

Address and city: _ _[*specify*]_ _.

Telephone no.: _ _[*specify*]_ _.

h. Junior lienholder(s) name(s): _ _[*name(s)*]_ _.

Address and city: _ _[*specify*]_ _.

Telephone no.: _ _[*specify*]_ _.

Address and city: _ _[*specify*]_ _.

Telephone No. _ _[*specify*]_ _.

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§6.103 I. Form: Other Information

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6.103-1 Other information

19. Parking Space No. _ _[*identify*]**_ _.**

20. Storage Space No. _ _[*identify*]**_ _.**

21. Pet Identification: _ _[*specify*]**_ _.**

22. Other: _ _[*specify*]**_ _.**

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.104 2. Form: Agreement to Lease

§6.104 2. Form: Agreement to Lease

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6.104-1 Agreement to lease

23. Agreement To Lease. The owner and management of the mobilehome park named in paragraphs 5 and 6 of this agreement (Management) and the homeowner(s) listed in paragraph 3 of this agreement (Homeowner) agree to the lease of the space listed in paragraph 2 of this agreement, according to the terms and conditions of this agreement.

[*If applicable, add the following option; see §6.15A*]

The terms and conditions of this agreement include special provisions related to the receipt of financial housing assistance or other consideration from a public agency. The special provisions may supersede standard provisions of this agreement related to the term, the rent, rent increases, occupancy restrictions, or other matters. The special provisions are contained in _ _[*e.g., the document that is attached hereto as Special Attachment A*]**_ _.**

Comment: This paragraph sets out the underlying premise of this document: It is a lease of real property between a landlord and a tenant. As such, it is subject not only to the Mobilehome Residency Law (MRL) (CC §§798-799.10) (see §§6.2-6.12), which provides unique protection to mobilehome park residents and homeowners, but also to a number of other laws affecting the landlord-tenant relationship (see §§6.13-6.18).

The optional language is inserted if the lease agreement must incorporate special terms and conditions related to public financing or assistance to ensure that management complies with the requirements and to allow eviction of residents in violation of management's obligations under the financing documents.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.105 3. Form: Term of Agreement

§6.105 3. Form: Term of Agreement

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6.105-1 Term of agreement

24. Term of Agreement. This agreement begins on the date specified in paragraph 7 of this agreement, and is for the term specified in paragraph 8 of this agreement.

Comment: Civil Code §798.15(a) requires that the term of the rental agreement be stated. Civil Code §798.18 requires that a homeowner be offered specified options regarding the term of the agreement. See §§6.23-6.25.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/ 4. Rent and Rent Increases/ §6.106 a. Form: Indexed Rent Increases (Long-Term Rental Agreement Only)

4. Rent and Rent Increases

§6.106 a. Form: Indexed Rent Increases (Long-Term Rental Agreement Only)

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6.106-1 Rent and rent increases (long-term agreement)

25. Rent and Rent Increases. The rent set forth in paragraph 9 is the rent until the rate in paragraph 10 takes effect on the date set forth in paragraph 11. Beginning 12 months after the date set forth in paragraph 11 (or 12 months after the date set forth in paragraph 7 if no date is set forth In paragraph 11), and unless a later agreement is executed, Management may increase the rent for each successive 12-month period by any one or a combination of the following factors:

a. The same proportion as the _ _[*specify economic or income factor, e.g., Consumer Price Index*]**_ _ for January of the year of increase bears to the same _ _**[*specify economic or income factor*]**_ _ for January of the previous year _ _**[*, but in no event less than _ _*[*percentage*]**_ _** *nor more than _ _*[*percentage*]**_ _** *of the current rent*]**_ _. _ _**[*Define factor in detail, if necessary*]**_ _.**

b. Homeowner's proportionate share of any increase in _ _[*e.g., real property taxes, assessments, governmental charges*]**_ _ during the 12 months after the date set forth in paragraph 11 (or paragraph 7, as applicable), and during each successive 12-month period, over the amount of such costs in the monthly rent during the preceding 12-month period.**

c. Homeowner's proportionate share of any increase in operating costs to cover _ _[*e.g., utilities for recreational or administrative facilities, other common areas, and mobilehomes*]**_ _ during the 12 months after the date set forth in paragraph 11 (or paragraph 7, as applicable), and during each successive 12-month period, over the amount of such costs in the monthly rent during the preceding 12-month period.**

6.106-2 Optional addition to 6.106-1: Capital improvement pass-throughs

[d.] Homeowner's proportionate share of any capital improvements incurred by Management. Capital improvements are defined as follows: _ _[*Insert definition of capital items to be included and excluded as negotiated between management and homeowner*]**_ _. The amount of increase in monthly rent for reimbursement of capital improvements shall equal the total cost of each capital improvement incurred by the Management during each 12-month period commencing with the effective date of this agreement, and amortized over a _ _**[*insert number of months for amortization or refer to formula for determination of schedule*]**_ _ month period and prorated among the number of spaces in the Park. After the amortization period has expired, the monthly rent will be reduced by the amount of the charge for that item.**

6.106-3 Optional addition to 6.106-2: Deduction for management's unreimbursed contribution

Management shall first deduct the amount of $_ _[*amount*]**_ _ from the total cost of each capital improvement as management's unreimbursed contribution thereto.**

6.106-4 Optional addition to 6.106-2: Limitation on pass-through amount; extension of amortization period

The maximum rent increase charged for capital improvements shall not exceed _ _[*percentage*]**_ _ of the then current total monthly rent charged, and the amortization period shall be extended as needed to continue such rent increases for reimbursement of such capital improvements.**

Comment: Under CC §798.31 and the cases set forth in §6.29, any provisions such as those above must be

designated as "rent" to be valid; the rental agreement cannot set forth these charges separately from rent. Any capital improvement reimbursement provisions in a mobilehome park lease should be drafted with extreme caution to avoid violating CC §798.31, which limits the fees park management may charge, and Pub Util C §739.5 if the pass-throughs relate to maintenance or repair of PUC-regulated utilities. See §§6.26-6.43.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.107 b. Form: Due Date of Rent Payments; Notice of Increase

§6.107 b. Form: Due Date of Rent Payments; Notice of Increase

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6.107-1 Alternative: Month-to-month agreement

26. Rent Payment. Homeowner must pay the rent specified in paragraph 9 on the first day of each month. Any change in rent will be preceded by at least 90 days' written notice.

6.107-2 Alternative: Term agreement

26. Rent Payment. Homeowner must pay the rent specified in paragraph 9 on the first day of each month. The amount of rent will be changed on the date listed in paragraph 11 to the amount set forth In paragraph 10 (if paragraphs 10 and 11 are completed). After the term has expired, rent may be changed following at least 90 days' written notice.

Comment: The rental agreement must state the amount of the rent. CC §798.15(a). A number of commonly used lease forms and rental agreements include a statement that rent must be paid "without set-offs or deductions." The addition of this statement essentially restates existing law (see §10.57) and would not affect the homeowner's rights under the implied warranty of habitability (established in *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704; see §§3.16-3.48, 6.16) or the homeowner's right to repair and deduct under CC §1942.

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§6.108 c. Form: Tender of Rent

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6.108-1 Tender of rent

27. Tender of Rent. Rent must be paid in cash or by cashier's check, money order, or personal check at the _ _[*e.g., park office*]_ _.

Comment: Although this provision permits payment of rent in cash, some mobilehome parks prohibit payment in cash to reduce the incidence of robbery. For such prohibitions, management should adjust the lease accordingly. Cash payment may not be required, except as permitted by CC §1947.3. See §4.30.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.109 d. Form: Charges for Late Payment of Rent

§6.109 d. Form: Charges for Late Payment of Rent

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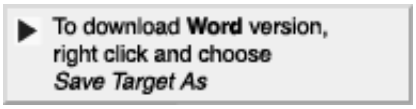

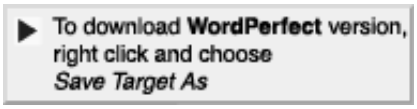

6.109-1 Charges for late rent payment

28. Late Fee and Charges. If the full amount of rent, including all fees and utility costs, is not paid to Management by the end of the fifth day following its due date, Homeowner must pay a late fee of $_ _[*amount*]_ _. If Homeowner's check is dishonored or returned to Management by the bank for any reason, Homeowner must pay Management a charge of $_ _[*amount*]_ _.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.110 5. Form: Fees, Service Charges, and Utilities

§6.110 5. Form: Fees, Service Charges, and Utilities

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6.110-1 Fees, service charges, and utilities

29. Fees, Service Charges, and Utilities. Fees, service charges, and utilities must be paid at the time of payment of rent according to the chart in paragraph 14, for the period noted in the bill. When such charges are billed by Management and due other than at the time for payment of rent, they must be paid within 5 days after the billing date. Utility costs for personal use may vary as permitted by law.

Comment: See §§6.33-6.43.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.111 6. Form: Security and Default Deposits

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6.111-1 Security and default deposits

30. Deposits. Homeowner must deposit with Management at the agreed-on time(s) the sum set forth in paragraph 15. If Homeowner is in default with respect to any category of deposit, Management may use any portion of the deposit to cure the default or to compensate Management for any damage sustained by Management resulting from Homeowner's default. Homeowner must pay to Management, immediately on demand, a sum equal to the portion of the deposit expended or applied by Management, in order to maintain the security deposit at the amount initially deposited with Management.

If Homeowner is not in default at the expiration or termination of this agreement, or on request for a refund as allowed by law, Management will return the unexpended deposit(s) to Homeowner. The deposit is subject to Civil Code §1950.5, and, if applicable, Civil Code §798.39.

Comment: As noted in §6.14, it is unclear to what extent general landlord-tenant rights and responsibilities not specifically addressed in the Mobilehome Residency Law (MRL) (CC §§798-799.10) apply to mobilehome park tenancies. If they do apply (because they are not preempted by express modification in the MRL), the language in Form 6.111-1 is consistent with the letter and spirit of CC §1950.5. In addition, the MRL specifically provides special requirements for refunds of security deposits, depending on whether they were collected before or after January 1, 1989. CC §798.39. See §6.44.

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§6.112 7. Form: State Law and Park Rules; Procedure for Amending Park Rules

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6.112-1 State law and park rules; amending rules

31. State Law and Park Rules; Homeowner Participation in Park Rules Amendment Process:

a. The park rules and regulations (attached to this agreement as Exhibit A), the Mobilehome Residency Law (attached to this agreement as Exhibit B), and other applicable state and local laws and regulations are incorporated In this agreement as though set forth in full. Homeowner and Management agree to comply with all provisions of these authorities, as they now exist, and new or amended rules that Management may issue in the future as required by law.

b. When Management proposes an amendment to the park's rules and regulations that is not mandated by a change in the law, Management shall meet and consult with Homeowners in the park, their representatives, or both, after written notice has been given to all Homeowners in the park 10 days or more before the meeting. The notice shall set forth the proposed amendment to the park rules and regulations and shall state the date, time, and location of the meeting.

c. Following the meeting and after consultation with Homeowners, the noticed amendment to the park rules and regulations may be implemented as to any Homeowner with the consent of that Homeowner, or without Homeowner consent on written notice of not less than 6 months, except for rules and regulations applicable to recreational facilities, which may be amended without Homeowner consent on written notice of not less than 60 days.

d. If the change to park rules and regulations is mandated by a change in statutory law, regulation, or ordinance, management need not consult with Homeowners and may implement the change immediately as to any Homeowner who gives consent, and after 60 days' written notice as to all Homeowners with or without their consent.

Comment: The rental agreement must include a copy of the mobilehome park rules and regulations (CC §798.15(b)) and of the Mobilehome Residency Law (MRL) (CC §§798-799.10), which must be attached (CC §798.15(c)). Incorporating them as attachments to the rental agreement complies with this requirement. In order for certain provisions to be effective, they must be included in the park rules and regulations. For example, CC §798.70 allows management to prohibit for-sale signs on mobilehomes only if such a prohibition is included in the rental agreement or the rules and regulations.

Civil Code §798.23(a) mandates that the park owner and the owner's employees be subject to the rules and regulations that govern homeowners and other residents and their guests.

Civil Code §798.25 governs amendments to park rules and regulations. Section 798.25 also permits written notice of amendments to a new homeowner before the start of the tenancy. See §§6.33, 6.41, 6.45-6.46, 6.61, 6.141 on adoption, amendment and legal limitations on park rules. See §6.142 on the recommended contents of park rules. See §6.45 for the special conditions related to automatic amendment of rules and regulations if mandated by statute, ordinance, or regulation.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.113 8. Form: Park Management Responsibilities for Physical Facilities, Services, Utilities, and Compliance With Law

§6.113 8. Form: Park Management Responsibilities for Physical Facilities, Services, Utilities, and Compliance With Law

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6.113-1 Management responsibilities

32. Responsibilities of Management:

a. It is the responsibility of Management to provide and maintain common facilities in good working order and condition. If common facilities suddenly or unforseeably break down or deteriorate, Management shall have a reasonable period of time, which is as soon as possible in situations affecting a health or safety condition, and shall not exceed 30 days in any other case except when emergency circumstances justify a delay, starting after Management knew or should have known of the condition in which to restore the facilities to good working order. Management shall provide and maintain these improvements with rent proceeds and not with other fees.

b. Management will provide the physical facilities described in paragraph 13.

c. Management will provide the services and utilities set forth in paragraphs 12 and 14, for the charges described in paragraph 14.

d. Management will comply with all other requirements of law.

e. Management may charge a reasonable fee for services related to the maintenance of the land and premises on which a mobilehome is situated in the event that the Homeowner fails to maintain the land or premises in accordance with the rules and regulations of the park after written notification to the Homeowner and failure of the Homeowner to comply within 14 days. The written notice shall state the specific condition to be corrected and an estimate of the charges to be imposed by Management if the services are performed by Management or its agent. If the service involves removal and/or storage of personal property from the Homeowner's lot to achieve compliance with park rules and regulations or state law, all notices and actions related to removal, storage, and disposal will comply with the minimum requirements of Civil Code §798.36(b).

Comment: The language in subparagraph a. above fulfills the minimum requirements of CC §798.15(d). The reasonable period granted by the statute begins at the time the landlord knew or should have known of the breakdown or deterioration. With regard to subparagraphs b. and c., CC §798.24 requires that common area facilities be open for use at all reasonable times, with hours posted, and with no insurance requirements for specified activities. Although not explicitly required by the Mobilehome Residency Law (MRL) (CC §§798-799.10), subparagraph d. provides for an implicit requirement of which management should be reminded and the homeowner should be informed. See §6.47. Subparagraph e. is authorized by CC §§798.15(g) and 798.36(b).

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§6.114 9. Form: Fixtures: Ownership, Maintenance, and Liability

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6.114-1 Fixtures

33. Ownership, Removal, Maintenance, and Liability for Permanently Attached Fixtures:

a. All items or structures permanently attached to the premises will become the property of Management when installed. These include fences and storage sheds, all permanent ground covers such as patios or decks, and all plants or trees.

b. Such fixtures may not be installed or removed after installation unless Management gives prior written consent, which must be requested at least 10 days before the installation or removal.

c. Homeowner is solely responsible for the maintenance, care, and use of such fixtures, even though they have become the property of Management, except for trees on the Homeowner's lot.

d. On termination of the tenancy, or if the fixtures' presence or condition violates this agreement or the park rules and regulations, Management may require their removal at Homeowner's expense.

e. After construction or repair on the premises, Homeowner will record the appropriate notices of completion. Homeowner may not permit any lien, claim, or demand of any nature arising from the construction or repair to be foreclosed against the park. If Homeowner contests any such lien or demand, he or she must post an adequate bond to prevent foreclosure of the lien if Homeowner is unsuccessful. Homeowner further agrees to hold Management harmless, and to indemnify Management for all costs incurred by or levied against Management, in connection with all such liens and claims.

f. If disabled access accommodations are installed pursuant to the MRL, CC §798.29.6, Management may require their removal by Homeowner at the time of resale or removal of the mobilehome.

Comment: This common lease provision is a carryover from laws governing hiring, and is seldom used for exercise of ownership. It does provide controls, however, on the installation and care of attachments and structures. All attachments that are structures (*e.g.,* patios, steps, and storage sheds) require permits and approval before installation.

Special rules in CC §§798.26 and 798.37.5 govern management's responsibilities to maintain trees (see §§6.34, 6.47-6.48).

Because structures installed with a mobilehome can cost thousands of dollars, homeowners may reasonably wish to retain ownership of these structures so that their value may be included in the value of the mobilehome if sold "in place" at a later date. Because of this, management may prefer to provide that the ownership of such structures remain with the homeowner, by omitting subparagraph a. and the final clause in subparagraph c. Homeowner ownership of fixtures may also eliminate management's potential responsibility for maintenance or removal costs or for liability for accidents caused as a result of a defect in the structure. See §6.48.

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§6.115 10. Form: Right of Entry

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§6.90-6.140.

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6.115-1 Right of entry

34. Right of Entry:

a. Unless Homeowner provides written consent by an acknowledgment in paragraph 52, g. Management has no right to enter a mobilehome or enclosed structure on the lot without the prior written consent of the resident. The written consent provided in paragraph 52, g., or provided at the time of entry, may be revoked by the resident at any time, but only by another written document.

b. Despite this limitation on entry, Management has a right to enter the mobilehome or enclosed structure on the lot without the resident's prior written consent in an emergency or when the resident has abandoned the mobilehome.

c. Management has the right to enter the mobilehome space or land at any reasonable time without unreasonably disturbing the resident for:

(1) maintenance of utilities, trees, and driveways;

(2) maintenance of the premises in accordance with the park rules and regulations when Homeowner or the resident falls to maintain the premises; and

(3) protection of the mobilehome park.

Comment: This form restates the language of CC §§798.26 and 799.2, which provide that management must obtain the homeowner's prior written approval to enter a mobilehome or enclosed accessory structure. The form provides for the homeowner's prior written approval in an acknowledgment of approval at the end of the rental agreement (see §6.139). This acknowledgment should not be considered to be a waiver of rights granted under CC §798.19, because the introduction to the acknowledgments specifies that the homeowner may exercise discretion in signing each one.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.116 11. Form: Changes in Zoning, Use Permits, or Master Lease

§6.116 11. Form: Changes in Zoning, Use Permits, or Master Lease

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§6.90-6.140.

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6.116-1 Changes in zoning, use permits, or master lease

35. Changes In Zoning, Use Permits, or Master Lease:

a. Paragraph 17 describes the current zoning and use of the park. Management will give Homeowner at least 15 days' written notice before appearing before a local government entity to request a permit for a change of use of the park. If no government permit is required for the change, Management will provide Homeowner with 12 months' notice of the proposed change.

b. If a change occurs in the zoning or use permit of the park, or in the lease that Management holds for the park, Homeowner will be provided written notice within 30 days of the change. If a change in use approved by a government entity will result in termination of Homeowner's occupancy, Management will provide at least 6 months' notice of the termination of tenancy.

Comment: See §§6.49-6.53, 6.101.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.117 12. Form: Sale or Subletting of Mobilehome

§6.117 12. Form: Sale or Subletting of Mobilehome

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6.117-1 Sale or sublease of mobilehome

36. Management Rights on Homeowner's Sale or Subletting of Mobilehome:

a. Homeowner, or Homeowner's surviving heir cotenant, personal representative of an estate, or agent of any of these persons, may sell his or her mobilehome at any time, subject to the rights and limitations imposed by state law. The seller must inform Management at the time that a sale may be made.

b. Management retains the right to approve a purchaser. Denial of a prospective purchaser will occur only if he or she does not have the financial ability to pay the rent and charges of the park, or if Management reasonably determines from the purchaser's prior tenancies that he or she will not comply with the rules and regulations of the park. Management will make written notice of approval or denial to Homeowner within _ _[*e.g., ten days*]_ _ of the seller's notification to Management of the prospective purchaser, including the reasons for denial.

c. If the purchaser wishes the mobilehome to remain in the park, the selling Homeowner must ensure that the purchaser completes an application for residency and executes a rental agreement before the close of sale. The new agreement and park rules and regulations may differ from those previously in effect. Seller must deliver the documents to Management before closing the sale.

d. After receiving notice of anticipated sale, and until the closing of the sale, Management may require the removal of a mobilehome in order to upgrade the quality of the park. Such removal may be required if (1) the mobilehome's width, age, or condition is consistent with the requirements of CC §798.73; (2) it is in a rundown condition or disrepair; or (3) It is allowed under a law enacted after this rental agreement is signed. If the condition of the mobilehome is in dispute, Management and Homeowner agree to submit to the results of an inspection by the enforcement agency prescribed by state law, each to pay half the cost of such an inspection.

e. If a homeowner has a confirmed medical situation under CC §798.23.5(a)(2), and has resided in the park for at least one year as his/her primary residence, the homeowner may rent or sublet the space and home for not less than 6 months, and not more than 12 months (unless other terms are approved in writing by Management), on approval under CC §798.23.5(b)(2), including payment of fees allowed by statute, and subject to all other requirements of CC §798.23.5.

f. If Management gives its approval in writing for any person other than a purchaser (*e.g.,* a sublessee of Homeowner) to be a homeowner or resident of the park, such approval will be governed by rights and procedures generally permitted by law, rather than the provisions of subparagraphs a and b of this paragraph.

Comment: Subparagraphs a. and b. fulfill the state statutory obligations prescribed by CC §§798.70-798.79 and 799.1.5, which specifically govern sales in place. To prevent inappropriate pressure from a seller, management may wish to specify in subparagraph b. the number of days for management review. The period specified should be long enough for management to complete a credit check and related investigations.

Subparagraph d. provides for park management and the tenant to agree in advance to an objective means of determining the condition of the mobilehome (*e.g.*, sharing the cost of inspection by a state or local mobilehome inspector). This may eliminate the cost of litigation and the statutory penalty authorized by CC §798.86 if a court determines that management's assessment of the mobilehome's condition was not "reasonable." See §§6.54-6.58.

For discussion of subparagraph e., see §6.61.

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§6.118 13. Form: General Prohibitions (Residential Use, Guests, Abandonment, Subletting, and Assignments or Encumbrances)

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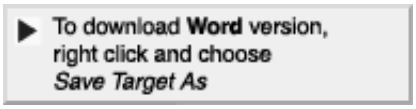

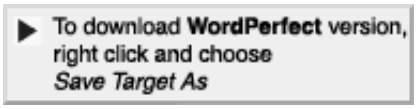

6.118-1 General prohibitions

37. General Prohibitions Concerning Use, Guests, Abandonment, and Sublease, Assignment, or Encumbrance of Mobilehome:

a. The mobilehome, mobilehome space, and common areas may be used only for private residential purposes, unless prior written consent is obtained from Management.

b. No person other than those listed in paragraphs 3 and 4 or authorized by the Mobilehome Residency Law (see Exhibit B), and no guests who remain for more than 20 consecutive days or 30 days in any calendar year, may reside on the premises without the prior written consent of Management.

c. It is a violation of this agreement to vacate the premises during the term of the agreement or its renewal without providing 60 days prior written notice.

d. Except for subletting consistent with Paragraph 36 of this agreement, Homeowner may not sublet or otherwise rent any portion or all of his or her mobilehome, or the premises on which it is situated, without prior written consent of Management.

e. Homeowner may not assign or encumber his or her interest in this rental agreement or the premises without prior written consent of Management. An assignment subject to this subparagraph may be voluntary, involuntary, or by operation of law.

f. Management's consent to a subletting, other rental, assignment, or encumbrance will not be considered a waiver of this paragraph. Consent may not be withheld unless (1) the new resident refuses to sign the rental agreement or does not have the financial ability to pay the rent and charges of the park, or (2) Management reasonably determines from the resident's prior tenancies that he or she will not comply with the park rules and regulations.

Comment: Subparagraph b. reflects the guest limitation requirements of CC §798.34. Note that CC §798.34 specifically prohibits a requirement that guests register with management, making it difficult for management to determine how many days a guest has been present. See §6.75 for a discussion of problems created by an assignment to a lender.

A new homeowner has no statutory right to assume the benefits of an existing rental agreement by subletting, assignment, or otherwise. Subparagraphs d. and e. above permit management to require execution of new agreements before such changes in homeowners. (But see §§3.56-3.58 for discussion of limitations on a landlord's right to refuse consent to a subletting or assignment.)

Subparagraph f. describes the criteria governing management's consent to such an assignment of interest (which is the same as the criteria used in approving prospective purchasers). Civil Code §798.79 requires a repossessing creditor to satisfy the former homeowner's recent rent and utility liabilities (not those earlier than 90 days before the eviction notices are served (CC §798.56a(b)(1)(A)) or while the mobilehome is subject to the bankruptcy court or trustee (CC §798.56a(d)) before selling the mobilehome to a third party. See also §§6.59-6.61.

Abandonment of a mobilehome and the remedies for abandonment are discussed in §§6.79-6.84.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.119 14. Form: Termination and Eviction

§6.119 14. Form: Termination and Eviction

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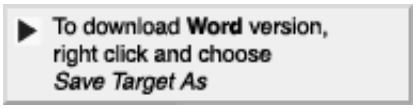

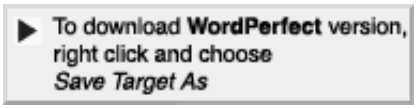

6.119-1 Termination and eviction

38. Termination and Eviction:

a. This agreement may be declared to be forfeited, and Homeowner's tenancy and right to possession may be terminated, if permitted by law and after Management provides 60 days' written notice to Homeowner, including the facts on which the termination is based.

b. A term tenancy other than a month-to-month tenancy terminates automatically at the end of the term. If Homeowner remains in possession without executing a new agreement after expiration of the term and without Management's consent, continued possession will be considered to create a month-to-month tenancy that may be terminated under subparagraph a if permitted by law. In addition, after 60 days' written notice, Management may amend the costs of rent and fees by any amount permitted by law.

c. Homeowner may terminate a month-to-month tenancy only after 60 days' written notice to Management before termination, or as otherwise permitted by law.

d. Homeowner is and will remain responsible for all performance and consideration required by this agreement for its duration, or for the 60-day notice period required for termination of a month-to-month tenancy, or any period thereafter until the mobilehome is removed, whether Homeowner continues to occupy the space or sublets the mobilehome to someone else.

Comment: See §§6.1-6.2, 6.13-6.18, 6.62-6.84.

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§6.120 15. Form: Waivers

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6.120-1 Waivers

39. Waivers. Management's waiver of, or failure to take any action in response to, any breach of a provision of this agreement or the park rules and regulations will not be considered to be a waiver of that provision. Management's subsequent acceptance of any sum due and payable by Homeowner (a) will not be considered to be a waiver of any previous breach of this agreement or the park rules and regulations, or of Homeowner's failure to pay any sum due, regardless of Management's knowledge of the breach or failure to pay; or (b) will not reinstate or extend the term of this agreement or effect any notice, suit, or demand under this agreement.

Comment: This is a standard provision in all residential leases. However, a homeowner's waiver of any of the provisions of the MRL should not be included in the rental agreement or in the park rules and regulations. Such waivers are considered to be void as contrary to public policy. CC §§798.19, 798.77.

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§6.121 16. Form: Notices

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6.121-1 Notices

40. Notices. Notices to Management must be provided in writing to the park office during normal business hours. In an emergency, they may be provided to the manager at his or her address. Notices to Homeowner terminating the tenancy (including a 3-day notice required by Civil Code §798.56(e)) must be in writing and must be served on Homeowner in the manner described in Code of Civil Procedure §1162. Notices to legal and registered owners of a mobilehome, if other than Homeowner, must be provided under Civil Code §798.55(b)(1). Except as otherwise required by law, Homeowner agrees that service of any other notice (including, but not limited to, notice of rent increase, notice of noncompliance with park rules and regulations, and notice of any meeting to discuss amendments to park rules and regulations) will have been validly served if the notice is mailed to Homeowner at his or her address (provided in paragraph 2 of this agreement) via first class United States mail, with prepaid postage. Homeowner agrees that any notice served In this manner will be considered to be served 5 days after its mailing. Homeowner agrees that service of amended copies of the Mobilehome Residency Law may be served in the same manner.

Comment: Inclusion of this paragraph may prevent later disputes over the appropriateness of the service of any notice. The provision "Except as otherwise required by law" in this paragraph refers to the posted notice required by Veh C §21107.9 for local government adoption of mobilehome park or mobilehome community speed limits subject to public enforcement. See §6.13.

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§6.122 17. Form: Consultation With Homeowner

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§6.90-6.140.

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6.122-1 Consultation with homeowner

41. Consultation With Homeowner. Management will meet and consult with Homeowner within 30 days after written request (individually, collectively, or with representatives of a group of homeowners who have signed a request to be so represented) on at least the following matters:

a. Resident concerns regarding existing park rules that are not subject to Civil Code §798.25;

b. Standards for maintenance of physical improvements in the park;

c. Addition, alteration, or deletion of services, equipment, or physical improvements; and

d. Rental agreements offered under Civil Code §798.17.

Any collective meeting will be conducted only after notice of the meeting has been given to all the requesting homeowners at least ten days before the meeting.

Comment: Civil Code §798.53 requires that management meet and consult with homeowners, within 30 days of written request, about resident concerns regarding existing park rules that are not subject to CC §798.25. See §§6.45, 6.141. Civil Code §798.53 includes rental agreements under CC §798.17 as one of the subjects on which mobilehome management must consult with homeowners and their organization or representatives. For discussion of CC §798.17, see §6.143.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.123 18. Form: Liability Indemnification

§6.123 18. Form: Liability Indemnification

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6.123-1 Liability indemnification

42. Liability Indemnification. Homeowner agrees to indemnify and hold Management harmless from, and on account of, any property damage or personal injury to any property or any person that (a) arises as a result of any willful or negligent act or omission related to the tenancy in the park by Homeowner, (b) arises from any act or omission of Homeowner resulting in a defect or deterioration in the condition of the mobilehome or leased site, or (c) arises from the negligent or intentional acts or omissions of Homeowner and his or her family or guests. This indemnification does not cover any injury or damage that is the fault of Management.

Comment: Some parks require homeowners to acquire liability insurance as a condition of residency. Management may wish to include a provision in this Form 6.123-1 to require the homeowner to do so, but management may not require homeowners to obtain liability insurance in order to use common area facilities for specified purposes (CC §798.24).

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.124 19. Form: Management's Right to Make Payments

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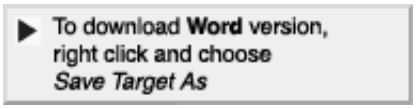

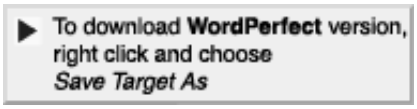

6.124-1 Management's right to make payments

43. Management's Right To Make Payments:

a. If Homeowner falls to pay any tax; assessment; lien; claim or demand arising out of construction, repair, or damages; or other charge or claim that Homeowner has agreed to pay under this agreement, Management may pay the amount, or settle or discharge any action for such amount, if Homeowner fails to do so (or to post bond for such amount) after 30 days' written notice by Management.

b. All reasonable and actual costs and other sums incurred by Management in connection with such action must be paid by Homeowner to Management on demand, together with interest at the prevailing prime rate, from the date of payment until repaid.

Comment: If a mechanics' lien is imposed on the park for fixtures added by a homeowner, or a homeowner does not pay the cost of an assessment passed through to homeowners on a per-space basis, management may pay the cost and then sue the homeowner for a money judgment (with interest) instead of evicting the homeowner for nonpayment of the obligations.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.125 20. Form: Ownership of Mobilehome

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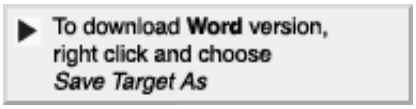

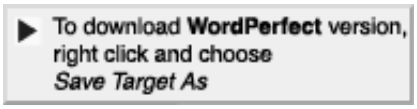

6.125-1 Ownership of mobilehome

44. Ownership of Mobilehome. Corporate ownership of the mobilehome, or multiple ownership other than by a husband and wife (or, if either or both of them die, their adult children), on the leased site is not permitted except on prior written approval of Management.

Comment: This form may be important if management anticipates a "normal" turnover in ownership, as is often the case in mobilehome parks located in vacation areas.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.126 21. Form: Multiple Mobilehome Ownership

§6.126 21. Form: Multiple Mobilehome Ownership

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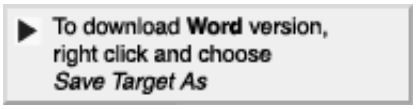

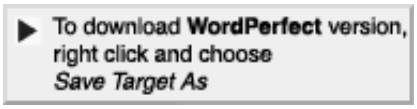

6.126-1 Multiple mobilehome ownership

45. Multiple Mobilehome Ownership. Direct or Indirect ownership by Homeowner of more than one mobilehome in the park is not permitted without the prior written approval of Management.

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§6.127 22. Form: Enforcement of Agreement

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6.127-1 Enforcement of agreement

46. Enforcement of Agreement: Fees; Notice; Abatement by and Reimbursement of Management; Homeowner's Right To Repair and Deduct:

a. Management may charge a reasonable fee for services relating to maintenance of the land and premises on which the mobilehome is located if Homeowner fails to maintain the land or premises in accordance with the park rules and regulations within 14 days of written notification. The written notice must state the specific condition to be corrected, and must include an estimate of the charges to be imposed by Management if the services will be performed by Management or its agent.

b. Management retains the right to repair or rectify any defects or deficiencies caused by Homeowner in the common areas, and to bill Homeowner the reasonable cost of these services.

c. Homeowner retains the right under Civil Code §1942 to repair and deduct (as permitted by law in effect at the time of notice to Management) any defect in common areas and leased areas, individually and jointly with other homeowners.

Comment: Civil Code §798.15(g) requires inclusion of subparagraph a. in the rental agreement. See §6.34.

Subparagraphs b. and c. provide respective limited "self-help" remedies to rectify limited defaults by the tenant or management. Availability of such remedies may discourage both parties from defaulting, as well as permit prompt rectification of serious problems.

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§6.128 23. Form: Attorney Fees

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6.128-1 Attorney fees

47. Attorney Fees. In any action arising out of the tenancy, this agreement, or the provisions of the Mobilehome Residency Law, the prevailing party will be entitled to reasonable attorney fees and costs at the time of entry of judgment In the action.

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24. Miscellaneous Provisions

§6.129 a. Form: Time of the Essence

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§6.90-6.140.

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6.129-1 Time of the essence

48. Time of the Essence. Time is the essence of each provision of this agreement.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.130 b. Form: Interpretation and Severability

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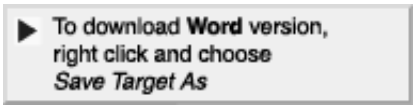

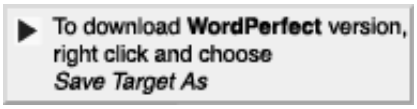

6.130-1 Interpretation and severability

49. Interpretation and Severability. Each provision of this agreement is separate, distinct, and individually enforceable. If any provision is declared to be unlawful or unenforceable, the validity of all other provisions will not be affected.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.131 c. Form: Entirety of Agreement

§6.131 c. Form: Entirety of Agreement

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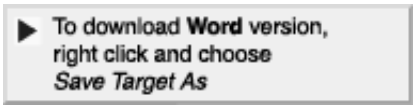

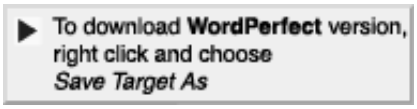

6.131-1 Entirety of agreement

50. Entirety of Agreement. This agreement contains the entire agreement between Homeowner and Management regarding tenancy in the park. This agreement supersedes any prior written or oral negotiations or agreements, unless they are set forth in writing in this agreement.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.132 d. Form: Alterations or Amendments

§6.132 d. Form: Alterations or Amendments

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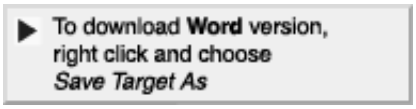

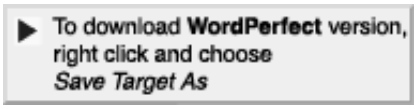

6.132-1 Alterations or amendments

51. Alterations or Amendments. This agreement may be altered or amended by Homeowner and Management only by written alteration or amendment (signed by all the parties) or by operation of law.

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25. Acknowledgments

§6.133 a. Form: Acknowledgment Is Voluntary; Caveat

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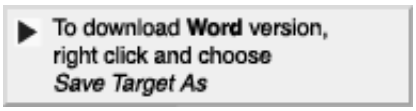

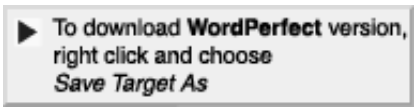

6.133-1 Voluntary acknowledgments; caveat to homeowner

52. Acknowledgments. ***Note:*** **Initialing the acknowledgments in subparagraphs a. through g. is voluntary. Approval should be given only after careful consideration and review of each one.**

Comment: Placed for convenience at the end of the lease, the acknowledgments in §§6.134-6.139 provide a record of the homeowner's understanding of important agreements made with management.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.134 b. Form: Inspection Made to Corroborate Management's Representation of Space and Facilities

§6.134 b. Form: Inspection Made to Corroborate Management's Representation of Space and Facilities

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6.134-1 Homeowner acknowledges inspection, satisfaction that facilities are as represented

a. By initialing this subparagraph, Homeowner agrees (1) that he or she has carefully inspected the rental space and the park's facilities; and (2) that the space and facilities are in every respect as represented by Management to Homeowner, either orally or in writing. To the extent that the space and facilities are not exactly as represented, either orally or in writing, Homeowner accepts them as they are. _ _[*Provide space for Homeowner's initials*]_ _

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.135 c. Form: Receipt and Understanding of Mobilehome Residency Law

§6.135 c. Form: Receipt and Understanding of Mobilehome Residency Law

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6.135-1 Homeowner acknowledges receipt and understanding of Mobilehome Residency Law

b. By initialing this subparagraph, Homeowner agrees that he or she has read, understood, and received copies of this agreement, the Park Rules and Regulations, and the Mobilehome Residency Law. Homeowner understands that by executing this agreement he or she will be bound by its terms and conditions. _ _[*Provide space for Homeowner's initials*]**_ _.**

Comment: Civil Code §798.15(b)-(c) require that the rental agreement contain the rules and regulations of the park and a copy of the provisions of the Mobilehome Residency Law (MRL) (CC §§798-799.10). Subparagraph b. above acknowledges receipt of these documents, which have been incorporated by reference by paragraph 31 in §6.112.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.136 d. Form: Charges for Month-to-Month Agreement

§6.136 d. Form: Charges for Month-to-Month Agreement

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§6.90-6.140.

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6.136-1 Homeowner acknowledges charges for month-to-month agreement

c. By accepting a month-to-month agreement and initialing this subparagraph, Homeowner acknowledges that (1) he or she has been offered a 12-month agreement; (2) agreement did not contain terms or conditions regarding charges for rent, utilities, or incidental reasonable service charges differing from the terms of this agreement; (3) Homeowner declined to enter into such an agreement; and (4) Homeowner instead requested and elected to sign this agreement. _ _[*Provide space for Homeowner's initials*]_ _**.**

Comment: See comment in §6.137.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.137 e. Charges for Term Agreement

§6.137 e. Charges for Term Agreement

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§6.90-6.140.

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6.137-1 Homeowner acknowledges charges for term agreement

c. By accepting a term agreement and initialing this subparagraph Homeowner acknowledges that this agreement does not contain terms or conditions regarding charges for rent or utilities or incidental reasonable service charges other than those that would be offered to Homeowner on a month-to-month basis. _ _[*Provide space for Homeowner's initials*]**_ _.**

Comment: Civil Code §798.18 requires that the homeowner be offered a rental agreement for a 12-month term or for a lesser term at the homeowner's request, and that the initial provisions for charges be the same as for a month-to-month agreement. This subparagraph c. and the alternative version of subparagraph c. in §6.136 provide for an acknowledgment that these alternative terms were available.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.138 f. Form: Acceptance of Commercial Goods or Services Not Required

§6.138 f. Form: Acceptance of Commercial Goods or Services Not Required

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6.138-1 Homeowner acknowledges that management has not required acceptance of commercial goods or services

d. By initialing this subparagraph, Homeowner acknowledges that Management has not required Homeowner to purchase, rent, or lease goods or services for landscaping from any person, company, or corporation. _ _[*Provide space for Homeowners initials*]_ _**.**

Comment: Civil Code §798.37 regulates fees for hook-ups and landscaping. Subparagraph d. provides an acknowledgment that management has not violated the provisions of this statute.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.139 g. Form: Consent to Entry

§6.139 g. Form: Consent to Entry

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6.139-1 Homeowner consents to entry of mobilehome

e. By initialing this subparagraph, Homeowner provides prior written consent for entry into Homeowner's mobilehome, understanding that such permission may be revoked in writing at any time. _ _[*Provide space for Homeowner's initials*]_ _.

Comment: Civil Code §798.26 regulates management's right of entry into a mobilehome. See also §6.115.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.139A h. Form: Attachments

§6.139A h. Form: Attachments

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6.139A-1 Attachments to agreement

If checked below, the following attachments were entered into concurrently with executing this agreement.

Pet Agreement:	**___Included**	**___Not Included**
Tree Maintenance Agreement:	**___Included**	**___Not Included**
Park Rules and Regulations:	**___Included**	**___Not Included**
Emergency Preparedness Information:	**___Included**	**___Not Included**
Other:_____	**___Included**	**___Not Included**

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§6.140 26. Form: Execution

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§6.90-6.140.

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6.140-1 Execution

53. Execution

Date: _ _ _ _ _ _ **By** _ _[*Name*]_ _
Management

Date: _ _ _ _ _ _ **By** _ _[*Name*]_ _
Homeowner

Date: _ _ _ _ _ _ **By** _ _[*Name*]_ _
Homeowner

Comment: The rental agreement should be signed by each adult who will reside in the mobilehome. Similarly, each acknowledgment should be initialed by each adult resident.

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VII. RULES AND REGULATIONS

§6.141 A. Importance

Given the nature of mobilehome parks, the needs of management, and the explicit requirements of the Mobilehome Residency Law (MRL) (CC §§798-799.10), the drafting and use of rules and regulations are critical factors in the operation of a mobilehome park. These rules must comply with the "reasonableness" requirements of CC §798.56(d) in order for their breach to be enforced by termination of the tenancy, but they also must be tailored to the specific needs of the park, its residents, and its management.

The rules and regulations are particularly important in mobilehome parks that grant long-term leases. Because CC §798.25 permits management to amend the park rules and regulations unilaterally in most situations (see §§6.33, 6.41, 6.45), management benefits from including in the rental agreement only items required by law, leaving the park rules to govern the rest. Tenants, of course, benefit from the opposite strategy. Rules and regulations that are mandated by statute, ordinance, or regulation and those that apply to recreational facilities may be amended after 60 days' written notice, if the tenant does not consent to the changes. Other amendments require 6 months' written notice if the tenant fails to consent and the notice complies with CC §798.25.

The rules and regulations that apply to park residents and their guests generally apply to owners and employees of the owner as well. CC §798.23(a).

A park owner may be required to make reasonable accommodations in park rules, regulations, and policies to accommodate disabled tenants. In *U.S. v California Mobile Home Park Mgmt. Co.* (9th Cir 1994) 29 F3d 1413, the mobilehome landlord denied the request of a tenant, mother of a disabled child, for a waiver of guest and guest parking fees for her daughter's health care aide imposed under park rules and regulations. The court held that landlords must absorb certain costs under the Fair Housing Act (42 USC §§3601-3631) to allow handicapped persons equal opportunity to use and enjoy housing, as long as the costs are not unduly burdensome. In a later decision in the case, however, the court affirmed a judgment in favor of the landlord, holding that the tenant had failed to show that use of the caretaker's automobile was necessary to provide services to the disabled child. *U.S. v California Mobile Home Park Mgmt. Co.* (9th Cir 1997) 107 F3d 1374.

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Source: Real Property/California Landlord-Tenant Practice/6 Mobilehome Tenancies/§6.142 B. Checklist: Common Provisions

§6.142 B. Checklist: Common Provisions

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The following topics, in alphabetical order, are usually covered by mobilehome park rules and regulations. When the rules repeat or interpret the terms of the rental agreement, they should be consistent with the agreement. All rules and regulations should be reviewed every year to ensure that they do not violate amendments to the Mobilehome Residency Law and cases interpreting it.

- (1) *Accessory buildings and lot maintenance*. Specify general lot maintenance standards related to trash, storage of personal property, hazardous materials, or attractive nuisances. Specify size, maintenance, decor, and appearance of adjoining buildings (*e.g.*, cabanas, ramadas, carports). Note whether homeowner must make prior written request for management's approval of installation or modification of such buildings and obtain required Department of Housing and Community Development (HCD) or local enforcement agency permits before work is commenced. See §6.48.
- (2) *Additional residents*. Specify number of additional residents permitted and for how long. Note whether homeowner must have prior approval of management. List fees for guests. See CC §798.34. Under CC §798.35, no fees may be charged for homeowner's immediate family, which includes the homeowner, his or her spouse, their parents, their children, and their grandchildren under the age of 18. Occupancy limits (*e.g.*, two persons per mobilehome bedroom plus one additional person) are sometimes stated. Such standards may be subject to attack, however, as illegal discrimination against families with children. See §§2.22-2.25.
- (3) *Adjoining facilities*. Specify rules and regulations of mobilehome park-owned or -operated recreational facilities (including, *e.g.*, fees, storage of boats or golf carts, hours of tennis court use). Some attorneys advise that management put these provisions in a separate agreement so that the facilities do not fall under rent control provisions.
- (4) *Age*. Specify minimum age of residents (*e.g.*, senior citizen only). If limiting the park to senior citizens, management should note whether both spouses must be senior citizens. (See discussion in §§2.22-2.25, 6.18 on age restrictions.)
- (5) *Amendments to rules*. Specify how amendments to park rules will be carried out (*e.g.*, timing, service of notice, places of posting).
- (6) *Antennas, satellite dishes, or cable requirements*. Specify limitations on size and placement of antennas and satellite dishes. Note whether cable television hook-ups may be made.
- (7) *Arbitration*. Without the consent of the homeowners, management may not unilaterally adopt a rule or regulation that attempts to deny homeowners' right to trial by jury or that requires binding arbitration of disputes. CC §798.25.5.
- (8) *Associations; residents or homeowners*. Describe park requirements, if any, for resident or homeowner associations.
- (9) *Commercial uses*. Specify permissible commercial uses (if any) of park, common areas, or individual homes. Keep in mind that many senior citizens supplement their incomes with commercial enterprises, and that a blanket ban may promote poor landlord-tenant relations.
- (10) *Common areas*. Specify care and use requirements of common areas (*e.g.*, speed limits in the park, consumption of alcoholic beverages, hours of use of laundry rooms).
- (11) *Community room*. Specify requirements for use of community room (*e.g.*, hours, prior approval of use by residents or management, liquor prohibitions, insurance riders, post-use cleaning, use by outside organizations). See §6.20.
- (12) *Conduct*. Specify rules governing resident and guest conduct, hours of gatherings, noise, and guest use of facilities.
- (13) *Guests*. Specify rules governing registration, fees, and ages of guests. (Note that CC §798.34 prohibits

charges for guests who stay not more than 20 consecutive days or those who stay 30 days or less in any calendar year. Registration requirements for such guests are also prohibited.)

- (14) *Hitches, axles, and wheels*. Specify requirements regarding removal, storage, sale, and covers of mobilehome hitches, axles, and wheels.
- (15) *Mobilehomes*. Specify limitations on size, appearance, and upkeep of mobilehomes. Describe types of interior and exterior installations that are permitted. Note whether earthquake protection devices are required. Specify whether specific fire-resistant construction of mobilehomes or accessory structures is required. See §6.57A. Require park approval for any repairs or alterations which may impact park operations, and obtain Department of Housing and Community Development (HCD) permits when required. See §6.48.
- (16) *Parking*. Specify rules governing approval, installation, appearance, and maintenance of leased-site parking area and other assigned parking areas, including registration and fees (if any).
- (17) *Patios and awnings*. Specify requirements for prior approval, installation, appearance, and maintenance of patio and awning areas.
- (18) *Pets*. Specify size, number, and type of pets allowed. Describe registration and fees for services, rules concerning pets' conduct, and locations where they may be kept or walked. But see CC §798.33 for leases signed on or after January 1, 2001.
- (19) *Repairs*. Specify the procedure for requesting repairs (*e.g.*, where such requests must be made, rules governing emergency situations).
- (20) *Sales*. Specify applicable rules in addition to state laws (*e.g.*, whether a for-sale sign may be placed on the coach).
- (21) *Space*. Specify rules for, *e.g.*, landscaping, upkeep, items requiring prior approval. Management's right to charge for premises maintenance may be repeated in the rules. See CC §798.15(g).
- (22) *Special rules*. Specify special rules incorporated in the park rules and regulations (*e.g.*, regarding the swimming pool) that may be amended without 6 months' prior notice.
- (23) *Storage*. Specify registration, fees, and use requirements for park-owned storage. Describe site requirements, rules for approval, installation, maintenance, and appearance of storage sheds and storage areas. Note what may and may not be stored in storage areas or on the site (*e.g.*, second cars, boats).
- (24) *Traffic rules*. Specify any traffic rules, *e.g.*, speed limits, park stop signs, street parking. See §§6.13, 6.121.
- (25) *Trash*. Specify rules regarding, *e.g.*, trash pick-up, appearance and up-keep of containers. The rules should prohibit spilling, depositing into trash containers, and other improper handling of environmentally hazardous waste materials. Auto repairs and maintenance such as changing motor oil (or any other automotive fluids or grease) and storage of automobile batteries should be prohibited within the park.
- (26) *Miscellaneous rules*. Specify other rules necessary for park operation.

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VIII. MANAGEMENT-TENANT RELATIONS

§6.143 A. Tenant Organizations

In most mobilehome parks, the homeowners or residents form a local association that represents them in meetings with park management. Civil Code §798.51(a) specifically requires that management permit resident meetings to take place in the park's community or recreation hall. Under CC §798.51, mobilehome park rental agreements, rules, or regulations may not deny or prohibit homeowners or residents from meeting for any lawful purpose, from inviting public officials, political candidates, or representatives of mobilehome owner organizations to speak on matters of public interest, or from canvassing and petitioning owners and residents for noncommercial purposes regarding mobilehome living, public elections, or the initiative, referendum, or recall processes. Any homeowner or resident may bring an action to enjoin enforcement of any rule, regulation, or policy that prevents exercise of these rights. CC §798.52.

Civil Code §798.53 requires that management, within 30 days of a tenant's written request, meet and consult with homeowners and their organization or representatives regarding changes in park rules, services, or maintenance.

Rental agreements under CC §798.17 are listed among the subjects on which mobilehome management must consult with tenants and their organization or representatives. CC §798.53(d). For discussion of CC §798.17, see §6.32.

In *Tenants Ass'n of Park Santa Anita v Southers* (1990) 222 CA3d 1293, 272 CR 361, the court held that an unincorporated association representing mobilehome park residents had standing to sue the park owner for injunctive relief, abatement of nuisance, statutory fines, and legal fees. The association did not have standing, however, to sue for damages for emotional distress and personal injuries of particular residents.

The state has established a mobilehome "ombudsman" within the Department of Housing and Community Development to provide assistance in taking complaints and to help resolve and coordinate resolution of complaints regarding various aspects of living in mobilehomes and manufactured housing, including:

- Mobilehome titling and registration;
- Installation;
- Warranties;
- Financing;
- Sales;
- Park or mobilehome inspections; and
- Accessories and other improvements.

See Health & S C §§18150-18153. However, the ombudsman may not arbitrate, mediate, negotiate, or provide legal advice on mobilehome park rental disputes, lease or rental agreements, or disputes arising from lease or rental agreements, but may provide information on these issues. Health & S C §18151(c). Civil Code §798.29 requires park management to post a sign in a conspicuous public place regarding contacting the ombudsman.

There are three statewide mobilehome park tenants' organizations. The Golden State Manufactured-Home Owners' League, Inc. (GSMOL) is a mass membership organization, with chapters at a number of parks. It provides services to mobilehome owners, including statewide and regional attorneys, a legislative advocate, and staff and publishers for various publications. A subscription to its monthly newsletter, the Californian, may be obtained by writing the GSMOL at the address listed in the Directory. The California Mobilehome Resource and Action Association (CMRAA) provides similar benefits. Its newsletter and other assistance can be obtained by writing or calling the CMRAA; see Directory for address and telephone number. The Coalition of Mobilehome Owners-California ("CoMoCal") provides information and advocacy for park residents; see Directory for address and telephone number.

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§6.144 B. Management Organizations

The primary mobilehome park management organization in California is the Western Manufactured Housing Communities Association (WMA). Like the Golden State Manufactured-Home Owners' League, its paid staff includes attorneys, legislative advocates, and publishers. It publishes not only a monthly newsletter (the WMA Reporter), but also a notebook of laws applicable to mobilehome operation and a variety of forms, leases, and other documents. Information regarding the WMA may be obtained by writing to the address listed in the Directory. Other park owner organizations are California Mobilehome Parkowners' Alliance and the Manufactured Housing Educational Trust (MHET); see the Directory for their addresses and phone numbers.

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7

Practicing Under Rent and Eviction Control Laws

Nancy C. Lenvin
Myron Moskovitz

I. INTRODUCTION
- A. Overview §7.1
- B. Resources §7.2

II. BASIC CONCEPTS §7.3
- A. Vacancy Control or Decontrol §7.4
- B. Base Rent §7.5
- C. Retroactive Application of Enactments §7.6

III. HISTORICAL BACKGROUND AND LEGAL CHALLENGES
- A. Wartime Rent Controls and the "Emergency Requirement" §7.7
- B. Rise of Peacetime Controls §7.8
- C. Facial Challenges §7.9
  - 1. Constitutional Challenges §7.10
  - 2. Mobilehome Park Rent Control Ordinances §7.11
  - 3. Other Bases for Facial Challenges §7.12
- D. Fair Return Issues §7.13
- E. "As Applied" Due Process Challenges §7.14
- F. Damage Actions Under 42 USC §1983 §7.14A
- G. Kavanau and Galland Decisions Applied §7.14B
- H. Actions Regarding Rent Controls §7.14C

IV. EXEMPTIONS §7.15
- A. Single-Family Homes, Condominiums, and Small Buildings §7.16
- B. Owner-Occupied Dwellings §7.17
- C. New Construction §7.18
- D. Federally Assisted Housing §7.19
- E. Care Facilities §7.20
- F. Hotels §7.21
- G. Luxury Units §7.22
- H. Substantially Rehabilitated Units §7.23
- I. Tenants Who Do Not Make the Unit Tenant's Principal Residence §7.23A
- J. Other Exemptions §7.24

V. VACANCY DECONTROL: COSTA-HAWKINS RENTAL HOUSING ACT
- A. Preemption of Local Vacancy Controls §7.25
- B. Phasing Out Existing Local Vacancy Controls §7.25A
- C. Preemption of Local Laws Affecting Collateral Rights Under Costa-Hawkins §7.25B
- D. Subletting and Assignment: When Does a Vacancy Occur? §7.26
  - 1. Former Law on Subletting §7.27
  - 2. Subletting After the Costa-Hawkins Act §7.28
  - 3. Eviction Issues After Costa-Hawkins §7.28A

VI. RENT INCREASE MECHANISMS
- A. Base Rents
  - 1. Determining Base Rent §7.29
  - 2. Changing Base Rent §7.30
  - 3. Base Rents for Newly Covered Rental Units §7.31
  - 4. Evidentiary Problems in Establishing Base Rents §7.32
- B. Annual Base Rent Adjustments §7.33
- C. Individual Adjustments

1. Increases in Operating and Maintenance Expenses §7.34
2. Utility and Capital-Improvement Pass-Throughs §7.35
3. Cost of Professional Services to Prove Need for Rent Increase §7.36
4. Limits on Individual Increases §7.37
5. "Fair Return" Adjustments §7.38
6. Tenant Does Not Occupy Unit As Principal Residence §7.38A

VII. TENANT PETITIONS FOR RENT DECREASES OR REFUNDS
A. Reductions in Services §7.39
B. Inadequate Maintenance §7.40
C. Refund of Rent Overpayments §7.40A

VIII. PRACTICING BEFORE RENT CONTROL BOARDS
A. Introduction §7.41
B. Powers of Rent Boards
1. Rule Making §7.42
2. Adjudicating Petitions §7.43
3. Registration of Rental Units §7.44
4. Registration of Rents §7.45
C. Representing Clients at Administrative Hearings §7.46
1. Evidence §7.47
2. Preservation of Record §7.48
3. Costs of Preparing for and Attending a Hearing §7.49
4. Findings and Conclusions Required §7.50
D. Judicial Review: Administrative Mandamus §7.51
E. Arbitration §7.52

IX. RESTRICTIONS ON EVICTIONS
A. Overview §7.53
B. Just Cause for Eviction or Termination of Housing Services §7.54
1. "Good Faith" Requirements §7.55
2. Protection for Subtenants §7.55A
C. Permissible Grounds for Just Cause Evictions
1. Tenant's Breach
a. Failure to Pay Rent §7.56
b. Failure to Cure Violation of Rental Agreement §7.57
c. Conduct Constituting a Nuisance §7.58
d. Use of Premises for Illegal Purpose §7.59
e. Refusal to Permit Access to Landlord §7.60
f. Refusal to Execute New Lease §7.61
g. Improper Subletting §7.62
2. Renovation or Rehabilitation §7.63
3. Demolition or Conversion Under Ellis Act §7.64
a. Constitutionality of Ellis Act Upheld §7.64A
b. Basic Provisions of Ellis Act
(1) Allows Withdrawal of Housing Accommodations From Market §7.64B
(2) Authorizes Local Restrictions on Subsequent Rental §7.64C
(3) Requires Reasonable Review of Permit Applications and Fair Return on Demolished and Reconstructed Units §7.64D
(4) Does Not Prohibit Multiple Owner Occupancy Use §7.64E
(5) Notice and Reporting Requirements §7.64F
c. Eviction Actions Under Ellis Act §7.64G
d. Local Requirements and Restrictions on Evictions §7.64H
4. Occupancy by Owner or Owner's Relative
a. Typical Ordinance Provisions §7.65
b. Statutory Provisions; CC §1947.10 §7.66
c. "Good Faith" Intent to Occupy §7.67
d. Counseling Potential Buyers Who Plan to Occupy Rented Premises §7.68
D. Grounds Not Set Forth in Ordinance
1. Tenant Eviction Not Allowed After Foreclosure §7.69
2. Termination of Manager §7.70
3. Tenant Gives Notice of Termination But Fails to Vacate §7.71
4. Death of Tenant §7.72
E. Notice and Pleading Requirements
1. Eviction Notices §7.73

2. Must Compliance With Ordinance Be Alleged in Complaint? §7.74
F. Burdens of Proof and Presumptions §7.75
G. Defenses to Evictions Provided by Local Ordinance §7.76
H. Required Payments to Tenants on Eviction §7.76A

X. CIVIL DAMAGES AND OFFSETS FOR ORDINANCE VIOLATIONS
A. Damages for Rent Overcharges §7.77
B. Damages for Unlawful Evictions §7.78
C. Attorney Fees §7.79
D. Liability of New Owner §7.80

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I. INTRODUCTION

§7.1 A. Overview

California has no statewide law controlling rents or rent increases. Each municipality is free to decide whether and, within certain limits, how to regulate residential rents. State law, however, imposes limits on the type of rent controls that a locality may enact. The Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535) outlaws rent controls on vacant apartments and exempts newly constructed units and, under certain conditions, single-family homes and condominiums from controls on rents (see §§7.4, 7.25-7.28). With these limitations, many municipalities have adopted some form of regulation on the amount of rent a landlord may charge and some have further adopted limits on the right of a landlord to evict a month-to-month tenant.

The ordinances, as well as the local rules adopted by administrative agencies (charged with enforcing the controls), vary widely. Knowledge of one ordinance does not mean the practitioner will know another. Moreover, many jurisdictions frequently amend their ordinances and their administrative rules. Rent control has also spawned litigation, and a range of state and federal court decisions have had an impact on the interpretation of local ordinances. As a result, practitioners often find it a daunting task to ascertain the current status of applicable law or to determine the propriety of historical rents.

Historically, the state legislature has been called on to address some of the more difficult problems posed by rent controls for property owners, particularly those in jurisdictions that controlled rents even on vacant apartments. Legislation that continues in force includes the Ellis Act (Govt C §§7060-7060.7), but amendments are frequently proposed and sometimes enacted in response to court decisions. With the passage of the Costa-Hawkins Rental Housing Act, earlier statutes regulating local rent control ordinances, such as CC §§1947.7-1947.11, although remaining on the books, may not apply.

Struggles between landlords and tenants for control of local rent boards have resulted in rules, regulations, and unwritten practices that might not seem wholly consistent with the intent of the rent control ordinance as it was originally written. Landlords and tenants may not, however, enter into a private settlement agreement that determines whether the property is subject to a rent increase under a rent control ordinance. *Gombiner v Swartz* (2008) 167 CA4th 1365, 1372, 85 CR3d 83.

Because local rent control schemes vary so greatly and are amended so frequently, this chapter does not discuss some issues that are peculiar to particular local ordinances. Practitioners should be sure to obtain the current version of their local ordinance and a copy of all the current rules and regulations, and they should determine whether any amendments are being considered by the local legislative body or rent control board.

Courts in other states—especially New York and New Jersey—have considered rent control issues similar to those that arise in California. Some of these cases are cited in this chapter, although as authority they should be viewed with caution because the laws applicable in such cases may differ from California or local laws.

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§7.2 B. Resources

In addition to the printed texts of the local ordinance and rules, it is often helpful to consult agencies and groups whose primary function is assisting either landlords or tenants. The staffs of these organizations are often knowledgeable about proposed legislation and the status of pending cases. The State Bar of California's Real Property Section has a Landlord Tenant Committee.

The California Apartment Association located in Sacramento, local apartment owners' associations, and local boards of realtors and their state and national organizations are excellent sources of information for attorneys representing property owners. See the Directory for addresses and phone numbers of these organizations.

Local legal services organizations and community-based tenant groups are excellent contacts for tenant advocates. Local rent boards frequently maintain rosters of professionals who can be of assistance to both landlords and tenants.

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§7.3 II. BASIC CONCEPTS

Local "rent control" ordinances are designed to control the amount of rent increases that a landlord may impose. These "rent increase" limitations are typically tied to a "base rent" (see §7.5). Whether the base rent applies to a particular apartment or a particular tenant depends on the type of rent control originally enacted (see §7.4).

Most ordinances permit annual rent increases in the base rent, often referred to as "general" increases or adjustments (see §7.33). Additional increases ("individual adjustments") requested by the landlord are also usually authorized by local ordinances (see §§7.34-7.38). Tenant petitions for rent decreases are also allowed (see §§7.39-7.40).

Generally, rent control ordinances provide a mechanism for handling tenant complaints that a landlord has violated the ordinance or regulations (see §§7.41-7.52). Many also contain restrictions on a landlord's ability to evict tenants, including "good cause" requirements (see §§7.54-7.72). An improperly set rent level will affect a landlord's ability to evict for nonpayment of rent. See §7.56.

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§7.4 A. Vacancy Control or Decontrol

For most units as of January 1, 1999, there are no controls on the amount of rent that may be charged a new tenant, provided that the old tenant vacated the unit voluntarily, abandoned the unit, or was evicted for a breach of the rental agreement. See CC §1954.53(a)(1). This result is mandated by the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535), originally enacted in 1995. Before the enactment of this statute, rent controls in several jurisdictions (notably Berkeley and Santa Monica) had imposed rent controls on apartments regardless of who lived in the unit and whether it was a new or existing tenancy.

WARNING: Practitioners in jurisdictions where there has been vacancy control need to be particularly careful in determining what is the proper base rent for tenants.

The issue of when an apartment is voluntarily vacated may be fraught with problems because the statute provides that the rent may not be increased to market rate if the landlord has given a 30-day or 60-day notice under either CC §1946 or §1946.1 (see §§8.69-8.77) or CC §827 (see §§3.65-3.65B), except for a change permitted by law in the amount of rent or fees. CC §1954.53(a)(1). The lack of precision in the drafting of the statute makes practice under it difficult.

The state authorization to landlords to set rents on vacant apartments is also limited if the owner has entered into a contract with a government entity that provides rental assistance and the owner attempts to terminate that contract. CC §1954.53(a)(2). Similarly, owners of units with unabated building or housing code violations are also denied the right to bring rents on vacant units to market. CC §1954.53(f).

The foregoing limitations must be evaluated carefully before a practitioner gives any advice on the amount of rents that may be charged or collected by a landlord.

WARNING: In cities such as Santa Monica and West Hollywood, where there was limited or no vacancy decontrol prior to Costa-Hawkins, landlords must register the new base rent to obtain a Costa-Hawkins vacancy rent increase. If the landlord fails to register the new base rent or does so incorrectly, succeeding rent increases may violate the local rent control law. Practitioners should check filings, particularly in the context of an eviction for nonpayment of rent.

For further discussion of the details of the Costa-Hawkins Act, see §§7.25-7.28.

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§7.5 B. Base Rent

Rent control ordinances usually establish a base rent from which future legal rent levels are calculated, in such amounts and at such times as the rent control ordinance permits. In jurisdictions that have (or had) controls on the amount of rent a landlord may charge a new tenant for a vacant apartment (vacancy control; see §7.4), this base rent will probably have been established as of a particular date, typically some time before the ordinance was adopted. See §§7.29-7.32. In vacancy decontrol jurisdictions, the base rent is the initial rent charged the tenant. The base rent may be increased by general adjustments or other permitted increases over the term of the tenancy.

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§7.6 C. Retroactive Application of Enactments

Frequent amendment of rent control ordinances and rules raises the questions of whether such enactments are retroactive and to whom they apply. Courts have upheld municipalities' authority to roll back rents to determine base rents under newly enacted rent controls. See *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 130 CR 465; *Berman v Downing* (1986) 184 CA3d Supp 1, 229 CR 660. For purposes of retroactivity, courts have often viewed rent controls as involving important state interests, and they are therefore reluctant to hold that a landlord's vested rights have been breached. See *Rue-Ell Enters., Inc. v City of Berkeley* (1983) 147 CA3d 81, 84, 194 CR 919 (Berkeley commercial rent control ordinance).

Courts will hold that a landlord's vested rights have been breached, however, under certain conditions. See *Palacio de Anza v Palm Springs Rent Review Comm'n* (1989) 209 CA3d 116, 257 CR 121, in which a landlord sought to compel the rent board to grant a request for a hardship rent increase based on the costs of purchase-money financing for the property, as provided for in the board's regulations at the time the landlord acquired the property. The court upheld the landlord's argument (209 CA3d at 120):

> The Guidelines and rent-control ordinances did not create a statutory "right of action" in Palacio. Rather those enactments created land-use property rights which became vested in Palacio when the financing of the apartment purchase was undertaken in reliance on the existing rent control laws. In this sense, Palacio enjoys a situation analogous to that of one who has established the right to pursue a nonconforming use on land following a zoning change.... Any attempt to retroactively apply the repeal of the Guidelines' debt financing cost allowance to Palacio's vested rights would constitute an invalid impairment of an established economic/property interest without due process of law.

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III. HISTORICAL BACKGROUND AND LEGAL CHALLENGES

§7.7 A. Wartime Rent Controls and the "Emergency Requirement"

Rent controls were first adopted in the United States by many localities at the end of World War I. In keeping with the substantive due-process doctrines of that era, the Supreme Court held that rent controls were constitutional only in emergency situations. *Block v Hirsh* (1921) 256 US 135, 65 L Ed 865, 41 S Ct 458; *Marcus Brown Holding Co. v Feldman* (1921) 256 US 170, 65 L Ed 877, 41 S Ct 465. By 1924, all state and local rent controls had been terminated except in New York City, where controls for low-rent units continued until 1929.

Rent controls were reintroduced in 1942, when the federal government adopted price controls that continued in effect until 1953. During that era, the Supreme Court relied on the existence of an emergency as a basis for upholding rent controls against due process claims of "confiscation," and therefore did not address the issue of whether an emergency was still a constitutional prerequisite to the regulations. *Woods v Cloyd W. Miller Co.* (1948) 333 US 138, 92 L Ed 596, 68 S Ct 421.

A number of California appellate department cases decided in this era may be helpful in interpreting modern rent control requirements, particularly eviction requirements. See §§7.55, 7.74.

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§7.8 B. Rise of Peacetime Controls

In the 1970s, rent controls not justified by a wartime emergency became widespread outside New York for the first time in United States history, due primarily to steeply rising real estate values, including:

- single-family dwelling prices, which caused increased demand in the rental market;
- multi-unit rental property prices, which translated directly into higher rental rates; and
- unusually high inflation, increasing the financing costs of rental property, which owners passed on to tenants in the form of higher rental rates.

Those three factors, which increased demand and limited supply, resulted in sharp increases in rents. When these factors were combined with a third factor, increased political activism of tenants, growing out of the consumer movement, rent control laws were enacted rather suddenly. Washington, D.C., Miami Beach, Boston and several neighboring cities, approximately 100 cities in New Jersey, and several California communities adopted various forms of rent regulation.

The rise of peacetime rent controls brought challenges to those enactments on various grounds, such as state preemption and lack of an emergency. The high courts of California, Maryland, and New Jersey ruled that the emergency requirement was a throwback to the era of substantive due process and that it had no place in modern judicial standards of review of price controls. *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 157, 130 CR 465; *Westchester W. No. 2 Ltd. Partnership v Montgomery County* (Md 1975) 348 A2d 856, 865; *Hutton Park Gardens v Town Council* (NJ 1975) 350 A2d 1, 12. For history of the emergency requirement for rent control laws, see Baar & Keating, *The Last Stand of Economic Substantive Due Process, The Housing Emergency Requirement for Rent Control*, 7 Urb Law 447 (1975).

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§7.9 C. Facial Challenges

From the mid 1970s until the early 1990s, most rent control challenges attacked the ordinances as written, *i.e.,* "on their face." The courts generally upheld communities' right to enact both price and eviction controls, as long as an ordinance provided a system for permitting an owner to obtain a fair return on investment and did not erect unreasonable procedural barriers to obtaining permitted rent increases.

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§7.10 1. Constitutional Challenges

The first and perhaps most important California case was *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 130 CR 465, in which the supreme court ruled that:

(a) California cities had the power to adopt rent controls under their police powers—even in the absence of an "emergency";

(b) The state had not "preempted" the field of rent regulation;

(c) No state enabling legislation was needed for local governments to enact rent controls; and

(d) Rent controls could be adopted by the initiative process.

Nevertheless, the court held that the Berkeley ordinance under review was unconstitutional because its cumbersome rent-increase procedures (which required a board hearing before approval of any rent increase) were "not reasonably related to the [rent control initiative's] stated purpose of preventing excessive rents" and would prevent most landlords from obtaining any rent increases for years. 17 C3d at 173.

The *Birkenfeld* court held that cities could regulate substantive grounds for eviction, but could not impede the summary nature of state eviction procedures. The court struck down a requirement that a landlord obtain a certificate of eviction from the rent board before filing an unlawful detainer complaint. 17 C3d at 150.

In a challenge to the subsequent Berkeley rent control ordinance, the supreme court ruled that the ordinance did not violate state or federal anti-trust laws. Moreover, the court held that rent controls do not constitute a taking or a denial of due process merely because they reduce appreciation or actual property value. *Fisher v City of Berkeley* (1984) 37 C3d 644, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045. When a city's rent control ordinance contains an evidentiary presumption that existing rent adjustment formulas in the ordinance provide a fair return, to obtain an individual rent increase, the owner must demonstrate that the returns provided by the CPI and NOI standards are so unreasonable and unfair as to be confiscatory. *TG Oceanside, LP v City of Oceanside* (2007) 156 CA4th 1355, 68 CR3d 320.

Defects in a rent control ordinance proposed by an initiative petition may be cured by a second ordinance enacted by the City that is made retroactively effective to the effective date of the initiative petition. *MHC Fin. Limited Partnership Two v City of Santee* (2005) 125 CA4th 1372, 23 CR3d 622 (ruling on mobilehome ordinance).

A due process challenge to the Escondido mobilehome rent control ordinance was rejected in *Yee v City of Escondido* (1990) 224 CA3d 1349, 274 CR 551. The court held that a reasonable price regulation does not become an unconstitutional "taking" merely because the rent control ordinance transfers value from the landlord to the tenant, in the absence of evidence that the ordinance has deprived the property owner of a fair return.

The court of appeal decision was affirmed by the United States Supreme Court in *Yee v City of Escondido* (1992) 503 US 519, 118 L Ed 2d 153, 112 S Ct 1522. The Supreme Court rejected the mobilehome park owners' contention that the Escondido ordinance, viewed against the backdrop of California's Mobilehome Residency Law (CC §§798-799.8), constituted a "taking," thereby requiring compensation under the Fifth Amendment. The court noted that there are two primary classes of cases interpreting the takings clause: physical takings, in which the government authorizes a physical occupation or actually takes title, and regulatory takings, in which the government merely regulates the use of property. The court held that the petitioners had not established a physical taking, and it noted that, although the petitioners might prevail on their claim of a regulatory taking, that issue was not before the court because it was not fairly included in the question on which certiorari had been granted.

A constitutional challenge to rent control in commercial tenancies was heard in *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, in which the United States Supreme Court reversed a summary judgment in favor of an oil company that challenged a state rent cap on gasoline franchises. Instead, the Court held that there was no unconstitutional taking in violation of the Fifth and Fourteenth Amendments. A legislative act restricting rents is not an unconstitutional taking of private property requiring just compensation merely because it fails to substantially advance a legitimate public policy aim. To demonstrate a governmental taking that requires just compensation, there must either be a physical invasion or direct appropriation of private property by the government, or

the governmental regulation must be the functional equivalent of a direct appropriation or ejection from private property (*e.g.*, when the regulation completely prevents the owner from putting the property to any economically beneficial use).

Following *Lingle*, the Ninth Circuit recognized that landlords can challenge the rationality of land-use regulations as a denial of substantive due process. See *Action Apartment Ass'n v Santa Monica Rent Control Opinion Bd.* (9th Cir 2007) 509 F3d 1020. However, the court concluded that the facial due process Fourteenth Amendment claim was time barred, and that the as-applied due process claim was unripe. A landlord may challenge, for lack of due process, a rent board ruling that is based solely on the testimony of tenants on which the hearing officer denied the landlord the right of cross-examination. *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367.

For an analysis of *Lingle* and for district courts' discussion of the application of *Lingle* to challenges to mobilehome rent control ordinances, see *S.G. Borello & Sons v City of Hayward* (ND Cal, Nov. 20, 2006, No. C03-0891) 2006 US Dist Lexis 86293 and *MHC Fin. Ltd. Partnership v City of San Rafael* (ND Cal, Dec. 5, 2006, No. C00-3785) 2006 US Dist Lexis 89195 (see subsequent history in §6.15), both of which permitted substantive due process claims to proceed.

In *Stardust Mobile Estates, LLC v City of San Buenaventura* (2007) 147 CA4th 1170, 55 CR3d 218, the court approved use of a maintenance net operating income formula with a partial inflation index but rejected the landlord's takings claim because the landlord failed to meet the *Lingle* test (neither a physical invasion of the property nor an economic regulation deprived the owner of all economically beneficial use).

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§7.11 2. Mobilehome Park Rent Control Ordinances

As prices of conventional "stick-built" housing rose in the 1970s, many people sought the cost advantages of factory-built housing, *i.e.,* mobilehomes. Finding a spot to place the mobilehome was not easy. Most cities and counties severely restricted the number of mobilehome park spaces they would allow, for aesthetic reasons and because mobilehomes were not affixed to the land and thus did not increase property tax valuations. Increasing demand and a limited supply put park owners in a position to charge high rents for the few spaces available, and mobilehome owners reacted by banding together politically to cause the enactment of local mobilehome park rent control ordinances. Park owners responded by filing lawsuits challenging the validity of the new ordinances. For further discussion of mobilehome parks and their regulation, see chap 6.

Some lawsuits challenged the constitutionality of some aspect of the ordinances. In *Sandpiper Mobile Village v City of Carpinteria* (1992) 10 CA4th 542, 12 CR2d 623, *e.g*., the court upheld the constitutionality of the Carpinteria mobilehome park rent control ordinance, and it further indicated that the absence of vacancy decontrol did not result in a taking of the owners' property.

In *Adamson v City of Malibu* (CD Cal 1994) 854 F Supp 1476, the court upheld a mobilehome park rent control ordinance's restrictions on rent increases, a 3-year rent moratorium while the city considered enacting the ordinance, and provisions that restricted rent increases on purchasers of mobilehomes to 10 percent. The court, however, invalidated provisions allowing an 8-year rent rollback and a 3-year rent freeze, and restrictions on increases in base rent.

In *Carson Harbor Village, Ltd. v City of Carson* (9th Cir 1994) 37 F3d 468, a park owner claimed that the combination of the city's prohibition on raising rents on new tenants and the state's restrictions on termination of tenancies of old tenants denied him due process, because it gave existing tenants the power to exact a premium from new tenants in the selling prices of the mobilehomes, which bore no rational relationship to the goal of preventing excessive rents. The court rejected this argument, holding that the legislative bodies also intended to protect mobilehome owners' investments in their homes.

A constitutional challenge may be rejected if the claim is not ripe for adjudication. In *Hacienda Valley Mobile Estates v City of Morgan Hill* (9th Cir 2003) 353 F3d 651, *e.g.,* the court held that the takings claim was not ripe because the landlord had failed to pursue available state remedies before filing a federal lawsuit. See also *Carson Harbor Village, Ltd. v City of Carson* (9th Cir 2004) 353 F3d 824; *Los Altos El Granada Investors v City of Capitola* (2006) 139 CA4th 629, 43 CR3d 434 (trial court correctly sustained demurrer to inverse condemnation, due process, and equal protection claims because park owner had not exhausted administrative remedies; case remanded to allow park owner to amend complaint after "as applied" takings, equal protection, and due process claims were ripe).

A 2005 Supreme Court case significantly altered the landscape of takings claims under the United States Constitution. After *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074 (discussed in §7.10), a California court of appeal found no taking when the mobilehome park was denied recovery of the cost of driveway improvements, a *Vega* adjustment (*Vega v City of W. Hollywood* (1990) 223 CA3d 1342, 273 CR 243), and a discretionary rent increase. *Stardust Mobile Estates, LLC v City of San Buenaventura* (2007) 147 CA4th 1170, 55 CR3d 218 (approved use of maintenance net operating income formula with partial inflation index and remanded case to trial court).

In *Cashman v City of Cotati* (9th Cir 2004) 374 F3d 887, the Ninth Circuit had held that because the city's mobilehome space rent control ordinance does not prevent incumbent tenants from capturing a premium on sale, it does not substantially further the city's legitimate interests (including that of maintaining affordable housing), and therefore constitutes a "taking." But after the decision in *Lingle v Chevron U.S.A., Inc., supra,* and in response to Cotati's petition for rehearing, the Ninth Circuit withdrew its opinion and affirmed the District Court's decision. See *Cashman v City of Cotati* (9th Cir 2005) 415 F3d 1027.

In *Montclair Parkowners Ass'n v City of Montclair* (1999) 76 CA4th 784, 90 CR2d 598, the court rejected a claim that a mobilehome space rent control ordinance mandating "vacancy control" (*i.e.,* prohibiting rent increases on the sale of

mobilehomes) was an unconstitutional "taking." The court held that the test for examining whether a mobilehome space rent control ordinance is a "taking" is not whether the regulation substantially advances a legitimate government interest and whether it deprives the owner of all economically viable use (see 76 CA4th at 791; see also §7.14), but whether the regulation was "arbitrary." Applying this test, the court held that the restriction was not arbitrary, because it protected current mobilehome owners' equity in their homes and protected prospective mobilehome owners from excessive rents. The court refused to follow *Richardson v City & County of Honolulu* (9th Cir 1997) 124 F3d 1150, which applied the other test to a mobilehome rent control ordinance.

Montclair and *Richardson* were invalidated by the Supreme Court's ruling in *Lingle v Chevron U.S.A., Inc., supra*. See, for example, *S.G. Borello & Sons v City of Hayward* (ND Cal, Nov. 20, 2006, No. C03-0891) 2006 US Dist Lexis 86293, in which the district court noted that *Lingle* "eviscerated the 'substantially advances' theory of takings jurisprudence that the Ninth Circuit had developed in a series of cases," thereby limiting a landlord's remedy to a due process challenge to rent control regulations. To succeed on a due process claim, however, the landlord must show that the governmental body enacting the legislation lacked a legitimate reason for its decision.

In *Village Trailer Park, Inc. v Santa Monica Rent Control Bd.* (2002) 101 CA4th 1133, 124 CR2d 857, the court held that the state's Mobilehome Residency Law (MRL) (see chap 6) does not "preempt" Santa Monica from applying its rent control law to mobilehome park spaces, and that an arbitration clause in mobilehome park leases does not prevent the local board from enforcing its ordinance against the park owner.

> First, Village cannot exempt itself from the operation of local law by simply announcing that its leases are subject to arbitration. If this were the case, every landlord would similarly announce a personal exemption from the law, thereby undermining a local government's legitimate exercise of its police power. [Citation omitted.] Second, the Board is not a party to the leases and is not bound by any arbitration clause or declaration of exemption from rent control.

In an evidentiary hearing before a rent control board to determine whether the tenants' rental agreements are subject to the rent control law or the MRL, the landlord must be permitted to cross-examine the tenants who testify. Failure to permit such cross-examination is a denial of due process. *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367.

On other challenges to mobilehome park ordinances, see cases cited in §§7.10, 7.12. On the question of what constitutes a "fair return" for mobilehome park owners, see *Carson Mobilehome Park Owners' Ass'n v City of Carson* (1983) 35 C3d 184, 197 CR 284; *Carson Harbor Village, Ltd. v City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 CA4th 281, 82 CR2d 569; *San Marcos Mobilehome Park Owners' Ass'n v City of San Marcos* (1987) 192 CA3d 1492, 238 CR 290; and *Oceanside Mobilehome Park Owners' Ass'n v City of Oceanside* (1984) 157 CA3d 887, 204 CR 239.

In *Concord Communities, LP v City of Concord* (2001) 91 CA4th 1407, 111 CR2d 511, a mobilehome space rent control ordinance was enacted soon after plaintiff purchased two mobilehome parks. The city rejected the owner's petition to increase the base rents, but the court held that the city had abused its discretion by ignoring evidence that rents were significantly below market because of "unique or extraordinary circumstances": the prior owner's refusal to raise rents because he had no debt on the property, paid "pre-Proposition 13" property taxes on it, and wanted to keep rents low to avoid "government involvement." Similarly, in *Stardust Mobile Estates, LLC v City of San Buenaventura* (2007) 147 CA4th 1170, 55 CR3d 218, the Court denied the mobilehome property owner's constitutional claims, but remanded the case for a trial court determination as to whether the base year rents had been set at an artificially low level.

Some mobilehome park owners have attempted to avoid the state courts and sought relief in the federal courts. For discussion of procedural problems attendant upon such efforts, as well as a discussion of the application of *Lingle v Chevron U.S.A., Inc., supra,* see *S.G. Borello & Sons v City of Hayward* (ND Cal, Nov. 20, 2006, No. C03-0891) 2006 US Dist Lexis 86293. Furthermore, in *MHC Fin. Ltd. Partnership v City of San Rafael* (ND Cal, Dec. 5, 2006, No. C00-3785) 2006 US Dist Lexis 89195, the federal district court denied the City's motion for summary judgment in part and allowed a substantive due process challenge to a local mobilehome ordinance that contained vacancy control provisions.

In *Guggenheim v City of Goleta* (9th Cir 2009) 582 F3d 996, mobilehome park owners challenged a rent control ordinance as facially unconstitutional. The ordinance provided that rent could be increased annually at 75 percent of the consumer price index and park owners could arbitrate for more rent to cover actual expenses. The park owners argued

that the ordinance forced them to rent their property at 80 percent below market value, thereby enabling the tenants to sell their mobilehomes at ten times their purchase price. The court found a regulatory taking, stating that the ordinance "effects a transfer of the right to rents for the use of the property from the Park Owners to the tenants." While the park owners own the property on which the mobilehomes rest, as a result of the ordinance, the tenants have the right to convey the home with the right to remain on the site at a much-reduced rent. The court, however, denied the park owners' due process claim, finding that the ordinance makes some allowance for profit on the investment and not merely an offset for the cost of the improvements.

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§7.12 3. Other Bases for Facial Challenges

After the decision in *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 130 CR 465 (see §7.10), the courts rejected facial rent control challenges that raised a variety of issues:

(a) Rent control ordinances need not comply with the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21178.1) when they are enacted by the initiative process. *Stein v City of Santa Monica* (1980) 110 CA3d 458, 168 CR 39.

(b) Mobilehome park rent controls are not preempted by state law, despite extensive state regulation of landlord-tenant relations in mobilehome parks (see CC §§798-799.8). *Gregory v City of San Juan Capistrano* (1983) 142 CA3d 72, 191 CR 47, overruled on other grounds in *Fisher v City of Berkeley* (1984) 37 C3d 644, 686 n43, 209 CR 682; *Palos Verdes Shores Mobile Estates, Ltd. v City of Los Angeles* (1983) 142 CA3d 362, 190 CR 866. See also *Griffith v County of Santa Cruz* (2000) 79 CA4th 1318, 94 CR2d 801 (long-term mobilehome park tenants residing in recreational vehicles enjoy protection under local rent control ordinances despite CC §1954.25's ban on commercial rent control).

(c) Rent control ordinances are not unconstitutional because they impair preexisting contractual arrangements. *Interstate Marina Dev. Co. v County of Los Angeles* (1984) 155 CA3d 435, 202 CR 377; *Rue-Ell Enters., Inc. v City of Berkeley* (1983) 147 CA3d 81, 194 CR 919.

(d) An ordinance is not unconstitutionally vague if it simply lists factors that must be considered in determining allowable rents, without stating how they should be considered. See *Carson Mobilehome Park Owners' Ass'n v City of Carson* (1983) 35 C3d 184, 197 CR 284. The Carson ordinance specified various factors for consideration in setting rents (35 C3d at 188 n2):

- The consumer price index;
- Government wage-and-price guidelines;
- Rents for comparable mobilehome park spaces;
- The length of time since the last rent increase;
- Changes in operating expenses; and
- Changes in lease payments by mobilehome park master lessees applying for rent increases.

See also *H.N. & Frances C. Berger Found. v City of Escondido* (2005) 127 CA4th 1, 25 CR3d 19 (determination of fair rent by rent board need not follow any specific formula; mobilehome rent control ordinance enumerated 11 factors the board might consider in making its determination).

(e) An ordinance is not void if its defects are cured by a later-enacted ordinance that is made retroactively effective to the date of the first ordinance. *MHC Fin. Ltd. Partnership Two v City of Santee* (2005) 125 CA4th 1372, 23 CR3d 622.

In 2004, a successful challenge was made to San Francisco's ordinance. In response to allegations that landlords attempt to circumvent notice requirements (and other consequences of evicting tenants from rent controlled units), San Francisco added provisions to its eviction control ordinance that punish both civilly and criminally a landlord who (1) requests that a tenant move or threatens to recover possession either verbally or in writing, unless the landlord has a good faith intent to evict and does actually go forward with the eviction, (2) seeks or obtains a tenant's agreement not to cooperate with an investigation by the city for violations of the ordinance, and (3) seeks or obtains a tenant's waiver of rights under the ordinance. The ordinance also provided that any such waiver by a tenant would be void as contrary to public policy unless the tenant was represented by independent counsel. These provisions were held to be an unconstitutional denial of free speech and contrary to a tenant's rights to self-representation in legal proceedings. *Baba v Board of Supervisors of the City & County of San Francisco* (2004) 124 CA4th 504, 21 CR3d 428.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.13 D. Fair Return Issues

§7.13 D. Fair Return Issues

Many rent control ordinances, particularly mobilehome park ordinances, use a vague "fair return" requirement to determine whether a landlord is entitled to raise the rent. The California Supreme Court has stated that an ordinance need not contain a specific formula as long as it provides a method of regulating rents that avoids confiscatory results. *Fisher v City of Berkeley* (1984) 37 C3d 644, 680, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045. It is enough that the ordinance permits the rent board to "approve such rent increases as it determines to be fair, just and reasonable" without providing a specific formula or procedure for determining rents. *H.N. & Frances C. Berger Found. v City of Escondido* (2005) 127 CA4th 1, 25 CR3d 19 (the ordinance enumerated 11 factors the board might consider in making its determination). See also *Stardust Mobile Estates, LLC v City of San Buenaventura* (2007) 147 CA4th 1170, 55 CR3d 218 (approval of maintenance net operating income formula with partial inflation index).

PRACTICE TIP: An attorney's understanding of the fair-return issue will help him or her to make a rational and persuasive presentation to the rent board in an individual-adjustment hearing and to present the evidence necessary to sustain a challenge if the board fails to provide an adequate rent increase.

There are three principal, and somewhat conflicting, types of fair return standards that have been discussed by courts in constitutional challenges to rent control ordinances:

- return on value;
- return on cash investment; and
- maintenance of net operating income.

See §7.38. See also Baar, *Fair Return Standards Under Mobilehome Park Space Rent Controls: Conceptual and Practical Approaches*, 29 CEB Real Prop L Rep 333 (Sept. 2006).

If an ordinance provides the landlord with adequate procedures for obtaining a timely rent adjustment, and if the adjustment mechanism is flexible enough to authorize a sufficient increase to provide a fair return, the courts are unlikely to strike down an ordinance merely because its language limits rent increases. Courts of appeal have ruled that the state and federal constitutions do not require that rent control legislation guarantee owners a fair return on the *value* of their property, citing the reasons set forth in *Helmsley v Borough of Fort Lee* (NJ 1978) 394 A2d 65 and its predecessor cases. See *Oceanside Mobilehome Park Owners' Ass'n v City of Oceanside* (1984) 157 CA3d 887, 204 CR 239; *Cotati Alliance for Better Hous. v City of Cotati* (1983) 148 CA3d 280, 195 CR 825; *Palos Verdes Shores Mobile Estates, Ltd. v City of Los Angeles* (1983) 142 CA3d 362, 190 CR 866. But see *Gregory v City of San Juan Capistrano* (1983) 142 CA3d 72, 191 CR 47, overruled on other grounds in *Fisher v City of Berkeley* (1984) 37 C3d 644, 686 n43, 209 CR 682, in which the court held that owners are entitled to a fair return on the value of their property. In *Fisher v City of Berkeley* (1984) 37 C3d 644, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045, the supreme court disapproved the portion of the *Gregory* decision that would have required an ordinance to provide for a fair return on value to withstand a facial challenge. 37 C3d at 686 n43.

The United States Supreme Court has held that use of a fair-return-on-value standard in the regulation of utility companies is not constitutionally required. See *Duquesne Light Co. v Barasch* (1989) 488 US 299, 308, 102 L Ed 2d 646, 657, 109 S Ct 609. See also *20th Century Ins. Co. v Garamendi* (1994) 8 C4th 216, 32 CR2d 807, in which the California Supreme Court held, "There is no constitutional or other requirement that all reasonable expenses and prudent investments must be allowed" (8 C4th at 258) and, indeed, that a "regulated firm has no constitutional right even against a loss" (8 C4th at 321) and "has no constitutional right to a profit" (8 C4th at 294).

Garamendi was distinguished in *Action Apartment Ass'n v Santa Monica Rent Control Bd.* (2001) 94 CA4th 587, 114 CR2d 412, in which the court upheld the right of landlords to challenge the city's imposition of a 3 percent interest rate on tenant security deposits. The landlords contended that, to the extent that they had to pay tenants 3 percent while only being able to obtain less than 3 percent interest on the mandated account, the city was "taking" from them under the Fifth Amendment of the U.S. Constitution and article I, §19 of the California Constitution. The court of appeal

agreed, holding that neither of the administrative problems asserted by the city (uncertainty and changeability of legal interest level; necessity for court to micromanage this matter) was so insurmountable that all relief should be denied. But see *Small Prop. Owners v City & County of San Francisco* (2006) 141 CA4th 1388, 47 CR3d 121 (San Francisco ordinance requiring landlords to pay tenants 5 percent interest on security deposits held for more than one year did not result in taking of landlords' property because ordinance did not require landlords to place deposits into accounts paying interest below rate they had to pay tenants).

A rent control ordinance need not assure a landlord of a fair rate of return on the *current* value of the property; it passes constitutional muster if it adopts a "fair rate of return on initial investment standard." *Palomar Mobilehome Park Ass'n v Mobilehome Rent Review Comm'n* (1993) 16 CA4th 481, 20 CR2d 371 (citing *Fisher v City of Berkeley, supra*). See also *Yee v Mobilehome Park Rental Review Bd.* (1993) 17 CA4th 1097, 23 CR2d 1.

Santa Monica's rent control ordinance was upheld in *Baker v City of Santa Monica* (1986) 181 CA3d 972, 226 CR 755. The court relied on *Fisher v City of Berkeley, supra,* in holding that a local rent control ordinance need not provide a landlord with a fair return on market value and need not preserve the appreciated value of the property. An evidentiary presumption that existing rent adjustment formulas in the ordinance provide a fair return will be upheld; the owner must demonstrate that the returns provided by the CPI and NOI standards are so unreasonable and unfair as to be confiscatory in order to obtain an individual rent increase. *TG Oceanside, LP v City of Oceanside* (2007) 156 CA4th 1355, 68 CR3d 320. Oceanside's mobilehome park ordinance was upheld against challenges to its evidentiary presumption that its existing rent adjustment formulas would provide a fair return. The presumption affected the burden of producing evidence and was not, therefore, preempted by Evid C §500.

In *San Marcos Mobilehome Park Owners' Ass'n v City of San Marcos* (1987) 192 CA3d 1492, 238 CR 290, the court interpreted the San Marcos mobilehome space rent control ordinance as requiring the rent review commission to consider both the current market value of the property and its operating costs.

Following the doctrine that the method for computing rate of return is immaterial if the result is reasonable, appellate courts have not held that return-on-investment standards are unconstitutional. The courts have noted, however, that the conceptual problems associated with use of such standards effectively limit their viability. In *Helmsley v Borough of Fort Lee* (NJ 1978) 394 A2d 65, 72 n8, the New Jersey Supreme Court stated: "Although an investment-based standard may not be as easy to apply as some income-based criteria, there are no obvious theoretical obstacles to using an investment based standard." However, the court also stated that a standard that results in differences in allowable rents because of differing mortgage rates "serves no legitimate governmental purpose." 394 A2d at 81.

In *Cotati Alliance for Better Hous. v City of Cotati* (1983) 148 CA3d 280, 195 CR 825, the court of appeal concluded that a return-on-initial-investment standard would not operate in a reasonable manner in an inflationary era. Therefore, the court held that a return-on-investment formula would be reasonable only if the original investment were indexed to reflect changes in the purchasing power of the dollar since the time of acquisition. In *Fisher v City of Berkeley, supra,* the California Supreme Court approved this view (37 C3d at 683):

> [A]lthough defendants' ordinance may properly restrict landlords' profits on their rental investments, it may not indefinitely freeze the dollar amount of these profits without eventually causing confiscatory results.

Although the court indicated that return on original investment or net operating income may not be frozen indefinitely, it did not specify what rate of growth must be permitted or how long it would be reasonable to freeze net operating income.

In *Cotati Alliance for Better Hous. v City of Cotati, supra,* the court implied that allowing inflation increases on the cash investment, but not on the financed portion of the investment, would be reasonable. Such an approach would result in heavily financed owners being entitled to smaller rent increases than owners who had made substantial cash down payments. The court suggested that the investment could be imputed in cases in which the return-on-investment approach was problematic (*e.g.,* if property was obtained by inheritance or gift). The court concluded (148 CA3d at 294):

> No specific formula can or should be developed since the Board, in making general rent adjustments and acting upon petitions for individual increases, must consider a variety of factors, some of which may be personal or individual to a particular landlord or rental property.

A mobilehome park that tried to pass on the costs of electrical upgrades to common areas was denied relief by the City and told that the PUC has exclusive jurisdiction over the electric system so that the City could not award a rent

increase. Although the landlord was forced to bear additional cost without recourse to recovery, the District Court found that the landlord had not clearly elected the legal theory on which it was proceeding and gave leave for the landlord to file an amended complaint. *S.G. Borello & Sons v City of Hayward* (ND Cal, Nov. 20, 2006, No. C03-0891) 2006 US Dist Lexis 86293.

Whatever standard a local jurisdiction has adopted to assess whether an owner is receiving a fair return, courts have required that an owner specifically address and present evidence as to why the system in operation fails to provide a fair return. *TG Oceanside, LP v City of Oceanside* (2007) 156 CA4th 1355, 68 CR3d 320.

In an evidentiary hearing at which testimony is taken, the parties must be allowed to cross-examine witnesses. Failure to permit such cross-examination is a denial of due process. *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367.

Arguments that a different valuation system or methodology should have been employed by the local rent control government entity are usually not a successful means for challenging an unfavorable administrative ruling. See, *e.g., TG Oceanside, supra*.

NOTE: Practitioners should be careful to utilize the nomenclature in any particular enactment in presenting arguments, since a failure to do so may be interpreted as a failure to address evidentiary standards required by the local ordinance.

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§7.14 E. "As Applied" Due Process Challenges

Beginning in the late 1980s, litigants in land use cases achieved successes in the United States Supreme Court with challenges to local regulations *as applied* to the particular landowner, on the basis that the regulation as applied worked a taking of the owner's property in violation of due process of law. *Dolan v City of Tigard* (1994) 512 US 374, 129 L Ed 2d 304, 114 S Ct 2309; *Nollan v California Coastal Comm'n* (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141; *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378.

Successes in the area of land use controls led landlords to begin to challenge local rent control enactments as applied to the individual owner on similar theories, with some success. In *Westwinds Mobile Home Park v Mobilehome Park Rental Review Bd.* (1994) 30 CA4th 84, 35 CR2d 315, the court held that a $4 per month increase was not adequate to provide a fair rate of return to the property owner. Although the court read *Nollan v California Coastal Comm'n, supra,* more narrowly than the property owner did, it analyzed the financial data provided by both sides and determined that there was insufficient evidence to support the Board's finding that the increase provided the owner a fair return.

In *Apartment Ass'n of Greater Los Angeles v Santa Monica Rent Control Bd.* (1994) 24 CA4th 1730, 30 CR2d 228, the court rejected as too broad a rent board regulation that denied individual rent increase petitions filed by *all* landlords who purchased their buildings after enactment of the rent control ordinance.

The United States Supreme Court upheld the constitutionality of a San Jose rent control ordinance that allowed the landlord to raise rents up to 8 percent per year, 5 percent per year plus certain costs, or certain debt service costs (whichever were highest) in *Pennell v City of San Jose* (1988) 485 US 1, 99 L Ed 2d 1, 108 S Ct 849. Landlords had claimed that the ordinance was unconstitutional because it provided that a hearing officer must consider seven factors when ruling on a rent increase application, including "the hardship to a tenant." The Court rejected the argument that the ordinance, as applied, resulted in an unconstitutional taking, citing the lack of evidence that a hearing officer ever relied on the hardship provision to reduce rent and noting that the ordinance required only that the hearing examiner *consider* the hardship factor. The decision strongly suggests, however, that a landlord who is denied an otherwise justified rent increase on grounds of tenant hardship may have suffered an unconstitutional taking. The Court also held that the ordinance did not violate the equal protection clause, ruling that a rational basis existed for treating landlords differently depending on whether they have hardship tenants.

In *Kavanau v Santa Monica Rent Control Bd.* (1993) 19 CA4th 730, 23 CR2d 724, the court held that a rent control ordinance, as applied, was confiscatory. The landlord, who had recently purchased the building, applied for permission to raise building rents by $35,000 to maintain net operating income, because of needed repairs. The hearing examiner found that this increase was needed to enable the landlord to make a fair return on investment, but nevertheless reduced the increase to $5184 in the first year (with higher increases thereafter), because the rent board had adopted a regulation limiting annual increases to 12 percent. The court of appeal held that the regulation was unconstitutional as applied. See 19 CA4th at 736 n7. The board's amendment of the regulation to allow a waiver of the 12 percent cap "in extraordinary circumstances" saved the regulation from facial unconstitutionality, but the board's application of the cap was unconstitutional, because it was limited to instances of insolvency or acts of God, and it thus deprived the landlord of a fair return on investment. The fact that the board allowed the landlord to increase rents by the full $35,000 over a period of several years was held to be inadequate, because the landlord would lose the interest he might have earned on the denied increases in early years, and he could not take other allowed increases because he would already be at the 12 percent cap. See 19 CA4th at 735.

A later appeal in the *Kavanau* case raised the issue of whether a "taking" had occurred. In *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 783, 66 CR2d 672, the supreme court ruled that although the landlord was denied due process by the Santa Monica Rent Control ordinance, no taking occurred because the landlord had an adequate remedy for his interim losses through an adjustment of future rent under the rent control regulations.

The court expressly rejected the argument that a taking requiring just compensation must be based on a total loss of the economic benefits of the property. 16 C4th at 774. Although it declined to prescribe a single analytical method for

all cases, the court suggested that a two-part test for finding a regulatory taking in a rent control case is that the ordinance both deprives the owner of a fair return on the property *and* fails substantially to advance legitimate state interests. 16 C4th at 776. The court did not decide, however, whether a rent regulation that deprives a landlord of due process necessarily constitutes a taking, but held that "a remedy for the due process violation, if available and adequate, obviates a finding of a taking." 16 C4th at 782. The court cautioned (16 C4th at 784):

> The state and federal Constitutions require only a fair process that reasonably takes into consideration the landlord's interests, and a landlord's return need only fall within a "broad zone of reasonableness." [Citation omitted.] Accordingly, courts are in no position to determine the appropriate rent ceiling for an apartment as a means of assessing damages. We strongly resist any rule that would impose on a reviewing court the impossible task of finding somewhere in the penumbra of the Constitution a stipulation that a particular apartment in a particular building should rent for $746 per month rather than $745.

The ruling in *Kavanau* that a remedy for a due process violation will obviate the finding of a taking was applied by a court of appeal in *Yee v Mobilehome Park Rental Review Bd.* (1998) 62 CA4th 1409, 73 CR2d 227, to deny a landlord's claim that he had suffered a taking based on a substantial financial loss during the time the board had refused to give him a proper rent increase. The court further denied the landlord's damage claims on the basis of governmental immunity. On rent control applicable to mobilehome parks, see §§6.15, 7.10-7.11.

A month before the supreme court rendered the *Kavanau* decision, a court of appeal reversed a trial court decision dismissing a challenge to the City of Cotati's rent control system as an unconstitutional taking of the landlord's property. *152 Valparaiso Assocs. v City of Cotati* (1997) 56 CA4th 378, 65 CR2d 551. The city had argued that the landlord must allege and prove that there could not be a taking unless the rental property had lost all economic value as a result of rent control, an argument rejected by the appellate court (independently of the *Kavanau* decision). The case was remanded to the trial court to determine whether the Cotati system was confiscatory as applied and whether it substantially advanced a legitimate state interest. Rather than address these problems, the parties to the action agreed to put the issue of whether the rent control system should be repealed to the voters, and in 1999 the voters repealed their city's rent control ordinance.

Following the analysis in *Kavanau,* a landlord claimed that Santa Monica's rent control ordinance had become an unconstitutional taking because it no longer substantially advanced legitimate state interests. The claim was rejected by the supreme court in *Santa Monica Beach, Ltd. v Superior Court* (1999) 19 C4th 952, 81 CR2d 93. The landlord alleged that the preamble to the ordinance said that it was intended to benefit low-income tenants, minorities, students, young families, and senior citizens, but in fact the numbers of those tenants living in Santa Monica since the ordinance was enacted had decreased. The supreme court held that the trial court properly sustained a demurrer to this complaint.

First, the court held that there is no constitutional requirement that an inquiry into whether legislation serves legitimate goals be limited to the legislation's stated goals. Here, the ordinance now serves the legitimate goals of stabilizing the community and protecting tenants not included in the stated groups—even if these goals are not stated in the preamble and even if the goals stated in the preamble are no longer served. (The court noted that there was, in fact, some broad language in the preamble that might encompass these other goals.) Second, the court noted the practical problems posed by the landlord's challenge to the ordinance based on subsequent events: "How long would a court, or a litigant, have to wait to give the law a 'fair chance' to work before declaring that it is a failure and therefore unconstitutional? There is no answer to this question that would not be arbitrary and would not put courts in a distinctively legislative role." 19 C4th at 973. Finally, the court held that "with rent control, as with most other such social and economic legislation, we leave to legislative bodies rather than the courts to evaluate whether the legislation has fallen so far short of its goals as to warrant repeal or amendment." 19 C4th at 974. Three justices dissented; one of their opinions was more than 25 pages long.

Despite the foregoing, challenges to rent control laws continue. In *Montclair Parkowners Ass'n v City of Montclair* (1999) 76 CA4th 784, 90 CR2d 598, the Fourth District Court of Appeal upheld the validity of an amendment to the City of Montclair's mobilehome rent control law, which for the first time imposed continuing controls on rents charged to a non family-member purchaser of a mobilehome. The court affirmed the dismissal of a suit brought by two park owners holding that a municipality's regulations would only be found to be facially unconstitutional or a taking of property if the regulations arbitrarily regulated an owner's rights. Protection of a homeowner's equity and providing protection for prospective buyers was found to be within the scope of legitimate government interests and therefore not an arbitrary

regulation of the owner's rights.

In *Galland v City of Clovis* (2001) 24 C4th 1003, 103 CR2d 711, the landlord sued a city in state court under 42 USC §1983, claiming that the city's mobilehome park rent control board denied the landlord due process of law by (1) confiscating the landlord's property by denying a requested rent increase needed to give the landlord a fair rate of return, and (2) denying substantive due process by imposing costly, arbitrary, and unreasonable burdens on the landlord during the administrative process.

On the first issue, the court held that, before bringing suit under §1983, the landlord must first challenge the rent board decision via a petition for writ of mandate as allowed by California law. The court noted that the landlord's burden of showing denial of a "fair rate of return" is a heavy one (24 C4th at 1026):

> Although the term "fair rate of return" borrows from the terminology of economics and finance, it is as used in this context a legal, constitutional term. It refers to a constitutional *minimum* within a broad zone of reasonableness. As explained above, within this broad zone, the rate regulator is balancing the interests of investors, *i.e.,* landlords, with the interests of consumers, *i.e.,* mobilehome owners, in order to achieve a rent level that will on the one hand maintain the affordability of the mobilehome park and on the other hand allow the landlord to continue to operate successfully [citation omitted]. For those price-regulated investments that fall above the constitutional minimum, but are nonetheless disappointing to investor expectations, the solution is not constitutional litigation but, as with nonregulated investments, the liquidation of the investments and the transfer of capital to more lucrative enterprises.

On the second issue, the court reiterated the rules that "only the most egregious official conduct" can be said to be arbitrary in the constitutional sense (24 C4th at 1031) and that substantive due process is denied only if the rent board "deliberately" flouts the law (24 C4th at 1034). The demands for information and other procedural demands must be so excessive and irrelevant to the case as to lead a court to conclude that they were imposed to obstruct or discourage landlords from either requesting or obtaining reasonable rent increases. The court stated (24 C4th at 1036):

> We emphasize, however, that something more than mere "bureaucratic bungling" is required. Rent control boards, like other regulators, have need of information from those regulated, and the act of requesting information is itself a legitimate government activity. Even if, for example, the information requested is in retrospect excessive in relationship to the relevant inquiry, that does not of itself constitute a due process violation compensable under section 1983.

For further discussion of *Galland,* see §7.14A. For discussion of constitutional challenges relating to eviction controls, see §§7.64A, 7.64H, 7.68. However, see also *300 DeHaro St. Invs. v Department of Hous. & Community Dev.* (2008) 161 CA4th 1240, 75 CR3d 98, in which an owner entered into a regulatory agreement directly with the Department of Housing and Community Development. The agreement provided that rents could be raised only with the Department's permission, based on operating costs or financial need. The city denied the owner's requests to raise rents, and the court held that the owner's remedy was to sue the Department for breach of contract. The regulatory agreement is a contract even though it incorporates statutes and regulations, thereby entitling both parties to contractual rights, including remedies for breach. Administrative mandamus is not available, as that applies only to contest administrative decisions made in legally required hearings before an administrative tribunal.

Several courts of appeal in the Ninth Circuit examined the constitutionality of mobilehome rent control ordinances on both facial and as-applied bases, but rejected the claims on procedural grounds. See *Hacienda Valley Mobile Estates v City of Morgan Hill* (9th Cir 2003) 353 F3d 651 (facial challenge barred by statute of limitations, and as-applied taking challenge not ripe); *Carson Harbor Village, Ltd. v City of Carson* (9th Cir 2004) 353 F3d 824 (similar ripeness outcome); *Ventura Mobilehome Communities Owners Ass'n v City of San Buenaventura* (9th Cir 2004) 371 F3d 1046 (lack of ripeness in both facial and as-applied challenges). See §6.15.

In *Action Apartment Ass'n v Santa Monica Rent Control Opinion Bd.* (9th Cir 2007) 509 F3d 1020, the constitutional challenge of an individual landlord to eviction requirements added to the Santa Monica rent control law was held not yet ripe for review. The mere existence of the statute was not sufficient to sustain an as-applied due process challenge. The government action under review was the anticipated enforcement of the amendments protecting a particular tenant in the landlord's building, which action had not yet occurred.

In *San Remo Hotel, LP v City & County of San Francisco* (2005) 545 US 323, 162 L Ed 2d 315, 125 S Ct 2491, the United States Supreme Court rejected the arguments of an owner who sought review of a federal takings claim *de novo* in federal court after litigating and losing the federal takings claims in the California courts. The Supreme Court refused

to create an exception to the full faith and credit statute in order to provide a federal forum for litigants seeking to advance federal takings claims. The owner was barred by issue preclusion because the California courts had decided the owner's state takings claims under an interpretation of California takings law that was coextensive with federal takings law. See also *MHC Fin. Limited Partnership v City of San Rafael* (ND Cal, Dec. 5, 2006, No. C00-3785) 2006 US Dist Lexis 89195 (city's mobilehome ordinance not an unlawful taking and does not violate substantive due process).

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§7.14A F. Damage Actions Under 42 USC §1983

Although a remedy for violation of substantive due process is theoretically compensable under 42 USC §1983, the California Supreme Court refused to sanction §1983 relief in the form of monetary damages to the landlord of rent-controlled property in *Galland v City of Clovis* (2001) 24 C4th 1003, 103 CR2d 711. Instead, the court imposed new restrictions on the landlord's remedies for substantive due process violations under §1983. The landlord had obtained a significant damage award under §1983 against the City of Clovis as a result of the landlord's assertion that its substantive due process rights had been violated because (1) the City of Clovis failed to grant rent increases, which resulted in confiscatorily low rents, and (2) the landlord was compelled to pay excessive costs and suffered unreasonable delays in obtaining the inadequate rent increases. In reversing the decision of the court of appeal, which had affirmed the award granted by the trial court, the supreme court announced different standards to be applied to the two separate bases for award of the claimed civil rights damages.

With respect to the confiscatorily low rents, the court held that a damage action under 42 USC §1983 would not be available until the landlord had demonstrated both that confiscatory rent ceilings had been imposed and that the local rent board had been given an opportunity to provide for appropriate rent levels through future rent increases and had failed to do so, as required by the court in its earlier decision in *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 66 CR2d 672 (referred to by the court as a "Kavanau adjustment"; see §7.14). As to the determination of whether the rent ceilings were in fact confiscatory, the court noted that there was a broad zone of reasonableness for judging whether rent ceilings were constitutionally confiscatory, thus adding to the difficulty of determining when rents provide a fair return to the owner. However, the court did require that the administrative agency, when determining whether rent increase levels are confiscatory, take into account attorney fees and other expenses incurred by the owner to obtain the rent increases. With respect to the *Kavanau* adjustment, the court concluded that a §1983 damage claim would lie only if such an adjustment were not possible or if the adjustment would not provide adequate rents over a reasonable time period. 24 C4th at 1021.

With respect to the damages allegedly suffered by the landlord because of the excessive delays and unreasonable information demands made by the administrative agency, the court held that only conduct which "deliberately flouts" the law and results in substantial infringement of rights gives rise to a claim for damages under §1983. The court made it clear that mere bungling, pettifoggery, negligence, or inefficiency does not meet the announced standard. Moreover, the court opined that landlords had an obligation to object to unreasonable demands and take prompt steps to challenge them in court so that unreasonable costs would not be incurred.

The combination of *Galland* and *Kavanau* leaves landlords with little relief other than to pursue administrative remedies followed by writs of administrative mandamus if the administrative process fails to provide adequate rents. For further analysis of *Galland*, and strategies for preserving rights to damages under §1983, see Pope, *Galland v Clovis: New Restrictions on Due Process Challenges to Rent Control Procedures*, 24 CEB Real Prop L Rep 217 (Aug. 2001). For further discussion of the constitutional issues in *Galland*, see §7.14.

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§7.14B G. Kavanau and Galland Decisions Applied

The first significant reported case in which a landlord attempted to obtain relief by applying the supreme court's decisions in *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 66 CR2d 672 and *Galland v City of Clovis* (2001) 24 C4th 1003, 103 CR2d 711 is that of *Hillsboro Props. v City of Rohnert Park* (2006) 138 CA4th 379, 41 CR3d 441, in which the landlord asserted that its substantive due process rights were violated because it was denied additional rental income by application of an unconstitutional law. It sought to recover damages incurred when the city prohibited it from collecting its increased rents. The court held that the landlord was not denied substantive due process simply because it was affected by a constitutionally defective ordinance. A denial of due process arises only if application of the defective measure deprives the landlord of a constitutionally protected right. The court held that *Kavanau* and *Galland* do not provide a constitutionally protected right to demand as much rent as a property owner wants, thereby making enforcement of an invalid rent ceiling a deprivation of a constitutionally protected right. It is necessary to prove that the landlord was deprived of a fair rate of return on its investment.

The propriety of joining causes of action based on constitutional claims with a petition for a writ of administrative mandamus was affirmed in *Los Altos El Granada Investors v City of Capitola* (2006) 139 CA4th 629, 43 CR3d 434. There the court held that causes of action for relief based on constitutional claims could be joined in the same action with a petition for writ of administrative mandamus. The court remanded the case ruling that there could be a trial on the constitutional claims even after the denial of the writ of administrative mandamus. The trial judge had improperly applied the "substantially advances formula test," which the Court stated was applicable only to due process claims, to the plaintiff's takings claim. See *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, discussed in §§7.10-7.11. See also *Stardust Mobile Estates, LLC v City of San Buenaventura* (2007) 147 CA4th 1170, 55 CR3d 218 (when park owner joined petition for writ of administrative mandamus with claim for declaratory relief, court remanded to trial court for further hearings).

However, in *300 DeHaro St. Invs. v Department of Hous. & Community Dev.* (2008) 161 CA4th 1240, 75 CR3d 98, the owner could sue for breach of contract and for declaratory relief, but not petition for administrative mandamus, after the Department of Housing and Community Development denied the owner's requests to raise rents. The owner had a regulatory agreement, a contract, with the Department and, therefore, had recourse to ordinary contractual remedies.

In *Action Apartment Ass'n v Santa Monica Rent Control Opinion Bd.* (9th Cir 2007) 509 F3d 1020, the Ninth Circuit addressed facial and as-applied constitutional challenges to amendments to Santa Monica's rent control ordinance adopted in 2002. First, the court rejected the takings claims based on the Fifth Amendment; although the ordinance and its amendments served a legitimate public need, the amendments were not rationally related to those purposes. The court said that such an argument could not succeed unless the legislature's chosen methodology involves an "impossibility" or "is palpably without reasonable foundation," citing prior Supreme Court and Ninth Circuit decisions. 509 F3d at 1024. The court then acknowledged that the plaintiffs had a substantive due process claim based on *Lingle v Chevron U.S.A, Inc., supra,* since *Lingle* held that while an arbitrary or irrational deprivation of real property would not constitute a taking, it might be so arbitrary and irrational as to violate the substantive due process clause. However, the court refused to analyze or rule on the apartment association's claims because they failed, in their argument on substantive due process, to mention the 2002 amendments; therefore, the argument was time barred. 509 F3d at 1027. On the as-applied arguments by the individual plaintiff, the claims against the rent ceilings were time barred because the ceilings existed since the original enactment in 1979, and the other claims were not ripe because none of the amendments had been enforced against the individual plaintiff.

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§7.14C H. Actions Regarding Rent Controls

Some practitioners have attempted to seek judicial relief in lieu of seeking determinations at the local rent control board or when those procedures seem not able to provide needed relief. Courts have evidenced an inclination to force litigants to exhaust all reasonably available administrative remedies. In *DeLaura v Beckett* (2006) 137 CA4th 542, 40 CR3d 253, the court of appeal affirmed a trial court ruling that a demurrer to a complaint for declaratory relief was proper in a situation where the plaintiff sought a court determination whether a particular tenant was in a protected class (senior or disabled). The court held that no justiciable controversy existed because the owner could petition San Francisco's rent board for such a determination even though such a petition was not expressly provided for in the local ordinance. See also *Los Altos El Granada Investors v City of Capitola* (2006) 139 CA4th 629, 43 CR3d 434 (sustaining a demurrer for failure to exhaust administrative remedies, but allowing an amendment to permit constitutional challenges to proceed after the administrative remedies had been exhausted). However, in *Apartment Ass'n Inc. v City of Los Angeles* (2006) 136 CA4th 119, 38 CR3d 575, the court of appeal affirmed the right of an association to challenge a local ordinance by declaratory relief because liability arising from any violation of the ordinance would entail significant penalties.

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§7.15 IV. EXEMPTIONS

Virtually every apartment rent control ordinance exempts some rental units from its coverage. The specific exemption language varies considerably among ordinances. Some exemptions are automatic; some require approval by the rent control board.

The courts have consistently rejected the argument that coverage of some units and exemption of others constitutes a denial of equal protection. *Fisher v City of Berkeley* (1984) 37 C3d 644, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045; *Marshall House, Inc. v Rent Control Bd.* (Mass 1971) 266 NE2d 876.

Typical exemptions are described in §§7.16-7.24.

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§7.16 A. Single-Family Homes, Condominiums, and Small Buildings

Some rent control ordinances exempt all dwellings (or parcels) with fewer than a specified number of units. The Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535) (see §§7.25-7.28) requires exemption of certain single-family homes and condominiums from local rent control under specified conditions, but the effect of the Costa-Hawkins Act in some situations is uncertain because it is ambiguous, inconsistent, and vague.

Section 1954.52(a)(3)(A) provides that "[n]otwithstanding any other provision of law," a landlord may establish the initial and subsequent rent on any unit that "is alienable separate from the title to any other dwelling unit or is a subdivided interest in a subdivision as specified in [Bus & P C §11004.5(b), (d), or (f)]." This definition includes single-family homes and condominiums, but it was amended in 2001 to allow local entities to control rents on condominium units that have not been sold separately by the subdividers to bona fide purchasers for value. CC §1954.52(a)(3)(B)(ii). In *City of W. Hollywood v 1112 Invs. Co.* (2003) 105 CA4th 1134, 130 CR2d 168, the court, although holding that the 2001 amendment was not retroactive, ruled that the City of West Hollywood could control rents on defendants' rented condominiums because the owners had failed to keep in effect the public reports required by Bus & P C §11010.

The Costa-Hawkins Act also does not preempt the application of local rent controls to single-family homes and condominiums "where the preceding tenancy has been terminated by the owner" by notice under CC §1946 or §1946.1, or "has been terminated upon a change in the terms of the tenancy" under CC §827. CC §1954.52(a)(3)(B)(i). See *City of W. Hollywood v 1112 Invs. Co., supra*.

Complete exemption of these units began on January 1, 1999, after the unit was voluntarily vacated, or if the tenant rented the unit after January 1, 1996. At that time, the landlord was permitted to establish initial and subsequent rents for all existing and new tenancies, if the tenancy in effect on or after that date was created between January 1, 1996 and December 31, 1998. CC §1954.52(a)(3)(C). On January 1, 1999, the landlord could also establish initial and subsequent rents on all new tenancies "if the previous tenancy was in effect on December 31, 1995." CC §1954.52(a)(3)(C). It would appear that if the tenant's predecessor terminated his or her tenancy before December 31, 1995, the statute does not apply, and the city may continue to regulate the rents on this unit.

Despite the foregoing, CC §1954.52 does not limit a locality's power "to regulate or monitor the basis for eviction." CC §1954.52(c). Thus, local "good cause for eviction" requirements for single-family dwellings and condominiums remain valid. Similarly, landlords are not empowered by this legislation to raise rents (1) in violation of a contract with a public entity, such as the Section 8 program run by local housing authorities (CC §1954.52(b)), or (2) when the unit contains serious health, safety, fire, or building code violations (CC §1954.52(d)).

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.17 B. Owner-Occupied Dwellings

§7.17 B. Owner-Occupied Dwellings

Some ordinances provide exemptions for smaller owner-occupied dwellings. Provisions on the owner-occupancy exemption vary considerably from ordinance to ordinance. Questions that arise concerning these provisions include the following:

- *What constitutes "ownership"?* If an exemption exists, a local enactment may provide a definition of an "owner." Many require an owner to have a minimum percentage interest in the property, ranging from as low as 10 percent to as high as 51 percent. Local ordinances also often change and may present knotty legal issues involving retroactivity and knowing which percentage to apply. See, *e.g., Garber v Levit* (2006) 141 CA4th Supp 1, 46 CR3d 348 (if section is amended by two different acts, passed at different times, last amendment repeals first and operates as sole amendment to original section).
- *Does the property become decontrolled immediately on owner occupancy, or must the owner reside on the property for a specific period of time before the property becomes decontrolled?* Some local ordinances, for example, provide that the exemption does not apply unless the owner actually resides on the property for a minimum of 3 years. Others require 1 or 2 years of owner occupancy to validate the exemption.
- *Does the ordinance define "owner" for purposes of the owner-occupancy exemption in the same manner as it does for purposes of eviction for occupancy of an owner or an owner's relative?* Under some ordinances, a landlord who is not an owner of record might be able to evict a tenant in order to occupy the unit, but would not be considered an owner for purposes of exemption from the ordinance. Some ordinances restrict the definition of "owner" to natural persons, so that corporations, limited partnerships, and trusts that hold title cannot evict for owner occupancy.
- *Is the exemption automatic, or must the owner file for the exemption with the local rent control agency?* Some cities, such as Santa Monica, require that the landlord file a petition for exemption with the rent control board and obtain a decision providing the exemption.

PRACTICE TIP: Practitioners should always check local rules or directly with staff of the local rent control board to determine if there is a rule or a practice regarding ownership interests held by an entity. For example, in San Francisco, the local board rulings have determined that a family trust used for estate planning purposes will satisfy the "natural person" requirement if title is held in the name of the trust or the trustee.

Similarly, there may be an issue if the ordinance requires ownership of record and the owner is buying the property under an installment land contract. If so, the practitioner may want to ensure that the purchaser's interest under the contract is recorded, even if the ordinance does not expressly state that an interest under an installment land contract satisfies the ownership of record requirement.

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§7.18 C. New Construction

Most local rent control ordinances exempt all units that were constructed after a specified date. Under the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535; see §7.16), any building that has a certificate of occupancy issued after February 1, 1995, or that was exempted by a local ordinance on or before February 1, 1995, as newly constructed housing, is permanently exempted from local rent control restrictions. CC §1954.52(a)(1)-(2).

In *City of Los Angeles v Los Olivos Mobile Home Park* (1989) 213 CA3d 1427, 262 CR 446, a 1979 rent control ordinance exempted housing accommodations located in a structure for which a certificate of occupancy was first issued after October 1, 1978. The court held that this exemption applied to a mobilehome park for which a statement of installation acceptance was first issued by the city in 1980, because such a statement was the functional equivalent of a certificate of occupancy.

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§7.19 D. Federally Assisted Housing

Federal laws require exemptions for many types of federally assisted units. 24 CFR pt 246. See National Housing Law Project, HUD Housing Programs: Tenants' Rights (3d ed 2004). Copies of this book are available from the National Housing Law Project. See Directory for mailing address, web address, and phone number.

Most exemption language in rent control ordinances identifies federally assisted units in language similar to the following: "Rental units owned or operated by any government agency or whose rent is subsidized by any government agency." This language has been interpreted to exempt Section 8 units (see 42 USC §1437f, discussed in §2.18), even though federal law does not require that they be exempted. The language does not extend, however, to units that have federally insured mortgages but do not receive a federal subsidy.

In communities with very tight housing markets and rapidly escalating rents, there is a trend to attempt to include Section 8 units under any local rent ordinance.

Similarly, in rent controlled cities where landlords are terminating contracts with the federal government for rental housing mortgage subsidies, there is a trend to protect tenants from excessive rent increases after the subsidies end. One such ordinance in Los Angeles provided that below-market rents landlords had charged while participating in a federal program could not be raised until existing tenancies terminated. It was challenged on preemption grounds under the federal Low-Income Housing Preservation and Resident Homeownership Act of 1990 (12 USC §§4101-4147). The Ninth Circuit held it was not preempted, because the ordinance did not restrict or inhibit the prepayment of federally subsidized mortgages and was exempt from the express preemption provision in the Act. *Topa Equities, Ltd. v City of Los Angeles* (9th Cir 2003) 342 F3d 1065.

In *Barrientos v 1801-1825 Morton LLC* (9th Cir 2009) 583 F3d 1197, a landlord subject to the Los Angeles Rent Stabilization Ordinance (LARSO) served notices of eviction on tenants whose rent was subsidized by the government, because it desired to raise the rent on the apartment units. Although LARSO prohibits eviction for that purpose, the landlord asserted that federal regulations permit the eviction of an assisted tenant during the lease term for good cause, which may include the desire to lease the unit for higher rent. The Ninth Circuit held that the federal regulations did not preempt LARSO and affirmed the trial court's grant of summary judgment in favor of the tenants, permanent injunctive relief, and award of attorney fees.

In *Independence Park Apartments v U.S.* (Fed Cir 2006) 449 F3d 1235, the court ruled that HUD regulations preempt local rent control laws only during the period that the properties are subject to federal regulation. Neither the federal regulations nor the mortgage subsidy program preempts local rent control laws as applied to properties that are no longer subject to federal regulation.

The Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535) (see §§7.4, 7.25-7.28), however, provides that (1) terminating a Section 8 tenancy subsidy contract will not create a "vacancy" under the Act and (2) terminating all tenancies participating in the program may also restrict the landlord's ability to take advantage of vacancy decontrol for a period of 3 years. Moreover, the law provides that a notice period of at least 90 days must be given to the tenant. CC §§1954.535; *Wasatch Prop. Mgmt. v Degrate* (2005) 35 C4th 1111, 29 CR3d 262 (Section 8 tenants are entitled to 90-day notice prior to eviction rather than standard 30-day notice in general use; court did not address whether 90-day notice applies in termination for cause). Civil Code §1954.535 preempts a local ordinance that prohibits a landlord, after termination or nonrenewal of a Section 8 housing contract, from ever charging the tenant more than the tenant's portion of the rent under the Section 8 contract. *Apartment Ass'n, Inc. v City of Los Angeles* (2006) 136 CA4th 119, 38 CR3d 575. The federal court in *Barrientos v 1801-1825 Morton LLC, supra,* did not consider the effect of the Costa-Hawkins Act, because the landlord did not raise that issue in a timely manner.

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§7.20 E. Care Facilities

All ordinances contain exemptions for various types of care facilities. In *Ocean House Corp. v Permanent Rent Control Bd.* (1983) 147 CA3d 395, 195 CR 147, the court of appeal ruled that Health & S C §§1500-1567.4 preempt local rent regulation of community-care facilities licensed under those sections. For discussion of the applicability of the Los Angeles rent control ordinance to a retirement residence, see *Klarfeld v Berg* (1981) 29 C3d 893, 176 CR 539.

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§7.21 F. Hotels

Most ordinances exempt hotel rooms that are rented to transient guests. A typical clause exempts units in any hotel, motel, inn, tourist home, or boarding house that are rented primarily to transient guests for a period of less than a specified number of days. Some ordinances frame the exemption in terms of whether the unit has been occupied by the same tenant for more than a certain number of continuous days (*e.g.,* 14 or 32 days). A landlord cannot move a transient guest or seek the voluntary removal of a transient guest from one room to another in an attempt to avoid a rent control ordinance that would apply to a transient guest after a continual occupancy for that certain number of days. Practitioners should check the applicable local ordinance.

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§7.22 G. Luxury Units

Some rent control ordinances exempt luxury units (see, *e.g.,* Beverly Hills, Los Angeles, and Palm Springs ordinances). "Luxury" is typically defined in terms of unit size and rent on a specified date before adoption of the ordinance. The right to the luxury exemption may be conditioned on the landlord's obtaining an exemption certificate.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.23 H. Substantially Rehabilitated Units

§7.23 H. Substantially Rehabilitated Units

A few ordinances exempt substantially rehabilitated units. Stiff requirements are usually imposed to qualify for these exemptions. A unit might be required to meet a minimum renovation cost or to meet applicable housing code standards.

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§7.23A I. Tenants Who Do Not Make the Unit Tenant's Principal Residence

Several jurisdictions faced with severe housing shortages have begun to deny protection for the amount of rent that a landlord may charge during the tenancy if the tenant does not make the rental unit the tenant's principal place of residence. See, *e.g.,* San Francisco Residential Rent Stabilization and Arbitration Board Rules and Regulations §1.21; Santa Monica Rent Control Board Regulation §3304. The Santa Monica regulation was upheld as a valid exercise of the rent board's rule-making authority in *Bisno v Santa Monica Rent Control Bd.* (2005) 130 CA4th 816, 30 CR3d 441. A subsequent court has held that a landlord may not evict a nonresident tenant who pays the rent, as such tenants are still protected by the just cause eviction protections of the Santa Monica rent control law. *Borten v Santa Monica Rent Control Bd.* (2006) 141 CA4th 1485, 47 CR3d 178. The landlord's right to make a general adjustment may be affected if the landlord received a rent increase because the tenant no longer occupies the unit as the tenant's principal residence. See, *e.g.,* Santa Monica Rent Control Board Regulation §3030(c)(2). For further discussion, see §§4.38, 7.24, 7.38A.

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§7.24 J. Other Exemptions

Other common provisions include certain exemptions for units rented to lodgers or boarders and for units maintained by nonprofit institutions. The terms "lodger" and "boarder" also include persons who share the rental of a single unit with a landlord or with a tenant who has entered into a rental agreement with a landlord.

Under most other ordinances, even if such a shared-rental situation were not exempt from the ordinance, the sublessor-tenant probably could evict the lodger or boarder for owner occupancy of the premises as the "landlord" vis-à-vis the subtenant. Most apartment rent control ordinances define "landlord" as "an owner of record, lessor, sublessor, or any person entitled to receive rent for the use and occupancy of any rental unit."

Exemptions for units maintained by nonprofit institutions often lead to litigation, because such organizations have varying types of nonprofit status. The problem is particularly complex when a nonprofit organization operates a rental business for profit or when the form of ownership of the property is changed after passage of the rent control ordinance (possibly for the purpose of obtaining exempt status).

Although such units remain subject to eviction protections, rent-controlled units in Santa Monica where the tenant of record does not occupy the unit as his or her principal residence are subject to rent increases upon petition by the landlord. *Bisno v Santa Monica Rent Control Bd.* (2005) 130 CA4th 816, 30 CR3d 441; *Borten v Santa Monica Rent Control Bd.* (2006) 141 CA4th 1485, 47 CR3d 178.

When a local rent control ordinance prohibits the tenant from waiving any provisions of the ordinance, a landlord and a tenant may not agree to exempt a housing unit from the rent increase limits of the ordinance. *Gombiner v Swartz* (2008) 167 CA4th 1365, 85 CR3d 83.

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V. VACANCY DECONTROL: COSTA-HAWKINS RENTAL HOUSING ACT

§7.25 A. Preemption of Local Vacancy Controls

As discussed in §7.4, the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535) prohibits jurisdictions that did not have a vacancy control ordinance as of January 1, 1995, from enacting a vacancy control form of rent control. Where vacancy control formerly existed, the Costa-Hawkins Act phased it out under specified conditions (see §7.25A). Unfortunately, the act is not a model of clarity and careful reading is required.

Under CC §1954.53, "[n]otwithstanding any other provision of law" (*i.e.,* presumably local rent control ordinances), a landlord may establish the initial rent for a unit (CC §1954.53(a)) unless the landlord terminated the previous tenancy by notice under CC §1946 or §1946.1, or "upon a change in the terms of the tenancy" noticed under CC §827, except a change permitted by law in the amount of rent or fees. CC §1954.53(a)(1). Thus, if the landlord terminated the prior tenancy by giving a notice in compliance with the local ordinance, or the tenant vacated on account of a change in the terms of the tenancy (*e.g.,* permission to keep a pet) or was removed by the giving of a notice changing the terms of the tenancy, the rent for a new tenant may not be raised if the local rent control law would not otherwise have permitted such an increase.

The Costa-Hawkins Act was held to invalidate a section of the San Francisco rent control law that required owners (who wished to evict a tenant in order to occupy the unit in which the tenant had lived) to offer any other unit owned by the evicting owners to the tenant at essentially the same rent the tenant had been paying in the rent controlled apartment. In *Bullard v San Francisco Residential Rent Stabilization Bd.* (2003) 106 CA4th 488, 130 CR2d 819, the court of appeal based its refusal to exempt San Francisco law from the Costa-Hawkins Act on a narrow interpretation of CC §1954.53(e), which allows local public entities to control the grounds for evictions from rent controlled properties. It does not, however, allow controls on posteviction rents and a landlord has the right to set the initial rent on the replacement unit at market rate.

The Costa-Hawkins Act also preempted a Los Angeles ordinance that prohibited a landlord, after termination or nonrenewal of a Section 8 housing contract with the Los Angeles Housing Authority, from ever charging the tenant more than the tenant's portion of the rent under the Section 8 contract. *Apartment Ass'n, Inc. v City of Los Angeles* (2006) 136 CA4th 119, 38 CR3d 575.

A landlord may waive the preemptive effect of vacancy decontrol under the Costa-Hawkins Act if the landlord delays in asserting it. In *Cobb v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2002) 98 CA4th 345, 119 CR2d 741, a landlord rented an apartment to a woman, who occupied it for some time before her son moved in with her, without obtaining the landlord's permission. About 2 years later, the mother moved out. The next month, the son began paying rent directly to the landlord. More than a year later, the landlord demanded a rent increase directly from the son beyond the amount allowed by the local rent control law, claiming that this was permitted by the vacancy decontrol provisions of CC §1954.535. The court disagreed. Because the landlord had already accepted rent from the son, thereby treating him as a tenant, the son was not a new tenant at the time the landlord attempted to impose the rent increase.

A landlord who has failed to remedy code violations in the vacated unit for 60 days after being cited may not take advantage of the Costa-Hawkins Act. CC §1954.53(f).

If a low-income tenant leaves because the owner terminates or fails to renew a contract with a local housing authority to provide "Section 8" housing, the owner may not raise the rent on a new tenant for 3 years. CC §1954.53(a)(1)(A).

If a landlord demolishes residential property subject to a rent control law and builds new residential rental units on the same property within 5 years, the new units are also subject to rent control if the city has enacted an ordinance providing for this scenario. *Apartment Ass'n of Los Angeles County, Inc. v City of Los Angeles* (2009) 173 CA4th 13, 92 CR3d 441. The City of Los Angeles enacted such an ordinance under CC §7060.2(d) (part of the Ellis Act). The Apartment Association argued that §7060.2(d) was impliedly preempted by CC §1954.52(a), the Costa-Hawkins Rental

Housing Act's exemption of newly constructed residential units from rent control. The Court of Appeal held that CC §7060.2(d) is an exception to CC §1954.52(a).

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§7.25A B. Phasing Out Existing Local Vacancy Controls

Between its enactment and January 1, 1999, the Costa-Hawkins Act provided for a "phase out" of local vacancy control provisions. Until that date, the landlord could raise rents for new tenants, only if the old tenant "has voluntarily vacated, abandoned, or been evicted pursuant to [CCP §1161(2)]" (which authorizes eviction for nonpayment of rent). CC §1954.53(c). In such a case, however, the rent increase was limited to 15 percent of the rent, or 70 percent of the "prevailing market rent for comparable units" (as defined in CC §1954.51(a) and (c)), whichever is higher. CC §1954.53(c). The landlord could not invoke this interim rent increase more than twice. CC §1954.53(c). The initial rent established under §1954.53(c) was in addition to any increase permitted by the rent control ordinance.

Civil Code §1954.53 does not empower the landlord to raise any rents in violation of a contract with a public entity, such as the Section 8 program run by local housing authorities. CC §1954.53(a)(2). Nothing in §1954.53 may be construed to affect a public entity's authority under an eviction control ordinance. CC §1954.53(e).

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§7.25B C. Preemption of Local Laws Affecting Collateral Rights Under Costa-Hawkins

The preemptive effect of the Costa-Hawkins Act (see §7.25) has been broadly interpreted by some courts. In *Bullard v San Francisco Residential Rent Stabilization Bd.* (2003) 106 CA4th 488, 130 CR2d 819, *e.g*., a court of appeal held that the Act prohibited San Francisco from forcing an owner seeking to evict a tenant (to allow the owner to move into that tenant's rental unit) to offer any other rental unit owned by the owner to the evicted tenant at the same rent the tenant was paying in the rental unit from which the tenant was being evicted. While the court recognized that the Costa-Hawkins Act expressly permitted localities to control the grounds for evictions, it reasoned that San Francisco's eviction regulation went too far and therefore violated the Act when it forced an owner to rent a vacant apartment at a rent below market rate. See also discussion of *Bullard* in §7.25.

Another court of appeal held that the Costa-Hawkins Act preempted a Los Angeles land use plan that imposed affordable housing requirements on certain residential and mixed-use development projects of more than ten dwelling units per lot. See *Palmer/Sixth St. Props. v City of Los Angeles* (2009) 175 CA4th 1396, 96 CR3d 875. The plan would have required the developer to either comply with the plan's housing replacement and inclusionary dwelling provisions or pay to the city an "in lieu" fee.

In *Apartment Ass'n, Inc. v City of Los Angeles* (2006) 136 CA4th 119, 38 CR3d 575, a court of appeal held that the Costa-Hawkins Act preempted a Los Angeles ordinance that prohibited a landlord, after termination or nonrenewal of a Section 8 housing contract, from ever charging the tenant more than the tenant's portion of the rent under the Section 8 contract.

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§7.26 D. Subletting and Assignment: When Does a Vacancy Occur?

Even prior to the passage of the Costa-Hawkins Act (See §7.25) in jurisdictions with vacancy decontrol, and certainly after that enactment for all jurisdictions with rent controls, owners and tenants were faced with complicated issues regarding when an eviction would lie for a subletting without the landlord's consent and when an apartment would be deemed "vacant" so that the landlord could raise the rent without reference to the local ordinance's controls. Tenants frequently attempt to sublet their rent-controlled apartments, either to save the benefits for themselves after a temporary absence, or to transfer the benefits of rent control to others (either with or without compensation) and often fail to seek their landlord's approval. When one of a group of original cotenants moves out and is replaced with another tenant approved by the landlord, whether the rent can be raised on account of the change in some of the tenants is often in dispute. If the remaining tenants have failed to obtain their landlord's approval, difficult issues often arise regarding the remedies available to the landlord.

On the effect of the Costa-Hawkins Act in residential tenancies, see §§7.27-7.28A. For general discussion of assignment and subletting, see §§3.49-3.59A, 4.40A-4.40B.

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§7.27 1. Former Law on Subletting

Before the Costa-Hawkins Act became effective, many municipalities had enacted rent control rules and eviction controls that were designed to restrict landlords' ability to interfere with the rights of individuals who became subtenants. In *Parkmerced Co. v San Francisco Rent Stabilization & Arbitration Bd.* (1989) 215 CA3d 490, 263 CR 617, the court rejected a landlord's argument that a subtenant, listed by the original tenant as an occupant on the landlord's form, was not protected by the ordinance after the original tenant vacated. The court reasoned that a "tenant" under the ordinance was anyone who legally occupied the rental unit and that the occupancy was legal because the landlord had accepted rent from the subtenant.

In *Little v Guadron* (1986) 187 CA3d Supp 1, 232 CR 516, another multiple tenant case, the landlord was prohibited from raising rents after the original tenant vacated because the tenancy agreement was oral and did not prohibit subleasing and because members of an extended family had lived in the unit for years.

Even when a lease prohibited the tenants from subletting without the landlord's prior written consent, a rent increase implemented after the last original tenant has vacated might still have been invalid. See *Getz v City of W. Hollywood* (1991) 233 CA3d 625, 284 CR 631.

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§7.28 2. Subletting After the Costa-Hawkins Act

To address vacancy control and sublease problems in rent-controlled jurisdictions, CC §1954.53(d), a section of the Costa-Hawkins Rental Housing Act (see §7.25), allows a landlord to establish in the original lease the amount of rent when the premises are sublet. It also permits the landlord to increase the rent "by any amount allowed by this section" to be paid by a sublessee or assignee if the last of the original occupants no longer resides on the premises and the lawful assignee or sublessee did not reside in the unit before January 1, 1996.

No rent increase is permitted, however, under §1954.53(d) if one or more of the original occupants remains and sublets part of the premises with the landlord's consent.

A landlord's acceptance of rent does not waive the landlord's right to raise the rent after a total assignment or sublease if the last original tenant no longer lives in the premises unless the landlord received a written notice from the tenant and thereafter accepted rent. To make sense from the language of §1954.53(d), it is logical to assume that the writing from the tenant needs to contain information about the occupancy of the subtenant and that the rent acceptance must therefore be acceptance of rent from the subtenant, not the original tenant. See discussion on subletting and creating tenancies by a subtenant paying and a landlord accepting rent in §§1.7, 4.40, 5.29.

The timing of a landlord's action to seek the benefits of the Costa-Hawkins Act may be crucial because issues of waiver and novation may arise if the owner delays. For example, a landlord may lose the right to increase rent under the Costa-Hawkins Act if rent is accepted directly from the subtenant or assignee after the original tenant moves out. In *Cobb v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2002) 98 CA4th 345, 119 CR2d 741, the court of appeal held that the landlord could not raise the subtenant's rent to market rate because the landlord had already raised rent once beyond the controlled limits, accepted rent directly from the subtenant after the original tenant had vacated, and treated the subtenant as a tenant. See §7.25.

PRACTICE TIP: The *Cobb* decision may raise problems for property owners because of its language, and practitioners are cautioned to read the facts of the case carefully. The offending rent increase was the second increase noticed by the owner, not the first after the original tenant had vacated, and came more than one year after the original tenant had vacated. Nonetheless, landlords should be alert not to accept rent from persons or occupants who are not original tenants, should provide notice to any subtenant that the owner does not intend to waive Costa-Hawkins rights, and should act reasonably promptly to raise the rent after an original tenant vacates. For lease drafting tips, see §4.40B.

However, there remains a question whether certain condominiums that were created prior to the effective date of the Costa-Hawkins Act would be subject to *Cobb*.

Whether an occupant is a subtenant or a cotenant will affect the parties' rights under both the Costa-Hawkins Act and the eviction controls in local ordinances. See, *e.g.*, *DeZerega v Meggs* (2000) 83 CA4th 28, 99 CR2d 366, which held that if a landlord prohibits subleasing in the lease, but agrees to occupancy by a roommate, characterizing the occupancy as a subtenancy does not prevent application of the local ordinance's "just cause" eviction requirement. Although *DeZerega* involved an eviction rather than a rent increase, the result turned on distinctions between "cotenant," "subtenant," and "roommate."

It should be noted, however, that the initial rent-controlled rent applies by the language of Costa Hawkins to "authorized subtenants." The issue therefore often becomes not only whether a landlord accepted rent but also whether in fact the subtenant was an authorized subtenant. See *Cobb v San Francisco Residential Rent Stabilization & Arbitration Bd.*, *supra*; *DeZerega v Meggs, supra*.

PRACTICE TIPS:

- Section 1954.53(d) probably supersedes the holding in *Getz v City of W. Hollywood* (1991) 233 CA3d 625, 284 CR 631 (see §7.27), although practitioners should be aware that the legislation neither removed all issues involving waiver and estoppel nor altered state law that provides that unless there is a prohibition against

assignment and subletting, a tenant is free to assign or sublease the rented premises.

- Because §1954.53(d) does not address the consequences of a tenant's failure to request the landlord's consent or the landlord's withholding consent, it can only be presumed that if consent is required, a tenant may not sublet or assign unless consent was sought or the landlord afterward waived the right to object or by conduct is estopped from complaining that consent was not obtained. See §§3.57-3.58.
- In the commercial context, landlords are permitted to withhold consent to subletting or assignment, even unreasonably, if the lease so provides. But if the lease requires the landlord's consent, it may also specify an express standard or condition for withholding consent, but if no standard is expressed, the landlord may not unreasonably withhold consent. CC §§1995.250-1995.260. For discussion, see §§3.56-3.59, 3.75.

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§7.28A 3. Eviction Issues After Costa-Hawkins

It should be noted that the Costa-Hawkins Act does not regulate evictions. However, whether a tenant is a protected tenant depends on the language of the local rent control ordinance, the language of the lease or rental agreement, and the actions taken by the landlord with regard to the subtenants. See, *e.g.*, *DeZerega v Meggs* (2000) 83 CA4th 28, 99 CR2d 366. In addition, particular attention should be paid to the requirements of local rent control enactments which may provide a standard as to what tenants are required to do in order to secure the landlord's approval. Some local ordinances or rules adopted by the local rent board provide procedures to be followed by tenants and landlords in dealing with subtenants. Additionally, landlords should pay attention to the issue whether a tenant who has subleased without a landlord's approval in contravention of a provision in a rental agreement requiring such approval must give the tenant an opportunity to cure the default. Code of Civil Procedure §1161(4) provides that if there is a subletting or assignment in violation of a lease, the lease is terminated and the landlord may regain possession of the premises by the giving of a 3-day notice to quit. See §§8.50, 8.56.

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VI. RENT INCREASE MECHANISMS

A. Base Rents

§7.29 1. Determining Base Rent

The starting point for calculating a permissible rent increase is the "base rent": *i.e.,* the rent selected and charged by the landlord at a time specified in the ordinance, the "base year." The date for setting base rent may be the date the ordinance was enacted, or it may be a "rollback" date some months before the date of enactment, selected to discourage landlords from raising rents in anticipation of the enactment to establish a higher base rent. In vacancy decontrol jurisdictions, a new base rent is established each time a new tenant takes occupancy.

Courts tend to defer to administrative decisions on establishing the proper base year. See, *e.g*., *MHC Operating Ltd. Partnership v City of San Jose* (2003) 106 CA4th 204, 130 CR2d 564.

Determining the proper base rent may be difficult, particularly in jurisdictions that do not require registration of units (see §7.44) and that do not issue some type of certificate to a property owner stating the amount of rent that may legally be charged. Owners frequently lack complete records because of improper recordkeeping or problems created by a predecessor-in-interest.

An attorney should determine the proper base rent for all units in question before advising the client, whether landlord or tenant. Most ordinances provide relief to a tenant whose base rent has been increased improperly, regardless of the nature of the proceeding before the local rent board and of the time that has elapsed since the improper increase. Moreover, any rent paid by the tenant in excess of the proper base rent counts as a credit against future months' rent, and there is *no* statute of limitations on asserting the offset. See *Minelian v Manzella* (1989) 215 CA3d 457, 263 CR 597; *Nourafchan v Miner* (1985) 169 CA3d 746, 215 CR 450.

A successor landlord is liable under a rent ordinance for overpayments charged to the tenant by a predecessor landlord. *Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 81 CR3d 341. Any rent overpayment that can be asserted by the tenant against the landlord who overcharged may, likewise, be asserted against a new owner who has just bought the building. The remedy for the new owner is to seek recourse against the prior owner who overcharged.

However, if the tenant brings a civil suit against the landlord to recover any improper increases as well as punitive damages, the tenant is subject to applicable statutes of limitation. CC §1947.11(c).

EXAMPLE: A landlord who applies for a rent increase on the basis of completed capital improvements may find that the board will review and decrease any and all rents not found to be at their proper levels. Similarly, tenants in an eviction proceeding based on nonpayment of rent may defend on the basis that the amount demanded in the 3-day notice to pay rent or quit is not the proper amount if it is higher than is permitted under the local ordinance. In light of these problems, a purchaser of rental property in a rent-controlled jurisdiction should always obtain a proper rent roll.

PRACTICE TIP: In addition to the rent roll, a prospective purchaser should be advised to obtain estoppel statements from the tenants that include the following information:

- the amount of the monthly rent;
- the date of the last rent increase;
- the number of occupants of each apartment;
- the names of the occupants; and
- whether the rental agreement is oral or written.

The purchaser should also obtain a signed statement from the seller setting forth this information, and stating whether any tenant is subject to a temporary rent increase or pass-through that might have a sunset date, and whether any tenant has had an "additional tenant" rent increase.

WARNING: From the tenant's point of view, estoppel statements can be dangerous, since there is no way to correct a mistake or add an item inadvertently omitted. Unless the tenant has a written rental agreement that requires that the tenant complete and return an estoppel statement, the tenant cannot be compelled to fill out the statement.

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§7.30 2. Changing Base Rent

Some rent control ordinances permit landlords who had not increased rents for a specified period of time (*e.g.,* 12 to 24 months) before the ordinance was enacted to increase base date rents by a set percentage over the amount permitted under the ordinance. The base rent figure is then increased to reflect this amount.

Similarly, some ordinances permit owners to petition for an adjustment of the base date rents if they are artificially low. Courts have consistently held that rent control ordinances utilizing a maintenance of net operating income (MNOI) formula are constitutional so long as they provide an owner the opportunity to obtain an adjustment of the initial base date rents. *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 772, 66 CR2d 672. See *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 165, 130 CR 465. The owner must demonstrate that the base date rents did not reflect comparable market conditions at the time they were established. *Vega v City of W. Hollywood* (1990) 223 CA3d 1342, 1351, 273 CR 243.

But there is no constitutional entitlement "to an increase in base date rents predicated on market conditions." *Apartment Ass'n of Greater Los Angeles v Santa Monica Rent Control Bd.* (1994) 24 CA4th 1730, 1737, 30 CR2d 228. The court ruled that because the local ordinance did not allow a post-rent control purchaser "to petition for a base rent increase on any ground," but the ordinance permitted pre-rent control owners to challenge the base rents under the MNOI formula, the ordinance was invalid on its face and "could have unconstitutional results in particular cases." 24 CA4th at 1739.

In *Vega v City of W. Hollywood, supra,* the court upheld the granting of a writ of administrative mandamus to an owner who had proven at the administrative hearing, through use of an appraisal, that the initial base rents for the subject property were below comparable rents at the time the local ordinance was adopted. The court overturned an effort by the local board to require submission of comparative operating and expense data rather than just comparable rental data. The ordinance in question required that the owner not only demonstrate that the base rents were disproportionately low but also that the low rents were due to peculiar circumstances.

Not all ordinances require a showing of peculiar circumstances to obtain a base rent adjustment. In *Stardust Mobile Estates, LLC v City of San Buenaventura* (2007) 147 CA4th 1170, 55 CR3d 218, for example, although the court overruled the landlord's constitutional claims, it remanded the action for a determination of whether the owner's initial base rents were below market, suggesting that it would be unreasonable for the agency or reviewing court to impose the "peculiar circumstances" requirement of the ordinance at issue in *Vega* rather than using the standard in the applicable San Buenaventura ordinance. 147 CA4th at 1184.

PRACTICE TIP: Counsel for property owners should review the *Stardust* decision carefully, noting the evidentiary problems that confronted the owner. Although an owner is entitled to a base year adjustment when rents in a base year had been set at an artificially low level, it is often extremely difficult to meet evidentiary requirements to demonstrate that rents were set at such low levels. Since technical hearsay requirements are often relaxed at administrative hearings, petitioners should endeavor to ensure that the evidence of low rent levels is introduced at the administrative level, and make a clear administrative record if the agency unreasonably fails to consider such evidence.

PRACTICE TIP: Counsel for both property owners and tenants should endeavor to make sure that cross-examination of all witnesses is always available. See *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.31 3. Base Rents for Newly Covered Rental Units

§7.31 3. Base Rents for Newly Covered Rental Units

Most ordinances permit the landlord to charge market rent when a unit has not previously been rented. Similarly, most ordinances provide for establishing base rents for units that are once again controlled by the ordinance after a period of exemption (*e.g.,* when units become exempt through owner occupancy, but become subject to the ordinance again when the owner moves out, or if a locality removes a previously established exemption). Some ordinances, however, do not permit the rent to be raised to market to the first tenant after an owner has vacated the unit if a previous tenant was evicted in order for the owner to occupy the unit. See, *e.g*., Los Angeles Rent Stabilization Ordinance §151.06.C.2.

PRACTICE TIP: Because most ordinances and rules have been amended over time, a practitioner may need to determine the state of the law at the time the unit first came under a particular rent control ordinance in order to advise the client concerning the appropriate base rent.

In *Vega v City of W. Hollywood* (1990) 223 CA3d 1342, 273 CR 243, a landlord who had charged low rents for many years increased rents in 1984 and was required under a rent control ordinance enacted in 1985 to roll back rents to their former level. The city's rent stabilization commission denied her petition to increase her base rents because she had failed to prove the expenses and the rate of return of comparable buildings and therefore had failed to show that the rate of return on her building was unreasonably low. Relying on a statement (in *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 169, 130 CR 465) that base rents at the time a unit comes under rent control should "reasonably be deemed to reflect general market conditions," the court of appeal held that a landlord must be permitted to start rent calculations with a base rent at the time the unit is subject to control similar to other comparable properties.

In *Apartment Ass'n v Santa Monica Rent Control Bd.* (1994) 24 CA4th 1730, 30 CR2d 228, the court interpreted *Vega* as applying to situations in which the base rent is artificially low due to special circumstances. But see *Stardust Mobile Estates, LLC v City of San Buenaventura* (2007) 147 CA4th 1170, 55 CR3d 218 which follows both *Vega v City of W. Hollywood, supra,* and *Apartment Ass'n* but suggests that "special circumstances" may not always be required for a base rent adjustment.

PRACTICE TIP: When evaluating comparable properties in applying the *Vega* test, practitioners should begin by consulting with the local rent board, which can generally provide a listing of all registered rental properties in the city with the *same number of bedrooms* for rent *in the base year* of the property in question. (Notably, properties that have come on the market *since* the base year nearly always reflect a higher base rent.) Once the universe of possible properties is known, practitioners should next narrow the list to the same or similar neighborhoods.

After a manageable number of potentially comparable properties has been selected, practitioners, their clients, and, when feasible, an experienced real estate consultant or expert should view each property. For making a useful record, a photograph of each property, taken from the street, can be very helpful. A walk-through of the unit may also provide useful information about the following issues when comparing the units to the property in question:

- What is the condition of the unit—walls, floors, and fixtures?
- Does the unit have hardwood floors or wall to wall carpeting?
- Does the kitchen have modern appliances, built-ins, garbage disposal?
- Does the bathroom have up-to-date plumbing; does it have a bathtub or only a shower?
- How many full bathrooms? How many half-baths?
- How many actual bedrooms (formal dining rooms are sometimes registered by landlords with the board as a closetless, walk-through bedroom)?
- Is there a formal dining room, den, enclosed patio, or porch?
- Are laundry facilities or hook-ups provided or available?
- Is there on-site storage available—attic, basement, garage?

- Is off-street parking available, and, if so, is it covered or open?
- Does the unit have a front yard, a back yard, fenced, paved, grassy, landscaped?
- Does the unit have decks, balconies, or a view?
- Is the street and neighborhood residential or commercial? Is it near public transit?
- Is it in a triplex or a huge complex?

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§7.32 4. Evidentiary Problems in Establishing Base Rents

One of a practitioner's most difficult problems may be determining the actual base rents. Owners may not have complete records, particularly if the building has been transferred. Tenant estoppel certificates may provide some information, but practitioners should be cautious about relying on them, because most ordinances prohibit waiver by a tenant of any rights the tenant may have under the local ordinance. Many ordinances permit the introduction of hearsay evidence, although some do not. Even if the ordinance permits the introduction of hearsay evidence (see, *e.g.,* Santa Monica Rent Control Board Regulation §8044; West Hollywood Rent Stabilization Regulation §60014), the hearing examiners usually have a stated policy that they will not base a finding of fact solely on hearsay. If hearsay is not admissible, facts regarding base rent might be elicited from the tenants if they attend the rent board hearing.

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§7.33 B. Annual Base Rent Adjustments

Most ordinances contain provisions for automatic annual rent increases ("general adjustments"), as well as procedures for individual rent adjustments (see §§7.34-7.38). Annual general adjustments are the primary rent-increase mechanism; only a small percentage of landlords seek individual adjustments. All California apartment rent control ordinances contain some type of annual general adjustment provision. In contrast, most mobilehome ordinances do not provide for general adjustments because of the small number of mobilehome parks in any given jurisdiction. Mobilehome park owners must petition individually for rent adjustments, unless a majority of the tenants in a mobilehome park agrees to an adjustment.

Rent control ordinances usually provide for annual general adjustments in one of three ways. An ordinance may:

(1) Specify a maximum percentage by which rents may be increased annually;

(2) Link automatic increases to a percentage of the increase in the consumer price index; or

(3) Provide that the amount of the annual increase be determined by the rent control board, based on criteria outlined in the ordinance.

Some ordinances permit landlords to "bank" (*i.e.,* to save) general-adjustment increases that they have not taken in previous years and to implement these increases in future years. For example, if a general adjustment of 5 percent were authorized and the landlord raised rents by only 3 percent, the 2-percent difference (translated to a dollar amount) could be "banked" and the landlord could raise rents in the future by the dollar amount of the unused 2 percent. Some ordinances, such as the Los Angeles Rent Stabilization Ordinance, do not permit "banking." Under such an ordinance, the rent may be raised only by the percentage allowable when the increase is taken.

Although a "banking" provision permits a landlord to increase *current* rents to the level at which they would be if the earlier authorized adjustment had been fully taken, it does not permit the landlord to recoup the *past* rent for the period during which the maximum authorized rent was not charged. Some ordinances restrict the manner and timing in which "banked" increases may be permitted.

PRACTICE TIPS:

- Tenant advocates might argue that a landlord should not be permitted to recover for past months in which the tenants' *actual* contract rent was below the rent *ceiling* for the unit. To permit this practice would arguably effectively permit a landlord to retroactively increase the past contract rent, violating principles of contract law by denying the tenant the benefit of the rental agreement. See CC §827, which restricts increases in the terms of rental agreements and specifically prohibits increases in the rental rate without proper notice. A landlord may increase rents only on service of a proper 30-day or 60-day notice of a rent increase. See §§3.65-3.65B.
- When a unit's rent has been established under the Costa-Hawkins Rental Housing Act (see §7.25), the landlord may lose "banked" increases if the new rent is less than the maximum that would be allowable under the rent control ordinance.

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C. Individual Adjustments

§7.34 1. Increases in Operating and Maintenance Expenses

Under some ordinances, owners are permitted to demonstrate that the annual adjustments allowed do not cover actual increases in the cost of operating and maintaining the building and the rental units. To obtain a rent increase based on such grounds, the owner will usually be required to prove the costs that were incurred in the year in which the increases occurred and also the expenses in a comparison year.

PRACTICE TIP: Practitioners must be mindful of this requirement and must ensure that proper evidence of such expenditures is submitted. See §7.47. Because of the contentious nature of disputes between landlords and tenants in many jurisdictions and the tendency of some rent control boards, hearing officers, and their staffs to assume that landlords will attempt to obtain greater rent increases than those to which they are entitled, the degree of proof required may be greater than originally anticipated. A tax return schedule showing expenditures may be admissible in some proceedings, but copies of canceled checks, bills, and other documentation may be required. Computers make compiling and presenting the evidence simpler, but practitioners should not overlook the need to present the underlying data in proper form.

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§7.35 2. Utility and Capital-Improvement Pass-Throughs

Some ordinances permit landlords to pass on to their tenants the costs of completing capital improvements or increased utility costs, either with or without having obtained permission from the local rent board. Some ordinances provide that these costs are in fact "pass-throughs" and thus do not become part of the tenant's base rent. Such pass-throughs often terminate after a period of time or when the costs decrease at a future date. The existence of pass-throughs that do not become a part of a tenant's base rent frequently cause owners to miscalculate base rents, either because of a misunderstanding about the applicable ordinance and rules or because a predecessor in interest made the error. On the importance of calculating base rent correctly, see §7.29.

In *Morgan v City of Chino* (2004) 115 CA4th 1192, 9 CR3d 784, the court held that regulatory agencies are not constitutionally required to grant a rent increase for every capital improvement. Instead, the agency must take capital improvements into account when evaluating whether the owner is receiving a fair return. "If the existing rents are sufficient to provide the owner with a fair return on the overall project even after the capital improvement, then due process is satisfied." 115 CA4th at 1201.

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§7.36 3. Cost of Professional Services to Prove Need for Rent Increase

Under CC §1947.15, the cost of professional services incurred by a property owner to prove the need for a rent increase must be included by the board as an item of cost recovery in the decision that allows the owner to increase the rent. In §1947.15(j) the legislature expressed its intent not to interfere in any way with the power of a local agency "to set its own fair return standards or to limit other actions under its local rent control program" other than those expressly stated in §1947.15. Note that §1947.15 applies only in jurisdictions that have a vacancy control rent control ordinance or require registration of rents. CC §1947.15(b). Because of the passage of the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535), which outlawed rent control on vacant apartments and newly constructed units (see §§7.4, 7.25-7.28), §1947.15 was declared inoperative unless the Costa-Hawkins Act is repealed. CC §1947.15(k).

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§7.37 4. Limits on Individual Increases

When an ordinance permits an individual rent increase due to an increase in the landlord's operating and maintenance expenses, capital improvements, or utility cost increases, it may impose a limit on such increases to prevent the landlord from passing the full amount of the increased costs on to the tenants. In *Fox v San Francisco Residential Rent Stabilization & Arbitration Bd*. (1985) 169 CA3d 651, 215 CR 565, the court upheld provisions of the San Francisco rent control ordinance that limit any rent increases in excess of the annual general adjustment, including a restriction that no single increase could exceed a tenant's base rent by 30 percent in any one year. See also *Kavanau v Santa Monica Rent Control Bd.* (1993) 19 CA4th 730, 23 CR2d 724, discussed in §7.14.

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§7.38 5. "Fair Return" Adjustments

Most rent control ordinances ensure that landlords may obtain a constitutionally mandated "fair return on investment" by providing a method for landlords to maintain the net operating income that they received before rent control took effect. Starting with the base rents selected by landlords (see §7.29), these ordinances permit rent increases to account for cost increases and inflation, thus preserving net operating income. Most ordinances restrict this right to seek adjustments to landlords who are in compliance with the requirements of the rent control ordinance.

A few ordinances use a vague "fair return" standard for adjudicating individual petitions. Because a vague standard precludes general adjustments for all landlords and requires an individual hearing for each landlord seeking a rent increase, it is appropriate only where the number of units or landlords regulated is relatively small. Thus, such ordinances are most often used to regulate mobilehome parks and should pass constitutional muster, because an ordinance need not contain a specific formula to withstand an attack on its facial validity, as long as it permits those administering it to avoid confiscatory results. *Fisher v City of Berkeley* (1984) 37 C3d 644, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045. See also *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 66 CR2d 672 and *Hillsboro Props. v City of Rohnert Park* (2006) 138 CA4th 379, 41 CR3d 441, discussed in §7.14B.

The courts have discussed three principal types of "fair return" standards in constitutional challenges to rent control ordinances:

- return on value;
- return on cash investment; and
- maintenance of net operating income.

The "return on value" theory has been criticized as circular because income property is generally valued by capitalizing its income. *Cotati Alliance for Better Hous. v City of Cotati* (1983) 148 CA3d 280, 195 CR 825. Many of the cases involve application of rent control ordinances to mobilehome parks. For discussion of decisions evaluating the validity of various fair return standards, see §7.13.

Practitioners should be mindful of the various theories underlying the fair return concepts and should attempt to present a complete administrative record of the owner's financial condition. The absence of a complete record demonstrating that the owner is suffering losses or that the annual general adjustment did not cover costs of operating the building plus a fair return on investment may result in the landlord losing a claim that should have been won. See, *e.g.*, *MHC Operating Limited Partnership v City of San Jose* (2003) 106 CA4th 204, 130 CR2d 564. See also *TG Oceanside, LP v City of Oceanside* (2007) 156 CA4th 1355, 68 CR3d 320. Given the amount of time necessary to collect and present such data, attorneys should attempt to educate their clients to prepare most of the needed paperwork and to organize their records to make future petitions or applications more routine and less burdensome.

PRACTICE TIP: Practitioners should be alert to evidentiary presumptions in rent control laws, *e.g.,* a presumption that existing rent adjustment formulas in the rent control ordinance provide a fair return. Failure to rebut the presumption effectively ends the landlord's challenge. See *TG Oceanside, LP v City of Oceanside, supra*.

In an appropriate case, the landlord may be able to sue the administrative agency for breach of contract. See *300 DeHaro St. Invs. v Department of Hous. & Community Dev.* (2008) 161 CA4th 1240, 75 CR3d 98 (landlord contracted with Department of Housing and Community Development and was denied right to raise rents).

For further discussion of fair return issues, see Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 Rutgers L Rev 723 (1983); Baar, *California Rent Controls: Rent Increase Standards and Fair Return*, 8 CEB Real Prop L Rep 97 (July 1985); Baar, *Fair Return Standards Under Mobilehome Park Space Rent Controls: Conceptual and Practical Approaches*, 29 CEB Real Prop L Rep 333 (Sept. 2006).

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§7.38A 6. Tenant Does Not Occupy Unit As Principal Residence

Many local ordinances provide that the rent increase limitations only apply to "tenants in occupancy" of units falling under the rent controls and then by local rule have defined "tenants in occupancy" to mean tenants who make the rent controlled unit their principal or primary residence. See, *e.g.,* San Francisco Residential Rent Stabilization and Arbitration Board Rules and Regulations §1.21 and Santa Monica Rent Control Board Regulation §3304. The Santa Monica regulation was upheld as a valid exercise of the Rent Board's rule making authority in *Bisno v Santa Monica Rent Control Bd.* (2005) 130 CA4th 816, 30 CR3d 441. The *Bisno* decision suggested (but did not decide) that it would be unfair to force landlords to subsidize tenants who did not actually reside in units located in areas where rent controls were justified because of a housing shortage. For further discussion, see §§4.38, 7.23A, 7.24.

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VII. TENANT PETITIONS FOR RENT DECREASES OR REFUNDS

§7.39 A. Reductions in Services

Most rent control ordinances authorize rent reductions if the level of services is reduced. For example, a reduction in services occurs if parking spaces that were previously available are withdrawn or made available only at an additional charge. Without such a provision in an ordinance, a landlord could effectively increase rents by reducing services. Standards for calculating the amount by which to reduce the rent for a reduction in services are necessarily vague.

Under most ordinances, reduction in maintenance constitutes a reduction in services, but inadequate maintenance would not qualify unless it constituted a reduction from previous levels. In *Sterling v Santa Monica Rent Control Bd.* (1985) 168 CA3d 176, 214 CR 71, the court held that a local rent control ordinance could authorize rent reduction for reductions in maintenance and that the state "repair-and-deduct" remedy did not preempt this field.

Courts have held that a rent overcharge may result from a reduction in base amenities or from imposition of an unauthorized charge for base amenities, and that local rent boards have the authority to determine which amenities are properly included in the base rent for a unit. *Richman v Santa Monica Rent Control Bd.* (1992) 7 CA4th 1457, 9 CR2d 690; *301 Ocean Ave. Corp. v Santa Monica Rent Control Bd.* (1991) 228 CA3d 1548, 279 CR 636.

In *Golden Gateway Ctr. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1999) 73 CA4th 1204, 87 CR2d 332, the board required a rent decrease when the landlord's repair of decks outside tenants' apartments interfered with the tenants' use of the decks. The court set aside the board's order, holding that if the landlord is not engaging in "furtive tactics" to decrease services but is trying to provide required services, an unavoidable temporary interference with housing services that does not interfere with the right of occupancy does not warrant a rent decrease.

Santa Monica's rent ordinance does not authorize its rent board to bring actions for individual rent reductions on behalf of tenants who did not come forward on their own initiative to protest a landlord's construction project that made certain facilities unavailable. *Ocean Park Assocs. v Santa Monica Rent Control Bd.* (2004) 114 CA4th 1050, 8 CR3d 421.

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§7.40 B. Inadequate Maintenance

Although a reduction in maintenance is generally a ground for obtaining a rent reduction (see §7.39), inadequate maintenance might not constitute a ground for a rent reduction. Tenants might rely on other remedies, such as the repair-and-deduct provisions of CC §1942. Practitioners may find, however, that rent control boards sometimes attempt to expand their jurisdiction into other areas of the landlord-tenant relationship by issuing regulations concerning maintenance and repair. A tenant, however, cannot recover a rent reduction for discomfort caused by disruptive repairs to the premises. See *Golden Gateway Ctr. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1999) 73 CA4th 1204, 87 CR2d 332.

Rent boards may condition the right to general or individual adjustments on compliance with housing code requirements and with the implied warranty of habitability. In *Berman v City of W. Hollywood Rent Stabilization Dep't* (1988) 197 CA3d 837, 243 CR 144, the court rejected a landlord's constitutional challenge to a rent control ordinance that required landlords to paint apartment units once every 4 years or to face a rent reduction. The court considered the ordinance "to be a proper, rational means to implement the valid purpose of effectuating affordable, well-maintained rental housing units available to the public." 197 CA3d at 841.

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§7.40A C. Refund of Rent Overpayments

Most ordinances provide relief in the form of a petition to the rent board for a refund for a tenant whose base rent has been increased improperly, regardless of the nature of the proceeding before the board and of the time that has elapsed after the improper increase. Many ordinances provide that any rent paid by the tenant in excess of the proper base rent counts as a credit against future months' rent; in some ordinances, there is *no* statute of limitations on asserting the offset. See *Minelian v Manzella* (1989) 215 CA3d 457, 263 CR 597; *Nourafchan v Miner* (1985) 169 CA3d 746, 215 CR 450. Excess rent paid to a prior owner may be recovered against the current owner if the local rent ordinance provides for successor liability. See *Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 81 CR3d 341. But a board may not issue an order directing a tenant to withhold a portion of the monthly rent as restitution for past overpayments, nor may it declare that such withholding may not form the basis of an unlawful detainer action. Such orders represent "an unwarranted intrusion" into the power of the courts. *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 377, 261 CR 318.

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VIII. PRACTICING BEFORE RENT CONTROL BOARDS

§7.41 A. Introduction

The importance of a careful reading of the applicable rent control ordinance cannot be overemphasized, and practitioners should also be sure to read the rent board's rules and regulations, which often provide specific answers to questions that may arise. Many rent control ordinances are either vague or laden with terms of art. It is often difficult to determine how a rent control ordinance actually operates if the ordinance has highly subjective rent-increase standards, such as provisions that require rent boards to determine the value of property or to decide what constitutes a "fair return," without defining those terms with specificity.

PRACTICE TIPS:

- An attorney should not prepare a petition for filing with the rent board, or give any advice to the client, without first reviewing the board's rules and regulations and other directives or unwritten policies. It is often useful to contact rent board staff for information on how the board or its hearing officers have ruled in the past on similar matters, although practitioners should be aware that orally conveyed information, and even written communications, may not be binding.
- Practitioners should be aware that in almost every case, the rent board must determine whether the tenant's current rent exceeds the maximum allowable rent (the first legal rate charged to the tenant plus all subsequent lawful increases). Whether the owner seeks a "pass-through" of certain costs, or the tenant believes that a particular increase is inappropriate, most rent boards will make a preliminary assessment of the correctness of the rent being charged. A base rent that is too high, or the landlord's failure to register the unit (see §7.44), may have significant unanticipated adverse consequences for an owner and may produce some added benefits for the tenant.

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B. Powers of Rent Boards

§7.42 1. Rule Making

The details of applying a rent control ordinance are often left to rent board regulations or unwritten policies. In jurisdictions that have had rent control for many years, the regulations have become an independent body of law, and they often appear to differ substantially from what a literal interpretation of the ordinance would suggest.

Administrative bodies, including rent boards, are often authorized by statute or ordinance to promulgate rules and regulations. Administrative law provides a useful context for evaluating the legality and applicability of such rules and regulations.

Rent control ordinances have been held to be remedial legislation that should be construed liberally to effect their purposes. See, *e.g., Parkmerced Co. v San Francisco Rent Stabilization & Arbitration Bd.* (1989) 215 CA3d 490, 495, 263 CR 617. Nevertheless, rent board rules and regulations themselves must be consistent with the enabling statute and not in conflict with it, and they must be reasonably necessary to effect its purpose. *Da Vinci Group v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1992) 5 CA4th 24, 29, 6 CR2d 461. See Govt C §11342.2.

In *Abramson v City of W. Hollywood* (1992) 7 CA4th 1121, 9 CR2d 507, the landlord sought a rent increase under the city's rent stabilization ordinance. Even though the requested increase was valid under the express terms of the ordinance, the rent stabilization commission denied the application, apparently based largely on policy concerns that duplicative rent increases, contrary to the purposes of the ordinance, might result if the ordinance were applied as written. The trial court upheld the commission's ruling, but the court of appeal reversed, stating (7 CA4th at 1128):

> The fact that City's rent control scheme has unintentionally created the potential for undesirable duplicative rent increases does not provide a valid basis for the introduction of a new procedure which seeks to avoid this undesired effect.
> We are mindful of the general rule that City's contemporaneous construction of Ordinance is entitled to great deference. We are also mindful of the policy arguments advanced by City throughout these proceedings regarding the protection of tenants from excessive increases in rent. But no matter how great the deference or how strong the policy, we are unwilling to read a procedure into Ordinance which does not exist.

In *City of Berkeley v City of Berkeley Rent Stabilization Bd.* (1994) 27 CA4th 951, 33 CR2d 317, the court rejected a contention that rent board regulations that *raised* rents were not authorized by the rent control ordinance. In *H.N. & Frances C. Berger Found. v City of Escondido* (2005) 127 CA4th 1, 25 CR3d 19, the court held that a determination of fair rent by the rent board need not follow any specific formula, but it must be supported by a proper evidentiary record.

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§7.43 2. Adjudicating Petitions

In addition to promulgating rules and regulations, rent control boards typically conduct rent adjustment hearings and issue opinions in matters brought before them (or before hearing officers or other personnel trained to hear the individual cases). Most boards have an administrative staff that conducts the board's routine business. An outline of the board's duties and hearing procedures is typically included in the rules and regulations.

The power of local rent boards to adjudicate excess rent claims (by ordering a monetary award to the tenant of the amount of previously paid excess rent) was upheld in *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 261 CR 318. The court rejected arguments that such adjudications violate the judicial powers clause (Cal Const art VI, §1) or the right to a jury trial (Cal Const art I, §16). The court also held that:

(a) No rent board may enforce any excess rent claim for 30 days after the final decision, so that an aggrieved party may petition a court for a writ of administrative mandamus and obtain a stay of the board's order (49 CA3d at 377 n44); and

(b) An administrative board may not award treble damages for a landlord's overcharge or other violation, because making such an award is a judicial function (49 CA3d at 378).

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§7.44 3. Registration of Rental Units

In municipalities that require landlords to register their units and to provide relevant information such as base-date rents, current rents, and amenities, a landlord's right to obtain a rent increase may be contingent on compliance with registration requirements. Some ordinances limit an owner's right to demand or accept rent on premises that are not registered with the rent board. Failure to register might be an affirmative defense in an eviction action based on nonpayment of rent. This defense is not subject to any statute of limitations. See, *e.g., Minelian v Manzella* (1989) 215 CA3d 457, 263 CR 597; *Searle v Berkeley Rent Stabilization Bd.* (1988) 197 CA3d 1251, 243 CR 449; *Nourafchan v Miner* (1985) 169 CA3d 746, 215 CR 450. See also *Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 81 CR3d 341 (current owner liable for rent overcharges by owner's predecessor).

If there is a problem or a defect in registration of a unit, CC §1947.7, which limits the nature of the penalties assessed by a local agency when there has been "substantial compliance" with the registration and rent level requirements, may afford some relief. "Penalties" within the meaning of CC §1947.7 may refer only to treble damages because the statute provides for restitution of the excess rent even when the landlord is in substantial compliance with applicable legal requirements.

A provision in Berkeley's rent control ordinance that allowed the rent board to authorize rent withholding for tenants whose landlords fail to register was held unconstitutional in *Floystrup v City of Berkeley Rent Stabilization Bd.* (1990) 219 CA3d 1309, 268 CR 898, on the ground that the provision impermissibly permitted the board to exercise judicial powers. A 5 percent penalty for late registration was held to be permissible, however, in *301 Ocean Ave. Corp. v Santa Monica Rent Control Bd.* (1985) 175 CA3d 149, 158, 221 CR 610, although the court held invalid a prohibition against rent increases for three months after late payment of fees, because it was not reasonably necessary to achieve the purpose of the ordinance.

In *West Hollywood Concerned Citizens v City of W. Hollywood* (1991) 232 CA3d 486, 283 CR 470, a group of landlords claimed that a registration fee increase of $48 per year per unit that could not be passed through to tenants was "confiscatory," because it effectively reduced the annual inflation adjustment of base rents allowed by the ordinance. The court disagreed, holding that, because the base rents may well have been more than the minimum needed to provide a fair return, the $48 increase would not necessarily cause profits to fall below a fair return.

In *Alpha Epsilon Phi Tau Chapter Hous. Ass'n v City of Berkeley* (9th Cir 1997) 114 F3d 840, the local rent board found that plaintiff's units were covered by the rent control ordinance and therefore plaintiffs owed registration fees and penalties for failing to register. Plaintiff sued in federal court, claiming that the board's ruling violated the due process clause, because the board had not adjudicated this dispute impartially, as the board's funding was dependent on registration fees. The court disagreed. While board members had some institutional (not personal) interest in ruling that units were covered, that interest was not large enough to violate due process, as less than five percent of the board's budget came from disputed fees and penalties, and the board could cover any budgetary shortfall by raising registration fees in subsequent years.

If the rent board requires landlords to furnish the name and any other information about a tenant or former tenant, the board must keep such name and information confidential. CC §1947.7(g). In other respects, public access to landlords' registration forms varies among jurisdictions. In some cities, only tenants in applicable units have access to registration forms; in others, the public has access to only part of the information on these forms. Rent board restrictions on public access to registration forms have not been tested in the courts.

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§7.45 4. Registration of Rents

Landlords (especially those who bought buildings after the enactment of rent control) have often had difficulty learning the correct base rents for all units. Although landlords often consider rent registration a nuisance, it does assist landlords in determining the proper base rent in vacancy control jurisdictions.

To help resolve potential disputes about base rents, the legislature enacted CC §1947.8, which provides that any rent control ordinance or regulation in effect on January 1, 1987, that requires registration of rents, must provide for the establishment and certification of permissible rent levels on or before January 1, 1988, including completion of all appeals and administrative proceedings. CC §1947.8(b). If the ordinance was adopted on or after January 1, 1987, the ordinance or regulation must provide for establishment and certification of rent levels within 1 year after adoption. Upon request, the local agency must provide the landlord or the tenant with a certificate of permissible rent levels for a rental unit. CC §1947.8(b). The landlord or the tenant may appeal the determination of permissible rent levels stated in the certificate within 15 days after it is issued, and the local agency is required to give written notification of its decision on the appeal within 60 days. CC §1947.8(c).

A local agency may not enact or enforce local regulations that are inconsistent with the intent of CC §1947.8 and may be compelled to comply with CC §1947.8 by a writ of mandate under CCP §1085. *Sego v Santa Monica Rent Control Bd.* (1997) 57 CA4th 250, 67 CR2d 68.

Under CC §§1947.7-1947.11, in a jurisdiction that requires registration of rent, restitution of overcharges to the tenant and recovery of registration or filing fees are the exclusive remedies for a landlord's failure to register when a landlord is in "substantial compliance" with the ordinance. No other penalties may be assessed against such a landlord. CC §1947.7(b).

In rent-controlled jurisdictions that require registration of rent, once a certified rent has been established (see CC §1947.8), any landlord who charges rent to a tenant in excess of the certified rent ceiling must refund the excess rent to the tenant on demand. If the landlord refuses to refund the excess rent and a court finds the landlord willfully charged the tenant rent in excess of the certified lawful rent ceiling, the court must award the tenant a judgment for the excess amount of rent and *may* treble that amount. The prevailing party is entitled to attorney fees and costs. CC §1947.11(a). The remedy under CC §1947.11 does not prohibit any other remedy that might be available to a party aggrieved by rent in excess of a certified level. CC §1947.11(b). Most rent control ordinances also provide for civil remedies in excess rent cases, and these remedies might not be limited by CC §1947.11.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.46 C. Representing Clients at Administrative Hearings

§7.46 C. Representing Clients at Administrative Hearings

The hearing process for an individual rent adjustment is similar to the process for most administrative hearings. Hearing officers are usually hired by the rent board or the program director, either as employees or on a per diem basis. They are often, but not always, attorneys.

Rent control ordinances or regulations usually contain provisions governing:

- notice to parties;
- timetables for hearings, decisions, and appeals;
- access to records;
- recording hearings;
- consolidation of petitions concerning the same property;
- representation (many ordinances permit representation by any person, not just by attorneys); and
- filing fees (which may be substantial).

PRACTICE TIP: The attorney should prepare as carefully for an individual adjustment hearing as for any other administrative hearing. Whatever the reason for the requested rent adjustment, complete and accurate records of revenues and expenses for the years in question must usually be presented at the hearing.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.47 1. Evidence

§7.47 1. Evidence

The party who has the burden of proof must be prepared to present full and complete evidence to make his or her case. Under some ordinances, copies of all supporting documentation must be submitted with the petition so that the hearing officer or rent-board staff can review the file before the hearing. In addition, if the issue is a rent increase beyond annually permitted increases in jurisdictions that require special evidence to demonstrate that the increases are warranted, attorneys should pay special attention to the language and burdens contained in the rent ordinance. In *Action Apartment Ass'n v Santa Monica Rent Control Opinion Bd.* (9th Cir 2007) 509 F3d 1020, 1027, the failure on the part of the plaintiff to have made a showing in the wording of the ordinance was fatal to the plaintiff's claim that it had not received a fair return.

Attorneys should determine the applicable rules of evidence in advance of the hearing. Strict rules of evidence, such as the secondary evidence rule (Evid C §1521), may not be applied. Hearsay is generally admissible, although a finding cannot be based solely on hearsay. See California Administrative Hearing Practice §§7.67-7.69 (2d ed Cal CEB 1997). The business records exception to the hearsay rule (Evid C §§1270-1272) may help to support a finding. In any case, the attorney should bring supporting documents, such as invoices and canceled checks, to the hearing. The landlord should be prepared to testify in support of documentary evidence that is introduced, unless the parties have stipulated to the accuracy of the evidence.

CAUTION: If there is any likelihood that the matter will be appealed to the full board or pursued in court, the attorney should be careful to prepare and present a complete record of all facts necessary to sustain the client's case.

The fact that many rent control boards do not possess subpoena power creates some difficulty for a party who may require testimony from a third party or even an opposing party.

PRACTICE TIP: Most rent control boards possess subpoena power, but some do not. If a witness cannot be subpoenaed, the attorney may have to rely on affidavits and declarations. Introducing hearsay evidence may provide a partial solution to the absence of subpoena power, but the attorney should be mindful of the basic rules of evidence and should strive to present all the basic facts with evidence that would be admissible in court. Although many rent boards do not apply strict rules of evidence, the attorney cannot simply assume or hope that the hearing officer will admit hearsay evidence.

The adverse consequences that may arise when an attorney who does not comply with a rent board rule or a hearing officer direction (even though the evidence would never be admitted in a court proceeding) was highlighted in *MHC Operating Limited Partnership v City of San Jose* (2003) 106 CA4th 204, 130 CR2d 564. In that case, the mobilehome park owner who did not own the park in 1985, the year when net operating income was to be established, and who had received no documentation regarding net operating income from the seller, was held to be required to attempt to estimate that income and expense data from other sources.

PRACTICE TIP: Those who buy rent-controlled property should obtain, as part of the sale, all documentation necessary to support future rent increases, and their attorneys should review the local ordinances to determine what information to obtain.

Expert witnesses may prove to be essential to provide economic analysis in rent control hearings. In jurisdictions with vague "fair return" standards (see §7.38), the landlord must be able to present coherent economic and financial data to demonstrate entitlement to a rent increase. Similarly, a tenant who claims a breach of the landlord's duties must present evidence concerning the dollar value of the loss.

In *King v Mobile Home Rent Review Bd.* (1989) 216 CA3d 1532, 265 CR 624, the rent review board required the landlord to furnish his federal income tax return as part of his petition for a rent increase. The court of appeal held that such returns are privileged unless the board is able to show some public policy basis beyond administrative convenience for requiring them.

In *Whispering Pines Mobile Home Park, Ltd. v City of Scotts Valley* (1986) 180 CA3d 152, 225 CR 364, the court

limited the rent board's ability to rely on the knowledge and expertise of its own members, demonstrating the importance of expert testimony presented by the parties themselves. The court also held, however, that a board may rely on its own members if it informs the parties of this procedure and gives them an opportunity to respond before determining the allowable increase. In *H.N. & Frances C. Berger Found. v City of Escondido* (2005) 127 CA4th 1, 25 CR3d 19, the court held that the rent board's determination of a fair rent was not supported by substantial evidence. The board rejected both the recommendation of its own rent control expert and that of an independent appraiser it had retained and arrived at a lower figure than either suggested. The court found that the figures used by the board were not within the range of reasonable rents.

In *TG Oceanside, LP v City of Oceanside* (2007) 156 CA4th 1355, 68 CR3d 320, the court validated the rent control ordinance's evidentiary presumption that existing rent adjustment formulas in the ordinance provide a fair return. Because the landlord failed to put on evidence sufficient to rebut the presumption, his rent increase was denied.

PRACTICE TIP: If a problem is encountered obtaining testimony at the hearing, the attorney should request that the hearing be continued or that the hearing record be left open. If the matter is to be appealed or subjected to judicial review, a complete administrative record will be needed (see §7.48).

In a reconsideration hearing on a matter before the rent board, the board may take additional evidence or rely on the existing record. *Whispering Pines Mobile Home Park, Ltd. v City of Scotts Valley, supra*.

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§7.48 2. Preservation of Record

Because reconsideration or judicial review of rent board decisions is usually based solely on the administrative record (see §§7.47, 7.51), the attorney must present all necessary evidence at the hearing and should attempt to present evidence that complies with the hearsay and secondary evidence (Evid C §1521) rules, regardless of whether those rules are applicable in the administrative hearing. See, *e.g.,* strategies in Pope, *Galland v Clovis: New Restrictions on Due Process Challenges to Rent Control Procedures*, 24 CEB Real Prop L Rep 217 (Aug. 2001).

If judicial review is contemplated, the attorney should also ensure that an accurate record of the proceedings is maintained. Although most hearings are tape recorded, the sound quality may be poor. Consequently, the attorney may wish to furnish his or her own tape recorder or to arrange for a certified shorthand reporter. In that case, the attorney may be required to furnish copies of the transcript to the board and the opposing party. If no secondary recording method is used, the taping system should be checked periodically during the hearing to ensure that it the sound quality is adequate.

The quality of the documentary evidence presented may overcome any problems with oral testimony, and the attorney should take care to see that it is introduced and marked properly.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.49 3. Costs of Preparing for and Attending a Hearing

§7.49 3. Costs of Preparing for and Attending a Hearing

Practitioners and their clients may be surprised at the cost of preparing for and attending a hearing to obtain or oppose a rent increase.

PRACTICE TIP: Practitioners should discuss the cost issue with their clients at the earliest opportunity, so that the parties may be afforded an opportunity to assist in preparing the case and the necessary evidence.

Civil Code §1947.15 provides that landlords who obtain a rent increase may recapture the cost of professional services (such as legal and accounting services) employed in the effort to obtain the rent increase. This rule applies only in jurisdictions that do not have vacancy decontrol (CC §1947.15(b)), but the rule is inoperative as long as the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535) (see §§7.4, 7.25-7.28) remains in effect (CC §1947.15(k)).

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§7.50 4. Findings and Conclusions Required

After a hearing officer's decision or a decision of the board is received, the attorney should review it carefully to ensure that it contains appropriate findings of fact and conclusions of law, both of which are necessary for any challenge to the decision. In *Parkmerced Residents Org. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1989) 210 CA3d 1235, 258 CR 774, however, the court held that the rent board's findings that there was good cause for an exemption and that the exemption was in the interests of justice was a sufficiently specific finding of ultimate fact.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.51 D. Judicial Review: Administrative Mandamus

§7.51 D. Judicial Review: Administrative Mandamus

An unsuccessful party may challenge a rent board decision by filing a petition for a writ of administrative mandamus under CCP §1094.5. The scope of judicial review under §1094.5 is limited to determining whether the board has "proceeded with or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." Abuse of discretion is established if the board failed to act in a manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. CCP §1094.5(b).

In most cases, the petitioning party must order the administrative record, pay for its preparation, and cause the record to be lodged with the court. Obtaining the administrative record is usually an expensive undertaking. Whether the entire administrative record, including a transcript of all the hearings, must be prepared depends on the basis for the challenge to the rent board's decision. A challenge based on an interpretation of the ordinance or rule, when the facts are not in dispute, may require only limited portions of the record. In cases that involve questions requiring interpretation of the evidence, the entire record, including a transcript of all proceedings, may be required. The better practice is to provide the complete record. See, *e.g., Buckhart v San Francisco Residential Rent Bd.* (1988) 197 CA3d 1032, 243 CR 298.

In some cases, new evidence may have been discovered since the administrative hearing. In administrative mandamus proceedings, evidence beyond the administrative record is ordinarily not admissible. There are, however, limited exceptions to this rule. CCP §1094.5(e). See California Administrative Mandamus (3d ed Cal CEB 2003). For extensive discussion of the admissibility of evidence from outside the record, see Practice Under the California Environmental Quality Act §§23.48-23.58 (2d ed Cal CEB 2008).

Except for jurisdictional and legal issues, when reviewing a rent board's decision at an individual adjustment hearing, the trial court must apply the substantial evidence rule, not the independent judgment test. *San Marcos Mobilehome Park Owners' Ass'n v City of San Marcos* (1987) 192 CA3d 1492, 238 CR 290. When the administrative decision substantially affects a fundamental vested right, however, the independent judgment standard of review applies. *Goat Hill Tavern v City of Costa Mesa* (1992) 6 CA4th 1519, 8 CR2d 385; *301 Ocean Ave. Corp. v Santa Monica Rent Control Bd.* (1991) 228 CA3d 1548, 279 CR 636. In *Goat Hill Tavern,* the court used the independent judgment standard of review in setting aside the city's denial of a conditional use permit because the tavern had operated for 35 years as a legal nonconforming use, the owner had invested $1.75 million in refurbishing the property, and the owner had a fundamental vested right. But see *Jaramillo v State Bd. for Geologists & Geophysicists* (2006) 136 CA4th 880, 39 CR3d 170 (where an administrative decision does not substantially affect a vested right, the trial court will consider only whether the findings are supported by substantial evidence). For further discussion of these tests and their ramifications, see Practice Under CEQA §§23.32-23.38.

If the trial court vacates the rent board's decision, it may not set the amount of a rent increase but must remand the case to the rent control board. *Carson Gardens, LLC v City of Carson Mobilehome Park Rental Review Bd.* (2006) 135 CA4th 856, 37 CR3d 768.

Many ordinances contain statutes of limitations within which administrative mandamus review must be sought. In the absence of a provision in the local ordinance, the time period specified in CCP §1094.6(b), (f) is 90 days from the date that the rent board sends notice of the final administrative decision. See *Liang v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2004) 124 CA4th 775, 21 CR3d 715. (The decision in *Liang* resulted from a filing clerk's rejecting a timely filing of the petition because the petition did not comply with local rule requirements.)

Under CCP §1094.6(d), if the petitioner requests the administrative record within 10 days after the date the decision becomes final, the period within which the petition must be filed is extended to 30 days after the petitioner's attorney has received the record. Although a period of months may thus ensue before the petition must be filed, it may have to be filed within 30 days if the decision concerns an excess rent claim. *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 261 CR 318. In such a case, a petition should be filed immediately so that a stay can be sought from the superior court.

PRACTICE TIP: Attorneys should be aware of some special challenges presented in practice before local rent control

boards. The petitioner will often want to proceed by the noticed motion procedure rather than to obtain an alternative writ with an order to show cause, because the motion procedure affords adequate time to obtain the record and permits a better briefing schedule. As discussed above, the petitioner's need for a stay of the decision may affect timing and strategy in the early stages of the proceeding.

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§7.52 E. Arbitration

Some rent control ordinances provide for arbitration of disputes. Arbitration requirements may not be binding in the rent control context, however, unless the parties are given an opportunity to seek review of the arbitrator's decision. In *Bayscene Resident Negotiators v Bayscene Mobilehome Park* (1993) 15 CA4th 119, 18 CR2d 626, the court considered Chula Vista's mobilehome park rent ordinance, which provided for negotiation between the landlord and tenants and, if that failed, binding arbitration by an arbitrator who was to provide the landlord with a "just and reasonable return on property." The court held that this procedure denied landlords due process, because it provided no review of the arbitrator's decision by the city council and no trial de novo or judicial review of whether the arbitrator's decision was supported by substantial evidence.

A landlord cannot avoid the police power of a rent control board or its adjudicatory functions by inserting a clause in a lease or rental agreement requiring binding arbitration of disputes. See *Village Trailer Park, Inc. v Santa Monica Rent Control Bd.* (2002) 101 CA4th 1133, 124 CR2d 857, in which the court held that the California Mobilehome Residency Law does not "preempt" Santa Monica from applying its rent control law to mobilehome park spaces, and that an arbitration clause in the mobilehome park lease did not prevent the local board from enforcing its ordinance against the park owner.

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IX. RESTRICTIONS ON EVICTIONS

§7.53 A. Overview

Local rent control ordinances may limit the *grounds* and conditions for eviction, but they may not conflict with the summary nature of state eviction *procedures*. *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 147, 130 CR 465.

Under state law, landlords may evict residential tenants at the end of the tenancy term without stating or proving a reason, although the eviction may be barred if the tenant can prove that the landlord is motivated by specifically prohibited reasons (*e.g.,* racial discrimination, retaliation for the exercise of one's rights). See chaps 2, 8. Most rent control ordinances alter the nature of tenants' tenure substantially by requiring just cause for eviction. See §7.54. Some ordinances specify additional procedural requirements for evictions, such as requiring the landlord to send the rent board a copy of the notice to terminate. Because these requirements do not interfere with the summary nature of state eviction proceedings, they do not appear to conflict with the decision in *Birkenfeld v City of Berkeley, supra*.

In *Danekas v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2001) 95 CA4th 638, 645, 115 CR2d 694, the court explained why evictions are regulated by San Francisco's rent control ordinance:

> Regulating the grounds for eviction is integral to the success of the statutory framework, because the Rent Ordinance permits unlimited rent increases whenever a rental unit becomes vacant. (Rent Ord., §37.3.) As soon as an original tenant no longer permanently resides in a rental unit, the rent for that unit is temporarily decontrolled, allowing the landlord to boost the rent as high as the market permits. Once the unit is re-rented, it again becomes subject to the Rent Ordinance under a regulatory concept known as "vacancy decontrol/recontrol." Under this framework, governing the grounds for eviction is essential to the successful implementation of the Rent Ordinance, lest landlords circumvent the rent limitations by expelling tenants in order to raise rents. To prevent this activity, section 37.9 of the Rent Ordinance enumerates the acceptable grounds for tenant eviction.

San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.9(j) requires both sellers and buyers of rent-controlled properties to notify tenants in writing of various rights, including that the fact of the sale does not permit the tenants to be evicted, the rent to be raised, or the terms of the rental agreements to be materially changed.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.54 B. Just Cause for Eviction or Termination of Housing Services

§7.54 B. Just Cause for Eviction or Termination of Housing Services

Under just cause eviction standards, a landlord is prohibited from evicting a tenant except for one or more of the reasons stated in the ordinance. Most rent control ordinances that contain eviction controls set out the permissible reasons.

PRACTICE TIP: Although lawyers customarily negotiate agreements that alter statutory provisions, such waivers may not be enforceable in rent control jurisdictions because most ordinances prohibit provisions waiving tenants' rights. See *Gombiner v Swartz* (2008) 167 CA4th 1365, 1376 n4, 85 CR3d 83 (acknowledging that partial waiver of right to complain to governmental agency in mutually agreed settlement of specific issue may be enforceable).

Grounds constituting "good cause" generally break down into two types: tenant breaches (see §§7.56-7.62) and the landlord's need for possession (see §§7.63-7.68).

In April 2004, for example, the city of San Diego adopted what has become known as a Just Cause Ordinance. The ordinance applies only to the city of San Diego and only if a tenant has resided in the property for over two years. The ordinance lists the following as acceptable reasons for asking a tenant to vacate the premises:

- Failure to pay rent;
- Violation of obligation or tenancy or covenant of the tenancy and/or failure to cure such violation after receiving written notice;
- Committing a nuisance in the rental unit or around the rental community;
- Permitting the rental unit to be used for an illegal purpose;
- Refusing to renew the lease on the rental unit;
- Refusing to provide reasonable access to the rental unit as prescribed in CC §1954;
- To allow for owner/relative/resident manager occupancy;
- To make necessary repairs to or construction on the rental unit; and
- To withdraw all the rental units on the parcel of land from the rental market.

In 2002, the City of Glendale enacted a Just Cause and Retaliatory Evictions law which restricts the grounds for eviction and requires relocation fees in cases where the tenant is not at fault (*e.g.,* good faith occupancy by owner or designated relatives or resident manager, permanent removal from rental housing use). Glendale Mun C Chapter 9.30.

In November 2002, the City of Oakland adopted the Oakland Just Cause for Eviction Ordinance, which likewise restricts the grounds for eviction. A group of landlords sought a writ of mandate to prohibit the ordinance. The court struck a provision that purported to create a presumption of violation if the owner recovered possession on the basis of an owner-move-in eviction but maintained continuous occupancy for less than 3 years. The provision was an invalid presumption affecting the burden of proof in conflict with Evid C §500 and was preempted. *Rental Hous. Ass'n of N. Alameda County v City of Oakland* (2009) 171 CA4th 741, 757, 90 CR3d 181.

In at least one jurisdiction, just cause eviction controls apply also to separate housing services such as parking spaces or storage. See, *e.g*., San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.9(a)(2). In the event of a dispute, a lawsuit must be filed so that the court may determine whether "just cause" exists. Following the removal or severance of the housing service, however, the rent board will determine the amount of a corresponding rent reduction upon petition by either the landlord or the tenant. San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.2(r). In March, 2007, the San Francisco Rent Board declined to adopt regulations to implement the requirement of good cause to sever the housing services. Until such time as the Rent Board enacts such regulations, it is up to the courts to interpret the provisions.

WARNING: Practitioners should determine if a city has enacted a just cause eviction law if they only sporadically handle cases involving property in a given city.

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§7.55 1. "Good Faith" Requirements

Some ordinances require that an evicting owner be acting in "good faith" in addition to stating and proving "good cause." Although good faith is most typically a requirement for evictions based on the owner's desire to occupy the premises (see §7.67), it may be a requirement of other grounds for eviction as well. The issue is important for attorneys because such a subjective standard seems to require a factual determination in every case.

PRACTICE TIP: Several ordinances define the elements of "good faith," either in the body of the ordinance or in regulations, and it is important for the practitioner, whether representing the landlord or the tenant, to know these elements.

Efforts to expand local ordinances to specifically define certain conduct often necessary to prosecute an eviction action as constituting "bad faith" have been challenged. Most importantly, in *Action Apartment Ass'n v City of Santa Monica* (2007) 41 C4th 1232, 1249, 63 CR3d 398, the supreme court held that the litigation privilege of CC §47(b) conflicts with, and thus preempts, a section of the Santa Monica tenant anti-harassment ordinance that authorizes civil and criminal penalties against a landlord who files an action to recover possession of a rental unit without a reasonable factual or legal basis. The litigation privilege, however, preempts only partially the ordinance provision regarding the service of an eviction notice. Because an eviction notice is a communication regarding prospective litigation, whether it is subject to the litigation privilege is a question of fact. 41 C4th at 1250. A landlord who merely serves an eviction notice is only protected by the litigation privilege if litigation is contemplated in good faith and under serious consideration. 41 C4th at 1251.

Similarly, in *Bisno v Douglas Emmett Realty Fund 1988* (2009) 174 CA4th 1534, 95 CR3d 492, the court of appeal applied the reasoning in *Action Apartment Ass'n* and held that the litigation privilege barred the tenant's claims for wrongful eviction under the Santa Monica just cause eviction control law arising out of the service of an eviction notice and subsequent unlawful detainer action. On the issue of whether the litigation privilege also protected the landlord in its service of a rent increase notice, the court of appeal permitted a retrial because whether the privilege applied was a question of fact, and the jury had not considered this defense.

In *Baba v Board of Supervisors of the City & County of San Francisco* (2004) 124 CA4th 504, 21 CR3d 428, a court of appeal held sections of the San Francisco eviction control ordinance addressing "owner move-in" (see §§7.65, 7.67) and Ellis Act (see §7.64) evictions to be unconstitutional. See §§7.12, 7.64F. The court invalidated provisions making it unlawful for a landlord to:

- Request that a tenant move unless the landlord in good faith intended to recover the housing unit;
- Seek or obtain a tenant's waiver of rights under the ordinance; and
- Obtain a tenant waiver unless the tenant was represented by independent counsel.

Despite the ruling in *Baba*, a court of appeal held that even by a mutual agreement with the tenant, a landlord cannot circumvent the local rent control ordinance setting maximum rents. See *Gombiner v Swartz* (2008) 167 CA4th 1365, 85 CR3d 83.

PRACTICE TIP: Practitioners representing landlords should document the good faith intention of the property owner or manager in instituting litigation, and those intentions should be recited in any settlement agreement. Practitioners representing tenants should investigate whether there are any facts that might lead a tenant to conclude that the owner had no basis in fact for the preparation and service of the eviction notice.

California courts have provided some guidance on the meaning of "good faith." In *Four Seas Inv. Corp. v International Hotel Tenants' Ass'n* (1978) 81 CA3d 604, 146 CR 531, the court upheld a directed verdict in favor of the landlord on the issue of retaliatory eviction, although the court accepted as fact that there had been a long history of disputes between the tenants and the former owners. The court noted that knowledge of those events would not create the necessary "retaliatory" motive, because it was clear that the new owners had intended to demolish the hotel from the date of their purchase. In so ruling, the court stated: "[M]otive is ordinarily a factual issue to be resolved by the trier

of fact, but such an issue cannot be submitted to the jury unless substantial evidence appears in the record to support it." 81 CA3d at 610.

Federal regulations in effect during World War II provided that owners could evict tenants in order to occupy the premises themselves, but only if they did so in "good faith." Several California cases held that "good faith" meant "honestly; without fraud, collusion or deceit." See *Janise v Bryan* (1948) 89 CA2d Supp 933, 201 P2d 466; *Gibson v Corbett* (1948) 87 CA2d Supp 926, 200 P2d 216; *Bumgarner v Orton* (1944) 63 CA2d Supp 841, 146 P2d 67. Each of those decisions, which still appear to be good law, noted that to defeat the eviction, any ulterior or improper motive must have had some direct relationship to defeating the purpose of the rental price regulations. See also *Gross v Superior Court* (1985) 171 CA3d 265, 275, 217 CR 284, noting that cases interpreting wartime regulations continue to have "precedential value" because the "problems addressed by rent control legislation are the same whether those problems are the result of a wartime or peacetime housing shortage."

Another way of looking at the issue is that because the landlord may only evict a tenant to move in himself or herself or move in a family member in "good faith" under the various rent control ordinances, the landlord must plead and prove "good faith" as one of the elements of the landlord's case. See *Lester v Isaac* (1944) 63 CA2d Supp 851, 146 P2d 524. The landlord must prove the element of "good faith" to a preponderance of the evidence, the normal civil standard.

Tenant advocates might also argue that "good faith" determinations should be analogized to "retaliatory eviction" cases, in which the burden of proof may not require that the tenant prove that the absence of "good faith" is the sole or dominant reason for the adverse action, but simply that lack of good faith is a "substantial" or "motivating" factor. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v Doyle* (1977) 429 US 274, 50 L Ed 2d 471, 97 S Ct 568; *Western Land Office, Inc. v Cervantes* (1985) 175 CA3d 724, 220 CR 784. For discussion, see §8.130.

In its original form, CC §1942.5 proscribed adverse action against tenants when the landlord's "dominant" purpose was retaliatory. In amending the statute, the legislature's deletion of the word "dominant" brings the *test* for retaliatory motive in line with the analogous rule established by the courts in the employment arena, *i.e.,* whether retaliation was a "substantial" or "motivating" factor.

PRACTICE TIP: A tenant's attorney taking a good faith issue to trial should draft a special jury instruction on this point, for example:

Although a lack of '"good faith" must be found to be a "motivating factor," lack of good faith need NOT be the "sole" nor "dominant" motive prompting the adverse action. The jury must determine whether the adverse action (*e.g.,* termination of the tenancy) was taken because of a valid reason alleged by the landlord, rather than out of desire to punish the tenant for a protected activity.

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§7.55A 2. Protection for Subtenants

Many rent control ordinances define "tenant" broadly enough to include subtenants; in that event the landlord must have just cause to evict a subtenant—even when the original tenant has given the landlord notice of intent to terminate the tenancy. See, *e.g.*, *DeZerega v Meggs* (2000) 83 CA4th 28, 99 CR2d 366 (interpreting Berkeley's law). Other ordinances have been amended to provide added protections for subtenants or occupants who have moved into the rental unit after the original tenant took occupancy. See, *e.g.,* West Hollywood Rent Stabilization Ordinance §17.08.010(21); San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.9(a)(2); San Francisco Residential Rent Stabilization and Arbitration Board Rules and Regulations §§6.13-6.14, 6.15A-6.15C. See also San Francisco Residential Rent Stabilization and Arbitration Ordinance §§37.2(t) and 37.9(j) (buyers of rent-controlled properties must notify tenants in writing that any tenants, subtenants, or roommates who were lawful occupants at the time of the sale remain lawful occupants). The West Hollywood ordinance was upheld against a constitutional challenge in *Pick v Cohen* (2000) 83 CA4th Supp 6, 100 CR2d 839. But see *Coalition Advocating Legal Hous. Options v City of Santa Monica* (2001) 88 CA4th 451, 105 CR2d 802.

Some jurisdictions also provide relocation assistance to subtenants in good cause evictions when the subtenant is not at fault. See, *e.g.,* San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.9C (for no-fault evictions, each authorized occupant is entitled to relocation assistance of $4500, with a maximum payment of $13,500 per unit, and each tenant aged 60 or older or disabled, and each household with minor children, is entitled to additional payment of $3000).

Perhaps unforeseen protection for approved occupants under local eviction controls was provided in *DeZerega v Meggs, supra*. There the landlord permitted serial roommates even though the lease agreement prohibited subleasing. One master tenant signed the lease and had the only formal, written contractual relationship with the landlord. Roommates came and went, but filled out forms provided by the landlord, although none signed a rental agreement with the landlord. The master tenant gave the landlord notice that he was vacating the premises, but his two roommates remained. The landlords instituted an eviction action against the roommates based on the notice. The court of appeal held that when co-occupants, whether or not characterized as subtenants or co-tenants, occupy a rent-controlled dwelling with the landlords' knowledge and consent, that occupancy cannot be disturbed, even if the original tenant terminates the master tenancy, unless the landlord has "just cause" to evict the remaining approved occupants.

The court refused to find that the notice from the master tenant bound the other occupants. Instead, the court extended the just cause eviction protections to the remaining occupants based solely on the notion that the landlord knew of their occupancy and had approved of it. It is unclear from the case whether under Berkeley's rent control ordinance a landlord may enforce a 30-day notice given by a tenant. Often such ordinances do not permit such enforcement and no court has directly addressed this point. See §7.71. On lease-drafting ideas, Practice Tips, and strategies in dealing with group tenancy situations, see §4.40B. For further discussion of *DeZerega*, see §§4.40B, 7.28.

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C. Permissible Grounds for Just Cause Evictions

1. Tenant's Breach

§7.56 a. Failure to Pay Rent

All eviction control ordinances permit the landlord to evict a tenant for failure to pay rent, under CCP §1161(2), which permits such evictions under state law. See §§8.26-8.45.

Some rent control ordinances, such as the Los Angeles Rent Stabilization Ordinance, require that the landlord register the unit and serve the tenant with a copy of the certificate of registration as a precondition to demanding rent. Failure to comply with this requirement is a defense to an eviction for nonpayment of rent. Under the Los Angeles Rent Stabilization Ordinance, registration or service on the tenant of a copy of the Statement of Registration of Rental Units after service of a 3-day notice to pay rent or quit will not save the notice or the lawsuit based on the pay or quit notice. Both registration and service of the Statement of Registration of Rental Units must be accomplished by the time the notice to pay rent or quit is served. If the tenant previously paid excess rent, the landlord will be unable to evict for nonpayment of rent. Los Angeles Rent Stabilization Ordinance §§151.05.A, 151.09. See §7.29.

PRACTICE TIP: In jurisdictions that require proof of compliance, the landlord may wish to attach a copy of the rent registration certificate to the eviction notice and include the certificate on the proof of service of the notice. In jurisdictions with requirements similar to those in Los Angeles, if the landlord pays the registration fees after serving the notice and provides the tenant with proof of payment, some landlord attorneys have successfully argued this constitutes "substantial compliance" with the ordinance under CC §1947.7. Tenant attorneys may argue in response that (1) Section 1947.7 does not apply to eviction controls, and (2) because the Statement of Registration must have been served on the tenant as a precondition to demanding rent, payment of registration fees after service of the notice (and proof of same to the tenant) may not save the notice. At that point, the notice period may have expired, and the landlord was not entitled to rent during the notice period.

The tenant's failure to pay rent may be defended if the tenant can show that the landlord has collected overcharges, even if more than 3 years in the past. Any rent paid by the tenant in excess of the proper base rent counts as a credit against future months' rent, and there is *no* statute of limitations on asserting the offset. See *Minelian v Manzella* (1989) 215 CA3d 457, 263 CR 597; *Nourafchan v Miner* (1985) 169 CA3d 746, 215 CR 450. Moreover, excess rent paid to a prior landlord may be counted as a credit against the current landlord if the local ordinance provides for successor liability. *Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 81 CR3d 341.

Although there are no California cases on point, in *447 Assocs. v Miranda* (NJ 1989) 559 A2d 1362, the court held that a late payment of rent that is the result of an unreasonable change in the lease terms does not constitute good cause for eviction.

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§7.57 b. Failure to Cure Violation of Rental Agreement

Eviction control provisions usually authorize eviction under CCP §1161(3) if the tenant has failed to perform a condition or covenant of the rental agreement. Ordinances generally require notice to the tenant and an opportunity to cure the breach. These requirements may create a dispute over whether a particular violation can be cured and therefore whether an opportunity to cure must be given.

Some ordinances attempt to restrict the landlord's right to evict for breaches of covenants not only by requiring notice and an opportunity to cure, but also by limiting the right to evict to "substantial" breaches of "material" terms that are "reasonable and legal." For discussion of case law on the materiality requirement of CCP §1161(3), see §8.48.

A lease or rental agreement should set forth everything that may be important to the landlord and the tenant as a condition or a covenant. Restrictions that a landlord wishes to place on the use of the unit or the common areas, or on the tenant's conduct, must be included in the agreement in order to form the basis for a later eviction. See §1.31. A landlord is permitted to change a month-to-month agreement by serving a 30-day notice of change of terms of tenancy under CC §827, *except* for a change in terms and conditions that may be governed by an applicable rent control ordinance (*e.g.,* decrease in the level of services to the tenant without a corresponding decrease in the rental amount). See §7.39.

Some rent control ordinances do not, however, permit a landlord to unilaterally change the terms of the rental agreement and then evict the tenant for violation of the changed term unless the tenant has agreed in writing to the additional covenant. See, *e.g.*, Los Angeles Rent Stabilization Ordinance §151.09.A.2(c); Santa Monica Rent Control Board Regulation §9007(a), San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.9(a)(2).

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§7.58 c. Conduct Constituting a Nuisance

Most eviction control ordinances permit evictions if the tenant commits a nuisance by causing substantial damage, or by disturbing the occupants of adjoining property or the immediate neighborhood. Some ordinances have crafted a special category of nuisance of conduct associated with drug dealing.

Unlike evictions for breaches of covenants, evictions based on breaches for damage, disturbance, or creating a nuisance do not always require an opportunity to cure. As a practical matter, the landlord may want to give the tenant an opportunity to cure the breach in order to establish a stronger case. A tenant who has willfully done substantial damage to the premises, however, could probably be evicted without an opportunity to cure.

PRACTICE TIP: Landlord: A tenant may be using the premises for an "illegal purpose" (*e.g.,* storage and sale of stolen goods, storage and sale of drugs and controlled substances, prostitution) that clearly constitutes an illegal use (see §7.59). Nevertheless, it may be wiser to proceed to evict on "nuisance" grounds, based on the comings and goings of strangers at odd hours, yelling, fights, banging on doors, police activity, the appearance of illegal activities that disturb tenants, and the like. Typically, this conduct has already distressed the other tenants and thus cannot be cured.

PRACTICE TIP: Tenant: If the tenant is facing both an eviction for nuisance and a criminal case based on the same conduct, the tenant's attorney should seek a stay of the unlawful detainer case until the criminal case concludes to avoid having the tenant waive Fifth Amendment protections.

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§7.59 d. Use of Premises for Illegal Purpose

Most rent control ordinances permit evictions if the premises are used for illegal purposes. In jurisdictions where illegal use of the premises is not a specific ground for eviction, the landlord may wish to provide in the lease or rental agreement that the tenant may not use the premises for an illegal purpose. Breach of this covenant might then be an independent ground for eviction. See §7.57.

Most ordinances that permit eviction for illegal use do not specifically require that notice of termination include an opportunity to cure. If the lease or rental agreement also contains a covenant against illegal use, then notice and an opportunity to cure probably would be required if the landlord elects to proceed on the basis of a breach of covenant. See §7.57. Some ordinances, such as the Santa Monica Rent Control Charter Amendment, require that the tenant be convicted of using the premises for an illegal purpose before the landlord is entitled to evict.

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§7.60 e. Refusal to Permit Access to Landlord

Virtually every eviction control ordinance permits the landlord to evict if the tenant refuses to permit the landlord access to the premises as permitted under CC §1954. The landlord's rights of access include the rights to (CC §1954(a)):

- enter in case of an emergency;
- make necessary or agreed on repairs;
- make necessary or agreed on decorations, alterations, or improvements;
- show the unit to a prospective tenant or a prospective or actual lender (or lender's agent such as an appraiser);
- show the unit to contractors or workers when the tenant has abandoned or surrendered the unit; and
- enter under a court order.

A landlord's right of entry is not delineated exclusively by CC §1954. Other laws may dictate when a landlord has access. For example, fire codes may require a landlord to enter the premises periodically to check and maintain smoke detectors and security-bar quick-release mechanisms. See also *Sachs v Exxon Co., U.S.A.* (1992) 9 CA4th 1491, 12 CR2d 237, cited in §3.2.

For discussion of limitations on landlords' right of entry and notice procedures, see §§3.2-3.4. For landlord strategies, see §4.43.

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§7.61 f. Refusal to Execute New Lease

Most rent control ordinances permit eviction if the tenant, who had a written lease or rental agreement that terminated after the effective date of the ordinance, refuses, after written request or demand by the landlord, to execute a written extension or renewal of the lease for a further term of like duration and having the same terms as the lease which has terminated. A landlord may neither make the terms of the tenancy more onerous nor shorten the term of the tenancy. If no new lease is created, the tenancy simply continues as a month-to-month tenancy on the same terms and conditions. CC §1945.

This ground for eviction does not, however, permit a landlord to refuse to execute a new agreement at the expiration of a fixed-term lease and then evict because the lease has expired.

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§7.62 g. Improper Subletting

Most eviction control ordinances permit eviction if the tenant holding possession at the end of the tenancy term is a subtenant who was not approved by the landlord. Under such language, a landlord may evict an unapproved subtenant at the end of a fixed-term lease. Whether an unapproved subtenant could be evicted *before* the lease expires depends on the terms of the lease. Under CC §§1995.010-1995.270 and applicable case law, if a lease or rental agreement does not prohibit subletting without the landlord's approval, a tenant in a rent-controlled jurisdiction should be free to sublet. If the lease requires the landlord's approval of an assignment or sublease, the tenant's failure to obtain the landlord's approval before subletting should constitute a violation of the lease that would be good cause to evict (see §7.57). For discussion of the statutory and case law on assignment and subletting, see §§3.49-3.59.

Subletting may create a different problem for a tenant who sublets. Under some ordinances, a tenant who sublets for a fixed term (*e.g.,* a three-month vacation) may not be able to evict the subtenant at the end of the subletting. This would be the case if only persons with a specified record interest in the property have the right to evict for owner occupancy. The tenant (the sublessor) would not be able to evict the subtenant to reoccupy the premises because the sublessor is defined as a "landlord" in the ordinance, but not as an "owner." (If there is no other cause to evict, the owner-landlord could not evict the subtenant unless he or she planned to occupy the unit.)

A tenant who takes in a roommate by subletting must be distinguished from one who takes in a roommate who becomes a cotenant. The cotenant becomes a tenant of the original landlord rather than a subtenant of the original tenant. In the cotenant situation, the original tenant has no right to evict the cotenant. Only the landlord may do so. For further discussion of issues arising in roommate situations, see §§1.7, 4.40-4.40B, 5.28-5.32, 7.28, 7.55A.

NOTE: The Costa-Hawkins Rental Housing Act in CC §1954.53(d) (see §§7.25-7.28) contains provisions on subleasing that may preempt local ordinances that conflict with the Act. In particular, §1954.53(d) provides that no law may restrict the amount a landlord charges in the event of a sublease, provided the sublease results in a total change of occupancy of the dwelling unit, and also mandates that a landlord's acceptance of rent does not operate as a waiver of a covenant prohibiting subleasing unless the acceptance occurs after the tenant provides written notice to the landlord.

In *Danekas v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2001) 95 CA4th 638, 115 CR2d 694, the court held that San Francisco's rent board did not exceed its authority under the San Francisco rent control ordinance by enacting regulations preventing a landlord from claiming breach of a lease provision against subletting where a new roommate replaces a vacating roommate. The court also held that the regulation could be applied retroactively to preexisting agreements. This did not create an unconstitutional impairment of contracts because the impairment of the landlord's interests was not substantial and the impairment promoted the significant public purpose of protecting tenants from the rent increases that would be caused by vacancy decontrol.

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§7.63 2. Renovation or Rehabilitation

Some rent control ordinances permit a landlord to evict a tenant in order to rehabilitate a unit. The ordinance might limit this right to situations where the work is necessary to bring the building into compliance with applicable health and safety codes. Some ordinances require that the work cost a certain amount and take limited time to complete to allow a landlord to evict for this reason. Such evictions are usually conditioned on the landlord's obtaining all necessary permits before the eviction. Frequently, the ordinance will give the tenant the right to:

- occupy any vacant unit that the same landlord owns within the city; and
- reoccupy the vacated unit on completion of the rehabilitation work.

Relocation assistance is usually required to be paid in such evictions. The amount of relocation assistance and the timing of payment vary from jurisdiction to jurisdiction, and the rules may change suddenly. See, *e.g.,* San Francisco Rent Stabilization and Arbitration Ordinance Section 37.9C; Los Angeles Rent Stabilization Ordinance Section 151.09.G.

In *Aguirre v Lee* (1993) 20 CA4th 1646, 25 CR2d 367, the court upheld the validity of a San Francisco ordinance that provided that, when a tenant has been evicted so the landlord can make repairs to the unit, the landlord must offer the unit to the same tenant on the pre-repair terms within 30 days of completing repairs.

For a decision defining "good faith" in the context of an eviction for rehabilitation of the unit under federal rent stabilization, see *Dargel v Barr* (Emer Ct App 1953) 204 F2d 697.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.64 3. Demolition or Conversion Under Ellis Act

§7.64 3. Demolition or Conversion Under Ellis Act

A landlord may wish to terminate rental agreements and evict the tenants if the landlord plans to remove the rental units from the rental housing market, to demolish the units, or to convert them to some type of common-interest ownership (such as a condominium complex or a tenancy-in-common arrangement). In these situations, the landlord may evict only after obtaining all necessary city or county permits or approvals for the demolition or conversion. Some rent control jurisdictions, such as Berkeley and San Francisco, restrict demolitions and conversions. In *Nash v City of Santa Monica* (1984) 37 C3d 97, 207 CR 285, the California Supreme Court held that a landlord had no constitutional right to evict tenants in order to go out of business if he or she retained the right to sell the property.

In response to the *Nash* decision, the legislature enacted the Ellis Act (Govt C §§7060-7060.7), which preempts conflicting local ordinances and permits a landlord, subject to certain restrictions, to evict tenants in order to go out of business. The legislature expressly intended to overrule *Nash* to the extent that it conflicts with the Act. Govt C §7060.7. As stated in *Bullock v City & County of San Francisco* (1990) 221 CA3d 1072, 1097, 271 CR 44, the core of the Ellis Act is that no public entity shall, "by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance, or regulation, compel the owner of any residential real property to offer, or to continue to offer," the property for rent or lease. See Govt C §7060(a). In other words, the Ellis Act prohibits municipalities from enforcing local ordinances that prevent landlords from evicting tenants to go out of business. The Ellis Act, however, exempts (*i.e.*, does not preempt local entity control over) conversion of guestrooms or efficiency units in residential hotels if they meet certain conditions. See Govt C §7060(a), cited in §7.64B. See also *San Remo Hotel, LP v City & County of San Francisco* (2002) 27 C4th 643, 117 CR2d 269.

Under the Ellis Act, the landlord's power to evict may be limited by specified requirements, *e.g.,* recordation of restrictions (Govt C §§7060.1(a), 7060.3), mitigation of adverse impacts on displaced tenants (Govt C §7060.1(c)), re-rental requirements (Govt C §7060.2), and notice requirements before eviction (Govt C §7060.4). See §§7.64C-7.64F, 7.64H. Despite the Ellis Act, some cities continue to restrict the total number of conversion of rental units to condominiums and impose requirements allowed by the Act. See, *e.g*., Berkeley Mun C §21.28.050. However, tenants have no right to insist that compliance with the Subdivided Lands Act (Bus & P C §§11000-11200) be undertaken as a precondition to an eviction based on the Ellis Act, and a landlord does not violate the Subdivided Lands Act by selling partial interests in a building withdrawn from rent or lease under the Ellis Act. *Daro v Superior Court* (2007) 151 CA4th 1079, 61 CR3d 716.

Although preventing municipalities from compelling owners to continue renting, the Ellis Act does allow them to impose certain requirements and controls (see §§7.64C, 7.64H) with respect to units withdrawn under the Act. But under cases interpreting it (see §7.64H), the Act has been held to prohibit municipalities from enacting unauthorized restrictions on (or imposing obstacles to) an owner's right to obtain the benefit of the Act. For instance, the city may not record Notices to Comply against hotels being withdrawn under the Ellis Act that refer to the city's ordinances related to sprinklers, hotel conversion, and demolition. An owner of a hotel that is being withdrawn from rental housing use need not comply with requirements imposed by the city's sprinkler ordinance, nor need the owner first obtain a permit to convert or demolish the building. *Reidy v City & County of San Francisco* (2004) 123 CA4th 580, 19 CR3d 894. The landlord may not be required to notify tenants about their rights to receive relocation payments and to state the amount of payment that the landlord believes to be due. *Johnson v City & County of San Francisco* (2006) 137 CA4th 7, 40 CR3d 8 (placing burden on landlord to state belief as to tenant's entitlement to assistance creates substantive defense in eviction cases not contemplated by the Ellis Act).

In cities where required by local ordinances, however, relocation assistance must be paid. Failure to pay the relocation assistance in a timely manner is a defense to an Ellis Act eviction. See Govt C §7060.1(c). The amount of relocation assistance and the timing of payment vary from jurisdiction to jurisdiction, and the rules may change suddenly. See, *e.g.,* San Francisco Rent Stabilization and Arbitration Ordinance Section 37.9C (Proposition H), applicable to notices served on or after August 10, 2006; Los Angeles Rent Stabilization Ordinance Section 151.09.G, with higher amounts applicable to notices served on or after April 11, 2007.

Allowable local restrictions on residential hotels have been separately addressed by the Ellis Act following cases in which owners of those hotels have been able to go out of the residential hotel business. For example, following the trustee's filing in *Reidy*, but before the case was finally decided, the Act was amended to allow local governments in cities having a population of over 1,000,000 (*i.e.,* San Francisco, San Diego and Los Angeles) essentially to prohibit most residential hotel owners from going out of the residential hotel business. See §7.64B.

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§7.64A a. Constitutionality of Ellis Act Upheld

The City of Santa Monica challenged the Ellis Act (Govt C §§7060-7060.7) in *City of Santa Monica v Yarmark* (1988) 203 CA3d 153, 249 CR 732. The court held that the Act was valid, effectively occupied the field, and preempted local rent and eviction control ordinances that sought to force landlords to continue to make units available for rental housing.

Santa Monica brought the action because it had passed an ordinance that (1) required landlords to obtain a removal permit before evicting and (2) authorized issuance of a permit only when rental units were uninhabitable or when the landlord planned to replace the units with a rent-controlled multifamily building. The city argued that its procedures were not subject to the Ellis Act or, alternatively, that the Ellis Act was an unconstitutional attempt by the legislature to deprive a charter city of its rights to regulate under the "municipal affairs" and "police powers" provisions of the state constitution. Rejecting these arguments, the court held that the Act was valid and that Santa Monica's removal controls were preempted. The preemptive ruling in *Yarmark* was modified by a 1999 amendment to the Act, codified in Govt C §7060.7(b). See §§7.64D, 7.64H.

For further discussion of the Ellis Act, see §§7.64B-7.64H. For detailed Ellis Act defense strategies, see California Eviction Defense Manual §§17.14, 17.25-17.49 (2d ed Cal CEB 1993).

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b. Basic Provisions of Ellis Act

§7.64B (1) Allows Withdrawal of Housing Accommodations From Market

The Ellis Act (Govt C §§7060-7060.7) states that "accommodations" may be withdrawn from rent or lease, and defines accommodations as the residential rental units in any detached physical structure containing four or more units or, with respect to a structure containing three or fewer units, the units in that structure as well as the units in any other structure located on the same parcel of land. Govt C §7060(b). Effective January 1, 2004, however, the Ellis Act exempts from its definition of "accommodations" guestrooms or efficiency units in a residential hotel if it (Govt C §7060(a)):

- Is located in a city and county (or in a city with a population of over one million);
- Had an occupancy permit issued before January 1, 1990; and
- Did not deliver to the public entity an Ellis Act notice of intent to withdraw the units from rent or lease before January 1, 2004.

This amendment was intended to supersede the ruling in *Bullock v City & County of San Francisco* (1990) 221 CA3d 1072, 271 CR 44.

Under the definition of "accommodations" in Govt C §7060(b), an owner of two four-unit buildings on the same parcel may assert rights under the Act with respect to only one building, for example, while continuing to rent the other. If the Act is invoked with respect to a smaller building, then all units on the same parcel must be withdrawn. There is no requirement that an owner "go out of business" with respect to any other property or any other units. Similarly, a landlord does not need to comply with the Subdivided Lands Act (Bus & P C §§11000-11200) if the owner has sold partial interests in a building withdrawn from rent or lease under the Ellis Act prior to evicting tenants from the withdrawn property. *Daro v Superior Court* (2007) 151 CA4th 1079, 61 CR3d 716.

The Ellis Act does not permit the owner of a single condominium in a multi-unit building to withdraw his unit from the rental market. *Valnes v Santa Monica Rent Control Bd.* (1990) 221 CA3d 1116, 270 CR 636. The Act does not authorize owners to avoid other obligations that may arise as a matter of contract, such as leases or agreements with public entities. Also, local governments retain whatever power they may have with respect to the granting and denying of entitlement to the use of real property through planning, zoning, and subdivision map approvals. See Govt C §7060.1. See also §§7.64, 7.64H.

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§7.64C (2) Authorizes Local Restrictions on Subsequent Rental

Prior to amendments enacted in 2002, the Ellis Act (Govt C §§7060-7060.7) itself did not impose any requirements on property owners; it merely authorized local jurisdictions to adopt specified requirements. Effective January 1, 2003, Govt C §7060.2 was amended to require that, in all rent control jurisdictions that had adopted processes to facilitate rental housing owners going out of the rental business, all owners who offer those units for rent within 5 years after filing any notice of intent to withdraw the rental units, regardless of whether that notice is withdrawn or rescinded, are prohibited from renting the units at market rates, and must rent them at the lawful rent in effect at the time the notice of withdrawal was filed with the public entity. Government Code §7060.2(b) provides statewide requirements that if the units are again offered for rent or lease within 2 years, the owner is liable to both the displaced tenants and the public entity for actual and exemplary damages. The provision contains its own statute of limitations and requires that any such suit be brought within 3 years of the withdrawal of the units from rent or lease. Additionally, if the units are to be rerented within the 2-year period, the owner must not only offer the units to the same tenants provided the tenants have indicated in writing that they would like to be able to reoccupy the withdrawn units, but the owner must also offer to reinstate the old rental agreement for those tenants. Many cities have amended their laws to be in accordance with Govt C §7060.2. See, *e.g.,* West Hollywood Rent Stabilization Ordinance §17.52.010(15)(c); Los Angeles Rent Stabilization Ordinance §151.25; Santa Monica Rent Control Board Regulation §1629.

These requirements are in essence designed to provide a disincentive to owners who rescind the notice of withdrawal once all the tenants have been evicted.

On strategies for the evicted tenant when a withdrawn unit is rerented within the 2-year limitation, see California Eviction Defense Manual, chap 17 (2d ed Cal CEB 1993).

In *Santa Monica Rent Control Bd. v Pearl Street, LLC* (2003) 109 CA4th 1308, 135 CR2d 903, the rent board sued to enjoin the landlord from entering into sham tenancies in order to evade the recontrol provisions of the Ellis Act. The landlord claimed that the suit was a strategic lawsuit against public participation (SLAPP) based on his filing with the board notices of intention to rerent. The court disagreed, holding that the suit was based primarily on whether the landlord was entitled to charge market rents.

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§7.64D (3) Requires Reasonable Review of Permit Applications and Fair Return on Demolished and Reconstructed Units

Under Govt C §7060.7(b), the Ellis Act expressly states that it is not intended to preempt local environmental or land use regulations, procedures, or controls governing demolition and redevelopment of residential property. See also Govt C §7060.1(b) and cases confirming a city's right to restrict demolition permits, *e.g.*, *Lincoln Place Tenants Ass'n v City of Los Angeles* (2007) 155 CA4th 425, 66 CR3d 120; *First Presbyterian Church v City of Berkeley* (1997) 59 CA4th 1241, 69 CR2d 710. Landlord advocates have argued that local restrictions based solely on the desire to avoid removal of rental units should be disallowed under the Act. See 59 CA4th at 1249. For discussion of local regulation of Ellis Act evictions, see §§7.64C, 7.64H.

A city may violate the Ellis Act if it unreasonably delays in making a decision on an application for a demolition permit. See *Ali v City of Los Angeles* (1999) 77 CA4th 246, 255, 91 CR2d 458, which observed that the city's delay was so unreasonable "as to be arbitrary, not in furtherance of any legitimate governmental objective, and for no other purpose than to delay any development other than for an SRO hotel."

If a landlord withdraws housing units from the market under the Ellis Act (Govt C §§7060-7060.7) and then demolishes the units, any replacement housing units constructed on the same property and offered for rent or lease within 5 years after the withdrawal are subject to rent control despite their status as new construction. See CC §7060.2(d). Such a result is not preempted by the Costa-Hawkins Rental Housing Act (CC §1954.52(a)). *Apartment Ass'n of Los Angeles County, Inc. v City of Los Angeles* (2009) 173 CA4th 13, 92 CR3d 441. Under the Ellis Act, the landlord may have the initial rent set for replacement units "on the basis of a fair and reasonable return." Govt C §7060.2(d). On fair return issues generally, see §§7.13, 7.38.

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§7.64E (4) Does Not Prohibit Multiple Owner Occupancy Use

Although the Ellis Act (Govt C §§7060-7060.7) authorizes removal of property from residential rental use and allows restriction of re-rental (see §§7.64B-7.64C), it does not preclude multiple owners from occupying the property even if, as a tenants-in-common group, the owners grant each other the right of exclusive possession of different units in consideration for proportionate payment of maintenance and mortgage expenses. *Santa Monica Rent Control Bd. v Bluvshtein* (1991) 230 CA3d 308, 281 CR 298.

In *Bluvshtein,* the defendants purchased a building as tenants in common and then invoked the Ellis Act to evict several tenants. Defendants then moved into the vacant units and entered into an oral agreement among themselves, granting each partner exclusive occupancy of certain units and each partner agreeing to pay certain amounts toward the property purchase and maintenance. The rent board sued the defendants, claiming that their agreement created a landlord-tenant relationship between the partnership and each partner, thereby constituting reentry into the rental market within 1 year of withdrawal, which would exempt the property from the Ellis Act. Citing the first edition of this text, the court ruled that the agreement did not create a landlord-tenant relationship because defendants did not agree to pay "rent."

The Subdivided Lands Act (Bus & P C §§11000-11200) does not provide a defense to Ellis Act evictions. In *Daro v Superior Court* (2007) 151 CA4th 1079, 61 CR3d 716, six owners (two persons and four LLCs) purchased a six-unit residential apartment building in San Francisco. The six owners executed a tenancy in common agreement which provided that each owner would have an undivided percentage interest in the property and the exclusive right to occupy one of the six units. The LLC owners purchased their interests as investments to repair and remodel, then sell to owners who would occupy the units. At the time of sale, all units were occupied by tenants. The owners served Ellis Act notices terminating tenancy. The tenants sued for injunctive relief under the Unfair Competition Law (Bus & P C §§17200-17210) alleging that the owners had violated the Subdivided Lands Act. The trial court agreed with the tenants; the court of appeal reversed, holding that the tenants were not among the class of persons the Subdivided Lands Act was intended to protect.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.64F (5) Notice and Reporting Requirements

§7.64F (5) Notice and Reporting Requirements

An owner wishing to withdraw an accommodation from the rental market may be required to give advance notice to the public entity and tenant under Govt C §7060.4. If a city enacts such notice provisions, then the rental units are deemed withdrawn 120 days after the delivery of the notice to the city. The notice requirements are exacting, and failure to comply is a procedural defect that can be asserted as a defense to an eviction. See Govt C §7060.6.

In addition, a city that enacts the advance notice provisions in Govt C §7060.4 must allow seniors and disabled individuals (who have lived in the affected units for at least 1 year) the right to extend their occupancy and delay the withdrawal of their units for up to 1 year after the date the notice is delivered to the public entity, provided that the tenant or lessee notifies the owner of the extension within 60 days after that delivery date. If a senior or disabled person exercises this right, the owner has a corresponding right to extend the withdrawal of the other units on the property for the same period. Govt C §7060.4(b).

A city may require official recordation of a notice that the Ellis Act (Govt C §§7060-7060.7) procedure has been used. Govt C §7060.4(b). This requirement is consistent with the fact that subsequent owners must also comply with the obligations imposed on the evicting owner. Govt C §7060.3. In addition, the landlord must periodically report to the rent board regarding the status and use of the unit for 5 years after withdrawal. Govt C §7060.4(a).

WARNING: The Ellis Act has a number of ambiguities and internal inconsistencies, including whether the 120-day withdrawal notice completely supersedes the usual 30-day termination notice, and if not, whether the 120-day notice must precede or succeed the 30-day notice. See, *e.g.,* Practice Tip in §8.22. See also California Eviction Defense Manual, chap 17 (2d ed Cal CEB 1993).

In response to alleged abuses of the Ellis Act, San Francisco added provisions to its eviction control ordinance that punish both civilly and criminally a landlord who (1) requests that a tenant move or threatens to recover possession either verbally or in writing, unless the landlord has a good faith intent to evict and does actually go forward with the eviction, (2) seeks or obtains a tenant's agreement not to cooperate with an investigation by the City for violations of the ordinance, and (3) seeks or obtains a tenant's waiver of rights under the ordinance. The ordinance also provided that any such waiver by a tenant would be void as contrary to public policy unless the tenant was represented by independent counsel. These provisions were held to be an unconstitutional denial of free speech and contrary to a tenant's rights to self-representation in legal proceedings. *Baba v Board of Supervisors of the City & County of San Francisco* (2004) 124 CA4th 504, 21 CR3d 428.

PRACTICE TIP: The effect of the ruling in *Baba* on the ordinance's general "non-waiver" provisions is probably narrow. But there is (and has been for years) some disagreement among practitioners on the meaning and extent of the "non-waiver" provisions in many local ordinances, which do not allow a tenant to give an advance waiver of a rent control or eviction control provision. For example, a lease cannot require the tenant to waive the protections of the ordinance. However, in the event of a dispute and a settlement of that dispute for adequate consideration, there can be a concurrent waiver of a particular provision. Attorneys regularly negotiate (either as part of litigation or to avoid litigation) moveout settlements with such waivers.

However, in *Gombiner v Swartz* (2008) 167 CA4th 1365, 85 CR3d 83, in which the landlord and tenant entered into a settlement agreement that effectively exempted the property from a rent control law, a trial court hearing a civil case for retaliatory eviction and excess rent concluded that the parties could exempt the property in this manner. The court of appeal reversed, explaining that an agreement that violates the rent increase provisions of the law is void and unenforceable.

In *Johnson v City & County of San Francisco* (2006) 137 CA4th 7, 40 CR3d 8, the court held that the Ellis Act preempted an ordinance requiring landlords seeking to evict under the Ellis Act to notify a tenant of the right to receive relocation payment the landlord believes to be due to the tenant. In those jurisdictions where an ordinance requires it, however, relocation assistance must be paid. Failure to pay the relocation assistance in a timely manner is a defense

to an Ellis Act eviction. See Govt C §7060.1(c).

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§7.64G c. Eviction Actions Under Ellis Act

After a rental unit is "withdrawn," an eviction suit may be necessary to actually recover possession. Ellis Act (Govt C §§7060-7060.7) evictions proceed the same as any other eviction, but the tenant cannot assert rights under local rent control ordinances or regulations as a defense to the eviction.

Under Govt C §7060.1(d), the Act does not supersede CCP §§1159-1179a (governing evictions) or the various provisions relating to landlords and tenants in Title V of the Civil Code (commencing with CC §1925). Whether a defense such as discrimination may be raised against Ellis Act evictions is an unsettled question.

Government Code §7060.6 provides that a tenant may assert the landlord's noncompliance with the Ellis Act as a defense to an Ellis Act eviction. In addition, a closely divided California Supreme Court held that the defense of retaliatory eviction is available to tenants who are being evicted because the property owner has withdrawn the residential units, but that the defense may be overcome by the owner showing that the withdrawal was undertaken in "good faith" (*i.e.*, with bona fide intent). See *Drouet v Superior Court* (2003) 31 C4th 583, 3 CR3d 205. The decision overturns the court of appeal decision, which had held that the defense of retaliatory eviction was simply not available as a defense to an Ellis Act eviction. The majority opinion suggested that trial courts might first want to determine whether, under CC §1942.5(e), the landlord's withdrawal of the units under the Ellis Act was bona fide, since the finding of such bona fide intent would overcome the statutory defense of retaliatory eviction set forth in CC §1942.5(a), (c). The three dissenting justices (1) disagreed with the majority's analysis that CC §1942.5(e) permitted a landlord to demonstrate that the withdrawal of the units was bona fide, and therefore defeat the defense of retaliatory eviction, and (2) stated that the Ellis Act does not permit a landlord to evict a tenant for a retaliatory purpose, and therefore would permit a tenant to defend such an eviction on the ground that the landlord's purpose in withdrawing the rental units was to retaliate against the occupying tenant.

Tenants may file actions for declaratory relief to determine whether landlords are entitled to Ellis Act evictions. In *Marlin v Aimco Venezia, LLC* (2007) 154 CA4th 154, 64 CR3d 488, the landlord sent Ellis Act notices to residential tenants. The tenants then sued the landlord for declaratory relief, claiming that the landlord was not entitled to rely on the Ellis Act. The landlord filed an unlawful detainer suit and responded to the tenants' action by filing an anti-SLAPP motion. The trial court granted the anti-SLAPP motion and dismissed the tenants' action. The court of appeal reversed, holding that the tenants' suit was not based on the landlord's filing and serving of the notice, but instead was based on the tenants' claim that the landlord was not entitled to invoke or rely on the Ellis Act.

Tenants may not seek injunctive relief under Unfair Competition Law (Bus & P C §§17200-17210), alleging that the owners violated the Subdivided Lands Act (Bus & P C §§11000-11200) as a way to stop an Ellis Act eviction. *Daro v Superior Court* (2007) 151 CA4th 1079, 61 CR3d 716. Tenants are not among the class of persons the Subdivided Lands Act was intended to protect. 151 CA4th at 1095.

For further discussion of evictions under the Ellis Act, including multiple defense strategies, see California Eviction Defense Manual §§17.14, 17.25-17.49 (2d ed Cal CEB 1993).

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§7.64H d. Local Requirements and Restrictions on Evictions

After Santa Monica's unsuccessful direct challenge to the Ellis Act (Govt C §§7060-7060.7) (see §7.64A), some cities attempted to deter owners from removing units or tried to mitigate the effect of the withdrawal of rental units. Typically, absent some perceived specific authorization in the Ellis Act itself, the reviewing court will determine whether the local enactment directly conflicts with the Act or unreasonably restricts the owner's right to go out of the rental housing business. When the local enactment adds a defense to an eviction action, it will often militate in favor of finding an impermissible conflict. See, *e.g., Javidzad v City of Santa Monica* (1988) 204 CA3d 524, 529, 251 CR 350; *Channing Props. v City of Berkeley* (1992) 11 CA4th 88, 14 CR2d 32; and *Johnson v City & County of San Francisco* (2006) 137 CA4th 7, 40 CR3d 8. But see *Pieri v City & County of San Francisco* (2006) 137 CA4th 886, 40 CR3d 629.

Many local efforts to deter withdrawal of residential units were unsuccessful. In *Javidzad v City of Santa Monica, supra,* for example, the city contended that its removal permit provisions were *consistent* with the Ellis Act as "a legitimate land use regulation which does not implicate a landlord's right to cease operating residential rental property but instead simply regulates the *subsequent* use of such property after the owner has stopped rental operations." The court of appeal rejected this contention as disingenuous and as a clear attempt to evade the goals of the Act. The court ruled that the city's attempt to withhold a demolition permit from a landlord unless the landlord provided alternative housing "imposes a prohibitive price" on the exercise of the landlord's right under the Act. 204 CA3d at 531. The court held that the restriction on the demolition permit seeking to impose requirements not found in the Ellis Act itself was preempted.

In another preemption case, a city ordinance restricted the issuance of demolition permits by withholding the permit unless the owner agreed to sign a waiver of the right to build a condominium or stock cooperative on the property for a given period, but permitting the demolition if the landlord agreed to build low-to-moderate income housing on the property. See *Los Angeles Lincoln Place Investors, Ltd. v City of Los Angeles* (1997) 54 CA4th 53, 62 CR2d 600. Following *Javidzad*, the court held that the ordinance was preempted by the Ellis Act.

But after the decisions in *Javidzad* and *Lincoln Place*, the legislature amended the Ellis Act to specify that it was not intended to preempt local land use or environmental law governing demolition and redevelopment. See Govt C §7060.7(b). Afterward, a court of appeal ruled that the Act does not prevent a city from enforcing mitigation conditions granting relocation rights to existing tenants when those rights were part of a local land use or environmental review process. The court noted that the landlord had agreed to the conditions during the process, the conditions did not impermissibly burden the landlord, and the conditions fit into the exceptions in Govt C §§7060.1(b)-(c), 7060.7(b). See *Lincoln Place Tenants Ass'n v City of Los Angeles* (2007) 155 CA4th 425, 66 CR3d 120.

In San Francisco, a residential hotel conversion ordinance sought to require an owner to furnish comparable residential units to occupants or pay a substantial sum to the city for a permit to convert to tourist hotel use. In *Bullock v City & County of San Francisco* (1990) 221 CA3d 1072, 1101, 271 CR 44, the court held that the Ellis Act preempted the ordinance because it denied the property owner the benefits conferred by the Act. But see amendments to Act (effective January 1, 2004, superseding *Bullock*) that exempt specified residential hotel accommodations, discussed in §7.64B.

The City of Berkeley enacted a requirement that tenants to be evicted under the Ellis Act be given 6 months' notice and a payment of $4500 per unit. Channing Properties challenged the requirements as imposing a burdensome obstacle not authorized by the Ellis Act. The trial court dismissed the case, but the court of appeal held that both the 6-month notice requirement and the mandatory relocation assistance provision were preempted by the express provisions of the Act. *Channing Props. v City of Berkeley, supra*. The court construed the Act as limiting notice requirements to tenants to 60 days and limiting allowable relocation payments for the benefit of low-income tenants. 11 CA4th at 97. At the time of the *Channing Props.* decision, the Ellis Act (Govt C §7060.1(c)(1)-(2)) authorized mitigation requirements only for housing for low-income households. The City of Berkeley was precluded from imposing "mitigation" payments without any showing of need by the tenant. However, 10 years later, Govt C §7060.1(c) was amended to allow a local public entity to mitigate adverse impacts on persons displaced by withdrawal of any rental unit regardless of the type of

housing or the income of the tenant.

Some cities took advantage of this change to enact local ordinances requiring payments to any tenant displaced by an Ellis Act withdrawal of that tenant's building. San Francisco's enactment was the object of an unsuccessful facial challenge in *Pieri v City & County of San Francisco, supra*. There the court of appeal upheld the increase in tenant payments because of the legislature's revision of Govt C §7060.1(c). The court specifically left open the question of whether the amount of the payment in any particular case was reasonable. The landlord is not required, however, to notify the tenants about their rights to receive relocation payments and to state the amount of payment which the landlord believes to be due. *Johnson v City & County of San Francisco, supra*.

PRACTICE TIP: The "reasonableness" standard discussed in *Pieri v City & County of San Francisco, supra* is a somewhat unusual Ellis Act standard. Most other decisions refer to whether a restriction is an impermissible burden on a property owner's right to go out of the rental housing business. An owner who is having a difficult time raising the cash necessary to pay tenants to leave a building may attempt to meet the "reasonableness" standard to show how the total payments are a burden to the particular owner.

The Ellis Act, however, may not supersede all local controls, particularly those that involve land use. In *First Presbyterian Church v City of Berkeley* (1997) 59 CA4th 1241, 69 CR2d 710, the court held that the Act did not preempt a local ordinance designed to preserve historic structures and allowed the city to deny a demolition permit under the ordinance. Similarly, in *San Remo Hotel, LP v City & County of San Francisco* (2002) 27 C4th 643, 117 CR2d 269, the supreme court ruled that hotel owners wishing to change their residential hotel to "tourist-only" could be required by the city under a conditional use permit to replace the number of housing units lost or pay an "in lieu" fee into the city fund for housing construction. Note, however, in *San Remo,* Ellis Act notices were not given by the hotel, so the court refused to consider the preemption issue on appeal.

For further discussion of cases interpreting the Ellis Act, as well as detailed defense tactics for Ellis Act evictions, see California Eviction Defense Manual §§17.14, 17.25-17.49 (2d ed Cal CEB 1993).

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4. Occupancy by Owner or Owner's Relative

§7.65 a. Typical Ordinance Provisions

All eviction control ordinances permit an owner to evict a tenant to enable the owner or specified relatives of the owner to occupy the premises. Practitioners must read eviction control ordinances carefully to determine the scope of the right to evict. Some ordinances require a landlord to be a "natural person" to evict for owner or family member occupancy. Some ordinances permit any "landlord" (as defined in the ordinance) to evict to occupy a unit, whether he or she is the fee owner or not. Other ordinances permit only a fee owner, or record owner, to evict for owner occupancy.

Most ordinances that permit owner occupancy evictions require the owner to hold a minimum percentage interest in the property. Some local enactments require as much as a 51 percent ownership interest. Some ordinances, which when enacted had a relatively low ownership requirement, have been amended to increase the requirement creating local confusion as well as application and retroactivity issues. See, *e.g., Garber v Levit* (2006) 141 CA4th Supp 1, 46 CR3d 348 (in San Francisco, under Proposition G, landlord may only need 25 percent ownership interest to evict tenant for owner-move-in; Proposition G supersedes Bierman Amendment, which required 50 percent ownership interest).

Owner-occupancy provisions permit evictions for occupancy by certain named relatives of the landlord as well as by the landlord. Because the ordinances often restrict the relatives included, each ordinance must be read carefully. Besides containing definitional limitations of "owner" and of "relatives," the ordinances frequently contain other substantial limitations on evictions for owner occupancy.

In *Bohbot v Santa Monica Rent Control Bd.* (2005) 133 CA4th 456, 34 CR3d 827, the court held that a Santa Monica rent control requirement that owners obtain a removal permit before owner occupancy did not apply to legally converted condominiums. The court also struck down a regulation that prohibited a landlord from bringing a second owner-occupancy case against a tenant within 4 years of an owner-occupancy case dismissed without prejudice prior to trial. The regulation conflicted with CCP §581, which allows a plaintiff to voluntarily dismiss a case without prejudice prior to commencement of the trial. Left intact, however, is a regulation which prohibits a landlord from bringing a second owner-occupancy case within 4 years against a tenant who prevailed on the merits in the first case.

Other definitional problems frequently arise regarding the owner-occupancy exemption. For example, it is unclear whether a landlord may evict and occupy more than one unit as his or her principal residence, thereby evicting tenants from more than one unit on the grounds of owner occupancy.

Some rent control ordinances do not specify a period within which the owner or owner's relatives must move into premises vacated on the basis of their expressed intent to occupy. In *Sylve v Riley* (1993) 15 CA4th 23, 18 CR2d 608, the court held that the date on which the evicted tenant should be held to have known that the reasons given for the eviction were false depends on the facts of each individual case. Under the "delayed discovery" rule, the statute of limitations does not begin to run until the plaintiff discovers or should have discovered all facts essential to the cause of action. 15 CA4th at 26.

Rent control ordinances often prohibit evictions for owner occupancy if a "comparable" unit is vacant and available. Reasonable subjective factors affecting the desirability of a unit must be considered in determining "comparability." In other words, objective criteria such as rental amount or size are not the sole or even most important criteria. See *Bakanauskas v Urdan* (1988) 206 CA3d 621, 253 CR 764, in which the court suggested that in a small building of, *e.g.,* three units, there will usually be differences between the units that "could reasonably make any one unit more desirable than the others as a personal residence depending on one's individual tastes and criteria.... 'Comparable' units are more likely to be found in a large apartment building with many units having identical floor plans and being similarly situated." 206 CA3d at 628. For discussion of hazards posed to landlords by "comparable unit" provisions in local ordinances, see §7.68.

In *Adler v Elphick* (1986) 184 CA3d 642, 229 CR 254, an owner was able to evict a tenant and assume occupancy for himself over the objection that the owner's occupation constituted a "community apartment project." The landlords

sought to evict the tenant under a local rent control ordinance provision that allowed eviction for owner occupancy. The landlords had taken title as tenants in common, and one of the landlords sought to occupy the tenant's unit. The tenant argued that the occupation would create a "community apartment project," which was prohibited by another local ordinance because of a low vacancy rate in the city. The court rejected the tenant's argument, holding that a community apartment project exists only when the right to exclusive occupancy of a particular unit is specified in the deed. 184 CA3d at 647. See also *Bakanauskas v Urdan* (1988) 206 CA3d 621, 624, 253 CR 764 (because grant deed failed to give landlord exclusive right of occupancy of part of property, apartment building did not constitute a "community apartment project," even though parties recorded an agreement giving landlord exclusive right to occupy specific unit simultaneously with grant deed).

In *Cwynar v City & County of San Francisco* (2001) 90 CA4th 637, 109 CR2d 233, the court of appeal was asked to rule on the constitutionality of an owner move-in provision that prevented the owner (or close relative or future landlord) invoking the provision from using the provision again to obtain possession of another unit in the same building. It also allowed the owner to move in a close relative only if the owner lived in the same building, and prevented the owner from using the provision to evict certain elderly or disabled tenants. The court of appeal held that such an ordinance might be a "taking"—if the landlord can prove at trial the "permanency" requirement of a per se physical taking and the city fails to prove that the requirements substantially advance a legitimate governmental interest. Additionally, a court of appeal held that the Costa-Hawkins Act preempted a local rent ordinance provision that required an owner who wished to move into a controlled unit to offer any other unit owned by the owner to the tenant at the tenant's existing rent-controlled rent. See *Bullard v San Francisco Residential Rent Stabilization Bd.* (2003) 106 CA4th 488, 130 CR2d 819. See also §§7.25, 7.67.

In rent controlled jurisdictions, relocation assistance is usually required to be paid in such evictions. The amount of relocation assistance and the timing of payment vary from jurisdiction to jurisdiction, and the rules may change suddenly. See, *e.g.,* San Francisco Rent Stabilization and Arbitration Ordinance Section 37.9C; Los Angeles Rent Stabilization Ordinance Section 151.09.G.

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§7.66 b. Statutory Provisions; CC §1947.10

Under CC §1947.10, when an owner evicts a tenant based on the intention of the owner or the owner's immediate relative to occupy the unit, the owner or relative must reside in the unit for at least 6 continuous months. This requirement applies to all evictions after July 1, 1990, in any rent-controlled jurisdiction that requires registration of rents. If a court determines that the eviction was based on fraud by the owner or the owner's relative in not intending to fulfill the 6-month requirement, a court may order the owner to pay three times the cost of relocating the tenant from his or her existing unit back into the previous unit and may order the owner to pay three times the amount of any increase in rent that the tenant has paid. If the tenant decides not to relocate back into the previous unit, the court may order the owner to pay three times the amount of one month's rent paid by the tenant for the unit from which he or she was evicted and three times the amount of any costs in relocating to a different unit. The prevailing party is entitled to attorney fees and court costs. CC §1947.10(a). These remedies do not preclude any other remedies available to a party aggrieved by the kind of conduct described in the statute. CC §1947.10(b). Examples of such remedies might include tort damages for emotional distress. See *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194. The great majority of cities with rent and eviction control ordinances provide for a longer requirement than 6 months, usually at least 1 year.

An action to recover treble damages must be filed within 1 year of receipt of the notice to vacate. Mandatory treble damages have been construed as a penalty and as such are subject to CCP §340(a), which provides a 1-year statute of limitations for an action on a statute for penalty or forfeiture. *Menefee v Ostawari* (1991) 228 CA3d 239, 278 CR 805.

A city may not enact an evidentiary presumption of violation of the ordinance if the owner fails to reside in the unit for a specified time period after evicting a tenant for owner move-in. *Rental Hous. Ass'n of N. Alameda County v City of Oakland* (2009) 171 CA4th 741, 90 CR3d 181.

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§7.67 c. "Good Faith" Intent to Occupy

Most rent control ordinances provide that the owner or relative must intend to occupy the unit "in good faith." Some ordinances also contain a rebuttable presumption of lack of good faith if the owner or relative for whom the tenant was evicted does not occupy the unit for 12 continuous months. Under CC §1947.10, an owner who evicts a tenant based on the owner's or the owner's immediate relative's intention to occupy the unit is required to reside in the unit for at least 6 continuous months. This requirement applies to all evictions after July 1, 1990, in any rent-controlled jurisdiction that requires registration of rents. See §7.66. For discussion of the standard for good faith, see §7.54.

In *Baba v Board of Supervisors of the City & County of San Francisco* (2004) 124 CA4th 504, 21 CR3d 428, a court of appeal invalidated a local eviction control provision that had made it unlawful for a landlord to request that a tenant move unless the landlord in good faith intended to recover the housing unit as an "owner move-in" eviction. The court found that the ordinance unlawfully regulated free speech because it suppressed speech that was neither false nor inherently misleading. 124 CA4th at 520. See §§7.12, 7.64F.

In *Castillo v Friedman* (1987) 197 CA3d Supp 6, 243 CR 206, the court held that the landlord had served a 30-day notice to vacate in bad faith. Although the notice stated that the landlord's mother was to occupy the premises, she never did so; after the tenant vacated, the landlord placed a "for rent" sign on the building and showed the apartment to the tenant's friend, who was posing as a prospective tenant. The court rejected the landlord's arguments that the tenant's failure to demand return of the apartment created an estoppel and a failure to mitigate damages. For further discussion of *Castillo,* see §7.77. On the preemption of certain evidentiary presumptions created by local rent ordinances, see §7.71.

In *Zimmerman v Stotter* (1984) 160 CA3d 1067, 207 CR 108, the court addressed res judicata and collateral estoppel issues presented by an action by an evicted tenant based on the landlord's failure to occupy the rental unit and later reoffering of the unit at a substantially higher rent. The court held that, although the landlord's "good faith" had been determined in the unlawful detainer trial, the evicted tenant had the right to litigate abuse of process and intentional infliction of emotional distress on the theory that the landlord had abused the right to possession awarded as part of the judgment in the unlawful detainer action.

In earlier California cases interpreting good-faith requirements under former federal regulations that restricted evictions (*e.g., Janise v Bryan* (1948) 89 CA2d Supp 933, 201 P2d 466; *Gibson v Corbett* (1948) 87 CA2d Supp 926, 200 P2d 216), the courts held that the landlord's intent to occupy the premises is not the equivalent of good faith. If the dominant motive is revenge, the landlord is not acting in good faith. The landlord's desire must be to possess the premises, not to dispossess the tenant.

PRACTICE TIP: The tenant's attorney might try to show lack of good faith with evidence that: (a) The apartment is similar to other apartments in the building but has a lower rent than the other apartments (this was not an issue on appeal, but possibly could have been raised in *Bullard v San Francisco Residential Rent Stabilization Bd.* (2003) 106 CA4th 488, 130 CR2d 819, cited in §§7.25, 7.65); or (b) The landlord or landlord's relative presently lives in a home or neighborhood very different from the apartment or its neighborhood, indicating that the landlord or relative has no intention of residing in the apartment for the indefinite future.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.68 d. Counseling Potential Buyers Who Plan to Occupy Rented Premises

§7.68 d. Counseling Potential Buyers Who Plan to Occupy Rented Premises

Buyers who plan to occupy their units should review rent-board ordinances and rules carefully. Municipalities with low vacancy rates often tighten their owner-occupancy requirements. If the property is in a jurisdiction with registration requirements, those records should be reviewed to determine whether the seller has complied with registration and rent regulations. The seller's failure to comply may lead to a substantial delay in the buyer's eviction of the current tenants.

The seller usually has no right to evict a tenant on the ground of owner occupancy, because the seller is not the person who intends to occupy the property. The buyer cannot evict before the sale closes, because the buyer is not yet the owner or the landlord. See §7.65. To protect the buyer, the buyer's attorney should consider having title transferred to the buyer so that eviction proceedings can begin. The purchase price may be held in escrow until the tenant vacates the premises and no further appeals are pending. Eviction expenses should be deducted from the balance of the purchase price.

Many rent control laws require that the landlord evict the most recent tenant to occupy an apartment of the size the landlord wants, (often referred to as the "last-in, first-out rule"). See, *e.g.,* Los Angeles Rent Stabilization Ordinance §151.30.D; Santa Monica Rent Control Board Regulation 9002(j); West Hollywood Rent Stabilization Ordinance §17.52.010(12)(g).

PRACTICE TIPS:

- A seller of residential apartment should advise the buyer, in writing, that the units are subject to a rent-control ordinance. If the buyer's plans for the units are known (*e.g.,* that the owner intends to occupy a unit), the buyer must be advised of the possibility that an eviction might be required, thus delaying occupancy. The buyer should also be advised that he or she might be required to pay the tenant relocation benefits.
- The seller might wish to approach a tenant in possession before the sale is completed to attempt to negotiate a mutually acceptable relocation agreement and payment. For instance, the $4500 available to a tenant in an Ellis Act eviction context (see §7.64) would provide the vacancy desired by the new owners without the time and notice burdens otherwise associated with an Ellis Act eviction. This payment can often be financed as part of the mortgage financing.

Potential buyers who plan to occupy their units in the "distant" future should be counseled that the courts have not viewed the right to evict for owner occupancy as an absolute constitutional right insulated from local regulation. Strong curbs on owner occupancy are common in condominium conversions. See, *e.g.,* Berkeley Mun C §21.28.050(B). However, in Santa Monica, an owner of a condominium that has been legally converted may, for owner-occupancy, evict a tenant who was not a tenant in the unit at the time of the conversion. The owner does not need to obtain a removal permit. *Bohbot v Santa Monica Rent Control Bd.* (2005) 133 CA4th 456, 34 CR3d 827. A Massachusetts regulation prohibiting evictions for owner occupancy of units that have been converted to condominiums was upheld in *Flynn v City of Cambridge* (Mass 1981) 418 NE2d 335. A New Jersey state law that granted lifetime tenancies to specified classes of senior citizen tenants was upheld in *Troy Ltd. v Renna* (3d Cir 1984) 727 F2d 287. The court rejected the view that granting lifetime tenancies constituted a taking for public use. 727 F2d at 300.

Outside the context of conversion, however, some courts have indicated that owners have a constitutional right to evict for owner occupancy. See *Kennedy v City of Seattle* (Wash 1980) 617 P2d 713 (ban on owner-occupancy evictions invalidated); *Sabato v Sabato* (NJ Super Ct Law Div 1975) 342 A2d 886, 897, overruled in part in 407 A2d at 844 (suggesting a constitutionally-based right to evict for owner occupancy in "buildings or structures ordinarily utilized for owner occupancy" such as two- to three-unit buildings).

Some California ordinances, *e.g.,* in Berkeley, expressly permit eviction for owner occupancy if a comparable unit in the property is unavailable. See §7.65. Without ruling directly on whether an owner's right to occupancy is constitutionally based, a court held that applying the Berkeley ordinance in a manner preventing the landlord from using "reasonable subjective factors" in selecting the desired unit would render the ordinance "constitutionally confiscatory." *Bakanauskas v Urdan* (1988) 206 CA3d 621, 627, 253 CR 764.

New Jersey courts have rejected attacks on the constitutionality of just-cause requirements that prohibit a landlord from recovering possession for residence by a member of the landlord's family (*Stamboulos v McKee* (NJ Super Ct 1975) 342 A2d 529) and from recovering possession of an apartment to use it for the landlord's own business (*Puttrich v Smith* (NJ Super Ct 1979) 407 A2d 842).

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D. Grounds Not Set Forth in Ordinance

§7.69 1. Tenant Eviction Not Allowed After Foreclosure

Most rent control ordinances contain language indicating that the grounds for eviction set out in the ordinance are the *exclusive* grounds allowed. In *Gross v Superior Court* (1985) 171 CA3d 265, 217 CR 284, the owner bought the property at a foreclosure sale, and claimed that this gave him the right to evict, although the San Francisco rent stabilization ordinance did not list purchase at a foreclosure sale as a ground for eviction. The court ruled in the tenant's favor, holding that a substantive right to evict is not created by CCP §1161a, which specifically permits the purchaser at a foreclosure sale to use unlawful detainer procedures to evict the tenant or owner. 171 CA3d at 272.

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§7.70 2. Termination of Manager

Most eviction control ordinances do not specify that termination of a resident manager's employment constitutes a ground for terminating the manager's tenancy. In *Chan v Antepenko* (1988) 203 CA3d Supp 21, 250 CR 851, the court held that a discharged resident manager is a licensee, holding occupancy as a condition of employment, not a tenant. Thus, a discharged resident manager was not covered by San Francisco's rent control ordinance. Consequently, the landlord was not required to show good cause for the eviction. As the court stated (203 CA3d Supp at 24):

> Discharged employees are not tenants. Their presence on the premises is not a possession or an occupancy, for these are retained by the owner; they are like guests or lodgers who, when their right to remain has ceased, may be removed without notice.

In *Karz v Mecham* (1981) 120 CA3d Supp 1, 174 CR 310, however, the court ruled that a resident manager was a tenant at sufferance because, when the manager was terminated, the owner served the manager with a notice to pay rent or quit as an alternative choice. The court held that this notice gave the terminated manager the rights of a tenant. See §1.4.

PRACTICE TIP: The attorney should review the local ordinance and its implementing rules for special issues. Some ordinances, for example, provide that a manager who was formerly a tenant may have certain rights to continue as a tenant, or that a manager who paid rent while employed has the rights of a tenant.

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§7.71 3. Tenant Gives Notice of Termination But Fails to Vacate

Suppose the tenant gives the landlord notice to terminate the tenancy but later changes his or her mind and does not vacate. Most ordinances do not list this as a ground for eviction, and so far the courts have not ruled on this situation, which presents difficult issues. See, *e.g*., §7.55A. Rent control ordinances usually preclude tenant waivers of their rights under the ordinance. On the other hand, it would seem inequitable to deny possession to a landlord who has relied on the notice and agreed to rent the premises to another tenant.

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§7.72 4. Death of Tenant

The law is not settled on the effect of the death of a tenant when a local rent control ordinance provides protections to roommates and co-tenants. See, *e.g.*, ordinances discussed in §7.55A. In *Miller & Desatnik Mgmt. Co. v Bullock* (1990) 221 CA3d Supp 13, 270 CR 600, a month-to-month tenant died, and the tenant's mother claimed that she then became the new tenant by inheritance. The landlord brought an unlawful detainer action against the mother, and the trial court ruled for the mother on the ground that the landlord had failed to show that he had served a notice stating one of the just causes for eviction allowed by Santa Monica's rent control ordinance. The appellate department reversed. When the landlord received notice of the tenant's death, the tenancy was terminated under CC §1934. Therefore, the mother was not a tenant under the rent control ordinance, but a trespasser, and she was not entitled to notice under the ordinance.

PRACTICE TIP: In the *Miller* situation, the surviving tenant may be entitled to remain in possession under the existing lease if the deceased tenant had executed a sublease or assignment of rights before leaving the unit to the successor.

In *Pick v Cohen* (2000) 83 CA4th Supp 6, 100 CR2d 839, the court upheld the validity of a provision of the West Hollywood rent control ordinance that certain surviving close relatives or the domestic partner of a tenant could not be evicted if the landlord had been notified of the additional tenant, the original tenant had died, and the additional tenant occupied the premises for more than one year before death. The court held that this provision was not preempted by state law (including the Ellis Act) and did not exceed the city's police power.

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E. Notice and Pleading Requirements

§7.73 1. Eviction Notices

When drafting notices of eviction and unlawful detainer complaints, the attorney should follow the requirements of rent control ordinances and regulations carefully. Failure to comply with such provisions may lead to absolute defenses to evictions.

Several ordinances require that eviction notices state the grounds for eviction with particularity, including a description of the triggering event, the date and time, and the identities of witnesses. For evictions alleging breach of a lease covenant, some ordinances require that the notice cite the particular section, subsection, or paragraph of the lease that was allegedly violated. Some rent control ordinances even require that the notice recite the specific section of the ordinance under which the landlord is proceeding. Some ordinances further require that a copy of the notice be mailed to the rent board. See also §§7.56, 8.26.

PRACTICE TIP: These varying notice requirements present a prime example of the need to review very carefully the ordinance before taking any action. A notice that would support an eviction in an area not under rent control may be insufficient in a rent-controlled municipality.

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§7.74 2. Must Compliance With Ordinance Be Alleged in Complaint?

Some rent control ordinances require not only that a landlord intending to evict have a specified permissible cause to do so, but also that written notice to that effect (sometimes containing other information as well) be given to the tenant. See §7.73. There are no recent California cases on whether an unlawful detainer complaint must allege compliance with, or, if applicable, exemption from, local rent control laws. Certain World War II-era cases suggest that the plaintiff must so plead. See, *e.g., Lester v Isaac* (1944) 63 CA2d Supp 851, 853, 146 P2d 524. See also *Gross v Superior Court* (1985) 171 CA3d 265, 275, 217 CR 284 (World War II-era cases considered useful for interpreting current rent control ordinances). Nonetheless, cases from that era dealt with federally imposed rent controls and generally hinged on issues of federal preemption.

In *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 149, 130 CR 465, the supreme court stated that local legislative bodies could create substantive defenses to an unlawful detainer action as part of their rent control legislation. Attorneys for landlords and tenants have been arguing ever since over whether the court's language meant that rent ordinance compliance must be pleaded in the complaint or noncompliance must be raised by the tenant as an affirmative defense. See, *e.g.,* discussion in §9.16.

This issue presents a dilemma for a landlord's attorney. If the landlord pleads compliance with a rent control ordinance, particularly in the form of a "general allegation of compliance" under CCP §459, as exemplified by paragraph 14 of the Judicial Council's unlawful detainer complaint form (see §9.31), the tenant's denial arguably puts the entire ordinance into issue, without informing the landlord which sections of the ordinance the tenant claims were violated. When a "general denial" form of answer is allowed, the landlord may not even know whether compliance with the ordinance is even at issue. The tenant might also move to strike before answering, alleging that the compliance allegation is surplusage, consequently delaying the action.

If the landlord elects *not* to plead compliance, tenant's counsel might demur to the unlawful detainer complaint, alleging that the landlord has failed to state sufficient facts to prevail in the unlawful detainer. If the landlord's attorney believes that the demurrer might be overruled, the risk of delay caused by the demurrer might be offset by the advantage gained by forcing the tenant to raise the rent ordinance issue by affirmative defense rather than by denial, placing the burden of proof on this issue on the tenant. However, because ultimately the landlord must plead and prove compliance with the eviction section of the particular rent control law, the burden of proof is on the landlord to show "just cause" for eviction.

For discussion of the time limit for bringing an action for treble damages for violation of an eviction control statute, see §7.66.

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§7.75 F. Burdens of Proof and Presumptions

Besides requiring just cause for eviction, some rent control ordinances shift the burden of proof or create rebuttable presumptions for factual issues in eviction cases. The California Supreme Court has held that a provision of the Berkeley rent control ordinance that shifted the burden of proof to the landlord when retaliatory eviction was raised as a defense was invalid, because the provision conflicted with Evid C §500. *Fisher v City of Berkeley* (1984) 37 C3d 644, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045.

In *Beeman v Burling* (1990) 216 CA3d 1586, 265 CR 719, a wrongful eviction action, the landlord argued that a rebuttable presumption provision in the San Francisco rent control ordinance, that "the landlord has not acted in good faith if the owner or relative for whom the tenant was evicted does not move into the unit and occupy said unit for a minimum of 12 continuous months," impermissibly conflicts with Evid C §500. The court of appeal acknowledged the conflict, but found it unnecessary to resolve the question because the landlord had admitted bad faith by failing to file an answer denying the tenant's allegation of bad faith. 216 CA3d at 1596. In *Rental Hous. Ass'n of N. Alameda County v City of Oakland* (2009) 171 CA4th 741, 90 CR3d 181, however, the court struck down a section of the Oakland Just Cause for Eviction Ordinance because it created a presumption of a violation of the ordinance if the owner failed to continuously occupy a unit for 3 years after evicting the tenant for owner-occupancy. But an evidentiary presumption that affects the burden of producing evidence was permitted in *TG Oceanside, LP v City of Oceanside* (2007) 156 CA4th 1355, 68 CR3d 320.

In *TG Oceanside,* the court validated a provision in the Oceanside rent control ordinance that required an owner to meet the burden of presenting evidence that the rent increase adjustments provided for in the ordinance did not provide the owner a just and reasonable return on investment in any given year. The court held that the provision involved the burden of producing evidence and not a burden of proof outlawed in *Fisher*. 37 C3d at 698.

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§7.76 G. Defenses to Evictions Provided by Local Ordinance

Some rent control ordinances provide possible defenses in unlawful detainer actions. Depending on the ordinance, a tenant may be able to defend an eviction action on the ground that:

(1) The units are not properly registered;

(2) The landlord is charging an incorrect rent;

(3) The landlord has breached the implied warranty of habitability in the tenant's unit or in another tenant's unit; or

(4) The landlord has failed in some other respect to comply with the rent control ordinance (*e.g.,* failed to serve the tenant with proof of current registration).

Rent control ordinances may specifically prohibit evictions made in retaliation for the tenant's exercise of rights under the ordinance. Under such a provision, a tenant could raise the landlord's retaliation as a defense to an eviction attempt even when good cause otherwise exists for eviction under the ordinance. Rent control ordinances frequently provide for protection against retaliatory evictions even if the jurisdiction does not otherwise restrict evictions to those made for "good cause."

PRACTICE TIP: Attorneys should read the applicable ordinance carefully, list all possible defenses that a tenant might raise to an eviction, and then determine whether the tenant can prevail on any of them.

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§7.76A H. Required Payments to Tenants on Eviction

The Ellis Act (Govt C §§7060-7060.7) authorizes localities to enact provisions that require landlords who withdraw properties from rent or lease to make payments to evicted tenants in advance of the tenant's vacating the withdrawn rental unit. See Govt C §7060.1(c), discussed in §§7.64, 7.64H. Some localities require landlords to make payments to tenants in other situations, typically where a tenant is being asked to leave due to no fault on the part of the tenant (e.g., owner move in). See, *e.g.*, San Francisco Residential Rent Stabilization and Arbitration Ordinance §37.9C.

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X. CIVIL DAMAGES AND OFFSETS FOR ORDINANCE VIOLATIONS

§7.77 A. Damages for Rent Overcharges

Rent control ordinances commonly authorize damages for rent overcharges (up to three times the amount of the overcharge). Some ordinances set a minimum level of damages for rent overcharges and an administrative procedure for determining the refund of overcharges. See, *e.g., Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 81 CR3d 341, cited in §7.40A. In the absence of administrative remedies for rent overcharges, a tenant must pursue the usual civil remedies in a court action for a refund of the overcharges, for declaratory relief concerning the proper rent, or both.

Many ordinances contain no provision for an administrative determination of the correct rent. In these jurisdictions, a tenant faced with what may be an unlawful rent increase must contest the amount in an unlawful detainer proceeding or pay the amount demanded and then seek a judicial determination in a declaratory relief action.

Under CC §1947.7, in a jurisdiction that requires registration of rent, restitution of overcharges to the tenant and recovery of registration or filing fees are the exclusive remedies for a landlord's failure to register when a landlord is in "substantial compliance" with the ordinance. No other penalties may be assessed against such a landlord. In *Richman v Santa Monica Rent Control Bd.* (1992) 7 CA4th 1457, 9 CR2d 690, the court held that CC §1947.7 does not prevent a rent board from determining whether parking was included in the landlord's base rent, when the board did not assess any excess rent penalty against the landlord.

In rent-controlled jurisdictions that require registration of rent, once a certified rent has been established (see CC §1947.8, discussed in §7.45), any landlord who charges rent to a tenant in excess of the certified rent ceiling must refund the excess rent to the tenant on demand. CC §1947.11(a). If the landlord refuses to refund the excess rent and a court finds the landlord willfully charged the tenant rent in excess of the certified lawful rent ceiling, the court must award the tenant a judgment for the excess amount of rent and *may* treble that amount. The prevailing party is entitled to attorney fees and costs. CC §1947.11(a). The remedy under CC §1947.11 does not prohibit any other remedy that might be available to a party aggrieved by rent in excess of a certified level. CC §1947.11(b).

Unlawful business practices that also constitute a violation of local rent control ordinances may be enjoined and penalized under Bus & P C §§17200-17209. In *People v Beaumont Invs., Ltd*. (2003) 111 CA4th 102, 3 CR3d 429, *e.g*., the court of appeal sustained judgments of $525,000 in restitution and $525,000 in civil damages in favor of the residents of two mobilehome parks and against the two parks and a mobilehome dealer, who entered into long-term leases favorable to the parks and then sold the new mobilehomes to consumers subject to the leases to evade local rent controls. The damages included repayment of several years of "excess" rent payments.

A rent control board may not issue an order allowing a tenant to withhold a portion of the monthly rent as restitution for past overcharges, nor may it declare that such withholding may not form the basis of an unlawful detainer action. Such orders represent "an unwarranted intrusion into the power of the courts to 'check' administrative adjudications." *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 377, 261 CR 318. The supreme court also held that, although an administrative agency may assess certain penalties, a local rent board's award of treble damages is invalid. Such penalties are not reasonably necessary to effect the board's primary, legitimate regulatory purposes. Moreover, a rent board's power to award treble damages "poses a risk of producing arbitrary, disproportionate results that magnify, beyond acceptable risks, the possibility of arbitrariness inherent in any scheme of administrative adjudications." 49 C3d at 379. In addition, the court upheld the power of local rent boards to adjudicate excess rent claims, rejecting the arguments that such adjudications violate the judicial powers clause (Cal Const art VI, §1) or the right to a jury trial (Cal Const art I, §16).

A treble damage award for fraudulent collection of rents in excess of those allowed by a local rent control ordinance is not dischargeable in bankruptcy. *Cohen v de la Cruz* (1998) 523 US 213, 140 L Ed 2d 341, 118 S Ct 1212.

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§7.78 B. Damages for Unlawful Evictions

Most rent control ordinances authorize civil actions for damages arising from eviction attempts or actual evictions that violate the eviction control ordinance. However, these ordinance provisions are undergoing many challenges. Claims for wrongful eviction under such ordinances arising out of court actions for unlawful detainer violate the litigation privilege under state law and are barred. See *Action Apartment Ass'n v City of Santa Monica* (2007) 41 C4th 1232, 63 CR3d 398, discussed in §7.55. In other words, if a tenant successfully defends the unlawful detainer action by invoking the local ordinance, the litigation privilege bars a wrongful eviction suit for damages, but a malicious prosecution action may be available to the tenant. 41 C4th at 1249. If the basis of the wrongful eviction suit is a mere eviction notice that violates the ordinance, the act of serving the eviction notice is protected by the litigation privilege only if litigation is contemplated in good faith and under serious consideration. 41 C4th at 1251. This is a factual question that would be difficult to resolve on a summary judgment motion. For further discussion, see Busch, *Reader Alert: Action Apartment Association Case May Bar Many Wrongful Eviction Lawsuits,* 25 Cal Real Prop J 51 (No. 3, 2007). See also *Bisno v Douglas Emmett Realty Fund 1988* (2009) 174 CA4th 1534, 95 CR3d 492 (granting summary judgment on malicious prosecution claim and applying litigation privilege to wrongful eviction claim), cited in §7.55.

One court of appeal allowed a suit for wrongful eviction to be defended with an anti-SLAPP (strategic lawsuit against public participation) motion to strike under CCP §425.16. See *Birkner v Lam* (2007) 156 CA4th 275, 67 CR3d 190. To succeed on this type of motion, the moving party defendant must show that the statements or acts complained of were in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue. The plaintiff defeats the motion by proving the probability that the plaintiff will prevail on the complaint. The *Birkner* decision held that the protection under §425.16 extends to an allegedly illegal notice of termination of tenancy served on the tenant even if an unlawful detainer action does not follow. The court ruled that even though the notice was not part of a judicial proceeding, service of the notice was a protected activity under §425.16 because the notice "is a legal prerequisite for bringing an unlawful detainer action." 156 CA4th at 282.

PRACTICE TIP: In view of *Birkner*, tenant attorneys bringing wrongful eviction suits should be especially diligent when preparing the complaint to gather sufficient facts to overcome an anti-SLAPP motion, which is often brought within 60 days of service of the complaint. See CCP §425.16(f). This should not be difficult if the tenant has prevailed in an unlawful detainer action on the same theory as the wrongful eviction claim.

In *Clark v Mazgani* (2009) 170 CA4th 1281, 89 CR3d 24, the tenant sued the landlord for fraud and unlawful eviction after the landlord evicted the tenant for supposed occupancy by the landlord's daughter. The daughter never moved in. The trial court granted the landlord's anti-SLAPP motion. The court of appeal reversed. The tenant's complaint was based on the landlord's violation of rent control laws, not on actions in furtherance of the right of free speech or petition. The landlord's fraudulent act of terminating a tenancy or removing a unit from the rental market and allowing that unit to stand empty was an actionable unlawful eviction under CC §1947.10(a) and was not protected by the rights of petition or speech.

In *Delois v Barrett Block Partners* (2009) 177 CA4th 940, 99 CR3d 609, the landlord, without filing suit, entered into a settlement agreement with the tenant requiring the tenant to vacate the property. Thereafter, the landlord raised the tenant's rent for breaching the settlement agreement. The tenant vacated and sued the landlord in tort and contract, alleging that he was forced to vacate his unit in violation of the local rent control act. The landlord brought an anti-SLAPP motion claiming that its actions were protected because they arose from a settlement agreement that was entered into to avoid litigation. The court held that the landlord's actions were not the basis of the plaintiff's lawsuit but merely preceded it and denied the anti-SLAPP motion.

Earlier cases interpreted the eviction control statutes liberally. For example, a court of appeal held that a private cause of action for damages exists when a landlord terminates a tenancy in bad faith in violation of a local rent control ordinance, even if the ordinance does not provide for such an action and the ordinance makes the landlord's action a crime. *Castillo v Friedman* (1987) 197 CA3d Supp 6, 243 CR 206.

Some ordinances authorize treble damages for unlawful evictions or eviction attempts. In *Kelly v Yee* (1989) 213 CA3d 336, 261 CR 568, the court of appeal held that an award of treble damages for unlawful eviction is mandatory under the San Francisco rent control ordinance, which authorizes the tenant or the rent board to institute a civil proceeding for "not less than" treble damages. Although the language of the ordinance appears to authorize a higher award, the opinion states in dicta that it is "an obviously absurd interpretation" to contemplate that more than three times actual damages might be awarded. 213 CA3d at 340. In addition, the court held that the ordinance was not preempted by CC §3294 (which authorizes awards of punitive damages in civil actions generally) because the treble damages provision was created to encourage private enforcement of the ordinance rather than to punish extreme and outrageous conduct. The court summarily rejected the landlords' argument that the ordinance violated due process by imposing treble damages without regard to fault or magnitude of violation. 213 CA3d at 341. See also *Beeman v Burling* (1990) 216 CA3d 1586, 265 CR 719, in which the court upheld the trebling of an award of $20,000 for mental anguish in an unlawful eviction action brought under the San Francisco ordinance. The court also awarded the tenant attorney fees incurred in the appeal under CC §1717 (see §13.25).

In *Balmoral Hotel Tenants Ass'n v Lee* (1990) 226 CA3d 686, 276 CR 640, the court held that mental anguish was a proper element of damages in a wrongful eviction action under the San Francisco rent control ordinance. The court of appeal refused to treble the portion of the damages attributable to mental anguish, however, and it limited treble damages to out-of-pocket expenses. The court held that the dominant motive of the board of supervisors in providing for treble damages was to encourage suits to protect tenants' rights, when the stakes would otherwise be too small to make litigation worthwhile. The amount of damages for mental suffering might easily be large enough to support litigation without trebling them. Interpreting the ordinance to authorize trebling only of economic damages avoided the substantive due process problems that might arise if a mandatory formula results in an excessive penalty. See *Hale v Morgan* (1978) 22 C3d 388, 149 CR 375, discussed in §8.149.

After the *Balmoral* decision, the San Francisco Board of Supervisors amended its ordinance to provide that damages for mental or emotional distress should be trebled, but only if the trier of fact finds that the landlord acted in knowing violation or reckless disregard of the eviction control ordinance.

In contrast, CC §1942.4 (see §§3.15A, 3.36) permits an award of "actual damages" in actions to remedy untenantability of the premises, and that term includes emotional distress damages. *McNairy v C.K. Realty* (2007) 150 CA4th 1500, 59 CR3d 429. The court distinguished *Balmoral*, because that case involved a constitutional challenge to the trebling of damages, which was not present in *McNairy*.

Damages for breach of an ordinance typically are calculated under CC §3333. Damages designed to compensate the tenant for actual losses are typically awarded, such as the difference between what the tenant was paying in the rent-controlled property and what the tenant was forced to pay for rent in a new apartment. On one occasion, even in the absence of pleading a contract based cause of action, one court has employed a contract measure of damages and awarded the tenant the benefit of the tenant's bargain (*i.e.,* the difference between what the tenant was paying for rent in the rent-controlled apartment and the amount of rent the landlord obtained for the unit after the tenant left) if no other means of compensation for the wrong existed. *Castillo v Friedman, supra,* in which the tenant who was wrongfully evicted had moved to a smaller apartment and in fact had paid significantly less rent than had been paid in the rent-controlled apartment, thus rendering inappropriate the more traditional measure of damages for the wrong. For further discussion of *Castillo,* see §7.67.

For practical tips on how to prosecute or defend a lawsuit for an eviction that violates a local rent control ordinance, see Souza, *The Wrongful Eviction Lawsuit*, 10 CEB Civ Litigation Rep 52 (Mar. 1988); Souza, *The Wrongful Eviction Lawsuit: Update*, 12 CEB Civ Litigation Rep 63 (Mar. 1990); Souza, *Wrongful Eviction Update and Introduction to Habitability Litigation*, 15 CEB Civ Litigation Rep 100 (Mar. 1993). See also California Eviction Defense Manual §§17.25-17.49 (2d ed Cal CEB 1993).

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§7.79 C. Attorney Fees

Some rent control ordinances provide for an award of attorney fees to the prevailing party in eviction cases and in civil actions for violation of the ordinance. They do not provide for attorney fees for hearings on individual-adjustment petitions. For discussion of attorney fee awards in unlawful detainer actions, see §§13.25-13.33.

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Source: Real Property/California Landlord-Tenant Practice/7 Practicing Under Rent and Eviction Control Laws/§7.80 D. Liability of New Owner

§7.80 D. Liability of New Owner

A new owner is liable for rent overcharges collected by a previous owner when the local ordinance imposes successor liability. *Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 81 CR3d 341 (interpreting San Francisco Residential Rent Stabilization and Arbitration Ordinance §§37.2, 37.8(e)(7)). Therefore, potential buyers should explore compliance and registration issues before buying property. They may wish to consider requiring that funds be held in escrow pending potential resolution of liability issues. See §7.68.

PRACTICE TIP: Buyers of apartment buildings in jurisdictions that have controls on rents should be careful to determine prior rent increases. The task of ascertaining correct rent levels may be easier in jurisdictions where the locality required registration of rents. If the buyer ascertains the prior rent increases did not comply with the local rent controls, the buyer may reduce the rent to an amount that complies. If there is no rent registration, adequate disclosures and hold harmless agreements should be obtained from sellers and estoppel letters sent to existing tenants. See strategies in comment following *Baychester* case summary in 31 CEB Real Prop L Rep 173 (Sept. 2008).

CAUTION: If a tenant has been overcharged rent by a former landlord, the new owner may risk having the tenant exercise the remedy of offsetting prior excess rent against current rents. The definition of "landlord" in many rent control laws includes a successor-in-interest. The rationale of *Minelian v Manzella* (1989) 215 CA3d 457, 263 CR 597, and *Nourafchan v Miner* (1985) 169 CA3d 746, 215 CR 450, permits all excess rent previously paid to be offset against future rents if permitted by local ordinance. The remedy of the new owner is to sue the former owner for fraud or negligence.

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8

Terminating the Tenancy

Myron Moskovitz

I. METHODS OF TERMINATING TENANCY §8.1
- A. Expiration of Term §8.2
- B. By Actions of Landlord or Tenant §8.3
- C. Death of Landlord or Tenant §8.4
- D. Destruction of Premises; Governmental Regulation §8.5
- E. Eminent Domain §8.6
- F. Sale of Premises §8.7

II. TERMINATION BY TENANT
- A. Abandonment
  - 1. Definition §8.8
  - 2. Establishing Abandonment
    - a. Under CC §§1951.2-1951.3 §8.9
      - (1) Form: Notice of Belief of Abandonment Pursuant to CC §1951.3(d) §8.10
      - (2) Service of Notice §8.11
      - (3) Countering Notice of Abandonment §8.12
    - b. At Common Law §8.13
  - 3. Remedies
    - a. Termination of Lease (CC §1951.2) §8.14
    - b. Continuation of Lease (CC §1951.4) §8.15
    - c. Liquidated Damages; Equitable Relief; Nonexclusivity of Remedies §8.16
- B. Surrender
  - 1. Historical Significance §8.17
  - 2. Implied Surrender §8.18
- C. Landlord's Breach of Lease Covenant §8.19
- D. Tenant's Termination of Periodic Tenancy (CC §§1946, 1946.1) §8.20
- E. Death of Tenant §8.21
- F. Servicemembers Civil Relief Act §8.21A
- G. Victim of Domestic Violence §8.21B

III. TERMINATION BY LANDLORD: NOTICE ISSUES
- A. Termination for No Stated Reason, for Tenant's Breach, or Because Landlord Is Going Out of Business
  - 1. Periodic Tenancies §8.22
  - 2. Sale of Residential Unit §8.22A
  - 3. Tenant Breaches §8.22B
  - 4. Ellis Act Evictions §8.22C
- B. Common Pitfalls §8.23
- C. Strict Compliance With Notice Provisions Required for Unlawful Detainer §8.24
- D. Remedies When No Notice Given: Ejectment; Quiet Title §8.25

IV. TERMINATION FOR TENANT'S BREACH: 3-DAY NOTICE
- A. Notice Required Before Filing Unlawful Detainer Action §8.26
- B. Effect of Debt Collection Practices Act §8.26A
- C. Effect of Lease Provision Altering Notice Requirements §8.27
- D. Computation of Notice Period
  - 1. Computation Rules (CCP §1161) §8.28
  - 2. Computation When Notice Served by Mail §8.29
- E. Form and Content of Notice
  - 1. In Writing; Signature Not Required §8.30
  - 2. Description of Premises §8.31
  - 3. Description of Breach; Demand for Cure §8.31A
  - 4. Unequivocal Demand for Possession §8.32

5. Tenant Has 3 Days to Pay Rent or Perform Covenant §8.33
6. Election of Forfeiture §8.34
F. Bases for Termination With 3 Days' Notice
1. Failure to Pay Rent: Purpose and Effect of Notice §8.35
a. Demand for Rent
(1) Stated "In the Alternative" §8.36
(2) Amount Due: Residential Leases §8.37
(3) Amount Due: Commercial Leases §8.37A
(4) To Whom and Where Rent Must Be Paid §8.37B
(5) Limitation to Rent Due Within Year Preceding Notice §8.38
b. Demand for Interest and Late Charges
(1) Interest and Late Charges May Be Includable in Notice §8.39
(2) Avoiding Excessive Late Charges §8.40
c. Form: 3-Day Notice to Pay Rent or Quit §8.41
d. Timing Service of Notice §8.42
e. Effect of Tender of Rent
(1) Before Service of Notice §8.43
(2) During Notice Period §8.44
(3) After Expiration of Notice Period §8.45
2. Tenant's Breach of Lease Covenant
a. Statutory Provision §8.46
b. Breaches Covered
(1) Breach of Express Covenant Only §8.47
(2) Minor Breach Not Sufficient §8.48
c. Waiver and Estoppel §8.49
d. Form of Notice
(1) Alternative of Performing or Vacating §8.50
(2) Stating the Breach §8.51
e. Effect of Tenant's Performance §8.52
f. Form: 3-Day Notice to Perform Covenant of Lease or Quit (Curable Breach) §8.53
g. Form: 3-Day Notice to Quit for Breach of Covenant (Noncurable Breach) §8.54
3. Breaches or Acts That Constitute Unlawful Detainer Under CCP §1161(4) §8.55
a. Breach of Covenant Against Subletting, Assignment, or Waste
(1) Covenant Must Be Express; Notice Considerations §8.56
(2) Evidence Required to Establish Waste §8.57
b. Nuisance §8.58
c. Unlawful Purpose §8.59
§§8.60-8.61 have been deleted; former sections renumbered as §§8.68A-8.68F
G. Service of Notice
1. Statutory Requirements §8.62
a. Service by Mail Alone §8.63
b. "Substituted" Service §8.64
c. "Conspicuous" Service §8.65
2. Actual Receipt of Improperly Served Notice §8.66
3. Service on Cotenants or Subtenants §8.67
4. Withdrawal of Notice §8.68

V. TERMINATION AFTER SALE OR FORECLOSURE (CCP §§1161a, 1161b)
A. Property Owners and Commercial Tenants (3-Day Notice) §8.68A
B. Residential Tenants
1. Foreclosure Sale
a. Notice of Foreclosure Sale §8.68B
b. Notice of Termination of Tenancy (60-Day Notice) §8.68C
2. Voluntary Sale §8.68D
C. Lease Priority Issues After Foreclosure §8.68E
D. Effect of 2009 Federal Law on Evictions After Foreclosure §8.68F

VI. TERMINATION OF MONTH-TO-MONTH TENANCY: 30-DAY OR 60-DAY NOTICE
A. Statutory Requirements §8.69
B. Alteration of Notice Period; Commercial Tenancies §8.70
C. Format and Contents of Notice
1. Description of Premises; Signature §8.71
2. Grounds for Termination §8.72

3. 30 or 60 Days to Vacate; Service in Middle of Term §8.73
D. Serving 30-Day or 60-Day Notice
1. Method of Service §8.74
2. Withdrawal of Notice §8.75
3. Service on Subtenants §8.76
4. When Tenant Must Vacate §8.77
E. Notice Period Must Expire Before Filing of Complaint §8.78
F. Terminating a Tenancy at Will §8.79
G. Form: 30-Day or 60-Day Termination Notice §8.80

VII. UNLAWFUL DETAINER ACTIONS THAT REQUIRE NO NOTICE
A. Tenant Gives Notice, But Remains After Notice Expires §8.81
B. Expiration of Fixed-Term Lease §8.82
C. Hotel and Motel Guests §8.83
D. Employees §8.84

VIII. TERMINATION BY LANDLORD UNDER GOVERNMENT-SPONSORED PROGRAM §8.85
§§8.86-8.108 have been deleted

IX. LIMITATIONS ON LANDLORD'S ABILITY TO TERMINATE TENANCY
A. Retaliatory Eviction §8.109
1. Several Sources of Law May Apply §8.110
a. CC §1942.5
(1) Tenant Actions on Habitability (CC §1942.5(a))
(a) Protected Acts §8.111
(b) Limitations on Protection §8.112
(2) Tenant Union Activity or "Rights Under Law" (CC §1942.5(c)) §8.113
(3) Tenant Cannot Waive Rights (CC §1942.5(d)) §8.114
(4) Notice and Burden of Proof (CC §1942.5(e)) §8.115
(5) Remedies (CC §1942.5(f)-(g)) §8.116
(6) Remedies Not Exclusive (CC §1942.5(h)) §8.117
b. Unruh Civil Rights Act (CC §51)
(1) Arbitrary Conduct Prohibited by Act's Discrimination Protections §8.118
(2) "Arbitrary" Defined §8.119
(3) Burden of Proof §8.120
(4) Remedies §8.121
c. California Fair Employment and Housing Act (FEHA) §8.122
d. Federal Statutes §8.123
e. Other Statutes §8.124
f. Common Law §8.125
g. Local Ordinances §8.126
h. Constitutional Protections §8.127
i. Applicability of Law to Retaliatory Eviction in Commercial Tenancies §8.128
2. Proof of Retaliatory Motive
a. Sole or Dominant Motive §8.129
b. Presumptions and Burden of Proof §8.130
c. Evidence
(1) Typically Circumstantial and Inferential §8.131
(2) Analogy to Labor Law Cases §8.132
3. Remedies for Retaliation
a. Defense to Unlawful Detainer Action §8.133
b. Injunctive and Declaratory Relief §8.134
c. Action for Damages §8.135
4. Beyond Retaliatory Eviction: Good Cause to Evict §8.136
B. "Self-Help" Not Permitted §8.137
1. Forcible Entry and Detainer §8.138
a. Elements of Cause of Action
(1) Forcible Entry
(a) Tenant's Possession Prerequisite §8.139
(b) Statutory Definitions and Judicial Applications §8.140
(2) Forcible Detainer §8.141
b. Kinds of Occupants Protected §8.142
c. Affirmative Defenses §8.143
d. Remedies §8.144
e. Procedure §8.145

f. Form: Complaint for Forcible Entry and Forcible Detainer §8.146
2. Denial of Tenant's Use of, or Access to, Premises
a. Utility Cutoffs §8.147
b. Access to Premises; Removal of Personal Property §8.148
c. Remedies Under CC §789.3 §8.149
d. Remedies Under Public Utilities Code and CC §1942.2 §8.149A
3. Suit for Tort of "Wrongful Eviction" §8.150
4. Anti-Harassment Statute (CC §1940.2) §8.150A
5. Other Injuries to Premises; Common Law Remedies §8.151
6. Criminal Prosecution §8.152
C. Strategy on "Self-Help" Evictions §8.153

X. EFFECTS OF TERMINATION
A. Tenant's Personal Property
1. Statutory Requirements After Unlawful Detainer, Abandonment, or Vacation by Tenant §8.154
a. Landlord Must Store Tenant's Property §8.155
b. Notice to Tenant Required §8.156
c. Return of Property on Payment of Storage Costs §8.157
d. Disposition of Unclaimed Property §8.158
e. Form: Notice to Tenant of Right to Reclaim Abandoned Property (CC §1984) §8.159
f. Form: Notice to Owner Other Than Tenant of Right to Reclaim Abandoned Property (CC §1985) §8.160
2. Enforcement of Landlord's Lien (CC §§1861-1861a) §8.161
B. Disposition of Fixtures §8.162
1. Rule: Fixtures Are Part of Real Property (CC §1013) §8.163
2. Tenant's Limited Right to Remove Fixtures (CC §1013.5) §8.164
3. Tenant's Right to Remove Trade Fixtures (CC §1019) §8.165
4. Disposition of Encumbered Fixtures §8.166
C. Disposition of Tenant's Security Deposit
1. Statutory Framework
a. Summary of Security Law §8.167
b. What Payments Are Covered? §8.168
c. Statutory Ceiling §8.169
d. Landlord's Duty to Maintain Deposit; Interest on Deposit §8.170
e. Priority of Tenant's Claim §8.171
f. Termination of Landlord's Interest in Unit §8.172
2. After Termination of Tenancy
a. Tenant's Right to Request Inspection of Premises and to Cure Deficiencies §8.172A
b. Form: Notice of Right to Request Inspection of Premises and to Cure Deficiencies §8.172B
c. Landlord's Duty to Give Itemized Statement and Return Deposit §8.173
(1) Items to Which Deposit May Be Applied §8.173A
(2) When Landlord Must Deliver Itemized Statement and Deposit Refund §8.173B
(3) Contents of Itemized Statement §8.173C
(4) When Repairs Cannot Be Finished Within Required Time §8.173D
(5) Exceptions to Required Documentation §8.173E
(6) Form: Waiver of Right to Receive Documents With Security Deposit Refund §8.173F
d. Remedies for Landlord's Improper Retention of Deposit §8.174
e. "Nonrefundable" Deposits and Waivers in Leases Prohibited §8.175
f. Effect on Unlawful Detainer Action §8.176
g. Effect on Subsequent Action Against Tenant §8.177

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§8.1 I. METHODS OF TERMINATING TENANCY

A tenancy may be terminated in a variety of ways, either automatically or on action of one or both parties, depending on the nature of the tenancy and the reasons for termination. Terminating a tenancy is not the same as physically vacating the premises, but termination may be a prerequisite to vacating physically. The classic termination of a tenancy is the series of steps initiated by the landlord on the tenant's breach, beginning with service of a notice to quit (see §§8.22-8.108). Termination in this context is a necessary step to enable the landlord to file and maintain an unlawful detainer lawsuit (see chaps 9-13). In addition to covering terminations initiated by the 3-day notice, this chapter will discuss the other most commonly encountered ways that tenancies are terminated.

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§8.2 A. Expiration of Term

A tenancy for a specified or fixed term terminates automatically when the term expires (see CC §1933(1); *Canning v Fibush* (1888) 77 C 196, 19 P 376; *Stoppelkamp v Mangeot* (1871) 42 C 316), but rent- and eviction-controlled jurisdictions prohibit such terminations and require that the landlord have a reason authorized by the ordinance and use a CC §1946 or §1946.1 notice to effect a termination (see §§7.53-7.54, 8.69). See also §§3.66, 8.82. Special rules also apply to owners of mobilehomes being evicted from a mobilehome park after the lease term expires (see §6.73) and to tenants in government-assisted housing being evicted after the lease term expires (see California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993)).

The parties may alter the CC §1933(1) rule by agreeing on some contingency that will terminate the tenancy before its term expires (*Caswell v Gardner* (1936) 12 CA2d 597, 55 P2d 1222) or that will authorize one party to terminate by giving prescribed notice (*Kurihara v City Market of Los Angeles* (1928) 90 CA 374, 265 P 987). See §8.82. For a tenancy with an indefinite term (periodic tenancy), the landlord-tenant relationship continues indefinitely until either the landlord or the tenant terminates it by giving notice (see §§8.20, 8.69-8.80).

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§8.3 B. By Actions of Landlord or Tenant

The tenancy may be terminated by either the landlord or the tenant if the other party breaches a covenant of the lease or rental agreement. See §§8.19, 8.26-8.68. The tenant's abandonment (see §§8.8-8.16), or surrender to the landlord (see §8.17) of the premises may also terminate the tenancy.

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§8.4 C. Death of Landlord or Tenant

The death of either the landlord or the tenant terminates a periodic tenancy and a tenancy at will or at sufferance (see §§1.10-1.11, 1.65). CC §1934; *Joy v McKay* (1886) 70 C 445, 11 P 763 (death of landlord); *Miller & Desatnik Mgmt. Co. v Bullock* (1990) 221 CA3d Supp 13, 270 CR 600 (death of tenant); *Dugand v Magnus* (1930) 107 CA 243, 290 P 309 (death of tenant). But see *Pick v Cohen* (2000) 83 CA4th Supp 6, 100 CR2d 839 (West Hollywood Rent Stabilization Ordinance may legally permit tenant's surviving roommate/caretaker to remain in unit after tenant dies). A tenancy for a specified term, however, does not terminate before expiration of the term, despite the death of either the tenant (*Joost v Castel* (1939) 33 CA2d 138, 91 P2d 172) or the landlord (*City of Los Angeles v Greines* (1930) 107 CA 481, 290 P 509). See also §§7.72, 8.21.

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§8.5 D. Destruction of Premises; Governmental Regulation

Destruction of the leased premises terminates a tenancy. CC §1933(4); *Hamer v Ellis* (1919) 40 CA 57, 180 P 30. If the leased premises are destroyed by fire, a lease cancellation provision in the lease will prevail over the tenant's option to extend the term. *11382 Beach Partnership v Libaw* (1999) 70 CA4th 212, 82 CR2d 533. Unless the lease specifically provides to the contrary, a tenancy for a specified term is not terminated by a governmental regulation that frustrates the purposes for which the property was leased, such as a zoning change, denial of a use permit or variance. *Mitchell v Ceazan Tires* (1944) 25 C2d 45, 153 P2d 53.

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§8.6 E. Eminent Domain

When the entire property subject to a lease is acquired by eminent domain, the lease terminates absent a provision to the contrary. CCP §§1265.110, 1265.160. A partial taking, however, terminates the lease only for the portion taken (CCP §1265.120), unless the court adjudges that the remainder of the property is no longer suitable for the purposes of the lease (CCP §1265.130). In *City of Vista v Fielder* (1996) 13 C4th 612, 54 CR2d 861, the supreme court held that a commercial tenant is entitled to compensation on condemnation of the premises, despite a lease provision that the lease would terminate if the building were condemned. The tenant will not have a right to obtain damages against a redevelopment agency for inverse condemnation, however, if the tenant is lawfully evicted by a private landlord under no threat of condemnation. *Langer v Redev. Agency* (1999) 71 CA4th 998, 84 CR2d 19.

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§8.7 F. Sale of Premises

Sale of the leased premises by the owner (as opposed to a foreclosure sale or deed in lieu of foreclosure) does not, in itself, terminate the tenancy; the new owner takes the place of the seller and becomes the new landlord. See §8.68D. See also *Rosenkranz v Pellin* (1950) 99 CA2d 650, 222 P2d 249. The parties may provide in the lease, however, that the tenancy will terminate on a sale of the property by the landlord. Such a provision is binding (*Lewis v Agoure* (1908) 8 CA 146, 96 P 327), but the landlord must show that the sale was bona fide (*Davis v Schweikert* (1900) 130 C 143, 62 P 411).

An eviction remedy under CCP §§1161a, 1161b is available to a new-owner landlord whose tenant holds over after a sale of the property by execution, foreclosure, or under a power of sale in a deed of trust, unless the tenant holds a fixed-term lease that has priority over the foreclosed lien. See §8.68E. But see §7.69 on evictions following foreclosure in rent-controlled jurisdictions.

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II. TERMINATION BY TENANT

A. Abandonment

§8.8 1. Definition

Abandonment is the unilateral, voluntary relinquishment of the premises by a tenant who does not intend to perform the future obligations of the lease. *Martin v Cassidy* (1957) 149 CA2d 106, 307 P2d 981; *Pickens v Johnson* (1951) 107 CA2d 778, 238 P2d 40. Abandonment is distinguishable from surrender (see §8.17), which is the tenant's relinquishment of the premises with the landlord's express or implied consent. *Scott v Mullins* (1962) 211 CA2d 51, 27 CR 269; *Dorcich v Time Oil Co.* (1951) 103 CA2d 677, 230 P2d 10.

Establishing both the tenant's breach of the lease and abandonment of the premises may have the important consequence of terminating the lease and the parties' obligations under it. Compare, *e.g.*, §8.14 with §8.15.

WARNING: Written acceptance of a tenant's offer to "surrender" the premises extinguishes the tenant's obligation to pay any future rent. See §8.17. A savvy tenant will offer to surrender the premises to the landlord; such an offer, if accepted, cuts off both privity of estate and privity of contract between the parties.

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2. Establishing Abandonment

§8.9 a. Under CC §§1951.2-1951.3

Civil Code §§1951.2-1952.2 provide a procedure for establishing abandonment, initiated by notice under CC §1951.3 that the landlord believes that the premises have been abandoned. If there is no response to the notice, the landlord may then reenter and take possession of the premises without filing an unlawful detainer action and obtaining a writ of possession. See §§8.14-8.16.

Strict adherence to the notice procedure is important because a landlord who reenters the premises under the mistaken belief that they have been abandoned, without filing the notice under the procedure specified in CC §§1951.2-1952.2, may be liable for damages for wrongfully evicting the tenant. See *Kassan v Stout* (1973) 9 C3d 39, 106 CR 783; *Saferian v Baer* (1930) 105 CA 238, 287 P 142. On "self-help" evictions generally, see §§8.137-8.153. Following the statutory procedure in CC §1951.3(a) may also enable the landlord to avoid the time and expense of an unlawful detainer action as a prerequisite to reletting the premises. Notice may be given only after the rent has been due for 14 or more consecutive days, and the landlord's belief that the tenant has abandoned the property must be "reasonable." CC §1951.3(b). The fact that the tenant has left personal property on the premises does not preclude a reasonable belief that the premises have been abandoned. CC §1951.3(e)(2). The notice must also specify a termination date for the lease that is not less than 15 days after service if the notice is served personally, or 18 days if it is served by mail. CC §1951.3(b). The premises will be considered abandoned if no response to the notice is received stating that the tenant does not intend to abandon the property and submitting an address where the tenant may be served by certified mail in an unlawful detainer action. CC §1951.3(a).

PRACTICE TIP: The landlord is not required to use the notice procedure to establish abandonment and is not precluded from otherwise proving that the property was abandoned. CC §1951.3(f). Many landlords follow the notice procedures, which provide simple and expeditious protection against liability for reentering and reletting the premises—even if it turns out that the tenant has *not,* in fact, abandoned the premises. On the other hand, the eviction process may be nearly as fast, and it provides the added protection of a judgment for possession and damages.

Use of the notice procedure for establishing abandonment is not a prerequisite for initiating an unlawful detainer action (CCP §§1161-1179a; see chap 9), nor does it satisfy the notice requirements for an unlawful detainer action (CC §1951.3(g); see §§8.22-8.85), and the landlord's attorney may find it advisable to undertake both notice procedures at the same time. If the abandonment procedure succeeds, the landlord will be able to reenter and relet faster than eviction procedures would have permitted. Conversely, if the tenant opposes the abandonment notice, the landlord can then proceed with the unlawful detainer action.

If the termination is for unpaid rent, the dual notice procedure may be followed as long as the rent has been unpaid for 14 days. CC §1951.3(b). The landlord may then file an unlawful detainer action after 3 days to prevent delay in case the tenant opposes the abandonment notice. On 3-day notices to pay rent or quit, see §§8.26-8.68.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.10 (1) Form: Notice of Belief of Abandonment Pursuant to CC §1951.3(d)

§8.10 (1) Form: Notice of Belief of Abandonment Pursuant to CC §1951.3(d)

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8.10-1 Notice of belief of abandonment

NOTICE OF BELIEF OF ABANDONMENT

To _ _[*name of lessee/tenant*]_ _, _ _[*address*]_ _**:**

This notice is given pursuant to Civil Code §1951.3 concerning the real property leased by you at _ _[*state location of property by address or other sufficient description*]_ _**. The rent on this property has been due and unpaid for 14 consecutive days, and the lessor/landlord believes that you have abandoned the property.**

The real property will be deemed abandoned within the meaning of Civil Code §1951.2, and your lease will terminate on _ _[*specify a date not less than 15 days after this notice is served personally or, if mailed, no less than 18 days after this notice is deposited in the mail*]_ _ **unless before such date the undersigned receives at the address indicated below a written notice from you stating both of the following:**

(1) Your intent not to abandon the real property.

(2) An address at which you may be served by certified mail in any action for unlawful detainer of the real property.

You are required to pay the rent due and unpaid on this real property as required by the lease, and your failure to do so can lead to a court proceeding against you.

Date: _ _ _ _ _ _ __[*Signature of lessor/landlord*]__
_ _[*Typed name of lessor/landlord*]_ _
_ _[*Address to which lessee/tenant is to send notice*]_ _

Copies: Original (served on tenant and each cotenant); copies for landlord's and attorney's files.

Comment: This form is taken almost verbatim from the notice in CC §1951.3(d), which merely requires that the notice be given in "substantially" the format it sets forth.

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§8.11 (2) Service of Notice

The notice of belief of abandonment (see §8.10) may be served personally or sent by first class mail to the tenant at his or her last known address. CC §1951.3(c). If the landlord believes that notice sent to the last known address (presumably the premises in question) will not reach the tenant, then notice also must be sent to other addresses, if any, at which the tenant reasonably could be expected to receive the notice. CC §1951.3(c). This provision does not express a preference for personal service over service by mail, and an attempt at personal service does not appear to be required. Compare CC §1951.3(c) with CCP §1162, which sets service requirements for a notice to quit, and requires that an attempt first be made to serve notice personally.

PRACTICE TIP: The landlord probably should mail a notice of abandonment to the tenant's work address. See CCP §1162(2).

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§8.12 (3) Countering Notice of Abandonment

The property is not considered abandoned, and the landlord therefore cannot reenter and relet the premises, if the tenant proves any of the following:

(a) The rent was not due and unpaid for 14 consecutive days at the time that the notice of belief of abandonment was served. CC §1951.3(e)(1).

(b) The landlord's belief that the property had been abandoned was not reasonable at the time notice was given. (The landlord's knowledge that the tenant left personal property on the premises does not justify a finding that the landlord's belief was unreasonable. CC §1951.3(e)(2).)

(c) Within the time specified in the landlord's notice (see §8.10), the tenant gave written notice to the landlord that he or she did not intend to abandon the property and stated an address at which service could be made by certified mail in an unlawful detainer proceeding concerning the property. CC §1951.3(e)(3).

(d) The tenant paid to the landlord all or a portion of the rent due on the property from 14 days before the notice of belief of abandonment was served through the date that the lease would have terminated under the notice. CC §1951.3(e)(4).

If the tenant proves any of the foregoing in response to the notice, the landlord must obtain a judgment in an unlawful detainer action to reenter and relet the premises. The landlord may not reenter under the abandonment provisions. CC §1951.3.

If the landlord served the appropriate notice to quit while serving the notice of belief of abandonment (see §8.9), the time within which the landlord may bring an unlawful detainer action will be shortened when it is clear that an abandonment procedure is unavailing. Otherwise, the landlord must serve a notice to quit (CCP §§1161-1162) at this time in order to recover possession of the premises.

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§8.13 b. At Common Law

The landlord is expressly permitted by CC §1951.3(f) to prove that the premises have been abandoned by means other than statutory procedure. Moreover, the lease does not terminate under CC §1951.3 if the tenant vacates the premises but is not in default under the lease. In these instances, the existence of an abandonment is determined by time-honored case law on the subject. It is important to note that a landlord who proceeds under common law may be liable if he or she mistakenly believes that the tenant has abandoned the premises, whereas the CC §1951.3 procedure protects the landlord from liability in the event of a "wrong guess" about abandonment unless the "wrong guess" was not a reasonable belief at the time notice was given.

The primary difference between the statutory and case definitions of abandonment is that the statutory definition requires that the tenant be in breach of the lease for an abandonment to be found. Under case law, abandonment turns primarily on the tenant's intent: Abandonment is the voluntary relinquishment of the premises with the intent not to perform future obligations under the lease. *Martin v Cassidy* (1957) 149 CA2d 106, 307 P2d 981; *Pickens v Johnson* (1951) 107 CA2d 778, 238 P2d 40. Whether an abandonment exists is a question of fact that must show that the tenant intended to relinquish all right to the property. *Kulawitz v Pacific Woodenware & Paper Co.* (1944) 25 C2d 664, 155 P2d 24; *Wiese v Steinauer* (1962) 201 CA2d 651, 20 CR 295. For examples of factual determinations of abandonment or its lack, see *Kassan v Stout* (1973) 9 C3d 39, 106 CR 783 (subletting premises in breach of lease not an abandonment); *Kulawitz v Pacific Woodenware & Paper Co., supra* (not an abandonment for commercial tenant to conduct "retirement sale" on premises and to give keys to landlord's agent); *Riner v Vernon* (1933) 132 CA 178, 22 P2d 255 (delivering keys and vacating premises not sufficient to constitute abandonment).

PRACTICE TIP: Landlords may consider entering the tenant's unit based on CC §1954(e), allowing entry without notice based on the tenant's abandonment of the dwelling. See §§3.2-3.4, 4.43, 5.17. A less risky procedure is serving a notice of intent to enter the premises under CC §1954(d). Landlord attorneys argue that, after posting the notice, the landlord can enter the unit to confirm a good faith belief that the tenant has abandoned it. The least risky, but most time-consuming, is the notice of belief in abandonment procedure under CC §1951.3(d).

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/ 3. Remedies/§8.14 a. Termination of Lease (CC §1951.2)

3. Remedies

§8.14 a. Termination of Lease (CC §1951.2)

Unless the lease specifically provides for the remedy in CC §1951.4 (see §8.15), the tenant's breach of the lease and eviction from (or abandonment of) the premises terminates the lease. CC §1951.2(a). On lease termination, the landlord is entitled to recover the following:

- unpaid rent earned to the time of termination (CC §1951.2(a)(1)), with interest (CC §1951.2(b));
- the amount by which the unpaid rent from the time of termination to the time of the award exceeds the amount that the landlord could have obtained by acting reasonably in reletting the property (*i.e.,* "the amount of such rental loss that the lessee proves could have been reasonably avoided" (CC §1951.2(a)(2)); and
- any other amount necessary to compensate the landlord for any loss proximately caused by the tenant's failure to perform, or that reasonably could have been foreseen to be a likely result of the tenant's breach (CC §1951.2(a)(4)).

The landlord may also be able to recover the amount by which the unpaid rent for the balance of the term exceeds the amount that the landlord reasonably could have obtained by reletting the premises (CC §1951.2(a)(3)), but only if the lease so provides or if the landlord actually relets the premises and the reletting constitutes a reasonable, good faith effort to mitigate damages (CC §1951.2(c)). See *Millikan v American Spectrum Real Estate Servs. Cal., Inc.* (2004) 117 CA4th 1094, 12 CR3d 459. If either of these conditions is met, the landlord may then recover the amount by which the unpaid rent for the balance of the term exceeds the amount of rent loss that the tenant proves could reasonably have been avoided (discounted at the Federal Reserve Bank of San Francisco discount rate at the time of the award, plus 1 percent). CC §1951.2(b).

An obvious purpose of CC §1951.2 is to induce the landlord to relet the premises in order to mitigate damages. The statute expressly provides that the landlord's efforts to mitigate damages do not constitute a waiver of the right to recover damages. CC §1951.2(d). In the somewhat curious wording of CC §1951.2(a)(2)-(3) ("the amount of such rental loss that the lessee proves could have been reasonably avoided"), the legislature permits the tenant to offset against unpaid rent not only amounts actually received by the landlord as a result of the reletting, but also any amounts that the tenant can prove that the landlord should have obtained by making reasonable efforts to relet the property. If the landlord relets the abandoned premises for a higher rent, the breaching tenant can offset the increase against the amounts due under the old lease. The landlord is not entitled to recover a windfall, and the tenant may owe nothing or a reduced amount. *Willis v Soda Shoppes* (1982) 134 CA3d 899, 184 CR 761.

The tenant may defend against a claim for future rent by proving acts or statements by the landlord that constitute cancellation, waiver, or estoppel. *Desert Plaza Partnership v Waddell* (1986) 180 CA3d 805, 225 CR 775. See also CCP §1161.5, discussed in §§8.44, 8.49. Efforts to mitigate damages, however, *e.g.,* discussions with the tenant concerning a sublet, do not waive the lessor's right to recover damages under CC §1951.2. *Walt v Superior Court* (1992) 8 CA4th 1667, 1678, 11 CR2d 278 (distinguishing *Desert Plaza*).

The landlord's duty to mitigate damages does not require him or her to run the business that was operated by the tenant, nor to sell the property. Therefore, profits that the landlord makes by running the business or selling the property shall not be deducted from recoverable damages. *Lu v Grewal* (2005) 130 CA4th 841, 30 CR3d 623. But it might be appropriate for the landlord to mitigate damages by selling the property rather than reletting it, and if the landlord does so, it may recover reasonable selling expenses. See *Millikan v American Spectrum Real Estate Servs. Cal., Inc.* (2004) 117 CA4th 1094, 12 CR3d 459. In *Millikan,* the court stated that the tenant (a real estate leasing, selling, and management business that had leased the whole building) was free to prove that a greater rental loss could have been avoided by retaining the property, or that the sale price was unreasonably low. However, *Millikan* involved a lease that specifically provided for postjudgment damages under CC §1951.2(a)(3). The court in dicta opined that when the lease does not so provide, a sale is not the proper method of mitigation and reletting would be a necessary precondition to obtaining postjudgment damages. 117 CA4th at 1101. In *First Nat'l Mortgage Co. v Federal*

Realty Inv. Trust (ND Cal 2009) 633 F Supp 2d 985, the court held that the sale of property following the tenant's abandonment of a lease does not deprive the landlord of its available contract remedies under CC §1951.2. The landlord retains the right to claim rental loss accruing after the date of sale, except to the extent the breaching tenant can prove the rental loss was avoidable. A rental stream of a value equivalent to the sale proceeds can be determined using a market capitalization rate. 633 F Supp 2d at 999.

An action for damages under CC §1951.2 may be maintained even when the tenant has been allowed to remain in possession of the premises. *Walt v Superior Court, supra*.

NOTE: A lease may reserve landlord's rights under both CC §§1951.2 and 1951.4 (see §8.15), allowing the landlord to elect between them after the tenant defaults. For further discussion in a commercial leasing context, see Office Leasing: Drafting and Negotiating the Lease, chap 29 (Cal CEB 1996).

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§8.15 b. Continuation of Lease (CC §1951.4)

The landlord may continue the lease in force and collect the rent as it becomes due, on the tenant's breach of the lease and abandonment of the property, but only if the lease so provides and the landlord does not terminate the tenant's right to possession of the property. CC §1951.4(a)-(b). For this remedy to be available to the landlord, not only must the lease provide for it (CC §1951.4(a)), but the lease must also permit the tenant, subject only to reasonable limitations, to assign or sublet the leasehold estate (CC §1951.4(b)). Under CC §1951.4(a), a lease provision in substantially the following form satisfies the requirements of that subsection:

The lessor has the remedy described in California Civil Code §1951.4 (lessor may continue lease in effect after lessee's breach and abandonment and recover rent as it becomes due, if lessee has right to sublet or assign, subject only to reasonable limitations).

This provision is not the exclusive method of providing for the remedy of CC §1951.4 in the lease (CC §1951.4(a)), but it is a clear and useful method that lessors should consider incorporating in their leases if they intend to avail themselves of the remedy under the statute.

Thus, it is the tenant's duty to relet the premises in order to mitigate damages under such a lease provision. The landlord's actions to maintain or preserve the property, to relet it, to appoint a receiver to protect the landlord's interest, or to withhold consent to or terminate a subletting or assignment (provided the action does not violate the lessee's rights under CC §1951.4(b)) do not constitute a termination of the tenant's right to possession under this section. CC §1951.4(c).

PRACTICE TIP: In an inflationary market, the landlord might be better off terminating the tenancy under CC §1951.2 (see §8.14) rather than continuing the lease. This is so because the tenant is entitled to offset any increase in rent on reletting against the rent owed under the original lease. See *Willis v Soda Shoppes* (1982) 134 CA3d 899, 184 CR 761.

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§8.16 c. Liquidated Damages; Equitable Relief; Nonexclusivity of Remedies

A lease executed on or after July 1, 1971, may contain a liquidated damages provision (see CC §1671), and the provision is enforceable if reasonable. CC §§1951.5, 1952.2.

The statutory remedies for recovering damages on termination or abandonment (CC §§1951.2, 1951.4; see §§8.14-8.15) are not exclusive. Thus, the landlord is entitled to obtain equitable relief in addition to the statutory remedies when such relief is otherwise appropriate. CC §1951.8. For example, the landlord may have a receiver appointed without being held to have terminated the tenant's rights under the lease. CC §1951.4(c)(2). Moreover, nothing in the abandonment sections affects the parties' rights to proceed with actions for unlawful detainer or forcible entry or detainer. CC §1952(a). Bringing such an action does not affect the landlord's ability to obtain relief under the abandonment provisions, but no damages may be recovered in the subsequent action for detriment for which a claim for damages was made and determined in the previous action. CC §1952(b).

In *Harbor Island Holdings, LLC v Kim* (2003) 107 CA4th 790, 132 CR2d 406, the court held that a lease provision tripling the rent if the tenant breached any provision of the lease was an unenforceable penalty under CC §1671(b) rather than a valid liquidated damages clause, because it bore no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. The fact that the lease was a commercial lease negotiated by seasoned business entities, not a consumer lease between unsophisticated individuals, was held to have no bearing on the result.

It might be appropriate in some circumstances for the landlord to mitigate its damages by selling the property rather than reletting it, and if it does so, it may recover reasonable selling expenses. See *Millikan v American Spectrum Real Estate Servs. Cal., Inc.* (2004) 117 CA4th 1094, 12 CR3d 459, cited in §8.14. The sale of the property following the tenant's abandonment of a lease does not deprive the landlord of its available contract remedies under CC §1951.2. The landlord retains the right to claim rental loss accruing after the date of sale, except to the extent the breaching tenant can prove the rental loss was avoidable. A rental stream of a value equivalent to the sale proceeds can be determined using a market capitalization rate. See *First Nat'l Mortgage Co. v Federal Realty Inv. Trust* (ND Cal 2009) 633 F Supp 2d 985, 999.

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B. Surrender

§8.17 1. Historical Significance

A surrender is the voluntary relinquishment of the tenant's rights under the lease with either the express or implied consent of the landlord. *Welcome v Hess* (1891) 90 C 507, 27 P 369; *Scott v Mullins* (1962) 211 CA2d 51, 27 CR 269. An effective surrender terminates the tenancy and extinguishes the tenant's obligation to pay future rent. CC §1935; *Rognier v Harnett* (1941) 45 CA2d 570, 114 P2d 654; *Baker v Eilers Music Co.* (1915) 26 CA 371, 146 P 1056.

Before July 1971, the doctrine of surrender was important because the tenant could not abandon the premises and terminate the tenancy unilaterally (see §8.13). The tenant's abandonment, however, could be interpreted as an offer to surrender that the landlord accepted by reentering and reletting the premises or engaging in similar conduct. *Welcome v Hess, supra*; *Dorcich v Time Oil Co.* (1951) 103 CA2d 677, 230 P2d 10. Enactment of CC §§1951-1952.2 in 1970 rendered the concept of surrender less crucial because the tenant's breach and abandonment now terminate the tenancy without any need for the landlord's acceptance. Thus, surrender rarely arises in the context of an attempted abandonment.

Surrender may retain some significance in the limited situation in which a tenant makes an offer to surrender, but wishes to determine whether the landlord accepts the offer before abandoning the premises. Under a lease that is required by the statute of frauds (CC §1624(a)(3)) to be in writing, the tenant can surrender his or her rights only by written agreement or executed oral agreement (*Bonetti v Treat* (1891) 91 C 223, 27 P 612) or by operation of law (CCP §1971; *Welcome v Hess, supra*). If the landlord accepts the tenant's written offer to surrender the lease in writing, the tenant must vacate the premises within the time specified in the notice and may be evicted in an unlawful detainer action for failure to do so. CCP §1161(5).

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§8.18 2. Implied Surrender

A surrender by operation of law (implied surrender) may arise when the parties' conduct is so inconsistent with the terms of the lease or the landlord-tenant relationship as to indicate that both parties consider the lease to be terminated. Such a surrender is based on estoppel doctrine, *i.e.,* an implied surrender occurs when the parties' actions would be valid only if the lease were considered to be terminated. *Welcome v Hess* (1891) 90 C 507, 27 P 369; *Dorcich v Time Oil Co.* (1951) 103 CA2d 677, 230 P2d 10. The landlord's reentry and releting of the premises often constitutes an implied surrender. See *Welcome v Hess, supra*; *Dorcich v Time Oil Co., supra*. If the lease is covered by CC §1951.2 (see §8.14), the tenant's abandonment terminates the tenancy in any event, and the landlord's remedy is to reenter and relet the premises and then seek to recover any difference between contract rent and reasonable rent after the breach. Implied surrender may continue to be an issue, however, for a lease covered by CC §1951.4, under which the landlord's remedy is to treat the lease as continuing in effect, and to seek to recover the rent as it becomes due.

PRACTICE TIP: A landlord's conduct in taking possession of the premises might constitute acceptance of an offer to surrender and thus terminate the lease despite CC §1951.4. To avoid this problem, the landlord could send a letter to the tenant indicating his or her intention to invoke the lease provision permitting the landlord to use the CC §1951.4 remedy.

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§8.19 C. Landlord's Breach of Lease Covenant

The landlord's failure to comply with any of the material conditions of the lease constitutes a material failure of consideration. The landlord's breach, sometimes called "constructive eviction" (see §§3.6-3.8, 3.15B), entitles the tenant to terminate the lease and his or her obligation to perform under it. *Fong v Rossi* (1948) 87 CA2d 20, 195 P2d 854. A landlord who has breached a material covenant is not entitled to notice or to a reasonable opportunity to comply with the covenant; the tenant has the right to treat the lease as ended without giving notice. *Kulawitz v Pacific Woodenware & Paper Co.* (1944) 25 C2d 664, 155 P2d 24.

The breached covenant may be either express or implied. For example, breach of an express covenant not to lease the landlord's other property for specified purposes during the term of the lease entitles the tenant to terminate the lease. *Kulawitz v Pacific Woodenware & Paper Co*., *supra*. Breach of the landlord's duty to maintain the premises in a habitable condition may entitle the tenant to terminate the lease as a matter of statutory right (CC §1942(a); see §3.7) or as a breach of the implied warranty of habitability (*Green v Superior Court* (1974) 10 C3d 616, 111 CR 704; see §§3.16-3.48A). Breach of the implied covenant of quiet enjoyment also entitles the tenant to vacate the premises and to cease paying rent. See *Guntert v City of Stockton* (1976) 55 CA3d 131, 126 CR 690; *Petroleum Collections, Inc. v Swords* (1975) 48 CA3d 841, 122 CR 114. See also §§3.5-3.7.

The tenant may actually have a choice of remedies for constructive eviction. In *Petroleum Collections, Inc. v Swords, supra,* the court held that, on breach of the covenant of quiet enjoyment, the tenant's sole remedy is to terminate the lease, vacate the premises, and sue for damages. In *Guntert v City of Stockton, supra,* however, the court held that the tenant may choose either to treat the lease as terminated, or to keep the lease in effect, remain in possession, and sue for damages. See also *Marchese v Standard Realty & Dev. Co.* (1977) 74 CA3d 142, 141 CR 370. See the discussion of these cases in §§3.6-3.7, 3.15B.

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§8.20 D. Tenant's Termination of Periodic Tenancy (CC §§1946, 1946.1)

A periodic tenancy is one that has no fixed term. The most common periodic tenancy is a month-to-month rental agreement with an indefinite term. See §1.9. The tenant may terminate a month-to-month tenancy by giving at least 30 days' written notice at any time. CC §§1946, 1946.1(b); see *Kingston v Colburn* (1956) 139 CA2d 623, 293 P2d 805; *Vavuris v Pinelli* (1957) 147 CA2d 390, 305 P2d 149. Under CC §1946.1(e), after the landlord has given notice of termination, a residential tenant may also give notice to terminate the tenancy, provided that the tenant's notice is for a period at least as long as the term of the periodic tenancy (usually 30 days) and the proposed date of termination occurs before the landlord's proposed date of termination (usually 60 days).

After the tenant gives notice, rent is then due and payable to and including the date of termination. CC §1946. By an express agreement in a nonresidential lease, the parties may provide for a shorter notice period of not less than 7 days before the expiration of the term. CC §1946. If notice of less than 30 days is given, as provided for in the rental agreement, the notice should not take effect until the time for which the tenant has paid rent has elapsed.

Any other tenancy for an unspecified term is considered to be renewed at the term implied by law, and continues indefinitely until one of the parties gives written notice of an intent to terminate it. This notice must specify a period before termination at least as long as the implied term of the hiring, not to exceed 30 days, unless the notice period was reduced in the lease or rental agreement. CC §§1946, 1946.1.

If the tenant gives less than 30 days' notice (when 30 days is required), the notice is ineffective to terminate the tenancy on the date stated in the notice but may be held to be effective after the lapse of 30 days from the date of notice. *Kingston v Colburn, supra*. (For extensive discussion of notice requirements under CC §§1946, 1946.1, in the context of termination by the landlord, see §§8.69-8.80.)

If the tenant gives notice and then does not vacate the unit, the landlord may bring an unlawful detainer action (see §8.81).

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§8.21 E. Death of Tenant

When the landlord receives notice of the death of a month-to-month tenant, the rental agreement is automatically terminated; the tenant's heirs have no tenancy to inherit, although a valid assignment by the deceased will permit the assignee to remain on the premises until 30 days have passed since the last rent payment. *Miller & Desatnik Mgmt. Co. v Bullock* (1990) 221 CA3d Supp 13, 18, 270 CR 600. See also §§1.65, 8.4.

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§8.21A F. Servicemembers Civil Relief Act

In December 2003, the federal government enacted the Servicemembers Civil Relief Act (SCRA) (50 USC App §§501-596) (Pub L 108-189, 117 Stat 2835), which supersedes the previous Soldiers' and Sailors' Civil Relief Act of 1940. The new law applies to all military servicemembers and their dependents, whether they entered military service before or after signing a lease agreement. The law allows servicemembers to terminate a lease agreement on giving of 30 days' written notice, along with a copy of orders showing that they are going to be deployed for a period of over 90 days or have received a permanent change of duty station. The servicemembers are then liable for rental payments under the following formula: Take the date the notice is given by the servicemember; go to the next rental due date; add 30 days. 50 USC App §535. For further discussion, see §1.73.

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§8.21B G. Victim of Domestic Violence

Under CC §1946.7, which became effective on September 27, 2008, a tenant who is a victim of domestic violence, sexual assault, or stalking may terminate a fixed-term lease by providing written notice of lease termination within 60 days of specified court orders or police reports and be liable only for a maximum of 30 days' rent from the date of the written notice, unless the unit is re-rented during that period. Under this section, cotenants who are not victims are not relieved of their responsibilities under the rent agreement.

Code of Civil Procedure §1161(4) was also amended effective September 27, 2008, but it sunsets on January 1, 2012. It provides that a person's act of domestic violence, sexual assault, or stalking of a resident on the premises creates a rebuttable presumption affecting the burden of proof that the person has committed a nuisance and is subject to a 3-day notice to quit. See §8.58.

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III. TERMINATION BY LANDLORD: NOTICE ISSUES

A. Termination for No Stated Reason, for Tenant's Breach, or Because Landlord Is Going Out of Business

§8.22 1. Periodic Tenancies

The landlord usually terminates a periodic tenancy (defined in §§1.9 and 8.20) by serving a termination notice on the tenant that gives a notice period that is at least as long as the term of the periodic tenancy. Prior to January 1, 2003, for example, a 30-day notice was required for both commercial and residential tenancies when the landlord terminated a month-to-month tenancy without stating a reason (unless a shorter period was specified in the lease). CC §1946. See §§8.20, 8.69-8.70. Between January 1, 2003, and January 1, 2006, landlords were required by CC §1946.1 to give a 60-day notice to residential tenants to terminate a periodic tenancy, but that law was repealed by its own terms. Effective January 1, 2007, however, that section was re-enacted with minor changes, so currently and for an indefinite period (see Stats 2009, ch 347), landlords are required by CC §1946.1, in most situations, to give a 60-day notice to residential tenants to terminate a month-to-month or other periodic tenancy, unless any tenant has resided in the unit for less than 1 year or the unit is up for sale.

The 60-day notice requirement does not affect commercial tenancies. Nor does it impede the authority of local public entities to regulate the basis for an eviction of a residential tenant. CC §1946.1(g). In jurisdictions without local controls on evictions, no reason needs to be stated in the 30-day or 60-day notice terminating a tenancy. In jurisdictions with such controls, the landlord typically must state the reason in the notice for the eviction, in the language mandated by the local regulation, and must provide such additional information to the tenant with the notice as is set forth in such local regulations. See chap 7.

NOTE: The period for tenants giving notice of termination remains unchanged (*i.e.,* for a period "at least as long as the term of the periodic tenancy"). See CC §§1946, 1946.1(b). Also, under CC §1946.1(e), after the landlord has given a 60-day notice, a residential tenant may then give notice to terminate the tenancy, provided that the tenant's notice is for a period at least as long as the term of the periodic tenancy and the proposed termination date occurs before the landlord's proposed termination date.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.22A 2. Sale of Residential Unit

§8.22A 2. Sale of Residential Unit

When a landlord wishes to terminate a periodic tenancy to sell a residential unit, CC §1946.1(d) requires the use of a 30-day notice if all of the following apply at the time the landlord gives the notice:

- The dwelling or unit is alienable, separate from the title to any other dwelling unit (*i.e.,* a single-family home on a single lot or a condominium);
- The owner has contracted to sell the unit to a bona fide purchaser for value and has opened escrow meeting certain conditions to facilitate the sale;
- The purchaser is a natural person;
- The notice is given no more than 120 days after escrow is established;
- No other CC §1946.1 notice has previously been given to the tenant; and
- The purchaser in good faith intends to reside in the property for at least 1 year after termination of the tenancy.

PRACTICE TIP: It is not clear whether cooperatives or other subdivided interests are covered by the language in CC §1946.1(d). Compare it with the language in the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535), which references Bus & P C §11004.5. See CC §1954.52.

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§8.22B 3. Tenant Breaches

When the tenant has not paid the rent or has breached another covenant of the lease, the landlord must serve a 3-day notice that is phrased either "in the alternative" (*e.g.*, the tenant must either rectify the breach or quit the premises; see §§8.35-8.40) or not (*e.g.*, the tenant must quit the premises if the breach cannot be rectified; see §§8.50, 8.55-8.59). CCP §1161. Special notices apply to owners of mobilehomes being evicted from mobilehome parks (see §§6.62, 6.74). In addition to state law, mobilehome parks and long-term recreational vehicle parks may be subject to local rent control laws; CC §1954.25, banning commercial rent control, does not preempt local ordinances that apply to long-term recreational vehicle park tenants. *Griffith v County of Santa Cruz* (2000) 79 CA4th 1318, 94 CR2d 801.

Within these legal requirements, various other options are available to the landlord. For example, in the case of a month-to-month tenancy, the landlord may choose to serve a CC §1946 or §1946.1 termination notice even though the tenant has breached the rental agreement, so that the tenant does not have an opportunity to cure the breach. The landlord may also serve both a CC §1946 or §1946.1 notice and a 3-day notice to perform or quit in the case of a month-to-month tenancy and proceed under the 3-day notice if the tenant fails to cure the breach. In a rent-controlled jurisdiction, however, the CC §1946.1 notice applicable to residential tenancies must state an approved ground for eviction under the particular rent control law. For further discussion, see §§8.69-8.70.

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§8.22C 4. Ellis Act Evictions

The Ellis Act (Govt C §§7060-7060.7) (see §§7.64-7.64H) provides that in jurisdictions with "good cause" eviction ordinances a landlord may terminate a tenancy for the purpose of going out of the rental business by giving "extended notice" to the tenant. In *Channing Props. v City of Berkeley* (1992) 11 CA4th 88, 14 CR2d 32, the court interpreted the Ellis Act as permitting municipalities to require a notice period of up to 60 days. See §7.64H.

After *Channing Props.,* the Ellis Act was substantially amended and currently allows a city to require 120 days' notice to the city of the landlord's intent to withdraw the unit from rental housing use. Any city choosing to adopt that standard must follow the notice procedures stated in Govt C §7060.4(b), including special extension options to senior and disabled tenants. Specifically, if a tenant is at least 62 years of age or disabled, and has lived at the premises for at least 1 year before the delivery of the 120-day notice to the city, the date of permitted withdrawal of the unit from rental housing use for that tenant shall be extended to 1 year after the date of delivery of the notice to the city if the tenant gives the landlord written notice of his or her entitlement to the extension within 60 days of the delivery of the notice to the city. Govt C §7060.4(b). During the period that any such tenant continues to reside at the premises, the landlord is required to perform all obligations under the lease or rental agreement. Govt C §7060.4(b)(2), (c)(5)(B)-(C).

PRACTICE TIP: Because the 60-day period for a senior or disabled tenant to extend the tenancy runs from the date of delivery of the notice to the city and not the tenant, public records must be checked to guarantee the tenant's timely response. Although the statute is unclear, arguably the 120-day notice of intent to withdraw the unit is separate and distinct from and succeeds a 30-day or 60-day termination notice, because one component of the 120-day notice is that the landlord certify that "actions have been initiated as required by law to terminate any existing tenancies." Govt C §7060.4(b). But see interpretation of the Ellis Act in §§7.64F-7.64G.

In most rent-controlled jurisdictions, a copy of a 30-day, 60-day, or other termination notice must be served on the rent control board as well as on the tenant. Some rent control ordinances require that the landlord register the unit and serve the tenant with a copy of the certificate of registration with a 3-day notice. Failure to comply with this requirement is a defense to an eviction for nonpayment of rent. Some rent-controlled jurisdictions also require that the notice allege that the property is in compliance with the local rent and eviction control ordinance and with the warranty of habitability. See §§7.56, 7.73-7.75.

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§8.23 B. Common Pitfalls

Giving notice is a step where the landlord is likely to make a mistake that may be fatal to an unlawful detainer action based on the notice. A copy of the notice is usually attached to the complaint and incorporated by reference. If the notice is defective, the tenant may either file a demurrer (see §§10.29-10.31) or move to quash the special 5-day summons permitted in unlawful detainer actions (see §§10.18-10.23). *Parsons v Superior Court* (2007) 149 CA4th Supp 1, 58 CR3d 48; *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 194 CR 685. A defect that does not appear on the face of the complaint or that cannot be challenged by a motion to quash may be attacked only by means of a specific denial in the answer. CCP §430.30.

PRACTICE TIP: The tenant's attorney should ascertain at the initial client interview whether the notice was served properly (see §§8.62-8.67, 8.74-8.76, 10.31, 10.52, 12.35) and scrutinize it carefully to determine whether it can be attacked. Conversely, the landlord's attorney should avoid potential problems by ensuring that the notice to quit complies with statutory requirements and is served on the tenant properly.

Local rent control ordinances usually limit the grounds on which landlords may terminate residential tenancies. See §§7.53-7.76.

NOTE: A landlord may not evict by asserting that an eviction is needed in order to comply with statutory requirements that water heaters be braced to protect against earthquake movement. Health & S C §19211(c).

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§8.24 C. Strict Compliance With Notice Provisions Required for Unlawful Detainer

Because unlawful detainer law involves a forfeiture of the tenant's right to possession, the courts strictly construe the statutory procedures that regulate it and require that the landlord comply strictly with those procedures. See *Liebovich v Shahrokhkhany* (1997) 56 CA4th 511, 65 CR2d 457; *Kwok v Bergren* (1982) 130 CA3d 596, 599, 181 CR 795; *Vasey v California Dance Co.* (1977) 70 CA3d 742, 139 CR 72; *Briggs v Electronic Memories & Magnetics Corp.* (1975) 53 CA3d 900, 126 CR 34. It follows that the landlord's strict compliance with statutory notice requirements is a prerequisite to invoking the summary procedures of unlawful detainer. *Lamey v Masciotra* (1969) 273 CA2d 709, 713, 78 CR 344; *Baugh v Consumers Assocs.* (1966) 241 CA2d 672, 674, 50 CR 822; *Feder v Wreden Packing & Provision Co.* (1928) 89 CA 665, 670, 265 P 386. In general, there is no "substantial compliance" exception to statutory notice requirements for terminating a residential tenancy. But see *Schulman v Vera* (1980) 108 CA3d 552, 166 CR 620, in which the court permitted a substantial compliance exception in the case of a commercial lease. In some jurisdictions, courts have allowed an exception to strict compliance if the rent demanded in the notice was higher than the actual rent but the difference in amount was "de minimis." See discussion in §8.37.

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§8.25 D. Remedies When No Notice Given: Ejectment; Quiet Title

A landlord who wants to evict a tenant for breach of the lease without giving the required 3-day notice must proceed by the nonsummary actions of ejectment (*Samuels v Singer* (1934) 1 CA2d 545, 549, 36 P2d 1098) or quiet title (*Universal Milk Co. v Wood* (1928) 205 C 751, 755, 272 P 745; *City of Stockton v Stockton Plaza Corp.* (1968) 261 CA2d 639, 656, 68 CR 266). In *Canal-Randolph Anaheim, Inc. v Wilkoski* (1978) 78 CA3d 477, 144 CR 474, the landlord filed an unlawful detainer action in superior court. At trial, the court found the 3-day notice defective, and announced its intention to rule for the tenant. The landlord then moved for relief in ejectment. The court denied the motion on the ground that it lacked authority to grant it. The court of appeal reversed the trial court's ruling, holding that (a) the motion was proper, and (b) the superior court had authority to enter a judgment of ejectment in a proper case. This strategy might be unavailable in a rent control jurisdiction, however, because rent control laws generally require "just cause" eviction and because the basis for the eviction must be stated on the face of the notice.

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IV. TERMINATION FOR TENANT'S BREACH: 3-DAY NOTICE

§8.26 A. Notice Required Before Filing Unlawful Detainer Action

The prerequisites for maintaining an unlawful detainer action are set forth in CCP §1161. A 3-day notice is a necessary basis for the action in the following instances of the tenant's breach:

- Rent overdue and tenant in possession (CCP §1161(2); see §§8.35-8.45);
- Violation of a covenant in the lease other than payment of rent (CCP §1161(3); see §§8.46-8.54); and
- Violation of a covenant against subletting, assignment, waste, maintaining a nuisance, including acts of domestic violence, sexual assault, or stalking, or using the premises for an unlawful purpose (CCP §1161(4); see §§8.55-8.59).

On unlawful detainer actions, see chaps 9-13.

WARNING: A 3-day notice is the minimum amount of notice required to be given to a tenant for breach of a provision in a lease. However, the lease may require that more notice be given (*e.g.,* 5-day notice for breach of any covenant to pay rent and 10-day notice for breach of any other covenant). Therefore, counsel should always review the lease terms applicable to the type of breach at issue before serving (if landlord) or accepting as valid (if tenant) any 3-day notice.

Special notice periods apply to owners of mobilehomes being evicted from mobilehome parks (see §§6.62, 6.74).

Some rent control ordinances require that the landlord register the unit and serve the tenant with a copy of the certificate of registration with a 3-day notice. Failure to comply with this requirement is a defense to an eviction for nonpayment of rent. Some rent-controlled jurisdictions also require that the notice allege that the property is in compliance with the local rent and eviction control ordinance and with the warranty of habitability. See §§7.56, 7.73-7.75.

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§8.26A B. Effect of Debt Collection Practices Act

The federal Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692o) provides that a "debt collector" (one who regularly tries to collect any consumer debt for another) must tell the consumer, in the initial communication with the consumer or within 5 days thereafter, that he or she has 30 days after receipt of the communication to dispute the validity of the debt; if the consumer does so, the debt collector must send verification of the debt to the consumer.

In *Romea v Heiberger & Assocs.* (2d Cir 1998) 163 F3d 111, the court held that a law firm violated the FDCPA by serving a standard 3-day notice to pay or quit served as a prerequisite to bringing an eviction action in New York. The court affirmed the trial court's refusal to dismiss a class action lawsuit brought by tenants against the law firm. (The Act allows suits for actual damages, $1000 statutory damages, and attorney fees.) 15 USC §1692k(a).

Although the Ninth Circuit has not yet addressed this identical issue, *Romea* relied in part on a Ninth Circuit case that held that the FDCPA applies to a law firm's efforts to collect on a bounced check. *Charles v Lundgren & Assocs.* (9th Cir 1997) 119 F3d 739. Anecdotal reports indicate that some California state judges hearing unlawful detainers follow the *Romea* decision, while others do not.

The FDCPA applies only to "debt collectors," and that term might include law firms that "regularly" try to collect debts for another. *Romea* did not deal with this "regularity" issue, but several other cases have. See, *e.g., White v Simonson & Cohen PC* (ED NY 1998) 23 F Supp 2d 273 and cases cited therein, noting that the "critical factor" about "regularity" is the firm's volume of debt collection activity. See also *Garrett v Derbes* (5th Cir 1997) 110 F3d 317; *Nance v Petty, Livingston, Dawson, & Devening* (WD Va 1994) 881 F Supp 223; *Catherman v First State Bank* (Tex 1990) 796 SW2d 299. A law firm that regularly uses litigation to collect consumer debts is a "debt collector." *Heintz v Jenkins* (1995) 514 US 291, 131 L Ed 2d 395, 115 S Ct 1489; *Fox v Citicorp Credit Servs.* (9th Cir 1994) 15 F3d 1507, 1512.

If the FDCPA applies, a debt collector must—within 5 days of the initial communication to a consumer—send a "written validation" which states the amount of the debt, the name of the creditor, and that the consumer has 30 days to dispute the validity of debt (in which case the collector will send verification). 15 USC §1692g. This, in effect, means that a lawyer who is a "debt collector" may not file an unlawful detainer suit until the 30 days has expired without a request for verification.

Two New York cases have held that a violation of the FDCPA may be raised as an affirmative defense in an eviction case. See *Eina Realty v Calixte* (1998) 679 NYS2d 796; *Dearie v Hunter* (1998) 676 NYS2d 896.

The *Romea* decision has stirred much debate among practitioners. Some argue that an unlawful detainer action is not a debt collection process because it is primarily an action to recover possession. Others believe a landlord's attorney may safely avoid being characterized as a debt collector under the FDCPA by never signing a 3-day notice to pay rent or quit, and having only the owner (or the property manager; see *Franceschi v Mautner-Glick Corp.* (SD NY 1998) 22 F Supp 2d 250) do that. The uncertainty exists because a complaint and summons, if it is the first contact the attorney has with the debtor, is exempt from the FDCPA's written validation requirement. See 15 USC §1692g(d). Until the courts or the legislature resolve the ambiguities in the FDCPA, landlord attorneys should proceed with caution.

PRACTICE TIP: One option (in addition to not having the landlord's attorney sign the 3-day notice) is to send the validation notice to the tenant before serving the complaint to state that the unlawful detainer action does not preclude the tenant's rights to validation under the FDCPA. In most instances, the validation and certification of the debt could be accomplished while the action is proceeding, but before the action is tried. The most conservative approach is to send the validation notice as soon as possible after the 3-day notice and wait the full 30 days to file the action. Note that any of these alternatives is capable of confusing a tenant, because of the inconsistencies between the notice periods in the state unlawful detainer procedures and those in the FDCPA.

For further discussion of the FDCPA, see §13.74. See also Debt Collection Practice in California, chaps 1, 4 (2d ed Cal CEB 1999).

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§8.27 C. Effect of Lease Provision Altering Notice Requirements

A provision in a residential lease that modifies or waives the tenant's right to any notice required by law is void under CC §1953(a)(3). A lease for commercial premises may provide notice requirements different from those provided by CCP §1161. *Folberg v Clara G.R. Kinney Co.* (1980) 104 CA3d 136, 140, 163 CR 426. See also CC §§1946, 1946.1, discussed in §8.70; *Schulman v Vera* (1980) 108 CA3d 552, 563, 166 CR 620.

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D. Computation of Notice Period

§8.28 1. Computation Rules (CCP §1161)

A cause of action for unlawful detainer does not accrue until after 3 days have elapsed. See CCP §1161; *Downing v Cutting Packing Co.* (1920) 183 C 91, 95, 190 P 455. After a 3-day notice is served, 3 full days must pass before the complaint can be filed, because the "time in which any act provided by law is to be done is computed by excluding the first day and including the last." CCP §12. If the third day falls on a holiday, the complaint may be filed the day after the next business day. See CCP §12a. Legal holidays are Saturday, Sunday, and the other days listed or defined in Govt C §6700 and CCP §§10, 12a, 12b, and 135. Thus, for example, if a 3-day notice is served on Wednesday, the complaint may not be filed until the following Tuesday. Wednesday is not counted, because the first day is excluded. CCP §12. The third day falls on Saturday. Because Saturday and Sunday are holidays, however, the rent may be paid on Monday, the next business day. CCP §12a. If it is not paid, the landlord may file the complaint on Tuesday. Landlords often serve the notice on Friday, leaving the tenant only the weekend and Monday to pay the rent. If the tenant fails to pay the rent by Monday, the landlord may file the complaint on Tuesday.

How holidays stretch the time under the 3-day notice was demonstrated in *Lamanna v Vognar* (1993) 17 CA4th Supp 4, 22 CR2d 501. In *Lamanna,* the landlord served a 3-day notice to pay or quit on Wednesday, May 20, and filed an unlawful detainer action on Tuesday, May 26. The court held that the action was filed prematurely. The first day (May 20) did not count in the 3 days, so the third day was Saturday, May 23. But that day, the following day (Sunday), and the next day (Memorial Day) were all legal holidays. Therefore, the third day became Tuesday, May 26, and the tenant had until the end of that day to pay the rent or quit. The court held that the earliest the landlord could file the unlawful detainer action was Wednesday, May 27. For further discussion of the effects of holidays on the notice period, including a list of legal holidays, see California Eviction Defense Manual §§6.7, 6.25-6.26 (2d ed Cal CEB 1993).

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§8.29 2. Computation When Notice Served by Mail

Attorneys representing tenants frequently argue that a landlord may not file an unlawful detainer action until 8 days after a 3-day notice has been posted and mailed (or served by substituted service and mailed). Under CCP §1013, when a legally required notice is served by mail, the time for responding to it is extended 5 calendar days if the address and the place of mailing are within California, 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. See *People v $20,000 U.S. Currency* (1991) 235 CA3d 682, 286 CR 746 (CCP §1013 applies whenever a prescribed time period is triggered by "service" of a notice). See also *Davidson v Quinn* (1982) 138 CA3d Supp 9, 10 n2, 188 CR 421, discussed in §8.65.

Attorneys representing landlords assert that the extensions of time under CCP §1013 do not apply to notices served as a prerequisite to an unlawful detainer filing. See *Losornio v Motta* (1998) 67 CA4th 110, 78 CR2d 799, a decision of the Fourth Appellate District, and *Walters v Meyers* (1990) 226 CA3d Supp 15, 18, 277 CR 316, both of which are discussed in §8.65.

Landlord attorneys have the additional argument that the extension of time granted by CCP §1013 does not apply to service of prelitigation eviction notices because they are not simply "mailed." The landlord also either leaves a copy with a person on the premises or at the tenant's place of business (CCP §1162(2)), or posts a copy of the notice on the premises (CCP §1162(3)). See §§8.64-8.65 on these methods of service. See also §9.44.

PRACTICE TIP: Both landlord and tenant attorneys should be familiar with the appellate district cases and the particular trial judge's interpretation of the applicability of CCP §1013 to landlord-tenant notices, and counsel their clients accordingly.

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E. Form and Content of Notice

§8.30 1. In Writing; Signature Not Required

Under CCP §1161, the 3-day notice to quit must be in writing; oral notice will not suffice.

There is no express requirement in CCP §1161 that the 3-day notice be signed; therefore, it appears that an unsigned notice will terminate the tenancy. See *Cavanaugh v High* (1960) 182 CA2d 714, 721, 6 CR 525 (unsigned notice held sufficient when personally served on tenant by landlord). If the notice is prepared and served by someone other than the landlord, such as an attorney or agent, the landlord may be required to prove that he or she authorized the attorney or agent to serve the notice. *Earl Orchard Co. v Fava* (1902) 138 C 76, 70 P 1073; *Felton v Millard* (1889) 81 C 540, 21 P 533. See §8.71 for discussion of this point in connection with a CC §1946 or §1946.1 notice. When only one of several landlords signs the notice, it may be necessary to show that the co-lessors authorized or ratified service of the notice. See *Axis Petroleum Co. v Taylor* (1941) 42 CA2d 389, 108 P2d 978.

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§8.31 2. Description of Premises

The landlord should identify the premises with some specificity in the notice, although CCP §1161 does not expressly require a description. The unlawful detainer complaint that follows the notice must "describe the premises with reasonable certainty." CCP §1166(a)(3). See §9.37. Because CCP §1161 requires that the notice demand the tenant's surrender of possession "of the property," it follows that the property should be described in the notice. Any description that enables the tenant to identify the property (*e.g.,* the street address or other locational information) will probably be held sufficient. Even a partially erroneous description will not render the notice defective, unless the tenant shows that the mistake was detrimentally misleading. *King v Connolly* (1872) 44 C 236, 238.

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§8.31A 3. Description of Breach; Demand for Cure

A 3-day notice must specify the nature of the breach (*e.g.*, nonpayment of rent or other breach of covenant) and demand that the tenant cure the breach within 3 days (see §8.33) or relinquish possession (see §8.32).

If the 3-day notice is based on the tenant's nonpayment of rent, the notice must also specify the amount due and to whom and where to pay it. See §§8.35-8.40. See form in §8.41. If the 3-day notice is based on a breach of another covenant in the lease or rental agreement or other ground constituting unlawful detainer, see §§8.46-8.59 for additional 3-day notice requirements and §§8.53-8.54 for notice forms.

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§8.32 4. Unequivocal Demand for Possession

A 3-day notice is ineffective to terminate the tenancy if it does not clearly, positively, and unequivocally state the landlord's intention to repossess the premises. *Turney v Collins* (1941) 48 CA2d 381, 119 P2d 954. In *Horton-Howard v Payton* (1919) 44 CA 108, 186 P 167, an unlawful detainer action based on breach of a covenant, the notice sought possession, but also requested that the tenant make a full statement regarding the breach. The court held that a request for such information rendered the demand for possession ambiguous, because it suggested that the landlord wanted to resolve the breach without evicting the tenant.

Of course, a demand for possession is not rendered equivocal or unclear merely because the notice is stated in the "alternative" form required by CCP §1161, *i.e.,* a demand that the tenant either perform the covenant allegedly breached or vacate the premises (see §§8.36, 8.50).

PRACTICE TIP: Landlords often serve a month-to-month tenant who fails to pay rent with both a 3-day notice to pay rent or quit and a 30-day or 60-day notice to quit. Such notices should make the tenant's situation clear. It could be argued that these notices are invalid for lack of clarity if they are so worded that the tenant believes that paying rent will allow the tenancy to continue indefinitely.

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§8.33 5. Tenant Has 3 Days to Pay Rent or Perform Covenant

The purpose of the 3-day notice period for a rectifiable breach of the lease is to give the tenant an opportunity to perform within that period. *Haydell v Silva* (1962) 201 CA2d 20, 19 CR 705. It is axiomatic, therefore, that the notice should indicate clearly that the tenant has 3 days in which to rectify the breach. In *Berryman v Gibson* (1908) 7 CA 679, 681, 95 P 671, a notice to pay rent or quit was held sufficient even though it did not refer to the 3 days allowed by CCP §1161 for the tenant to act on it. In light of the purpose of the notice period, landlords' counsel should be cautious about relying on *Berryman*. The decision probably means merely that a notice may be upheld if the tenant is given 3 days to act on it, presuming that the tenant does not show that he or she would have complied with the notice if notified of the 3-day limit.

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§8.34 6. Election of Forfeiture

The landlord may obtain a provision in an unlawful detainer judgment declaring the lease forfeited only if the notice to quit indicated the landlord's election to declare a forfeiture. (On the effect of a judgment declaring a forfeiture of the lease, see §13.17.) The notice must use some language indicating forfeiture in addition to demanding that the tenant perform a covenant of the lease or quit the premises. See §§8.41, 8.53-8.54.

A 3-day notice that merely demands that the tenant pay rent or surrender possession does not sufficiently indicate the landlord's intent to declare a forfeiture. See *Neuhaus v Norgard* (1934) 140 CA 735, 738, 35 P2d 1039. The notice need not, however, specifically use the word "forfeiture"; any language showing the landlord's intent to treat the lease as terminated should suffice. The court in *Neuhaus* held that a 3-day notice that included the clause, "or the said lessors will institute legal proceedings against you to recover possession of said premises with treble rent," indicated the landlord's intention to elect a forfeiture.

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F. Bases for Termination With 3 Days' Notice

§8.35 1. Failure to Pay Rent: Purpose and Effect of Notice

The 3-day notice period (see CCP §1161(2)) is intended to give the tenant the opportunity to pay the rent within the 3 days, and thus to cure the default and remain in possession. *Haydell v Silva* (1962) 201 CA2d 20, 23, 19 CR 705. If the tenant pays the rent within this time, the lease or rental agreement remains in effect as if the default had never occurred. *Downing v Cutting Packing Co.* (1920) 183 C 91, 190 P 455.

If the tenant quits the premises within the 3-day period or is thereafter evicted, the tenant's liability for any future rent due under the lease is governed by CC §1951.2, discussed in §8.14.

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a. Demand for Rent

§8.36 (1) Stated "In the Alternative"

When an unlawful detainer action is based on default in rent, the 3-day notice must include a demand for the rent. The demand must state the amount of rent due and offer an alternative demand that the tenant quit the premises (*e.g.,* either pay the rent or leave the premises). CCP §1161(2).

A notice that is not stated "in the alternative" does not render the defaulting tenant guilty of an unlawful detainer. *Hinman v Wagnon* (1959) 172 CA2d 24, 341 P2d 749.

PRACTICE TIP: Landlords' attorneys should be aware of this common notice defect. Landlords often believe that a lease provision for termination on breach permits them to avoid offering an alternative in the notice. For tenants' attorneys, landlords' failure to give this type of notice may form the basis for a successful demurrer (if the notice is attached to the complaint) or defense to the action (if it is not attached).

STRATEGIES: Landlords may consider other options to beginning eviction procedures. In areas where it may be difficult to find a new tenant, the landlord may wish to renegotiate the lease provisions with the existing tenant. See Puleo and Polger, *Landlord's Dilemma When Faced With a Defaulting Tenant: Negotiate or Litigate?* 29 CEB Real Prop L Rep 265 (May 2006).

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§8.37 (2) Amount Due: Residential Leases

A common defect of a 3-day notice to quit is an erroneous designation of the exact amount of rent due. Under CCP §1161(2) the notice must state "the amount which is due." This requirement has been interpreted to require both that the notice demand the rent due (*Gage v Bates* (1870) 40 C 384) and that the amount demanded be no more than the exact sum due (*Levitz Furniture Co. v Wingtip Communications, Inc.* (2001) 86 CA4th 1035, 103 CR2d 656; *Baugh v Consumers Assocs.* (1966) 241 CA2d 672, 50 CR 822). A 3-day notice that demands rent in excess of that allowable under an applicable rent control ordinance is invalid. *Dertiman v Almey* (1949) 92 CA2d 724, 207 P2d 615. In *Nourafchan v Miner* (1985) 169 CA3d 746, 753, 215 CR 450, the court held that a 3-day notice that overstated the amount of rent due by $5.96 was invalid.

PRACTICE TIP: Tenant lawyers should verify whether the landlord complied with CC §827(b)(2)-(3) in raising the rent by more than 10 percent on or after January 1, 2001. See §3.65A. If a rent increase of more than 10 percent in the preceding 12 months was given on only 30 days' notice, the landlord will have collected excess rent for one month.

In *Gruzen v Henry* (1978) 84 CA3d 515, 148 CR 573, however, the court refused to reverse a judgment based on a 3-day notice demanding more than the amount due, rejecting the tenants' argument that an eviction was improper because the notice "demanded accrued rent in the amount of $600 whereas the judgment was for only $582." 84 CA3d at 519. The court did not mention the general rule that a 3-day notice may demand no more than the rent actually due.

A notice that merely demands "the rent due," without stating any amount, does not support an unlawful detainer action. See *J. B. Hill Co. v Pinque* (1919) 179 C 759, 762, 178 P 952. When the precise amount of rent due, however, is peculiarly within the tenant's knowledge (*e.g.,* rent based on percentage of tenant's crop), the 3-day notice may leave calculation of the precise amount to the tenant. *Valov v Tank* (1985) 168 CA3d 867, 214 CR 546.

If the amount demanded in the notice exceeds a judgment later entered on it, the notice is insufficient to support the judgment for rent. *Werner v Sargeant* (1953) 121 CA2d 833, 264 P2d 217. A demand for a sum less than the precise amount due, however, will probably not invalidate the notice. See *Cavanaugh v High* (1960) 182 CA2d 714, 722, 6 CR 525 (notice demanding only September rent held valid although October rent had accrued by time of suit).

In *Canal-Randolph Anaheim, Inc. v Wilkoski* (1978) 78 CA3d 477, 144 CR 474, the court reaffirmed the rule that the 3-day notice must demand no more than the exact amount due, but added a footnote suggesting that the rule be reexamined. The court suggested that when the amount stated in the notice is incorrect, but it is shown at trial that a substantial amount is due, multiplicity of litigation could be avoided by the court's entering judgment in favor of the tenant on the condition that he or she pay the rent within a specified period of time. 78 CA3d at 488 n4. The *Canal-Randolph* court may have overlooked the fact that an inaccurate statement of the rent amount due may confuse the tenant, and deter him or her from paying either the amount demanded or the amount actually due. This would frustrate a major purpose of the demand requirement: encouraging tenants to pay arrearages, and thus to avoid unnecessary litigation (see §8.36). Landlords' attorneys might argue, however, that a tenant would not be harmed by a conditional judgment unless he or she did not have the ability to pay the rent.

Arguably, any weakening of the strict requirement of accuracy in the demand might tax judicial resources rather than conserve them. On the other hand, landlord advocates might argue that the landlord should not be penalized by losing the right to obtain possession because of negligently caused inaccuracies in the notice when a substantial amount of rent is nonetheless due. See §9.6.

PRACTICE TIP: A landlord should be counseled to exercise caution if the landlord prepares the 3-day notice and the tenant attempts to cure the default. Civil Code §1947.3 provides that a landlord or landlord's agent may not require cash as the exclusive form of payment of rent or security deposit, unless the tenant has previously attempted to pay with a check drawn on insufficient funds or stopped payment, in which case the landlord may demand cash for up to the next 3 months. Any waiver of the tenant's rights under this section is void.

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§8.37A (3) Amount Due: Commercial Leases

In commercial leases, the landlord may state in the 3-day notice an estimated amount due, as long as it is clearly identified as an estimate. CCP §1161.1. Code of Civil Procedure §1161(2) limits the rents that may be listed on a 3-day notice to pay rent or quit to those due within one year before service of the notice. In commercial cases only, if the landlord states that the amount of rent is an estimate under CCP §1161.1, seeking rent that is more than one year old will not invalidate the notice as long as the estimate is no more than 20 percent above the amount due within the one-year period before service of the notice. *Levitz Furniture Co. v Wingtip Communications, Inc.* (2001) 86 CA4th 1035, 103 CR2d 656. For further discussion of estimated rent in 3-day notices, see California Eviction Defense Manual §19.3 (2d ed Cal CEB 1993).

Code of Civil Procedure §1161.1(c) permits the landlord to continue an unlawful detainer action after accepting partial payment of rent only if the landlord has provided actual notice in writing to the tenant that acceptance of partial payment will not waive the landlord's right to recover possession. In *Woodman Partners v Sofa U Love* (2001) 94 CA4th 766, 114 CR2d 566, the landlord accepted partial payment while the eviction lawsuit was pending. Although the landlord's 3-day notice to pay or quit failed to include the language required by subsection (c), the lease itself contained the required language. The court held that the lease gave the tenant the actual notice required by the statute.

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§8.37B (4) To Whom and Where Rent Must Be Paid

Code of Civil Procedure §1161(2) provides that a 3-day notice to pay rent or quit must include the name, phone number, and address of the person to whom rent must be paid and, if rent may be paid personally, the usual days and hours that person will be available. If the address does not allow for personal delivery (*e.g.*, a post office box) and the tenant mails the rent to that address, the rent is deemed paid on the date posted if the tenant shows proof of mailing. The notice may instead designate the name and street address and the account number of a financial institution within five miles of the rental property to which the tenant may send or deposit the rent. The notice may direct the tenant to make an electronic funds transfer, if such a procedure has been previously established with the tenant.

This requirement applies to notices for both residential and commercial tenancies.

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§8.38 (5) Limitation to Rent Due Within Year Preceding Notice

A 3-day notice to pay rent or quit may be served at any time within 1 year after the rent becomes due. CCP §1161(2). Thus, the landlord is apparently limited to demanding rent that becomes due within the year preceding service of the notice. Although a landlord usually serves a notice to pay rent or quit within a relatively short period after rent is due and unpaid, problems may arise under this statute—primarily as a result of the landlord's accounting procedures.

EXAMPLE: If a tenant fails to pay the March 2001 rent, but then pays the April rent, the landlord may credit the tenant for paying the April rent, and consider the March rent to be unpaid. After 1 year has passed, if the landlord shows the March 2001 rent to be still unpaid but the tenant to be otherwise current, an unlawful detainer action based on nonpayment of the March rent is now precluded. Had the landlord followed the more common practice of considering the payments to be late each month, after 1 year the tenant would be late on the last month's payment and CCP §1161(2) would not invalidate the notice.

A more complicated problem arises if the tenant in this example stops paying rent altogether in April 2002, and the landlord serves a 3-day notice in June. Presumably, if the 3-day notice includes a demand for the March 2001 rent as well as the April and May 2002 rent payments, the entire notice would be ineffective under the rule that the notice must demand the exact amount due (see §8.37). Again, the landlord's bookkeeping method would have invalidated the notice.

Because each periodic monthly rental payment is a severable contractual obligation, the statute of limitations begins to run on each monthly payment from the time it is due. *Tsemetzin v Coast Fed. Sav. & Loan Ass'n* (1997) 57 CA4th 1334, 67 CR2d 726.

The 1-year limitation imposed by CCP §1161(2) applies only to periodic payments that the lease designates as "rent." Other payments due (*e.g.,* for maintenance of common areas in a shopping center lease) are enforceable under CCP §1161(3) (breach of covenant), so the 1-year limitation does not apply to them. *Cal-American Income Prop. Fund IV v Ho* (1984) 161 CA3d 583, 207 CR 532. Although the tenant's failure to pay those charges may serve as a basis for eviction, the charges may not be recovered in an unlawful detainer action as damages caused by the holdover. See §13.19.

A landlord who wishes to recover rent due beyond one year may file a civil complaint for money damages on a standard 30-day summons, but may not seek such sums in an unlawful detainer case. A commercial landlord may serve a notice that states the rent due in a "reasonably estimated amount" under CCP §1161.1, and as long as the total amount of rent sought is not more than 20 percent above the amount due within the year before service of the notice the unlawful detainer case can proceed subject to proof of the true amount due. *Levitz Furniture Co. v Wingtip Communications, Inc.* (2001) 86 CA4th 1035, 103 CR2d 656. In *Levitz*, the landlord's notice of estimated rent due explicitly included rent more than one year overdue. The court held that the landlord could not recover such rent in the unlawful detainer action, but the inclusion did not invalidate the notice. If including rent more than one year old results in a sum more than 20 percent above the amount of rent due within the one-year period before service of the notice, CCP §1161(2) would invalidate the notice.

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b. Demand for Interest and Late Charges

§8.39 (1) Interest and Late Charges May Be Includable in Notice

Under CCP §1161(2), a 3-day notice to pay rent or quit may be served "after default in the payment of rent," and the notice must require "its payment, stating the amount which is due." No mention is made of charges other than rent, *e.g.,* late charges, interest, attorney fees, fines, compensation for damage to the premises. From this language, an argument could be made that a notice would be ineffective if it included any amounts due that were not rent, because the sum demanded would exceed the amount of rent due. See *Jack v Sinsheimer* (1899) 125 C 563, 566, 58 P 130; *Werner v Sargeant* (1953) 121 CA2d 833, 264 P2d 217. See §§4.43A, 8.37.

Under California case law, however, at least interest and possibly late charges may be included in the notice. In *Canal-Randolph Anaheim, Inc. v Wilkoski* (1978) 78 CA3d 477, 144 CR 474, the 3-day notice included a demand for the unpaid rent and for interest on the unpaid rent as specified in the lease. The court held that inclusion of the demand for interest did not invalidate the notice" because "the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." 78 CA3d at 492.

PRACTICE TIP: In most residential tenancy cases, any charge other than rent is best omitted from a notice to pay rent or vacate. If the late charge is small, the risk of challenge for defective notice far outweighs the potential benefits. If the late charge is large, the amount of rent charged will usually also be large and the potential loss threatened by any resulting delay (and possible res judicata bar to any future suit for the same rent installments) dictates against risking inclusion of a late charge in a notice. See also Practice Tip in §1.41.

Items that may not be included in a 3-day notice to pay rent or quit under CCP §1161(2) may be included in a 3-day notice served on the tenant under CCP §1161(3) for failure to perform covenants other than payment of rent. See §§8.46-8.54. The landlord, for example, may serve the 3-day notice to pay rent or quit at the same time as the 3-day notice for failure to perform covenants or quit, and eliminate the risk of the court finding that the sum demanded exceeds the amount of rent due either because it was not properly deemed "rent" or because the charge identified in the lease as "rent" may be an unenforceable penalty, *e.g.,* late charges, or unreasonable liquidated damages.

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§8.40 (2) Avoiding Excessive Late Charges

Although late charges may arguably be included in a 3-day notice to pay rent or quit (see §§1.41, 4.43A, 8.39), counsel for both landlords and tenants should examine the facts carefully to determine whether the late charge is excessive. A late charge is a liquidated damages provision; to be valid, it must meet the requirements of CC §1671. *Ridgley v Topa Thrift & Loan Ass'n* (1998) 17 C4th 970, 73 CR2d 378; *Garrett v Coast & S. Fed. Sav. & Loan Ass'n* (1973) 9 C3d 731, 738, 108 CR 845. See also *Utility Consumers' Action Network, Inc. v AT&T Broadband of S. Cal.* (2006) 135 CA4th 1023, 37 CR3d 827. But see *Jack v Sinsheimer* (1899) 125 C 563, 566, 58 P 130 (late charges not permitted in action for possession in any event).

The first requirement of CC §1671 is that the landlord in a residential tenancy must show that it would be "impracticable" or "extremely difficult" to fix the amount of actual damages whenever the tenant pays the rent late. See CC §1671(d); *Orozco v Casimiro* (2004) 121 CA4th Supp 7, 17 CR3d 175. See also *Garrett v Coast & S. Fed. Sav. & Loan Ass'n, supra*. The landlord should be able to prove this if it is difficult to determine the actual administrative cost (in addition to loss of interest) of processing a late payment. But see *McCarthy v Tally* (1956) 46 C2d 577, 297 P2d 981 (no presumption that damages resulting from tenant's breach of covenant to pay rent are difficult to fix).

The second requirement of CC §1671 is that the landlord must show that the late charge is based on a "reasonable endeavor to estimate a fair compensation for a loss which would be sustained on the default" of the tenant. See *Garrett v Coast & S. Fed. Sav. & Loan Ass'n* (1973) 9 C3d 731, 740, 108 CR 845. (In commercial tenancies, this burden of proof was shifted onto the tenant, who must prove that the late charge was also "unreasonable under the circumstances existing at the time" the lease was executed. See CC §1671(b), enacted after *Garrett*.)

Despite the amendments to CC §1671 after the *Garrett* decision, the supreme court reaffirmed the invalidity of excessive late charges. See *Ridgley v Topa Thrift & Loan Ass'n* (1998) 17 C4th 970, 73 CR2d 378. The court in *Ridgley* held that nothing in the 1977 legislation indicated any intent to "abrogate *Garrett*'s analysis of unjustified late fees as unenforceable penalties." 17 C4th at 981 n6. See also *Perdue v Crocker Nat'l Bank* (1985) 38 C3d 913, 931, 216 CR 345.

If, for example, the late charge is 20 percent of the rent, then the landlord clearly intended it as a penalty to coerce timely payment of rent, rather than as compensation for any loss caused by the late payment. Such a penalty provision in a lease is invalid. See *Garrett v Coast & S. Fed. Sav. & Loan Ass'n, supra*.

Civil Code §2954.4(a) also provides some guidance on the amount that the landlord may charge, limiting late charges in residential mortgages to 6 percent of the payment due or $5, whichever is greater. A late charge of 1-1/2 percent of the overdue balance was upheld in *Fox v Federated Dep't Stores* (1979) 94 CA3d 867, 156 CR 893. The court noted that the charge could not be a penalty because it was too low to cover the cost of processing late payments.

For further discussion of late charges, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 8 (4th ed Cal CEB 2009).

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.41 c. Form: 3-Day Notice to Pay Rent or Quit

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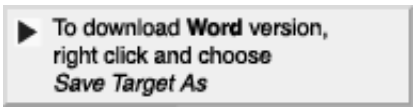

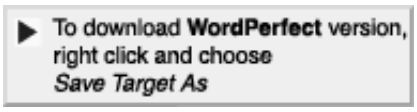

8.41-1 3-day notice to pay rent or quit

NOTICE TO PAY RENT OR QUIT

To _ _[*name of Tenant*]_ _ **tenant in possession of premises located at** _ _[*specify address or other identifying information*]_ _**.**

Within three (3) days after service of this notice, you are required to pay the rent now due and unpaid on the premises at _ _[*address*]_ _**, a total of $**_ _[*amount*]_ _**, representing rent due for the month(s) of** _ _[*specify month(s) and year and itemize if both rent and late charges are included in total amount*]_ _**, or to deliver possession of the premises to the undersigned** _ _[*landlord/landlord's authorized agent*]_ _**. Payment shall be made to** _ _[*specify name, telephone number, and address of person to whom rent payment shall be made and, if payment may be made personally, the usual days and hours that person will be available to receive payment; see §8.37B*]_ _**.**

Your failure to pay the amount demanded, or to deliver possession of the premises within three (3) days, will cause the undersigned to initiate legal proceedings against you _ _[*to declare a forfeiture of your* _ _[*lease/rental agreement*]_ _]_ _**, to recover possession of the premises, and to seek judgment for the rent owed through the expiration date of this notice, with damages for each day of occupancy after that date,** _ _[*specify statutory damages and costs*]_ _ _ _[*, and attorneys fees*]_ _**.**

You are further notified that the undersigned elects to declare the forfeiture of the _ _[*lease/rental agreement*]_ _ **under which you hold possession of the premises, if you fail to pay the amount of rent demanded above.**

Date: _ _ _ _ _ _ __[*Signature of landlord*]__
_ _[*Typed name of landlord*]_ _

Copies: Original (served on tenant and each cotenant); copies for landlord's and attorney's files.

Comment: When preparing a 3-day notice to pay rent or quit, always review CCP §1161(2) for possible amendments to notice requirements. Avoid using preprinted forms entitled "Notice To Quit" (rather than "Notice To Pay Rent or Quit") when an alternative demand for payment of rent or giving up possession is required, even if the body of the notice contains the alternative demand (a contradiction between title and body of notice may make notice ambiguous). See §8.35. Attention to these details will lower the risk of a tenant claim that the notice is invalid.

Some rent control ordinances require not only that a landlord intending to evict have a specified permissible cause to do so, but also that written notice to that effect (sometimes containing other information as well) be given to the tenant whose eviction is contemplated. See §8.72.

On contents of the notice, see §§8.30-8.40. On allowable methods of service, see §§8.62-8.67. The amount of rent demanded must be no more than the precise amount due on a residential lease (see §8.37) and may be estimated on a commercial lease (see §8.37A); any rent demanded must have become due within the year immediately preceding service of the notice (see §8.38). On whether attorney fees are recoverable, see §§13.25-13.33. On damages available, see CCP §1174 and §13.19.

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§8.42 d. Timing Service of Notice

A 3-day notice to pay rent or quit is effective only if it is served after the rent demanded becomes due. *Lydon v Beach* (1928) 89 CA 69, 74, 264 P 511. Thus, premature service of the notice renders the notice ineffective even if the rent demanded eventually becomes due and unpaid.

If the lease contains a "grace period," the tenant may argue that the rent is not late if it is paid within that period. In *Baypoint Mortgage Corp. v Crest Premium Real Estate Trust* (1985) 168 CA3d 818, 214 CR 531, a deed of trust provided that payments were to be made on the first of each month and a late charge would be imposed if payment was not received by the tenth. The court held that this language created a grace period and refused to "allow the drastic sanction of foreclosure" when the borrower failed to pay on the first. The same reasoning seems to apply to a rental agreement providing for payment on the first and a late charge to become effective at a later date, unless the agreement makes it clear that the tenant is in default if payment is not made on the first. A court is unlikely to interpret a grace period as precluding service of a 3-day notice to pay rent or quit until the grace period has elapsed if the lease provides that rent is "due and payable on the first."

The rent due date is statutorily extended to the next business day if it falls on a legal holiday. CCP §13. Holidays include Sundays, all other holidays specified in Govt C §6700 and in CCP §§10, 12a, and 135. But see *Stoltenberg v Harveston* (1934) 1 C2d 264, 268, 34 P2d 472. See also §8.28. For further discussion of the effects of holidays on the notice period, including a list of legal holidays, see California Eviction Defense Manual §§6.7, 6.25-6.26 (2d ed Cal CEB 1993). On statutory methods of serving the notice, see §§8.62-8.67.

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e. Effect of Tender of Rent

§8.43 (1) Before Service of Notice

The tenant's tender of rent before service of a 3-day notice to pay rent or quit will not constitute a defense to an unlawful detainer action based on the notice if the landlord refuses the rent and the tenant does not deposit it in a bank account in the landlord's name under CC §1500. The tenant must retender the rent during the subsequent 3-day notice period. See *Occidental Real Estate Co. v Gantner & Mattern* (1908) 7 CA 727, 731, 95 P 1042; *Webb v Jones* (1927) 88 CA 20, 29, 263 P 538.

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§8.44 (2) During Notice Period

Tender of the full amount of rent demanded in the notice and its acceptance by the landlord within the 3-day notice period cures the default and extinguishes the rental obligation. The tenant's performance within the 3-day period also nullifies any declaration of forfeiture in the notice. CCP §1161.5. The *obligation* is not extinguished merely by the tenant's tendering the rent or depositing the money in a bank. *Owen v Herzihoff* (1906) 2 CA 622, 84 P 274. To extinguish the obligation, the tenant must actually pay the amount due, or (under CC §1500) deposit it in a bank account in the landlord's name and give the landlord notice of the deposit. See *Mau v Hollywood Commercial Bldgs.* (1961) 194 CA2d 459, 15 CR 181. A deposit in accordance with the provisions of CC §1500 is not a mere "tender" of rent, but actual performance that discharges the obligation. *Walker v Houston* (1932) 215 C 742, 746, 12 P2d 952. Payment of the rent demanded in a 3-day notice within the 3 days nullifies any declaration of forfeiture in the notice. CCP §1161.5.

Although a *tender* of rent refused by the landlord and not deposited in a bank to the landlord's credit does not extinguish the rental obligation, it does ensure that the tenant has *not breached the covenant to pay rent. Randol v Tatum* (1893) 98 C 390, 398, 33 P 433. See also *Walker v Houston* (1932) 215 C 742, 745, 12 P2d 952. Thus, although the landlord may still maintain an action for rent, the tender protects the tenant against an *unlawful detainer* action based on breach of the covenant to pay rent. An unaccepted tender is also sufficient to terminate the *incidents* of the tenant's obligation to pay rent under the lease or rental agreement (*e.g.,* interest, attorney fees, costs). CC §1504. See also 215 C at 746; *Holland v Paddock* (1956) 142 CA2d 534, 539, 298 P2d 587. A tenant who defeats an unlawful detainer action by proving tender of the rent, and who deposits the rent into court, might recover attorney fees under CC §1717(b)(2) (see §13.25).

Although the general rule is that a creditor may refuse a tender made by check rather than in cash, if the mode of payment during the lease has been by check, then a tender by check is proper unless the tenant has been notified otherwise. *Strom v Union Oil Co.* (1948) 88 CA2d 78, 84, 198 P2d 347.

WARNING: If the 3-day notice to pay rent or quit does not give an address that allows the tenant to personally deliver the rent (*e.g.*, lists a post office box but no street address) and the tenant mails the rent to that address, the rent is deemed paid on the date posted if the tenant shows proof of mailing. See CCP §1161(2), discussed in §8.37B.

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§8.45 (3) After Expiration of Notice Period

In earlier cases, the courts held that a tender of rent after expiration of the notice period, but before commencement of the unlawful detainer action, is not a defense to the action. *Roussel v Kelly* (1871) 41 C 360, 363. See *Cambridge v Webb* (1952) 109 CA2d Supp 936, 244 P2d 505, in which the court held that an offer at trial to pay the rent, plus costs and attorney fees, did not relieve the tenant of forfeiture of the lease when the notice provided for forfeiture.

Of course, the landlord may accept the tender and waive his or her right to terminate the tenancy under the notice. The landlord may also agree to extend the notice period. If the tenant tenders within the extended time, the landlord presumably must accept the tender when the tenant has detrimentally relied on the extension, as is usually the case. See *Schulman v Vera* (1980) 108 CA3d 552, 564, 166 CR 620 (notice providing for fewer days than required by lease held in substantial compliance because tenants did not pay rent before unlawful detainer filed).

Other, more recent cases have held that the tenant may retain possession by paying the rent after expiration of the notice period if the 3-day notice does not provide for forfeiture of the rental agreement. In *Briggs v Electronic Memories & Magnetics Corp.* (1975) 53 CA3d 900, 905, 126 CR 34, the court stated in dictum:

> Where there is no provision in the notice for forfeiture, a tenant is not foreclosed from paying the rent after the expiration of the three-day period and retaining possession.

See also *Cambridge v Webb, supra*. In *EDC Assocs., Ltd. v Gutierrez* (1984) 153 CA3d 167, 200 CR 333, the court held that acceptance of rent by the landlord after the notice period expires constitutes a waiver of the breach, and that tender of such rent by mail raises a rebuttable presumption that the landlord accepted it.

If the landlord accepts partial payment during the 3-day notice period, a new notice for the balance of the rent must be served in order to continue with an unlawful detainer action against a residential tenant. If, however, the tenant could prove that a specific arrangement was made for the payment of the balance at a future date, the court may determine that a new notice could not be served until after the expiration of the extended period granted to pay. See discussion on waiver and estoppel in §8.49. For different rules on partial payments in commercial tenancies, see CCP §1161.1(b) and (c) and California Eviction Defense Manual §19.6 (2d ed Cal CEB 1993).

After judgment, the court has discretion to relieve the tenant of forfeiture of the lease or rental agreement, whether written or oral, and restore the tenant to possession on condition that the tenant pay the back rent in full or otherwise perform. CCP §1179 (see §§13.56-13.57). At this stage, however, most courts will require that the tenant pay the judgment in full, including attorney fees and costs.

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2. Tenant's Breach of Lease Covenant

§8.46 a. Statutory Provision

The landlord has a statutory right under CCP §1161(3) to terminate the tenancy and recover possession by an unlawful detainer action when a tenant fails to perform a condition or covenant of the lease, even if the lease contains no reentry or forfeiture clause. *McCarty v Raso* (1951) 102 CA2d 909, 228 P2d 577. The landlord must serve a tenant who continues in possession after breaching the lease with a 3-day notice in writing as a prerequisite to maintaining an unlawful detainer action.

When the breach can be rectified, the notice must be phrased "in the alternative" (*e.g.,* either cure the breach or quit the premises), as in the case of failure to pay rent. CCP §1161(3). When the covenant breached cannot be performed, a 3-day written notice to vacate is still required, but it need not offer an alternative. See §8.50.

PRACTICE TIP: Most landlords prepare and serve their own notices. It is therefore imperative that the landlord's attorney examine the notice to ensure it is not ambiguous or vague.

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b. Breaches Covered

§8.47 (1) Breach of Express Covenant Only

It appears that a landlord may terminate a tenancy under CCP §1161(3) only for breach of an express covenant or condition. Because the law abhors forfeitures, a landlord may not terminate a tenancy for breach of an implied covenant unless the lease expressly provides for that remedy. *Keating v Preston* (1940) 42 CA2d 110, 118, 108 P2d 479. The landlord's remedy for breach of an implied covenant is to sue either for damages or for injunctive relief. 42 CA2d 110 at 115. Further support for the argument that only breach of an express covenant entitles the landlord to terminate the tenancy is found in CC §1442, which provides: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." See generally *McNeece v Wood* (1928) 204 C 280, 267 P 877.

When a landlord alleges breach of an express covenant as a basis for termination of the tenancy, the court will construe the covenant strictly against the landlord. *Salton Community Servs. Dist. v Southard* (1967) 256 CA2d 526, 535, 64 CR 246. See also *Randol v Scott* (1895) 110 C 590, 42 P 976.

In *King v Menachem* (Sup Ct 1981) 450 NYS2d 933, the court held that the tenant did not violate a lease provision limiting the number of "occupants" in an apartment by allowing a person to reside with him to provide necessary health care. The caretaker was held not to be an "occupant," and therefore the tenant could not be evicted for violation of that provision of the lease.

Certain rent control laws provide that the presence of a medically necessary healthcare provider is not a breach of a lease limiting occupancy. See, *e.g.,* West Hollywood Rent Stabilization Ordinance §17.52.010(2)(e); Santa Monica Rent Control Charter Amend, Reg 2005. In addition, cities with rent control laws may also provide that a tenant may move in certain family members, a spouse, or a domestic partner despite language in a rental agreement limiting occupancy of a unit. See, *e.g.,* Los Angeles (one additional person), Santa Monica (spouse, child, domestic partner), West Hollywood (certain family members, domestic partner).

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§8.48 (2) Minor Breach Not Sufficient

Forfeiture in an unlawful detainer action will not be supported by a technical or minor breach (see *McNeece v Wood* (1928) 204 C 280, 285, 267 P 877; *Randol v Scott* (1895) 110 C 590, 597, 42 P 976; *Keating v Preston* (1940) 42 CA2d 110, 118, 108 P2d 479) or a breach that does not harm the landlord's interests (*Feder v Wreden Packing & Provision Co.* (1928) 89 CA 665, 673, 265 P 386). But see *Hignell v Gebala* (1949) 90 CA2d 61, 202 P2d 378 (when violation of lease provision is willful, court will not measure extent of violation). For a recent out-of-state case holding that payment of the rent 2 days late in a commercial context was not a material breach, see *Foundation Dev. Corp. v Loehmann's, Inc.* (Ariz 1990) 788 P2d 1189.

The tenant's substantial compliance with a covenant is a defense to the landlord's claim, especially when uncontrollable circumstances prevent literal fulfillment of the covenant. *Knight v Black* (1912) 19 CA 518, 526, 126 P 512.

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§8.49 c. Waiver and Estoppel

If the landlord has full knowledge of all pertinent facts, acceptance of rent or other benefits after breach of a covenant constitutes a waiver of the breach. The landlord is then precluded from declaring a forfeiture of the lease by reason of the breach. *Kern Sunset Oil Co. v Good Roads Oil Co.* (1931) 214 C 435, 440, 6 P2d 71; *Randol v Tatum* (1893) 98 C 390, 396, 33 P 433; *Salton Community Servs. Dist. v Southard* (1967) 256 CA2d 526, 533, 64 CR 246; *Julien v Gossner* (1951) 103 CA2d 338, 344, 229 P2d 786. See also *EDC Assocs., Ltd. v Gutierrez* (1984) 153 CA3d 167, 200 CR 333; *Rafolin Constr. Corp. v Lippman* (Civ Ct 1982) 457 NYS2d 712 (acceptance of rent estops landlord from evicting tenant under lease provision limiting occupants of unit).

The landlord's failure to object to the tenant's conduct that breaches the lease may also constitute a waiver. *Thriftimart, Inc. v Me & Tex* (1981) 123 CA3d 751, 753 n3, 177 CR 24 (landlord's failed to object when tenant removed portion of paving from leased parking lot). If the landlord objects to the tenant's conduct, however, the objection may prevent a waiver, even when the landlord continues to accept rent while trying to settle the dispute. 123 CA3d at 754.

PRACTICE TIP: The landlord may avoid the waiver problem by entering into a written agreement with the tenant that acceptance of a partial rent payment is not a waiver. This is often done when there is a large rent arrearage that the tenant agrees to pay within a specified time.

The landlord's waiver of the breach after service of a 3-day notice nullifies any election of forfeiture in the notice. CCP §1161.5.

Leases frequently provide that the landlord's acceptance of rent with knowledge of the breach does not constitute a waiver of the breach (see §1.75). The courts will enforce such a provision as an exception to the general rule. *Salton Community Servs. Dist. v Southard* (1967) 256 CA2d 526, 530, 64 CR 246*; Karbelnig v Brothwell* (1966) 244 CA2d 333, 341, 53 CR 335. Even under such a provision, the landlord will be estopped from asserting the breach as the basis for an unlawful detainer action, if the tenant detrimentally relied on a belief inferred from the landlord's conduct that strict compliance with the covenant would not be required. 256 CA2d at 531.

For continuing conditions or covenants of the lease, the waiver of one breach does not preclude the landlord from proceeding against the tenant for subsequent breaches, except in estoppel situations. *Budaeff v Huber* (1961) 194 CA2d 12, 20, 14 CR 729; *Extension Oil Co. v Richfield Oil Corp.* (1942) 52 CA2d 105, 125 P2d 895.

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d. Form of Notice

§8.50 (1) Alternative of Performing or Vacating

The form of the notice depends on whether the covenant breached can be performed after notice is given. When the breach can be cured, the notice must be phrased "in the alternative" (*e.g.,* either cease breaching the covenant or quit the premises) (see §8.53). CCP §1161(3); *Feder v Wreden Packing & Provision Co.* (1928) 89 CA 665, 672, 265 P 386. When the covenant cannot be performed after its breach, a 3-day demand to vacate must be given, but it need not offer an alternative (see §8.54). *Schnittger v Rose* (1903) 139 C 656, 662, 73 P 449; *Richard v Degen & Brody, Inc.* (1960) 181 CA2d 289, 294, 5 CR 263, disapproved on other grounds in *Kendall v Ernest Pestana, Inc.* (1985) 40 C3d 488, 498, 220 CR 818; *Horton-Howard v Payton* (1919) 44 CA 108, 111, 186 P 167.

Thus, for example, if the tenant violates a covenant banning pets by keeping a dog, notice in the alternative is probably required because the tenant can perform under the covenant by getting rid of the dog.

On the other hand, if the tenant breaches a covenant that is not curable, the notice need not offer the alternative of performance; it may simply demand that the tenant vacate the premises within 3 days. Noncurable defects most commonly arise under CCP §1161(4) (see §8.54). In *Crowell v City of Riverside* (1938) 26 CA2d 566, 579, 80 P2d 120, for example, the court held that

> where the breach of a condition consists of subletting, no notice requiring the performance of the covenant need be served since it is impossible for the one guilty of the breach not to do that which he has already done.

The reasoning in *Crowell* seems flawed. The same logic would result in concluding that *any* violation of a restrictive covenant, such as having a dog in violation of a covenant banning pets, is not curable.

Code of Civil Procedure §1161(4) was amended effective September 27, 2008, but it sunsets on January 1, 2012. It provides that a person's commission of domestic violence, sexual assault, or stalking of a resident on the premises creates a rebuttable presumption affecting the burden of proof that the person has committed a nuisance and is subject to the 3-day notice to quit authorized by §1161(4). This is apparently a noncurable act justifying termination.

If a tenant has impermissibly *sublet* the premises, the breach can be cured by termination of the subtenancy. Although the tenant could not force the removal of a subtenant within 3 days, but would have to use a 30-day notice (unlike the pet situation, which could be cured unilaterally), the tenant arguably could negotiate for the subtenant to vacate within 3 days (perhaps in exchange for some mutually acceptable monetary consideration) and thus cure the breach complained of by the landlord within the time demanded in the notice. Only if the tenant had *assigned* the lease in violation of a nonassignment clause does it seem correct that the tenant could not undo the violation.

In *Salton Community Servs. Dist. v Southard* (1967) 256 CA2d 526, 529, 64 CR 246, a 3-day notice to quit, not stated in the alternative, alleged that the tenant had violated a provision of the lease that prohibited the tenant from allowing camping on the premises. The court held that the notice was valid, because the breach was not curable.

Because forfeitures are not favored under the law (see CC §1442; *Randol v Scott* (1895) 110 C 590, 42 P 976), notice given under CCP §1161(3) should provide the tenant, whenever possible, with an option to remedy the breach and save the lease from forfeiture. See *Feder v Wreden Packing & Provision Co., supra*.

When the covenant cannot be performed after its breach, giving the tenant the alternative of performing or vacating does not invalidate the notice. *Richard v Degen & Brody, Inc.* (1960) 181 CA2d 289, 293, 5 CR 263.

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§8.51 (2) Stating the Breach

A 3-day notice, required by CCP §1161(3) to be phrased "in the alternative" (see §8.50), must specifically set forth the breach on which the notice is based, so that the tenant has an opportunity to remedy the breach. *Feder v Wreden Packing & Provision Co.* (1928) 89 CA 665, 671, 265 P 386. See also *Julien v Gossner* (1951) 103 CA2d 338, 344, 229 P2d 786.

It is unclear whether the notice must specify the breach if the notice need not offer an alternative. In *Zucco v Farullo* (1918) 37 CA 562, 568, 174 P 929, the court indicated that the breach need not be specified. The tenant might argue, however, that the breach must be stated, because deciding whether or not to abide by the notice to quit (and thereby avoid the possibility of a suit and $600 statutory damages for unlawful detainer) depends on whether the breach on which it is based actually occurred. The tenant can decide whether the landlord's statement that a breach occurred is correct only if the notice specifies the breach. Also, in rent control jurisdictions, a notice to quit for breach of covenant generally must give the tenant the opportunity to cure the breach and state specific details of the breach.

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§8.52 e. Effect of Tenant's Performance

The tenant's performance within the 3-day period, in response to a notice to perform or quit, keeps the tenancy in effect. See *Feder v Wreden Packing & Provision Co.* (1928) 89 CA 665, 671, 265 P 386. A tenant who has a fixed-term lease and vacates the premises after receiving a 3-day notice to perform or quit still may be held liable for future rent under very limited circumstances. See CC §1951.2, discussed in §8.14. See also CC §1952.

An interesting situation develops when a tenant performs within the 3-day period but later commits the same breach, *e.g.,* the tenant is served with a 3-day notice for violating a no-pet clause and the tenant removes the pet within the 3-day period but brings it back the following week. Landlord attorneys would argue that the breach was not cured because the pet was not removed from the property permanently. "Plain text" of a statute should prevail when interpreting the meaning of a statute, but under *J. A. Jones Constr. Co. v Superior Court* (1994) 27 CA4th 1568, 1578, 33 CR2d 206, the court ruled that "a void created by an absurd result should also be filled, … *if possible*." See also CCP §§1858-1859.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.53 f. Form: 3-Day Notice to Perform Covenant of Lease or Quit (Curable Breach)

§8.53 f. Form: 3-Day Notice to Perform Covenant of Lease or Quit (Curable Breach)

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8.53-1 3-day notice to perform covenant of lease or quit

NOTICE TO PERFORM COVENANT OF LEASE OR QUIT

To _ _[*name of tenant*]_ _**, tenant in possession of premises located at** _ _[*specify address or other identifying information*]_ _**:**

You are in breach of the _ _[*lease/rental agreement*]_ _ **in that** _ _[*specify covenant breached and facts indicating breach*]_ _**.**

Within three (3) days after service of this notice, you must _ _[*specify manner in which tenant must perform breached covenant*]_ _**, or deliver possession of the premises to the undersigned** _ _[*landlord/landlord's authorized agent*]_ _**. Your failure to perform the covenant breached as specified above, or vacate the premises within three (3) days, will cause the undersigned to initiate legal proceedings against you to declare a forfeiture of your** _ _[*lease/rental agreement*]_ _, **to recover possession of the premises, and to seek judgment for damages for each day of occupancy after the expiration date of this notice** _ _[*, statutory damages and costs*]_ _ _ _[*, and attorney fees*]_ _**.**

You are further notified that the undersigned elects to declare the forfeiture of the _ _[*lease/rental agreement*]_ _ **under which you hold possession of the premises if you fail to perform as indicated above.**

Date: _ _ _ _ _ _ __[*Signature of landlord/landlord's agent*]__
_ _[*Typed name of landlord/landlord's agent*]_ _

Copies: Original (served on tenant and each cotenant); copies for landlord's and attorney's files.

Comment: On required contents of the notice, see §§8.46-8.51. On requirements for service, see §§8.62-8.67. On whether attorney fees are recoverable, see §13.25. On declaring a forfeiture under CCP §1174, see §8.34.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.54 g. Form: 3-Day Notice to Quit for Breach of Covenant (Noncurable Breach)

§8.54 g. Form: 3-Day Notice to Quit for Breach of Covenant (Noncurable Breach)

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8.54-1 3-day notice to quit for noncurable breach

NOTICE TO QUIT

To _ _[*name of tenant*]_ _**, tenant in possession of premises located at** _ _[*specify address or other identifying information*]_ _**:**

Within three (3) days after service of this notice, you must vacate the premises and deliver possession of them to the undersigned _ _[*landlord/landlord's authorized agent*]_ _**. Your failure to deliver possession of the premises within three (3) days will cause the undersigned to initiate legal proceedings against you to declare a forfeiture of your** _ _[*lease/rental agreement*]_ _**, to recover possession of the premises, and to seek judgment for rent owed through the expiration date of this notice, with damages for each day of occupancy after that date** _ _[*, statutory damages and costs*]_ _ _ _[*, and attorney fees*]_ _**.**

You are further notified that the undersigned elects to declare the forfeiture of the _ _[*lease/rental agreement*]_ _ **under which you hold possession of the premises.**

The reason for service of this notice and termination of your tenancy is that you are in breach of your _ _[*lease/rental agreement*]_ _ **in that** _ _[*specify covenant breached and facts indicating breach*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of landlord/landlord's agent*]__
_ _[*Typed name of landlord/landlord's agent*]_ _

Copies: Originals (served on tenant and each cotenant); copies for landlord's and attorney's files.

Comment: The landlord's attorney should use this form only when the facts indicate that the covenant breached by the tenant is not one that can thereafter be performed. If the breach is rectifiable, the form in §8.53 should be used. See §8.50. On required contents of the notice, see §§8.46-8.51. On requirements for service, see §§8.62-8.67. On whether attorney fees are recoverable, see §13.25. On declaring a forfeiture under CCP §1174, see §8.34.

This form also may be used for terminating a tenancy for the tenant's violation of a lease covenant against subletting, assignment, waste, maintaining a nuisance, or using the premises for an illegal purpose under CCP §1161(4). In those instances, the reason for the termination need not be stated in the notice (see §8.56), but it is safer to state the reason to discourage a demurrer to the complaint and the defense of retaliation. Note that some courts may treat an assignment or subletting as a curable breach (see §8.50).

This form may not be usable in a rent-controlled jurisdiction. Many rent control laws require that the landlord give the tenant an opportunity to cure the breach. Even if the landlord believes the breach is not curable, the notice may have to give the option of curing the breach in order to comply with the rent control law.

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§8.55 3. Breaches or Acts That Constitute Unlawful Detainer Under CCP §1161(4)

Under CCP §1161(4), a tenant is guilty of unlawful detainer for any of the following:

- Violating a covenant of the lease against subletting, assignment, or committing waste (see §§8.56-8.57);
- Maintaining a nuisance, including acts of domestic violence, sexual assault, or stalking (see §8.58); or
- Using the premises for an unlawful purpose, including certain drug-related activity or unlawful possession (or use) of illegal weapons or ammunition (see §8.59).

Subletting, assignment, and committing waste form a basis for an unlawful detainer action only if they violate a condition or covenant of the lease. Maintaining a nuisance or using the premises for an unlawful purpose will support an action even if no covenant in the lease bars such activity. CCP §1161(4).

NOTE: Section 1161(4) was amended effective September 27, 2008, but the amendment sunsets on January 1, 2012. It provides that a tenant's act of domestic violence, sexual assault, or stalking of a resident on the premises creates a rebuttable presumption affecting the burden of proof that the tenant has committed a nuisance and is subject to a 3-day notice to quit. If the victim has not vacated the premises, the presumption does not apply.

To terminate a tenancy under CCP §1161(4), the landlord must serve the tenant with a 3-day notice to quit, which need not be phrased "in the alternative" (*i.e.,* either perform a covenant of the lease or vacate the premises). See §8.56. When a city attorney intends to file suit to abate a nuisance in the form of an unlawful detainer action under the provisions of CC §§3485-3486 (see §4.44), a specially prescribed 30-day notice must precede the 3-day notice and suit under CCP §1161(4).

The form in §8.54 should be used for terminations under CCP §1161(4).

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a. Breach of Covenant Against Subletting, Assignment, or Waste

§8.56 (1) Covenant Must Be Express; Notice Considerations

It appears that the landlord may proceed under either CCP §1161(3) or §1161(4), or both, to terminate a tenancy for breach of a covenant against subletting, assignment, or waste. Under either section, the tenant must be in breach of an express covenant. See §8.35. If the lease or rental agreement does not contain a covenant against waste, the landlord's only remedy is an action for damages. *Chipman v Emeric* (1853) 3 C 273.

For termination under CCP §1161(4), the notice need not be phrased "in the alternative." *Zucco v Farullo* (1918) 37 CA 562, 567, 174 P 929. In *Zucco,* a notice that merely canceled the lease and demanded possession, without specifying the breach on which the termination was based, was held sufficient because the breach (waste) was not curable. Even under CCP §1161(3), a court might rule that notice need not offer an alternative, if the breach cannot be revoked or undone by the tenant (see §8.50).

Note that the 3-day notice may be based on more than one of the grounds enumerated in CCP §1161, and will be enforced if any one of the stated grounds is valid. *Richard v Degen & Brody, Inc.* (1960) 181 CA2d 289, 294, 5 CR 263, disapproved on other grounds in *Kendall v Ernest Pestana, Inc.* (1985) 40 C3d 488, 498, 220 CR 818. Thus, a notice may be based on violation of both CCP §1161(3) and (4).

See §3.51 on subletting and assignment as grounds for unlawful detainer. On subletting and assignment generally, see §§3.49-3.59A. On lease assumption and assignment rules when the tenant is in bankruptcy, see §§14.35, 14.43, 14.49-14.52.

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§8.57 (2) Evidence Required to Establish Waste

To maintain an unlawful detainer action based on waste, the landlord must show that the tenant has committed acts that substantially or permanently diminish the property's market value. See *Rowe v Wells Fargo Realty Servs.* (1985) 166 CA3d 310, 212 CR 374 (tenant's repeated tampering with thermostats did not substantially affect value of property; damage done to thermostats was temporary; therefore, court held that tenant's actions did not constitute "committing waste"). In *Freeze v Brinson* (1991) 3 CA4th Supp 1, 5 CR2d 227, the trial court impliedly found that the premises were unclean and unsanitary, a breach of the lease covenant, and ordered the tenant evicted for committing waste. On appeal, the court noted that the tenant must both have breached a covenant and committed waste, and that the court "must construe the ambiguous concept of 'waste' in order to *avoid* a forfeiture of the lease, if at all possible" (3 CA4th at Supp 4). On the issue of waste, the landlord in *Freeze* proved the amount of damage done to the premises, but that "is merely a starting point. A landlord must then present evidence that this damage caused a substantial *or* permanent diminution in the market value of the premises." 3 CA4th at Supp 4. Because such evidence was lacking, the court reversed.

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§8.58 b. Nuisance

A landlord may terminate a tenancy if the tenant maintains, commits, or permits a nuisance on the premises, whether or not there is a covenant in the lease or rental agreement prohibiting a nuisance. The criminal conduct described in CC §§3485(c) and 3486(c) (the illegal manufacture, possession, sale, or use of a controlled substance, the unlawful possession or use of illegal weapons or ammunition, or the use of the premises to further such activities) is expressly considered a nuisance under CCP §1161(4). Nuisance is further defined in CC §3479 as

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property….

Under this definition, the existence of a nuisance seems to depend on the extent to which the activity affects others' ability to enjoy their lives and property. In the landlord-tenant context, nuisance most commonly applies to tenant activity that seriously disturbs other tenants or neighbors, such as loud noise late at night, vile and offensive language, and quarrelsome behavior. For further discussion of a landlord's rights and obligations concerning drug-related activity in residential housing, see discussion of nuisance in §§1.58, 4.44.

Code of Civil Procedure §1161(4) was also amended effective September 27, 2008, and that amendment sunsets on January 1, 2012. It provides that a person's commission of domestic violence, sexual assault, or stalking of a resident on the premises creates a rebuttable presumption affecting the burden of proof that the person has committed a nuisance and is subject to the 3-day notice to quit authorized by §1161(4). The presumption does not apply if the victim has not vacated the premises.

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§8.59 c. Unlawful Purpose

Under CCP §1161(4), the landlord may terminate the tenancy by serving a 3-day notice to quit if the tenant uses the premises for an unlawful purpose. See *Haig v Hogan* (1947) 82 CA2d 876, 187 P2d 426 (using premises as boarding house in violation of zoning ordinance). Tenant violations of local zoning, fire, or health ordinances present common instances of such unlawful tenant activity. Similarly, even though not specifically mentioned or incorporated in §1161(4), illegal activities such as gambling, prostitution, or other criminal activity on the premises probably entitle the landlord to terminate the tenancy under §1161(4). The definition of "nuisance" in CC §3479 includes the illegal sale of controlled substances, and CCP §1161(4) expressly allows an eviction if the tenant manufactures, possesses, sells, or uses a controlled substance on the premises (by incorporating CC §3486); possesses or uses illegal weapons or ammunition on the premises (by incorporating CC §3485); or uses the premises to further those purposes. For further discussion of a landlord's rights and obligations concerning drug-related activity in residential housing, see discussion of nuisance in §§1.58, 4.44.

Under federal law, a public housing authority may evict a tenant because of a household member, guest, employee, or any other person under the tenant's control who engages in any drug-related criminal activity at or near the tenant's unit. *HUD v Rucker* (2002) 535 US 125, 152 L Ed 2d 258, 122 S Ct 1230. In *Rucker*, the United States Supreme Court reversed *Rucker v Davis* (9th Cir 2001) 237 F3d 1113, which had construed 42 USC §1437d(*l*)(6) as meaning that "innocent tenants" could not be evicted for drug-related criminal activity outside the premises that they neither knew of nor had reason to know of. In an opinion written by Justice Rehnquist that expressed the unanimous agreement of the eight participating members of the Court, it was held that "[T]he plain language of the statute … provides that 'each public housing authority shall utilize leases which … provide that … any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.'" Thus, "Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related criminal activity' precludes any knowledge requirement." 152 L Ed 2d at 266. On federal legislation and regulation regarding drug-related activity in public housing, see 42 USC §1437d(*l*)(6); 24 CFR §966.4(f)(12)(i)(B). See also California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993).

Minor regulatory violations do not constitute an unlawful purpose under CCP §1161(4). In *Rowe v Wells Fargo Realty Servs.* (1985) 166 CA3d 310, 212 CR 374, the court held that the tenant's repeated tampering with the thermostats on the premises did not constitute use of the premises for an unlawful purpose, although the temperature adjustments violated Department of Energy regulations. The violation did not affect the legitimate purpose for which the tenant used the premises, threaten the physical safety of the property, stigmatize the premises, or jeopardize the landlord's receipt of rent.

In *Cook v City of Buena Park* (2005) 126 CA4th 1, 23 CR3d 700, the court struck down a city ordinance requiring landlords to evict all occupants of a rental unit when the police chief suspected that the premises were used for drug or gang-related activity. "Because the ordinance imposes on landlords a substantial risk of erroneous deprivation of property rights through compelled eviction litigation, unwarranted fines and penalties, and countersuits by tenants, we hold that the ordinance violates procedural due process." 126 CA4th at 3.

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§§8.60-8.61A [Deleted]

For discussion regarding termination after sale or foreclosure, see §§8.68A-8.68F.

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G. Service of Notice

§8.62 1. Statutory Requirements

Courts are not always as strict in evaluating proper service of *notice* as in evaluating proper service of *process.* Proper service of process is necessary to give the court jurisdiction over the defendant. Whether proper service of notice is a jurisdictional requirement, or only a necessary element for the plaintiff's cause of action, is not clear. See *Parsons v Superior Court* (2007) 149 CA4th Supp 1, 58 CR3d 48; *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 194 CR 685; *Marini v Ireland* (NJ 1970) 265 A2d 526, 530.

Under CCP §1162, a 3-day notice may be served by the following methods:

(1) A copy of the notice may be delivered to the tenant personally;

(2) If the tenant is absent from his or her place of residence and usual place of business, a copy may be left with a person of suitable age and discretion at either place, and a copy mailed to the tenant at his or her place of residence; or

(3) If the places of residence and business cannot be ascertained, or a person of suitable age or discretion cannot be found, a copy of the notice may be affixed in a conspicuous place on the property, a copy delivered to a resident (if one can be found), and a copy mailed to the tenant at the location of the property.

Note that method (2) may be used only if method (1) was tried, but failed to reach the tenant. Method (3) may be used only if methods (1) and (2) were tried, but failed. See *Lamey v Masciotra* (1969) 273 CA2d 709, 713, 78 CR 344. On timing of service, see §8.42.

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§8.63 a. Service by Mail Alone

Without proof of actual receipt of a mailed 3-day notice (see §8.66), service only by mail does not comply with CCP §1162. See *Davidson v Quinn* (1982) 138 CA3d Supp 9, 188 CR 421. Compare CCP §1162 with CC §§1946 and 1946.1(f), which permit service of both 30-day and 60-day termination notices by certified or registered mail, as well as in any manner permitted by CCP §1162.

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§8.64 b. "Substituted" Service

When the tenant is absent from both his or her residence and place of business, "substituted" service may be made by the landlord's leaving a copy of the notice with a person of suitable age and discretion at either place, plus mailing a copy to the tenant at the tenant's residence. CCP §1162(2). Proof of actual receipt is not necessary.

The landlord's failure to attempt to serve the tenant at the tenant's place of business does not preclude substituted service when there is no evidence that the tenant has a place of business. *Lehr v Crosby* (1981) 123 CA3d Supp 1, 5, 177 CR 96. A "person of suitable age and discretion" to satisfy CCP §1162(2) need not be 18 years or older; a 16-year-old may qualify. 123 CA3d at Supp 5.

On proof of service and time to respond to a 3-day notice when, as in substituted service, notice is also served by mail, see §8.65.

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§8.65 c. "Conspicuous" Service

Under "conspicuous" service, sometimes called "nail and mail," the landlord affixes a copy of the notice to a conspicuous place on the property, mails another copy to the tenant, and leaves a third with a person residing on the premises (if one can be found). CCP §1162(3). Serving the notice by placing it under the door, but not mailing a copy, does not comply with §1162(3). *Jordan v Talbot* (1961) 55 C2d 597, 608, 12 CR 488. Proof of actual receipt is not required by §1162(3). This method may be used only if the tenant's places of residence and business cannot be ascertained, or if a person of "suitable age and discretion" cannot be found on the premises.

What begins as substituted service under CCP §1162(2) frequently becomes compliance with CCP §1162(3) and thus effects conspicuous service. See *Highland Plastics v Enders* (1980) 109 CA3d Supp 1, 167 CR 353.

PRACTICE TIP: Landlord attorneys should counsel their clients who serve their own notices to mail a copy of the notice so that it is postmarked the same day in compliance with CCP §1162. Also, the proof of service of mailing should be filled out and signed on the same day as the notice was served to add credibility to the landlord's testimony that the notice was served on the day alleged in the complaint. See also Practice Tip in §12.20.

Code of Civil Procedure §1013(a) provides that "any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail…." For quite a while, it has been unclear whether this 5-day extension applies where a landlord chooses to use the "nail and mail" method of service provided by CCP §1162(3) to serve a 3-day notice to pay or quit or a notice of termination of a month-to-month tenancy. In 1995, however, it appeared that the Legislature resolved this issue when it added the following sentence to CCP §1013(a): "This extension applies in the absence of a specific exception provided for by this section or other statute or rule of court." This seemed to settle the matter: CCP §1162(3) includes no "specific exception" to the rule of extension, so the 5-day extension applies.

In *Losornio v Motta* (1998) 67 CA4th 110, 78 CR2d 799, however, the court ruled otherwise—at least as to 30-day notices terminating month-to-month tenancies. The court held that the notice prerequisites to unlawful detainer suits and the provisions of CCP §1013 are "mutually exclusive," because "Unlawful detainer is a unique body of law and its procedures are entirely separate from the procedures pertaining to civil actions generally." The court overlooked CCP §1177: "Except as otherwise provided in this chapter the provisions of part two of this code are applicable to, and constitute the rules of practice in the proceedings mentioned in this chapter." Part 2 of the Code of Civil Procedure is from §307 to §1062.20—it clearly includes §1013. More troubling, however, is the court's failure to consider how its ruling might undermine the legislative purpose behind the notice requirements. Code of Civil Procedure §1162 requires the landlord to try to serve the tenant in a manner that has the best chance of assuring that the tenant receives the notice in time to act on it. Code of Civil Procedure §1162(1) requires the landlord to try to serve the tenant personally. If that fails, the landlord may leave a copy of the notice with a person of suitable age and discretion. CCP §1162(2). If that fails, the landlord may use a method less likely to succeed: "affixing" a copy of the notice in a conspicuous place on the premises, and mailing a copy to the tenant. Why both? Because someone might tear down the affixed copy. A risky method of service requires a backstop. But this backstop—mailing—takes more time. A tenant who must pay the rent or move in 3 days (or face an eviction lawsuit) needs a full 3 days to act. If a nailed notice is torn down and the mailed notice does not reach the tenant until 4 or 5 days later, the tenant will be deprived of the 3 days the legislature granted in CCP §1161. Likewise, the tenant being given 30 or 60 days' notice terminating a month-to-month tenancy will be deprived of the full 30 or 60 days needed, *e.g.,* to find another place to live or work, or to arrange for movers, that the legislature contemplated in enacting CC §§1946 and 1946.1. *Losornio*'s "mutually exclusive" approach failed to consider these difficulties.

Although the notice in *Losornio* was a 30-day notice, language in the opinion indicates its ruling also applies to 3-day notices. The court broadly stated that CCP §1013(a) does not extend the statutory notice periods pertaining to unlawful detainer actions. 67 CA4th at 115. The decision, however, does not resolve earlier conflicting opinions.

In *Davidson v Quinn* (1982) 138 CA3d Supp 9, 10 n2, 188 CR 421, for example, the court declined to decide the

question of whether §1013 applies to 3-day notices to quit, but held that service of a 3-day notice by mail is not effective until the tenant actually receives the mailed notice. (Under §1013, however, service is complete when the notice is deposited in the mail.) In *Walters v Meyers* (1990) 226 CA3d Supp 15, 18, 277 CR 316, the court held that the time to respond to a 3-day notice to pay rent or quit that is served by posting and mailing under CCP §1162(3) is not extended by CCP §1013(a). The court also held that service of a 3-day notice by posting and mailing is effective on the date the notice is posted and mailed, not the date the tenant actually receives the mailed notice. Note that *Davidson* and *Walters* were decided both before the 1995 amendment to CCP §1013 and the decision in *Losornio v Motta, supra*. See also §§8.29, 9.44.

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§8.66 2. Actual Receipt of Improperly Served Notice

The courts have not conclusively determined whether actual receipt of a 3-day notice is sufficient to support an unlawful detainer action even though the method of service does not strictly comply with CCP §1162. Although not dealing directly with a 3-day notice, several courts have held that personal service was accomplished when a letter carrier delivered a termination notice to the tenant. In *University of S. Cal. v Weiss* (1962) 208 CA2d 759, 769, 25 CR 475, the tenant admitted receiving in the mail a 30-day notice to vacate. The court held that CCP §1162's requirement of personal service was met by the mail delivery. See also *Colyear v Tobriner* (1936) 7 C2d 735, 743, 62 P2d 741; *Shearman v Jorgensen* (1895) 106 C 483, 39 P 863; *Heinlen v Heilbron* (1892) 94 C 636, 638, 30 P 8; *Reserve Oil & Gas Co. v Metzenbaum* (1948) 84 CA2d 769, 774, 191 P2d 796.

These cases may merely be applications of the requirement that the notice be served personally. The rationale in *University of S. Cal. v Weiss, supra,* was that the tenant waived any defect in the method of service by acknowledging receipt and agreeing to vacate the premises. In *Reserve Oil & Gas Co. v Metzenbaum, supra,* and *Heinlen v Heilbron, supra,* the notices were served by registered mail; *i.e.,* the mail carrier personally handed the notice to the tenant, rather than merely put it in the mailbox. In *Colyear v Tobriner, supra,* and *Shearman v Jorgensen, supra,* there is no indication that the notices were sent by registered mail, but the party in *Shearman* admitted receiving the notice, and the court in *Colyear* stated that the post office department or any other type of messenger may effect personal service.

In *Liebovich v Shahrokhkhany* (1997) 56 CA4th 511, 65 CR2d 457, the court of appeal held that strict compliance with CCP §1162 is required. Because the tenant did not admit receiving the notice, service by certified mail did not establish personal delivery. For further discussion of this rule as applied in commercial tenancies, see California Eviction Defense Manual §19.5 (2d ed Cal CEB 1993).

In *Highland Plastics v Enders* (1980) 109 CA3d Supp 1, 7 n2, 167 CR 353, the court indicated (in dictum) that a tenant has actual notice if he does not prove that he did not receive an improperly served notice. In *Lehr v Crosby* (1981) 123 CA3d Supp 1, 6 n3, 177 CR 96, the court implied that actual receipt of an improperly served notice cures any defect in service. See also *Valov v Tank* (1985) 168 CA3d 867, 214 CR 546.

PRACTICE TIP: Because of language in the opinions in *Losornio v Motta* (1998) 67 CA4th 110, 78 CR2d 799, and *Liebovich v Shahrokhkhany, supra,* some tenant attorneys have successfully argued that *Losornio* and *Liebovich* overrule *Lehr v Crosby, supra*. That is, actual receipt of an improperly served notice *does not* cure the defects of service. A landlord's attorney should be prepared to argue that any language in *Losornio* and *Liebovich* that refers to "strict compliance" with service statutes is merely dictum and not the holding.

When service of *process* is involved, however, actual receipt of an improperly served summons does not cure the defect. *Sternbeck v Buck* (1957) 148 CA2d 829, 307 P2d 970. See also *Taliaferro v Hoogs* (1963) 219 CA2d 559, 33 CR 415.

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§8.67 3. Service on Cotenants or Subtenants

Proper service on one of several cotenants named in a written lease is proper service on the other cotenants. *University of S. Cal. v Weiss* (1962) 208 CA2d 759, 769, 25 CR 475; *Gentry v Citron* (1918) 36 CA 288, 171 P 1079.

If the landlord properly serves the tenant, the subtenant need not be served in order for the landlord to maintain an unlawful detainer action against the tenant. *Chinese Hosp. Found. Fund v Patterson* (1969) 1 CA3d 627, 81 CR 795. If the landlord wishes to evict both the tenant and subtenant, however, the subtenant must be served with a separate notice that complies with CCP §1161. Service on the subtenant of a copy of the notice to the tenant is not sufficient. *Briggs v Electronic Memories & Magnetics Corp.* (1975) 53 CA3d 900, 904, 126 CR 34. The purpose of serving the subtenant is to give the subtenant an opportunity to cure the tenant's default. *Four Seas Inv. Corp. v International Hotel Tenants' Ass'n* (1978) 81 CA3d 604, 611, 146 CR 531. This rationale suggests that if the defect is not curable, no notice need be given to the subtenant.

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§8.68 4. Withdrawal of Notice

A notice that gives the tenant the alternative of performing or vacating may be withdrawn within the 3-day period; the withdrawal maintains the lease in effect. *Downing v Cutting Packing Co.* (1920) 183 C 91, 190 P 455. When a notice to vacate is not phrased "in the alternative," however, the landlord may not withdraw it without the tenant's consent. *Devonshire v Langstaff* (1935) 10 CA2d 369, 51 P2d 902.

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V. TERMINATION AFTER SALE OR FORECLOSURE (CCP §§1161a, 1161b)

§8.68A A. Property Owners and Commercial Tenants (3-Day Notice)

Under CCP §1161a(b)(1)-(5), an unlawful detainer action may be brought against the property owner or a commercial tenant who holds over after being served with a 3-day notice to quit when the property has been sold by:

- Execution;
- Foreclosure;
- Power of sale contained in a deed of trust;
- Voluntary sale; or
- Sale in accordance with Health & S C §18037.5 under the default provisions of a conditional sales contract or security agreement.

This list does not provide for a termination notice to the property owner or a tenant who holds over after the transfer of the property by a deed in lieu of foreclosure to the lender. On deeds in lieu, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 7 (4th ed Cal CEB 2009).

After a voluntary sale, CCP §1161a operates primarily against owners rather than tenants, because the purchaser usually knows that the tenant is in possession and therefore takes the property subject to the leasehold interest. See *Rosenkranz v Pellin* (1950) 99 CA2d 650, 222 P2d 249. For further discussion, see California Real Property Sales Transactions §§4.71-4.73 (4th ed Cal CEB 2007).

NOTE: After an involuntary sale, such as a foreclosure, the interests of a commercial tenant depend on whether the lease has priority over the foreclosing mortgage. Only a tenant whose interest is subordinate to the mortgage can be evicted under CCP §1161a. See §8.68E.

Although the law is unsettled on this issue, the tenant (as well as the borrower under the loan and former owner) may arguably defend an unlawful detainer action following a foreclosure by challenging the plaintiff's title, *e.g.,* by claiming that the foreclosure sale was not conducted properly (although not by challenging the validity of the underlying mortgage). See *Cheney v Trauzettel* (1937) 9 C2d 158, 160, 69 P2d 832, discussed in §8.68B. See also *Evans v Superior Court* (1977) 67 CA3d 162, 170, 136 CR 596 (tenant having express agreement to purchase property from subsequent purchaser after foreclosure may litigate title defensively in unlawful detainer action); *Vella v Hudgins* (1977) 20 C3d 251, 255, 142 CR 414. The defendants may put the new owner's title at issue in an action under CCP §1161a, although the new owner's lack of title may not be raised as a defense to an ordinary unlawful detainer action brought under CCP §1161. *Kessler v Bridge* (1958) 161 CA2d Supp 837, 838, 327 P2d 241. See *Johnson v Hapke* (1960) 183 CA2d 255, 259, 6 CR 603. See also §§9.8, 10.54.

If the foreclosure was legally insupportable, defective, or wrongfully executed, the unlawful detainer action may be stayed pending the resolution of an affirmative suit by the borrower to set aside the foreclosure. See Banke, *Staying Postforeclosure Eviction Actions Pending Borrower Actions Against Lenders,* 32 CEB Real Prop L Rep 92 (July 2009).

On serving 3-day notices, see §§8.62-8.68. For additional discussion of enforcing possessory interests after foreclosure, see Mortgage Deed of Trust Foreclosure, chaps 2-3, 6-7.

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B. Residential Tenants

1. Foreclosure Sale

§8.68B a. Notice of Foreclosure Sale

Civil Code §2924.8, effective September 8, 2008, through the end of 2012 (see Stats 2008, ch 69, §4 (SB 1137), amended by Stats 2009, ch 43 (SB 306)), requires the trustee or authorized agent to post and mail first class an additional notice to the occupants concurrently with the mailing of the notice of trustee sale (nonjudicial foreclosure) for residential real property if the billing address for the note is different from the property address. The notice must be given at least 20 days before the date set for sale of the property. CC §2924f(b). The additional notice is designed to communicate the urgency and gravity of the foreclosure to residential tenants. See California Mortgages, Deeds of Trust, and Foreclosure Litigation §§2.49, 2.63-2.68 (4th ed Cal CEB 2009).

The additional notice must (1) conform to CC §2924.8(a) (see form in Mortgage Deed of Trust Foreclosure §2.133), (2) be prepared in English and the languages described in CC §1632, (3) be posted on the property in foreclosure, and (4) be served by first-class mail on persons living in the property in an envelope addressed to "Resident of property subject to foreclosure sale."

It is unclear whether the trustee's noncompliance with this requirement is a defense to a subsequent unlawful detainer action. Arguably, under *Cheney v Trauzettel* (1937) 9 C2d 158, 160, 69 P2d 832, the tenant might be able to defend the eviction (on the basis of noncompliance) by denying in the answer that the foreclosure sale was conducted properly because the plaintiff has the burden of proof on that issue. The court in *Cheney* stated that in a postforeclosure eviction action, the plaintiff-purchaser must prove a foreclosure sale conducted in compliance with statutory law and the deed of trust, followed by purchase at the sale, and the defendant-occupant may raise objections only on that phase of the issue of title. Note that in *Cheney*, the defendant was the borrower, not a tenant of the borrower, but that fact may not make a difference for the rule on the plaintiff's burden of proof. See *Evans v Superior Court* (1977) 67 CA3d 162, 171, 136 CR 596 (tenant having express agreement to purchase property from subsequent purchaser after foreclosure may litigate title defensively in unlawful detainer action); *Vella v Hudgins* (1977) 20 C3d 251, 255, 142 CR 414.

Another possible remedy for a violation of §2924.8 would be in the nature of equitable relief; the trial court in the unlawful detainer action could award possession to the plaintiff but stay execution of the judgment for a time at least equal to the notice period specified in §2924.8. For further discussion, see Mortgage Deed of Trust Foreclosure §§7.38, 7.75.

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§8.68C b. Notice of Termination of Tenancy (60-Day Notice)

A *tenant* in a rental housing unit of the former owner (see §8.68A) falls within the language of CCP §§1161a and 1161b and may be forced to vacate because of that owner's transactions. For example, if the landlord defaults on mortgage payments and suffers foreclosure, the ultimate purchaser may evict both the landlord and the tenant. See, *e.g., Moss v Williams* (1948) 84 CA2d 830, 191 P2d 804 (tenants did not appeal). When this scenario unfolds, a residential tenant holding a lease subordinate to the mortgage or a subtenant must be given 60 days' written notice to quit under CCP §1161b, even though a former owner (borrower) or commercial tenant (see §8.68A) must be given only 3 days' notice under CCP §1161a.

Concerned about the increase in foreclosures caused by the proliferation of unsustainable residential mortgage loans, the California legislature enacted urgency legislation, effective July 8, 2008, and sunsetting at the end of 2012. Stats 2008, ch 69 (SB 1137). It added, among other things, CCP §1161b, requiring the 60 days' termination notice for residential tenants, which temporarily supersedes the 30 days' notice mandated by CCP §1161a(c). (It also added CC §2924.8, effective September 8, 2008, requiring the posting and first-class mailing of an additional notice when the trustee mails the notice of foreclosure sale for residential property if the billing address for the note is different from the property address. See §8.68B.)

When any party to the note on which the foreclosure was based remains in the property as a tenant, subtenant, or occupant, the 60-day notice does not apply. On serving 60-day notices, see §§8.74-8.78.

WARNING: In May 2009, Congress enacted preemptive legislation that temporarily protects residential tenants holding possession under a month-to-month agreement or a lease from immediate eviction after a foreclosure sale by the purchaser. See Protecting Tenants at Foreclosure Act of 2009 (Pub L 111-22, §§701-704, 123 Stat 1660), discussed in §8.68F.

Only a tenant whose interest is subordinate to the mortgage can be evicted under CCP §1161a or §1161b. See §8.68E.

CAUTION: In most rent-controlled jurisdictions, foreclosure is not a ground for eviction of the tenant. See §7.69. See also *Gross v Superior Court* (1985) 171 CA3d 265, 217 CR 284.

See Banke, *Staying Postforeclosure Eviction Actions Pending Borrower Actions Against Lenders,* 32 Real Prop L Rep 92 (July 2009).

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§8.68D 2. Voluntary Sale

If the tenant has a month-to-month rental agreement or another type of periodic tenancy, eviction after a voluntary sale by the owner can be accomplished under the rules applicable to periodic tenancies. See §§8.22-8.22A, 8.69.

If the tenant has a fixed-term lease, a voluntary sale of the property does not abrogate the lease. *Rosenkranz v Pellin* (1950) 99 CA2d 650, 222 P2d 249. Therefore, if the tenant has a 1-year lease running from January 1 to December 31, and the landlord sells the property on April 1, the buyer may not use CCP §1161a to evict the tenant through a 30-day notice served in April. The buyer simply becomes the new landlord; if the tenant fails to leave on December 31, the buyer may have the tenant evicted. CC §821. This result follows even if the lease is unrecorded. The tenant's possession puts a purchaser on notice of the tenant's interest (*Scheerer v Cuddy* (1890) 85 C 270, 24 P 713) despite CC §1214, which provides that an unrecorded lease for more than 1 year does not bind a subsequent purchaser in good faith (*i.e.,* without notice) who records first.

On transitional issues in selling residential or commercial property subject to a lease (*e.g.,* rent control, lease assignment, estoppel certificate, proration of rent), see California Real Property Sales Transactions, chap 4 and Apps C-D, J-L (4th ed Cal CEB 2007).

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§8.68E C. Lease Priority Issues After Foreclosure

Only a tenant whose interest is subordinate to the mortgage can be evicted under CCP §1161a or §1161b. Subordination of the lease can be accomplished by agreement if the lease predated the mortgage. On the meaning of "subordinate" and on ascertaining priority between leases and mortgages, see California Mortgages, Deeds of Trust, and Foreclosure Litigation §§6.90-6.98 (4th ed Cal CEB 2009). On the effect of foreclosure sales on subordinate leases, see Mortgage Deed of Trust Foreclosure §§6.86-6.89.

If the lease has priority over (*i.e.,* was executed before) the foreclosed mortgage, and there is no subordination agreement, the tenant has a complete defense to the eviction action, as long as the tenant is not in default. See Mortgage Deed of Trust Foreclosure §§6.84-6.85. In that situation, the landlord has mortgaged only a future reversionary interest in the land, subject to the lease. (Although it is possible that the recording act (CC §1214) may reverse this result, possession by a tenant generally constitutes notice to a subsequent, secured lender and preserves the tenant's priority even if the lease was not recorded. See *R-Ranch Mkts. #2, Inc. v Old Stone Bank* (1993) 16 CA4th 1323, 21 CR2d 21.) Because most standard leases and rental agreements are by their terms automatically subordinated to future mortgages, this issue does not arise very often. On automatic subordination, see Mortgage Deed of Trust Foreclosure §6.92; Office Leasing: Drafting and Negotiating the Lease, chap 28 (Cal CEB 1996).

In an unreported decision similar to *R-Ranch Mkts.,* the owner and lessor of real property sold it to a buyer who executed a deed of trust to the plaintiff-lender. The defendant-tenant already occupied the property under a 10-year lease, and was not a party to the sale or the deed of trust. When the lender foreclosed following the new owner's default, it sought to evict the tenant under CCP §1161a. The court held that the plaintiff acquired its interest subject to the leasehold interest, and that the tenant could not be evicted. The tenant's continuous occupation of the property gave the lender constructive notice of the tenant's interest (see *Scheerer v Cuddy* (1890) 85 C 270, 24 P 713; *Evans v Faught* (1965) 231 CA2d 698, 705, 42 CR 133); therefore, the lender could not be a bona fide purchaser protected by CC §1214. See *Home Sav. & Loan Ass'n v Piggee* (SF Super Ct App Dep't, Nov. 23, 1981, No. 3833 (unpublished opinion).

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§8.68F D. Effect of 2009 Federal Law on Evictions After Foreclosure

Effective May 21, 2009, the federal government enacted legislation that temporarily protects bona fide residential tenants holding possession under a month-to-month agreement or a lease from immediate eviction after a foreclosure sale by the purchaser or the foreclosing lender. See Protecting Tenants at Foreclosure Act of 2009 (Pub L 111-22, §§701-704, 123 Stat 1660). Under §704, the Act automatically terminates on December 31, 2012. To qualify for protection under the Act, the lease or tenancy must be bona fide by meeting the following criteria (12 USC §5220(b)):

- The tenant must not be the borrower or related to the borrower as a child, spouse, or parent;
- The lease or tenancy must be the result of an arm's length transaction; and
- The rent must not be substantially less than the fair market rent for the property.

Under California law, most residential tenants holding possession under a lease subordinate to the foreclosed loan are entitled to 60 days' notice of eviction after foreclosure under CCP §1161b. See §8.68C. The new federal law increases this to 90 days for month-to-month tenants. 12 USC §5220(a)(1). Tenants holding possession under a residential lease have the right to possession until the end of the lease term, unless the purchaser will occupy the unit as a primary residence, in which case the 90-day notice applies. 12 USC §5220(a)(2).

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VI. TERMINATION OF MONTH-TO-MONTH TENANCY: 30-DAY OR 60-DAY NOTICE

§8.69 A. Statutory Requirements

Under CC §§1946 and 1946.1, a tenancy that has an unspecified termination date ("periodic tenancy"; see §§1.9, 8.20) is considered to be renewed automatically at the expiration of the specified term, unless one of the parties gives written notice of intent to terminate the tenancy. A tenancy for an indefinite period under which rent is payable monthly is considered to be a month-to-month tenancy. *Palmer v Zeis* (1944) 65 CA2d Supp 859, 151 P2d 323. This type of tenancy is by far the most common form of periodic tenancy; many landlords and tenants prefer its flexibility to a fixed-term lease. Because it is so prevalent in residential landlord-tenant situations, month-to-month tenancy is emphasized in this discussion.

A month-to-month tenancy does not terminate automatically by lapse of time, as does a fixed-term lease (see §§8.2, 8.82). *Stoppelkamp v Mangeot* (1871) 42 C 316, 323; *Palmer v Zeis, supra*. It can be terminated only by either party giving the appropriate written notice allowed by statutory law—or notice for a shorter period of not less than 7 days, if provided for in a commercial lease or rental agreement. Civil Code §1946.1 provides that a residential landlord must give the tenant at least 60 days' notice to terminate a month-to-month tenancy, unless the tenant has resided on the premises for less than one year, in which case only 30 days' notice need be given. Code of Civil Procedure §1161b provides that a purchaser at a foreclosure sale who seeks to recover possession must give any residential tenant in possession (but not the foreclosed owner) 60 days' notice to quit (except for tenants covered by temporary federal legislation; see §8.68F). In commercial tenancies, a 30-day notice applies to terminate a month-to-month tenancy, and a 3-day notice applies to terminate after a foreclosure sale if the tenancy is subject to the mortgage. See CC §§1946, 1946.1, discussed in detail in §§8.20, 8.22, 8.70. See also CCP §1161a, discussed in §§8.68A, 8.68C, 8.68E. (On serving the notice, see §8.74.)

WARNING: The 60-day notice requirement in CC §1946.1 contains numerous exceptions, and CCP §1161b has sunset provisions. See §§8.20, 8.68C.

Civil Code §§1946 and 1946.1 apply only when the parties have not specified a definite term for the tenancy. If the parties have set a term, but its length is in dispute, no notice need be served. See *Pierce v Walter* (1933) 129 CA 228, 18 P2d 345.

Local rent control ordinances and state laws governing the eviction of owners of mobilehomes from mobilehome parks usually limit the grounds on which a residential tenancy may be terminated. See §§6.62-6.74, 7.54.

When the 30-day or 60-day notice period expires, the month-to-month tenancy ends in the same way that a fixed-term lease is over when the term expires. After this period, no 3-day notice is required before the landlord may file an unlawful detainer complaint. CC §791; *Hennessy v Gleason* (1947) 81 CA2d 616, 184 P2d 913; *La Cava v Breedlove* (1946) 77 CA2d 129, 174 P2d 880; *Palmer v Zeis, supra*.

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§8.70 B. Alteration of Notice Period; Commercial Tenancies

Although CC §1946 requires that 30 days' notice be given to terminate a month-to-month commercial tenancy (see §8.69), it also provides that the parties may agree at the outset of the tenancy to a shorter notice period "of not less than 7 days before the expiration of the term thereof." Because of this language, it appears that a month-to-month rental agreement (running from the first day of each month) could provide for service of a termination notice at least 7 days before the end of the month, and require the tenant to vacate at the end of the month. Apparently, it does not allow service of the notice at any time during the month to take effect 7 days later. On service of the 30-day notice, see §8.74.

If the landlord and tenant agree that the tenancy may be terminated only by either party's giving more than 30 days' notice, the notice served will be valid only if it complies with the agreement. *Watkins v McCartney* (1922) 57 CA 643, 207 P 909 (60 days' notice). When there is no notice agreement, the landlord may give more than 30 days' notice. See *Bauer v Neuzil* (1944) 66 CA2d Supp 1020, 1027, 152 P2d 47.

Under CC §1946.1, the required 60-day notice apparently overrides any attempt to shorten the notice period in rental agreements for residential periodic tenancies. Arguably, a residential tenant cannot legally waive its right to a 60-day termination notice by agreeing to a shorter period in the rental agreement because

- such a provision is void under CC §1953(a)(3);
- the 60-day notice required by CC §1946.1 supersedes that part of CC §1946 allowing a shorter period by mutual agreement, which now applies only to commercial tenancies; and
- California courts recognize that the bargaining power of residential landlords generally exceeds that of tenants (see, *e.g., Green v Superior Court* (1974) 10 C3d 616, 625, 111 CR 704), and therefore landlords should not be permitted to force waiver of important rights.

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C. Format and Contents of Notice

§8.71 1. Description of Premises; Signature

A 30-day or 60-day termination notice must be in writing (CC §§1946, 1946.1). Like a 3-day notice to quit (see §8.31), the notice to terminate should include a reasonably accurate description of the property.

Although not expressly required by CC §1946 or §1946.1, the notice should include the signature of the owner or an authorized agent. This seemingly innocuous requirement can cause an inattentive landlord a good deal of trouble. In *Orange St. Assocs. v Naton* (Alameda Super Ct App Dep't, Nov. 10, 1982, No. 1226; unpublished opinion; CAVEAT: Cal Rules of Ct 8.1115 restricts citation of or reliance on this opinion), Orange Street Associates had been the defendant's landlord, but sold the property with title passing on June 4. On June 12, a 30-day termination notice was served on the tenant, signed by an attorney "as agent for: Orange Street Associates." The court held that the notice was invalid. Although CCP §1161 allows an unlawful detainer action when the tenant remains in possession without consent of the landlord or the landlord's successor in interest, Orange Street Associates was not the landlord when the notice was served. The court rejected Orange Street's argument that it served the notice as agent for the new owner, because the notice did not mention the agency or the new owner. The court stressed that the plaintiff in an unlawful detainer action must demonstrate strict adherence to notice requirements (see §§10.20, 10.31, 12.35).

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§8.72 2. Grounds for Termination

Civil Code §§1946 and 1946.1 contain no express requirement that a 30-day or 60-day notice to quit specify the reason for termination. In fact, the demand for possession in the notice must be unequivocal, with no statement of the alternatives of performing under the lease or vacating as with some 3-day notices under CCP §1161 (see §§8.36, 8.50). *Turney v Collins* (1941) 48 CA2d 381, 119 P2d 954.

PRACTICE TIP: In some situations, the landlord may want to state the reason for termination in a 30-day or 60-day notice, although the notice need not be phrased "in the alternative." One reason to state the grounds for termination in the notice is the possibility of a claim that the eviction is retaliatory (see §§8.109-8.136). If the notice requires the tenant to vacate within 180 days after any of the actions enumerated in CC §1942.5(a), the landlord should state the reason for termination to demonstrate that grounds exist for termination other than retaliation (see §8.129).

The landlord may be required to state the grounds for termination under a local "just-cause eviction" ordinance. Several cities have enacted rent control ordinances that limit the grounds on which landlords may terminate month-to-month tenancies or refuse to renew leases. For discussion of eviction controls under rent control ordinances, see §§7.53-7.76.

Note that even when there is no requirement that the landlord state the reason for termination in the notice, the tenant still may defend a subsequent unlawful detainer action by claiming that the notice was served for retaliatory or discriminatory reasons. See §§8.133, 12.38.

NOTE: A landlord may not evict by asserting that an eviction is needed in order to comply with statutory requirements that water heaters be braced to protect against earthquake movement. Health & S C §19211(c).

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§8.73 3. 30 or 60 Days to Vacate; Service in Middle of Term

Any termination notice given under CC §1946 or §1946.1 should state specifically that the month-to-month tenancy will terminate in 30 or 60 days, whichever applies. In *Kingston v Colburn* (1956) 139 CA2d 623, 293 P2d 805, the court held that a notice giving fewer than 30 days to vacate was ineffective on the date stated in the notice, but was effective to terminate the tenancy after 30 days.

For termination of a month-to-month tenancy, a 30-day notice need not be served at the beginning of a given 30-day period of the tenancy. Under CC §1946, the 30-day notice may be served "at any time and the rent shall be due and payable to and including the date of termination." Similarly, CC §1946.1 does not require the 60-day notice to be given on any particular date relative to rent payment for a month-to-month tenancy. Thus, a 30-day or 60-day notice may be served at any time during the month, and the rent will be apportioned for the days of possession during the following month. In *Wheeler v Bainbridge* (1948) 84 CA2d Supp 849, 191 P2d 134, a 30-day notice was served on October 13, and the November rent was due on November 8. Because rent for an entire month was $50.50, the tenant owed $10.10 as the apportioned amount for the period from November 8 to November 13, when the tenancy was terminated.

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D. Serving 30-Day or 60-Day Notice

§8.74 1. Method of Service

Under CC §§1946 and 1946.1, service of a 30-day or 60-day notice to quit must be made in accordance with the provisions of CCP §1162, or "by sending a copy by certified or registered mail addressed to the other party." Thus, service by mail alone is clearly permitted for a 30-day or 60-day notice, unlike for a 3-day notice. This distinction makes some sense, because the courts have expressed concern over the possibility that mail delay would render the short time period under a 3-day notice meaningless (see §§8.62-8.67 for detailed discussion of §1162).

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§8.75 2. Withdrawal of Notice

The landlord may withdraw a 30-day or 60-day notice to quit only with the tenant's consent. See *Downing v Cutting Packing Co.* (1920) 183 C 91, 94, 190 P 455; *Devonshire v Langstaff* (1935) 10 CA2d 369, 373, 51 P2d 902. In contrast, the landlord's withdrawal of a 3-day notice to quit phrased "in the alternative" maintains the lease in effect (see §8.36). *Downing v Cutting Packing Co., supra*.

An implied withdrawal of a 30-day or 60-day notice might be found if, after service, the landlord accepts rent for a period beyond the 30 or 60 days. In *Highland Plastics v Enders* (1980) 109 CA3d Supp 1, 11, 167 CR 353, the court held that, when the landlord serves a 30-day termination notice, acceptance of rent for any period beyond the termination date "probably" constitutes an "implied withdrawal" of the notice. Mere tender of the rent, not accepted by the landlord, does not result in withdrawal of the notice. *Highland Plastics v Enders, supra*. The landlord should be able to avoid this problem by notifying the tenant that no waiver is intended, and by refunding the rent for those days beyond the date of termination.

In *EDC Assocs., Ltd. v Gutierrez* (1984) 153 CA3d 167, 200 CR 333, the landlord served a 30-day termination notice on August 30th, and then on September 14th served a 3-day notice to pay rent or quit. On October 2nd, the tenant sent the landlord a money order for the October rent. By accepting this rent, the landlord "waived its right to obtain possession of the leased premises." 153 CA3d at 171.

PRACTICE TIP: When a landlord serves a defective notice, a second notice must be served. Some tenants may refuse consent to withdrawal of the first notice in an attempt to force the landlord to prosecute an unlawful detainer action based on a defective notice. To avoid this predicament, the landlord should serve a second notice before filing an unlawful detainer action and argue that the defective notice was a nullity and need not be withdrawn. The second notice should also indicate that it supersedes any previously served notices.

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§8.76 3. Service on Subtenants

A 30-day or 60-day termination notice need not be served on subtenants; service on the tenant is sufficient because there is no default that the subtenants could cure, unlike the situation with a 3-day notice under CCP §1161 (see §§8.36, 8.50). *Four Seas Inv. Corp. v International Hotel Tenants' Ass'n* (1978) 81 CA3d 604, 611, 146 CR 531. Although the subtenants in the *Four Seas* case were not served with 30-day termination notices, they were apparently named in the unlawful detainer action, served with the complaint, and eventually evicted by the sheriff. Thus, it appears that subtenants may be evicted by legal process even though they have not been served with a 30-day termination notice. (See §§9.35, 9.45, 13.70-13.73 on naming occupants in the unlawful detainer action and effecting service of process in such an action.)

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§8.77 4. When Tenant Must Vacate

Under CCP §12, the service date is excluded in calculating the 30-day or 60-day period of a notice to terminate a month-to-month tenancy (or the final day of a shorter notice period; see §8.28). If the 30th or 60th day falls on a holiday, the tenant must vacate on the following business day. CCP §§12a-13. Legal holidays are every Saturday, Sunday, and other days listed in Govt C §6700 and in CCP §§10, 12a, 12b, 135. Thus, if a 30-day notice is served on Monday, June 16, the 30-day period expires on Wednesday, July 16, and the tenant must vacate on that date. If the 30-day notice is served on Thursday, June 12, the 30 days expire on Saturday, July 12. Because Saturday and Sunday are holidays, the tenant need not vacate until Monday, July 14.

Service of a 30-day or 60-day notice by mail arguably extends the period within which the tenant must vacate under CCP §1013(a). See §8.29. In *Highland Plastics v Enders* (1980) 109 CA3d Supp 1, 167 CR 353, the 30-day notice was posted and mailed as required by CCP §1162(3) on February 9th (see §8.65), but apparently was not sent by registered or certified mail as required by CC §1946 (see §8.74). An unlawful detainer action was filed on March 16th. The tenant argued that the action was filed prematurely because the time to vacate should have been extended an additional 5 days under CCP §1013. The court rejected this argument, holding that:

(a) "Service is complete under CCP §1162(3) when the notice is posted and a copy is deposited in the mail addressed to the tenant at the address where the premises are located" (109 CA3d at Supp 7 n3); and

(b) "The notice period is not extended by provisions of [CCP] §1013(a) and the plaintiff's unlawful detainer action was not prematurely filed" (109 CA3d at Supp 7). See §9.44.

Despite a 1996 amendment to CCP §1013(a), the reasoning in *Highland Plastic* was implicitly followed in *Losornio v Motta* (1998) 67 CA4th 110, 78 CR2d 799. See §§8.29, 8.65.

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§8.78 E. Notice Period Must Expire Before Filing of Complaint

A periodic tenancy (see §§1.9, 8.20) is not terminated on service of the notice required by CC §§1946 and 1946.1, but on expiration of the period specified in the notice. *Nicolaysen v Pacific Home* (1944) 65 CA2d 769, 151 P2d 567. The landlord has no cause of action in unlawful detainer until the tenancy has terminated, on expiration of the notice period. See *Bauer v Neuzil* (1944) 66 CA2d Supp 1020, 1028, 152 P2d 47.

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§8.79 F. Terminating a Tenancy at Will

A tenant at will is one who enters the premises with the landlord's permission for an indefinite period, when no rent is paid or reserved (see §1.10). *Covina Manor v Hatch* (1955) 133 CA2d Supp 790, 284 P2d 580. Such a tenancy might occur when the tenant enters the property with the landlord's consent while the lease is still being negotiated, but has not been finally executed and delivered. It may also arise under a void lease or a void oral agreement. *Covina Manor v Hatch, supra*. The landlord's consent is the characteristic that distinguishes a tenancy at will from a tenancy at sufferance (see §1.11). *Hull v Laugharn* (1934) 3 CA2d 310, 314, 39 P2d 478.

The landlord may terminate a tenancy at will by serving the tenant with a 30-day termination notice. CC §§789-790; *Turney v Collins* (1941) 48 CA2d 381, 391, 119 P2d 954. It is unsettled whether an additional 3-day notice is required under CCP §1161 to maintain an unlawful detainer action. See *Alves v Rodrigues* (1948) 84 CA2d 333, 190 P2d 649 (not required); *Martin v Splivalo* (1880) 56 C 128 (required). Civil Code §789 refers only to the manner of service under CCP §1162, and specifies not less than 30 days' notice. Under these provisions, it seems that a 3-day notice would be superfluous and a 30-day notice should suffice.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.80 G. Form: 30-Day or 60-Day Termination Notice

§8.80 G. Form: 30-Day or 60-Day Termination Notice

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8.80-1 30-day or 60-day termination notice

TERMINATION NOTICE

To _ _[*name of tenant*]_ _**, tenant in possession of premises located at** _ _[*specify address or other identifying information*]_ _**:**

Within _ _[*30 or 60*]_ _ **days after service of this notice, you must surrender possession of the premises to the undersigned** _ _[*landlord/landlord's authorized agent*]_ _**. Your failure to vacate the premises within** _ _[*30 or 60*]_ _ **days will cause the undersigned to initiate legal proceedings against you to recover possession of the premises, and to seek a judgment for damages for each day of occupancy after the expiration date of this notice** _ _[*, /and*]_ _ _ _[*statutory damages and costs*]_ _ _ _[*, /and attorney fees*]_ _**.**

This notice is intended as a _ _[*30 or 60*]_ _**-day notice terminating your** _ _[*e.g., month-to-month*]_ _ **tenancy. Prorated rent totaling $**_ _[*amount*]_ _ **is due and payable through and including the date of termination of your tenancy under this notice.**

[*If applicable, add one or more of the following options*]

[*Option 1: Reason for termination (see, e.g., good cause requirements in chap 7, or if landlord wants benefit of statutory protection (noted in §§8.115, 8.130) to defense based on retaliation)*]

The reason for service of this notice and termination of your tenancy is: _ _[*specify*]_ _**.**

[*Option 2: Notice of right to inspection (residential tenancy; use if landlord holds security deposit requiring tenant to leave premises in same condition as at inception of lease; see §§1.53, 3.73, 8.172A)]*

Under California law, you have a right to request that the undersigned _ _[*landlord/landlord's authorized agent*]_ _ **make an initial inspection of the premises to determine its condition before you vacate, and you have the right to be present during the inspection. The purpose of the inspection is to allow you an opportunity to remedy identified deficiencies or damage to the premises, if any, caused by you. If you wish to have such an inspection, please contact the undersigned** _ _[*landlord/landlord's authorized agent*]_ _ **as soon as possible at** _ _[*specify address & telephone number*]_ _**. If you request an inspection, you will be given 48 hours' advance notice of the inspection, but you may waive in writing the required 48 hours' notice and have the inspection done sooner.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature of landlord/landlord's agent*]__
_ _[*Typed name of landlord/landlord's agent*]_ _

Copies: Original (served on tenant and each cotenant); copies for landlord's and attorney's files.

Comment: On required contents of notice, see §§8.71-8.73. Note that a specification of reasons for the termination is not normally required in jurisdictions without rent control (see §8.72), but may be advisable or necessary to anticipate tenant defenses that the eviction is retaliatory (see CC §1942.5(e)). In a jurisdiction with rent control, it is usually necessary to state the specific ground for eviction on the face of the notice. For specific requirements, check the language of the individual rent control law and any regulations promulgated by the local rent control board. On requirements for service of the notice, see §8.74. On whether attorney fees are recoverable, see §13.25.

If a commercial rental agreement provides for a shorter notice period (of not less than 7 days; see §§8.69-8.70), the notice should be changed to specify the shorter period.

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VII. UNLAWFUL DETAINER ACTIONS THAT REQUIRE NO NOTICE

§8.81 A. Tenant Gives Notice, But Remains After Notice Expires

When the tenant gives a 30-day or other notice of termination of a periodic tenancy under CC §1946 or §1946.1 (see §§8.20, 8.69-8.70), but remains after the notice period expires, the landlord need not serve the tenant with a termination notice, specifying 3 days or any other period, before initiating an unlawful detainer action. CCP §1161(5). Note that this rule may not apply under a local rent control ordinance, so the landlord may be required to give notice in this situation. See chap 7.

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§8.82 B. Expiration of Fixed-Term Lease

In jurisdictions without rent control, the lessor may file an unlawful detainer action without serving any notice whatsoever, when the lease provides for a fixed-term tenancy, the term has expired, and the tenant holds over without permission. CCP §1161(1); *Lee Chuck v Quan Wo Chong & Co.* (1891) 91 C 593, 597, 28 P 45; *Ryland v Appelbaum* (1924) 70 CA 268, 233 P 356. See CC §1933(1) and cases cited in §8.2. But see *Martin v Splivalo* (1880) 56 C 128, 129 (dictum stating that 3-day notice required).

A tenant who holds over without the landlord's consent after the fixed term has expired is a tenant at sufferance (*Colyear v Tobriner* (1936) 7 C2d 735, 742, 62 P2d 741; *Hull v Laugharn* (1934) 3 CA2d 310, 314, 39 P2d 478) and is liable for the reasonable rental value of the premises during the holdover period (*Colyear v Tobriner, supra*).

If the tenant remains in possession after the expiration of a fixed term, and the landlord accepts monthly rent, the parties are presumed to have created a month-to-month tenancy (*Renner v Huntington-Hawthorne Oil & Gas Co.* (1952) 39 C2d 93, 102, 244 P2d 895), on the same terms as under the original lease, unless modified. CC §1945; *Miller v Stults* (1956) 143 CA2d 592, 598, 300 P2d 312, 316. Note that the original lease may entitle the parties to attorney fees in an unlawful detainer action even though there is no present agreement. See §§13.25-13.34 on recovery of attorney fees. The landlord's consent, express or implied, is essential to create such a tenancy, even when the lease provides that a month-to-month tenancy will result if the tenant holds over after expiration of the lease term. *Ryland v Appelbaum* (1924) 70 CA 268, 270, 233 P 356.

The lease may provide for automatic renewal or extension if the tenant either (a) remains in possession after expiration of the lease or (b) fails to give notice of intent not to renew or extend before expiration of the lease term. The tenant may void such a provision unless it is set forth in boldface type, at least eight points in size. CC §1945.5. Without a renewal or extension provision, or a rent control ordinance (see §§7.54-7.68), a private nonsubsidized landlord generally is under no obligation to renew or extend a fixed-term lease. Even so, such a landlord may not be able to refuse to renew or extend for retaliatory or arbitrary reasons. See §§8.109-8.136. Special rules apply to expired leases for spaces in mobilehome parks (see §6.73).

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§8.83 C. Hotel and Motel Guests

Guests in certain categories of hotels and motels are not considered to be tenants, are not subject to the general provisions of California landlord-tenant law (see CC §§1940-1954.1), and are not entitled to notice before their occupancy is terminated. CCP §1161; CC §1940. For further discussion, see §1.3. All other categories of occupants, including many who were considered to be "lodgers" or "licensees" before enactment of CC §1940 in 1976, are "persons who hire dwelling units" under CC §1940, and they thus are subject to the notice provisions of CCP §1161. Under CCP §1161, a "tenant" is "any person who hires real property" except those persons whose occupancy is described in CC §1940(b), *i.e.:*

(a) Persons who maintain transient occupancy in a hotel, time-share, or other facility, subject to the hotel tax under Rev & T C §7280;

(b) Persons who have not made valid payment for all room and other related charges owing as of the last day on which the occupancy is or would be subject to that tax; or

(c) Persons who maintain occupancy in a hotel where the management retains a right to enter and control the rooms, and offers all the following services to every resident: facilities for safeguarding personal property; central telephone service; maid, mail, and room services; occupancy for fewer than 7 days; and food service meeting specified requirements.

See Note in §1.3C concerning the status and rights of tenants living in residential hotels offering only long-term occupancy.

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§8.84 D. Employees

A landlord who is also the tenant's employer may bring an unlawful detainer action under CCP §1161(1) against the tenant-employee on termination of the employment, without prior notice, *provided that* the tenant became the occupant of the premises as a

- servant,
- employee,
- agent, or
- licensee.

The language of CCP §1161(1) does not appear to make a terminated employee guilty of unlawful detainer on termination of the employment if he or she became the occupant of the premises first as a tenant and was thereafter hired by the landlord as an employee. The landlord-employer may not, however, evict the tenant by force; an unlawful detainer action is the proper remedy. *Eichhorn v De La Cantera* (1953) 117 CA2d 50, 54, 255 P2d 70. Resident managers of apartment complexes are probably employees under CCP §1161(1). See *Cook v Klenk* (1904) 142 C 416, 76 P 57.

In *Karz v Mecham* (1981) 120 CA3d Supp 1, 174 CR 310, after the tenant's employment was terminated, the landlord served a notice stating that the rent would be $200 a month if the tenant did not vacate. The tenant did not vacate, and the court held that the rental provision converted a tenancy at sufferance into a month-to-month tenancy that could be terminated only by a 30-day notice in the absence of a breach by the tenant. In *Chan v Antepenko* (1988) 203 CA3d Supp 21, 250 CR 851, the court refused to follow *Karz v Mecham,* holding that a resident manager was a licensee, not a tenant at sufferance. Therefore, on termination of the employment relationship, the manager was not entitled to a 30-day notice to quit before the landlord could bring an unlawful detainer action.

On evictions of farmworkers who reside in grower-supplied housing, see *Vargas v Municipal Court* (1978) 22 C3d 902, 150 CR 918; *S. P. Growers Ass'n v Rodriguez* (1976) 17 C3d 719, 131 CR 761. In *Vasquez v Glassboro Serv. Ass'n* (NJ 1980) 415 A2d 1156, the court held that a grower's employment contract with a farmworker, which provided housing for the worker but required the worker to vacate immediately on termination of employment, was an unconscionable adhesion contract. The court concluded that "public policy requires the implication of a provision for a reasonable time to find alternative housing." 415 A2d at 1166.

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§8.85 VIII. TERMINATION BY LANDLORD UNDER GOVERNMENT-SPONSORED PROGRAM

When rental housing is owned or subsidized by a federal, state, or local government agency, special termination requirements are imposed on the landlord in addition to those imposed generally by state law. Typically imposed as conditions to provision of government funding, these requirements may stem from state or federal statutes, regulations (usually those of the U.S. Department of Housing and Urban Development (HUD)), or the due process clause of the Fifth or Fourteenth Amendment to the U.S. Constitution. They mandate a pretermination notice, good cause for termination, and a pretermination hearing, with certain exceptions created by contract, statute, or regulation. For comprehensive discussion of substantive law, procedures, and special issues arising in evictions from government-owned or government-assisted housing, see California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993).

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§§8.86-8.108 [Deleted]

Evictions from government-owned and government-assisted housing are highly specialized and are covered in numerous publications including California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993); National Housing Law Project, *HUD Housing Programs: Tenants' Rights* (3d ed 2004) (and its latest supplement); HUD, Occupancy Requirements of Subsidized Multifamily Housing Programs Handbook No. 4350.3 (2004).

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IX. LIMITATIONS ON LANDLORD'S ABILITY TO TERMINATE TENANCY

§8.109 A. Retaliatory Eviction

A tenant has a complete defense to an unlawful detainer action if the landlord's intent in initiating the eviction is retaliatory. If the eviction is brought under the Ellis Act (Govt C §§7060-7060.7) (see §7.64), special rules on the burden of proof apply. See *Drouet v Superior Court* (2003) 31 C4th 583, 3 CR3d 205, explained in §§7.64G, 12.38.

In an affirmative defense in an unlawful detainer suit, retaliation is any action by the landlord that is *intended* to punish the tenant (or to set an intimidating example to other tenants) because the tenant has committed a legally protected act. Actionable retaliatory *conduct* often takes the form of the landlord's serving a termination notice or initiating an unlawful detainer action, but it may also consist of a rent increase, decrease in services, refusal to renew a lease, change of lease terms, or increase in fees or deposits, or *threat* to do any of the foregoing. CC §1942.5. With the minor exceptions discussed below, the legal analysis remains the same, no matter what form the landlord's conduct takes (assuming that the tenant can prove a retaliatory intent behind the landlord's action). In analyzing whether legally cognizable retaliatory conduct has occurred, the starting point is not the nature of the landlord's action, but the nature of the tenant's act that induced the landlord's conduct. As discussed below, different legal theories may support a claim of retaliation. Their applicability usually depends on whether the conduct that induced the retaliation is legally protected.

Landlord's attorneys might argue that a retaliatory eviction defense would not apply to an eviction based on expiration of a fixed-term lease. After expiration of the lease term, it might be argued, the leasehold no longer exists and the tenant becomes a tenant at sufferance, giving the owner an absolute right to the return of the property. See §§1.11, 3.64, 8.2.

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§8.110 1. Several Sources of Law May Apply

Counsel should be aware that several sources of law against retaliation may apply in a given instance, including federal and state constitutions, California statutes, local ordinances, and common law. The fact that one legal theory is inapplicable does not preclude the tenant from relying on other theories. The tenant apparently may proceed on any one or more theories of retaliation that apply. See *Barela v Superior Court* (1981) 30 C3d 244, 250, 178 CR 618 (retaliation against tenant for reporting to police that landlord had molested her child; tenant entitled to proceed under both CC §1942.5 and California common law on retaliatory eviction).

Thus, for example, if the landlord attempts to terminate the tenancy to punish the tenant for reporting housing code violations, and the termination notice expires more than 180 days after the tenant's action, CC §1942.5 might not apply (see §§8.111-8.117), but the tenant might be able to rely on common law theories of retaliatory eviction (see §8.125). *Glaser v Meyers* (1982) 137 CA3d 770, 187 CR 242 (tenant complaint to city council about conditions at mobilehome park; tenant entitled to proceed under common law doctrine when CC §1942.5 time limit had expired).

The tenant may also be able to file a special motion to strike the unlawful detainer under CCP §425.16 on the ground that the landlord's suit is a strategic lawsuit against public participation (SLAPP). If the tenant prevails, attorney fees are available under CCP §425.16(c). *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377. See §§5.18A, 10.38A.

The seminal case on retaliation, *Edwards v Habib* (DC Cir 1968) 397 F2d 687, is a good illustration of the point that *several* sources of law may bar retaliation in a particular case. In *Edwards,* the tenant contended that the landlord was evicting her for reporting housing code violations to the city code-enforcement agency. The court allowed this defense after carefully analyzing the following three theories supporting it.

First, the court considered the argument that to permit the eviction would interfere with the tenant's right under the First Amendment to the United States Constitution to petition the government for redress of grievances. The required "state action" would be found in use of the courts to enforce the eviction, just as the U.S. Supreme Court held that it was state action for a court to enforce a private covenant restricting residential property to whites only (*Shelley v Kraemer* (1948) 334 US 1, 92 L Ed 1161, 68 S Ct 836). Expressing reservations about the possible ramifications of *Shelley,* but concerned that state courts not unreasonably restrict First Amendment rights, the court declined to accept or reject this theory. 397 F2d at 696.

Second, the court examined the argument that state action was not necessary, because a citizen's right to inform the government of a legal violation is constitutionally protected against private action as well as government action. 397 F2d at 690. This theory stems from the holding in *In re Quarles & Butler* (1895) 158 US 532, 536, 39 L Ed 1080, 15 S Ct 959, that "[t]he right of a citizen informing of a violation of law … does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." *Edwards v Habib* (DC Cir 1968) 397 F2d 687, 697. The court also declined to adopt or reject this theory, but noted that the decision in *Quarles* seemed to apply to a retaliatory eviction. 397 F2d at 698.

Third, the court ultimately adopted the legal theory that to permit retaliatory evictions would be contrary to the legislative intent behind the housing code, and thus would contravene public policy. The court held that permitting retaliatory evictions "would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing," because tenants in homes with code violations would hesitate to complain, fearing eviction. The court stated (397 F2d at 701):

> In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated.… [A]n eviction under the circumstances of this case would… punish appellant for making a complaint which she had a constitutional right to make, a result which we would not impute to the will of Congress simply on the basis of an essentially procedural enactment.

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a. CC §1942.5

(1) Tenant Actions on Habitability (CC §1942.5(a))

§8.111 (a) Protected Acts

Under CC §1942.5(a), the tenant is protected from retaliatory conduct by the landlord for using the "repair-and-deduct" remedy (CC §1942; see §§3.12-3.15) and for reporting code violations to the local building inspection agency. Section 1942.5 bars the landlord from retaliating by means of eviction, rent increase, or decrease in services.

In *Kemp v Schultz* (1981) 121 CA3d Supp 13, 175 CR 412, the tenant claimed that the unlawful detainer action was brought in retaliation for his complaints to the landlord about the tenantability of the premises. In CC §1942.5(a)(1)-(5), the legislature listed a series of possible operative dates from which the 180-day protection of the subsection may extend (see §8.112). The court in *Kemp* allowed the tenant's defense under CC §1942.5(a)(1), which makes the date of a tenant complaint to the landlord one of the dates from which the protection period may run. Although the result in *Kemp* seems correct, the court's analysis appears faulty.

Subsections (a)(1)-(5) of CC §1942.5 do not purport to itemize tenant acts protected by the section, but merely to establish the date from which the protection extends. The acts protected by CC §1942.5(a) are set out in its first clause: "If the lessor retaliates against the lessee because of the exercise… of his rights under this chapter or because of his complaint to an appropriate agency as to tenantability of a dwelling." A tenant's complaint to the landlord should be "an exercise of his rights under this chapter," because CC §1942 (a part of "this chapter") not only permits but requires the tenant to complain to the landlord before exercising the repair-and-deduct remedy.

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§8.112 (b) Limitations on Protection

A tenant who is in default in payment of rent may not invoke the protection of CC §1942.5(a). It is unclear whether this section means that the tenant cannot be in default at the time of the landlord's retaliatory conduct or at the time that the tenant invokes the claim of retaliation, *i.e.,* as a defense to the landlord's action for possession. The latter time seems the more reasonable interpretation of CC §1942.5(a). Moreover, the tenant may not invoke subsection (a) more than once in any 12-month period. CC §1942.5(b).

Retaliatory conduct by the landlord more than 180 days after the tenant's action does not fall within the ambit of CC §1942.5(a). The tenant is protected only for 180 days after the latest of the following dates, on which (CC §1942.5(a)(1)-(5)):

(1) The tenant told the landlord of defects in the premises (see *Kemp v Schultz* (1981) 121 CA3d Supp 13, 175 CR 412, discussed in §8.111);

(2) The tenant filed a written complaint (or oral complaint recorded in writing) with a government agency, if the landlord knew of the complaint;

(3) The government agency inspected the premises or issued a citation, if the landlord did not know of the complaint;

(4) The tenant filed a judicial or arbitration proceeding involving tenantability; or

(5) The tenant won a judgment or arbitration award involving tenantability.

In *Kriz v Taylor* (1979) 92 CA3d 302, 154 CR 824, the court held that the landlord may serve a termination notice within the time period specified by CC §1942.5 (then 60 days), as long as the notice does not require the tenant to vacate until after the statutory period, and the §1942.5 defense is not then available to the tenant in the landlord's action for possession.

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§8.113 (2) Tenant Union Activity or "Rights Under Law" (CC §1942.5(c))

When a tenant organizes or joins a tenant union or peaceably exercises "any rights under the law," CC §1942.5(c) prohibits the landlord from retaliating or threatening to retaliate by eviction, rent increase, or decrease in services. Note that subsection (c) contains none of the limitations imposed in CC §1942.5(a) (see §8.112). The tenant may invoke subsection (c) more than once in any 12-month period, even though behind in rent payments and 180 days have expired. See *EDC Assocs., Ltd. v Gutierrez* (1984) 153 CA3d 167, 172, 200 CR 333 (concurring opinion of Andreen, J).

Conduct encompassed by the phrase "any rights under the law" appears at first glance to include the tenant's exercise of the repair-and-deduct remedy (a "right" under CC §1942; see §§3.12-3.15) and complaining to a building inspection department about conditions on the premises (arguably a "right" under the First Amendment to the U.S. Constitution; see §8.111). See *Glaser v Meyers* (1982) 137 CA3d 770, 776 n4, 187 CR 242. Because CC §1942.5(a) specifically covers these acts, with its limitations on exercise of tenants' rights (see §8.112), §1942.5(c) probably does not cover them, or the limitations imposed by subsection (a) would be ineffective.

"Any rights under the law" should include at least the rights granted by the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996; see §§2.49-2.56), the Unruh Civil Rights Act (CC §51; see §§2.57-2.59), other statutes, and judicial decisions. Section 1942.5(c) also seems to cover constitutional rights and thus may apply to retaliation for constitutionally protected acts such as marrying, having sex with an unmarried person, having a baby, gathering signatures on a petition, or joining an unpopular political party. (Note that the Unruh Civil Rights Act might also protect these acts from retaliation by the landlord. See §2.58.

In *Barela v Superior Court* (1981) 30 C3d 244, 178 CR 618, the court held that, by reporting to the police a crime allegedly committed by the landlord, the tenant had "lawfully and peaceably exercised her rights" within the meaning of CC §1942.5(c).

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§8.114 (3) Tenant Cannot Waive Rights (CC §1942.5(d))

Any attempt by the tenant to waive his or her rights under CC §1942.5 is void. CC §1942.5(d). Thus, a waiver in a lease or rental agreement is clearly barred (see, *e.g., Green v Superior Court* (1974) 10 C3d 616, 625 n9, 111 CR 704; *Henrioulle v Marin Ventures, Inc.* (1978) 20 C3d 512, 143 CR 247), but it is doubtful that §1942.5(d) was intended to invalidate a waiver in a settlement agreement negotiated by attorneys during a pending lawsuit. In such a case, the bargaining power is more equal, the waiver is subject to judicial oversight, and public policy favors settlement of lawsuits.

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§8.115 (4) Notice and Burden of Proof (CC §1942.5(e))

Civil Code §1942.5(e) provides that, despite the other subsections of §1942.5, a landlord may recover possession if the notice to the tenant states the ground on which the landlord "in good faith" seeks to recover possession. If the statement is controverted, the landlord must "establish its truth" at the unlawful detainer trial.

Civil Code §1942.5(e) does not contain the same ambiguity as CC §1942.5(d) (discussed in §8.114), because the requirement that the landlord state the ground "in good faith" seems to preclude the landlord from stating an otherwise valid ground if the dominant purpose is to retaliate. The problem with §1942.5(e) is that CC §§827, 1946, and 1946.1 (see §8.69) do not require a landlord to state the ground for giving a notice raising the rent or terminating a month-to-month tenancy. If the landlord does state a ground, he or she thus acquires the burden of proving the ground under CC §1942.5(e). Although the tenant would still have the burden of "producing evidence" of retaliation (see CC §1942.5(c)), the landlord would have the ultimate burden of negating retaliatory motive by proving the truth of the stated ground. See §8.130. A landlord's attorney, therefore, should recommend that the notice state cause to avoid the relatively easy showing of a prima facie retaliatory defense by a tenant who alleges the reason for the notice was retaliation for the tenant's protected act within the 180-day period.

Does CC §1942.5(e) require that the landlord state the nonretaliatory ground in the termination notice and plead it in the complaint as a prerequisite to introducing evidence that the eviction was motivated by that ground? It is possible that the legislature intended this effect (see discussion of cases in §8.130), but subsection (e) does not contain such mandatory language, and retaliation is an issue in only a minority of eviction and rent increase cases. Perhaps the legislature meant to require that the landlord state the ground whenever CC §1942.5(a) or (c) might apply, *e.g.,* whenever the notice will expire within 180 days of any of the dates set out in subsection (a). See cases interpreting CC §1942.5(e) in §12.38.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.116 (5) Remedies (CC §1942.5(f)-(g))

§8.116 (5) Remedies (CC §1942.5(f)-(g))

A landlord (or landlord's agent) who violates CC §1942.5 is liable for actual damages sustained by the tenant, and for punitive damages from $100 to $2000 for each retaliatory act if the retaliation was committed with "fraud, oppression, or malice" (which are often present in retaliation cases). CC §1942.5(f). The prevailing party is entitled to recover attorney fees if either party requested them at the outset of the action (presumably in the initial pleadings, *i.e.*, complaint or answer). CC §1942.5(g).

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§8.117 (6) Remedies Not Exclusive (CC §1942.5(h))

Civil Code §1942.5(h) requires that "remedies provided by this section shall be in addition to any other remedies provided by statutory or decisional law." The meaning of this subsection is not entirely clear. If the legislature used the word "remedies" in a narrow sense (covering only means of redressing violations of the substantive rights granted by CC §1942.5), then the subsection arguably permits the tenant to invoke other methods of redressing retaliation (such as injunctive relief and punitive damages over $2000; see *Aweeka v Bonds* (1971) 20 CA3d 278, 97 CR 650; but see *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v De Anza Santa Cruz Mobile Estates* (2001) 94 CA4th 890, 114 CR2d 708), even though other sources of law concerning retaliation are "preempted" by CC §1942.5.

The California Supreme Court appears to have rejected this narrow view. Instead, the court has implied that CC §1942.5(h) refers to remedies in the broad sense (*i.e.,* that it includes substantive rights as well as means of redressing their violation), so that a tenant may invoke applicable theories of retaliation in addition to those provided for in §1942.5. *Barela v Superior Court* (1981) 30 C3d 244, 250, 178 CR 618 (tenant, evicted in retaliation for complaining to police that landlord had molested her child, entitled to proceed under both CC §1942.5 and California common law on retaliatory eviction). See also *Glaser v Meyers* (1982) 137 CA3d 770, 187 CR 242.

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b. Unruh Civil Rights Act (CC §51)

§8.118 (1) Arbitrary Conduct Prohibited by Act's Discrimination Protections

The tenant may be protected from the landlord's "arbitrary" retaliatory conduct by the Unruh Civil Rights Act (CC §51), which is amended frequently and extensively discussed in chap 2. It provides (CC §51(b)):

> All persons … are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to … full and equal accommodations … in all business establishments.

Effective January 1, 2006, persons protected under the Unruh Act include those who are perceived to have any particular characteristic of the listed classes in the Act or who associate with persons who have, or are perceived to have, any such characteristic. CC §51(e)(5).

Although customarily invoked in cases involving the protected classes, the Act also prohibits all arbitrary discrimination by business establishments. The listed classes must be construed as illustrative rather than restrictive. See uncodified declarations of the legislature in Stats 2005, ch 420, §2; *In re Cox* (1970) 3 C3d 205, 216, 90 CR 24. In *Cox*, the petitioner (who was on a motorcycle and speaking to a young man "who wore long hair and dressed in an unconventional manner") was ordered to leave a shopping center for no apparent justifiable reason. After refusing to do so, he was arrested and prosecuted under a local ordinance. The court held that the Unruh Act forbids "arbitrary" exclusions, and requires that the prosecution show some reasonable ground for the order to leave. See also *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 180 CR 496.

Because a person who is in the business of renting apartments or houses is covered by the Unruh Act (*Swann v Burkett* (1962) 209 CA2d 685, 26 CR 286), it appears that a landlord may not evict a tenant, raise the rent, or withhold services for an "arbitrary" reason. The tenant may raise arbitrary retaliatory conduct under the Unruh Act as a defense to an unlawful detainer action. *Marina Point, Ltd. v Wolfson, supra*. For discussion, see §2.58.

Note that although *Swann v Burkett, supra,* involved the renting of units in a triplex, the court implied that duplexes and single-family homes might also be covered by the Unruh Act. *Swann v Burkett* (1962) 209 CA2d 685, 695, 26 CR 286. The California Attorney General determined that the Act covers virtually all landlords, even "an owner of a non-owner occupied single family dwelling who sells, rents, or leases it for income or gain." 56 Ops Cal Atty Gen 546, 551 (1973). For further discussion, see §§2.21, 2.57-2.59.

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§8.119 (2) "Arbitrary" Defined

The term "arbitrary" appears to be synonymous with "without good cause." See *Stoumen v Reilly* (1951) 37 C2d 713, 717, 234 P2d 969; *Madonna v County of San Luis Obispo* (1974) 39 CA3d 57, 62, 113 CR 916. From the supreme court's holding in *In re Cox* (1970) 3 C3d 205, 90 CR 24, that the Unruh Civil Rights Act (CC §51) bars arbitrary discrimination (see §8.118), the following bases for eviction or other action by the landlord appear to be "arbitrary":

(1) The tenant has long hair. *In re Cox, supra*.

(2) The tenant associates with black people. *Winchell v English* (1976) 62 CA3d 125, 133 CR 20. See also *Woods-Drake v Lundy* (5th Cir 1982) 667 F2d 1198 (eviction violates federal law).

(3) The tenant associates with homosexuals. *Hubert v Williams* (1982) 133 CA3d Supp 1, 184 CR 161.

(4) The tenant receives public assistance. 59 Ops Cal Atty Gen 223 (1976). The landlord might, however, establish reasonable criteria related to the tenant's ability to pay rent (see §§2.9, 2.57-2.58).

(5) The tenant is a student. See 59 Ops Cal Atty Gen 70 (1976).

In *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 180 CR 496, the court held that a landlord's policy of excluding and evicting families with children was an arbitrary exclusion of a class of people and therefore violated the Unruh Act. In *O'Connor v Village Green Owners Ass'n* (1983) 33 C3d 790, 191 CR 320, the *Marina Point* ruling was applied to a condominium owners' association that forbade occupancy by minors. For further discussion, see §§2.57-2.59.

In response to the *Marina Point* and *O'Connor* decisions, the legislature adopted CC §§51.2-51.4, which permit owners to develop or rehabilitate certain multi-unit buildings for senior citizens, and to limit occupancy to such tenants and people who provide physical or economic support for them. For discussion, see §2.25.

In non-Unruh Act cases, the courts have held the word "arbitrary" to include the landlord's basing a decision to evict on a valid purpose but alleging insufficient facts to support that purpose: *Guntert v City of Stockton* (1974) 43 CA3d 203, 210, 117 CR 601; *Hollon v Pierce* (1967) 257 CA2d 468, 64 CR 808.

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§8.120 (3) Burden of Proof

The tenant usually raises an Unruh Civil Rights Act (CC §51) violation as an affirmative defense to an unlawful detainer action. Thus, the tenant seems to have the burden of proof on the issue.

One municipal court ruled to the contrary when the tenant pleaded retaliatory eviction as a defense. In *M & D Props. v Lopez* (LA Mun Ct, Nov. 7, 1978, No. 241 584) 13 Clearinghouse Rev 310 (1979), the court held that the landlord has the burden of proving a valid nonretaliatory reason for the eviction, because of the tenant's inherent inability to know the landlord's reasons.

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§8.121 (4) Remedies

In addition to constituting an affirmative defense to an unlawful detainer action, arbitrary conduct in violation of the Unruh Civil Rights Act (CC §51) may also render the landlord subject to various affirmative civil remedies. See §2.58.

A person who violates the Unruh Act is liable under CC §52(a) for:

- actual damages;
- up to three times actual damages (but at least $4000); and
- attorney fees.

Under CC §52(b), additional damages are available against anyone who denies the right to be free of violence or to be free of sexual harassment (see also §3.70A).

If there is reasonable proof that someone is engaging in "conduct in resistance to the full enjoyment" of any right secured by the Unruh Act, injunctive relief may be obtained by the Attorney General, a district or city attorney, or any aggrieved person. CC §52(c).

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§8.122 c. California Fair Employment and Housing Act (FEHA)

The California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) prohibits discrimination based on the tenant's race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, sexual orientation, or source of income. Govt C §12955(a). The portions of FEHA that cover housing discrimination were adopted from the former Rumford Fair Housing Act (former Health & S C §§35700-35745). Much of FEHA's coverage duplicates the Unruh Civil Rights Act (CC §51) (see §§8.118-8.121). Differences include specific mentions in FEHA of "marital status," and the fact that no court has construed FEHA to cover all "arbitrary" discrimination (see §8.119). FEHA is primarily enforced by Department of Fair Employment and Housing. Govt C §§12930, 12980-12988. See §§2.49-2.59.

In *Atkisson v Kern County Hous. Auth.* (1976) 59 CA3d 89, 130 CR 375, the court held under the former Rumford Act that a landlord's policy of evicting unmarried couples constituted an illegal eviction based on "marital status." The supreme court later ruled that a landlord who refused to rent to unmarried couples on the basis of her religious beliefs violated the FEHA. *Smith v FEHC* (1996) 12 C4th 1143, 51 CR2d 700. See further discussion of this issue in §2.50. Other states have addressed this issue. See Johnson, *The Conflict Between Religious Exercise and Efforts to Eradicate Housing Discrimination Against Nontraditional Couples: Should Free Exercise Protect Landlord Bias?*, 53 Wash & Lee L Rev 351 (1996); Wistner, *Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption From Fair Housing Laws*, 46 Case W Res L Rev 1071 (1996).

Under Govt C §12955(f), a property owner may not:

> harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner's dominant purpose is retaliation against a person who has opposed practices unlawful under this section, informed law enforcement agencies of practices believed unlawful under this section, has testified or assisted in any proceeding under this part… Nothing herein is intended to cause or permit the delay of an unlawful detainer action.

The last sentence in §12955(f) appears to bar only frivolous retaliation defenses to unlawful detainer actions. If the action is brought in retaliation for the tenant's assertion of rights under FEHA, it would seem improper for the court to deny this defense and thus assist in a clear violation of the Act. This provision presumably would bar injunctive relief to delay an unlawful detainer action.

In *Hess v FEHC* (1982) 138 CA3d 232, 187 CR 712, the landlord required each member of an unrelated couple to meet certain financial standards, while allowing married couples to aggregate their income. The Fair Employment and Housing Commission found that the' practice violated Govt C §12955, which forbids discrimination on the basis of marital status. The court upheld this ruling, rejecting the landlord's defense of a legitimate business purpose.

In *Brown v Smith* (1997) 55 CA4th 767, 64 CR2d 301, the jury awarded damages against a landlord for sexually harassing a tenant. On appeal, the landlord argued that FEHA and the Unruh Act did not cover sexual harassment. The appellate court ruled that FEHA is to be broadly construed to accomplish its purpose of prohibiting discrimination and read in conformity with federal law, which prohibits sexual harassment as a form of discrimination. Note also that CC §51.9 has since been amended to allow a civil action for damages for sexual harassment by a landlord or a property manager.

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§8.123 d. Federal Statutes

A retaliatory eviction defense is available to a tenant who is evicted for asserting rights under federal law. In *S. P. Growers Ass'n v Rodriguez* (1976) 17 C3d 719, 131 CR 761, the court held that the tenants could not defend against an unlawful detainer action by alleging that the landlord sought to evict employees from company housing because they were on a labor strike. The court ruled, however, that the tenants could defend on the ground that the landlord 'retaliated against the tenants for having sued the landlord under a federal farm labor statute (former Farm Labor Contractor Registration Act (former 7 USC §§2041-2055); see 29 USC §§1801-1872). The court noted that the statute relied primarily on private lawsuits for its enforcement, and that the Supremacy Clause of the U.S. Constitution prevents states from frustrating federal legislation.

In *Halet v Wend Inv. Co.* (9th Cir 1982) 672 F2d 1305, the court held that the tenant's complaint stated a cause of action under 42 USC §1983 (denial of civil rights under color of state law) by alleging that the defendant landlord had an "adults-only" rental policy. See also Note, *Use of the Fair Housing Act to Redress Housing Discrimination Against Families with Children*, 17 Clearinghouse Rev 736 (1983).

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§8.124 e. Other Statutes

Any statute that authorizes certain conduct by tenants, or contemplates such conduct, appears to contain implicit protection from retaliation by the landlord for engaging in such conduct. This conclusion stems from the reasoning of various courts that to permit evictions in retaliation for exercise of statutory rights undercuts the intent behind protective legislation and contravenes public policy. See *Edwards v Habib* (DC Cir 1968) 397 F2d 687 (discussed in §8.110). See also *Vargas v Municipal Court* (1978) 22 C3d 902, 915, 150 CR 918; *S. P. Growers Ass'n v Rodriguez* (1976) 17 C3d 719, 131 CR 761; *Schweiger v Superior Court* (1970) 3 C3d 507, 90 CR 729. Each of these cases involved a statute that did not deal directly with retaliation, but in each case the court inferred that the legislature intended to prohibit retaliation to promote the statute's purpose.

Note that this reasoning applies even when the statute contemplates action by the tenant in some other role. See, *e.g., S. P. Growers Ass'n v Rodriguez, supra* (exercise by farm laborer-tenant of rights under statute regulating farm labor contractors). Thus, for example, a court might infer that the legislature intended a statute that permits citizens to circulate petitions to place initiatives on the ballot (see Elec C §9021) to prohibit landlords from retaliating against tenants who circulate such petitions. Also, because CC §51.9 allows a tenant to bring a civil action for damages for sexual harassment by a landlord or a property manager, a court could easily conclude that the statutory purpose would be frustrated if the tenant were evicted in retaliation for bringing an action under §51.9.

Some statutes prohibit retaliation with respect to certain types of housing. See, *e.g.,* Health & S C §17031.5 (employee housing).

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§8.125 f. Common Law

A separate and independent basis for a prohibition on retaliatory evictions exists under California common law. *Barela v Superior Court* (1981) 30 C3d 244, 178 CR 618; *S. P. Growers Ass'n v Rodriguez* (1976) 17 C3d 719, 131 CR 761; *Schweiger v Superior Court* (1970) 3 C3d 507, 90 CR 729; *Glaser v Meyers* (1982) 137 CA3d 770, 187 CR 242. See also Comment, *Laws In Flux: Landlord Retaliation and the California Courts*, 10 West St U L Rev 197 (1983). Under this doctrine, the tenant may assert a valid defense of retaliatory eviction if, on balance, the public policies furthered by protecting a tenant from eviction outweigh the state's interest in ensuring that unlawful detainer proceedings remain summary. *Barela v Superior Court* (1981) 30 C3d 244, 250, 178 CR 618.

Note that the common law doctrine typically arises when the landlord retaliates for the tenant's exercise of some statutory right and therefore is quite similar to the statutory protection of CC §1942.5(c) (exercise of any rights under the law; see §8.113) and to the notion of an implicit prohibition against retaliation for exercising rights under statutory protections (see §8.123). Any or all of these doctrines may apply to a particular case of retaliation. See, *e.g., Barela v Superior Court, supra* (tenant's complaint to police that landlord had molested her child); *S. P. Growers Ass'n v Rodriguez, supra* (tenants filed action under federal farm labor regulatory statute against employer-landlord); *Schweiger v Superior Court, supra* (tenant's exercise of repair-and-deduct remedy (CC §1942; see §§3.12-3.15)).

The common law retaliatory eviction doctrine might also be applied to protect a tenant who exercises a right that itself arises under common law (*e.g.,* the implied warranty of habitability). As with statutory enactments, such common law doctrines would be frustrated if landlords could retaliate against tenants for invoking them. Thus, courts might read a prohibition against retaliation into the common law right itself, as did the court in *Robinson v Diamond Hous. Corp.* (DC Cir 1972) 463 F2d 853. See also Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 Cal L Rev 1444, 1493 (1974). This reasoning should also apply to any component of the common law doctrine. Thus, for example, if the tenant is required to give prior notice of defects to the landlord before withholding rent for breach of the warranty of habitability (see §§3.16-3.48), the landlord should not be permitted to retaliate against the tenant for complaining about the condition of the premises (see §§8.111-8.112).

For discussion of the retaliatory eviction defense in a commercial tenancy, see California Eviction Defense Manual §19.25 (2d ed Cal CEB 1993).

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§8.126 g. Local Ordinances

Several California rent control ordinances prohibit retaliation against tenants who exercise their rights under the ordinances. These local ordinances are probably not preempted by state law. See CC §1942.5(h); *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 148, 130 CR 465. See also *Fisher v City of Berkeley* (1984) 37 C3d 644, 705, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045.

Whether local ordinances prohibiting retaliation are valid when they are not part of local rent control laws was left open in *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 151 n22, 130 CR 465. A local ordinance prohibiting retaliation may not alter the burden of proof set by the Evidence Code. *Fisher v City of Berkeley, supra*.

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§8.127 h. Constitutional Protections

In a particular case, the federal or state constitution may constitute a bar against retaliatory conduct by the landlord. If so, the fact that other sources of law against retaliation are not available is irrelevant.

EXAMPLE: Suppose that the tenant successfully defends an eviction action by claiming that the landlord brought the action in retaliation for the tenant's reporting code violations to the appropriate government agency. More than 8 months later, the landlord again sues to evict the tenant. May the tenant raise a retaliation defense again? Not under CC §1942.5(a), because that section cannot be invoked more than once in any 12-month period. CC §1942.5(b). The 180-day limitation in §1942.5(a) might also bar the defense (see §8.112). If the U.S. Constitution were held to bar evictions in retaliation for complaints to code enforcement agencies, however, the tenant could base the defense on constitutional grounds and would not be subject to the limitations of CC §1942.5(a)-(b).

The constitutional provision usually invoked in retaliation cases is U.S. Const Amend I, which guarantees freedom of speech and association (*e.g.,* tenant union organizing) and the right to petition the government for redress of grievances (*e.g.,* complaints to local housing inspectors). See also Cal Const art I, §§2-3. The First Amendment restrains only government action, however, not purely private action. The requisite state action might be found in retaliation cases in a private landlord's use of state courts to evict, or in the landlord's interaction with government agencies regarding the financing and operation of the building.

In *Edwards v Habib* (DC Cir 1968) 397 F2d 687, the court seemed inclined to accept the theory that use of state courts to evict constitutes state action. See discussion in §8.110. That "state action" theory was rejected, however, in *Higbee v Starr* (8th Cir 1983) 698 F2d 945; *Miller v Hartwood Apartments, Ltd.* (5th Cir 1982) 689 F2d 1239, 1242; *Fallis v Dunbar* (ND Ohio 1974) 386 F Supp 1117; *Mullarkey v Borglum* (SD NY 1970) 323 F Supp 1218, 1226. But see *Hosey v Club Van Cortlandt* (SD NY 1969) 299 F Supp 501.

In *McQueen v Druker* (D Mass 1970) 317 F Supp 1122, aff'd (1st Cir 1971) 438 F2d 781, the court held that tenant organizing is protected by the First Amendment. The court found the required state action in substantial city, state, and Federal Housing Administration financial support given to the landlord, rather than in state court participation in the intended eviction. See also *Holt v Richmond Redev. & Hous. Auth.* (ED Va 1966) 266 F Supp 397.

2 Powell, Powell on Real Property, §16B.05[1][a] (1949), cites several out-of-state cases holding that retaliation for the tenant's exercise of various rights is prohibited. This includes the right to oppose the landlord's plans to develop the property, the right to support certain political platforms, and the right to join a tenant union.

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§8.128 i. Applicability of Law to Retaliatory Eviction in Commercial Tenancies

A commercial tenant may be protected from a landlord's retaliatory conduct, although the courts have had little occasion to rule on this issue to date. Sources of law such as statutes, common law doctrines, and federal or state constitutions (see §§8.123-8.125) might apply to commercial tenancies when a landlord's retaliation against a commercial tenant for exercising rights under these legal sources would frustrate the policies behind them. For further discussion of applying the retaliatory eviction defense in a commercial tenancy, see California Eviction Defense Manual §19.25 (2d ed Cal CEB 1993).

In *Custom Parking, Inc. v Superior Court* (1982) 138 CA3d 90, 101, 187 CR 674, the court held that the "strong public policy against intimidating witnesses in a lawsuit from testifying honestly" outweighed the landlord's need for a summary proceeding. The court reasoned that even a commercial tenant must be allowed to defend an unlawful detainer action on the ground that the landlord retaliated against him or her because the tenant's employees refused to perjure themselves in lawsuits brought by the landlord against other tenants. See also *Mobil Oil Corp. v Handley* (1978) 76 CA3d 956, 966, 143 CR 321 (suggesting that retaliation defense might be available to filling-station lessee who alleges landlord is retaliating, in violation of Bus & P C §21140.2, for tenant's refusal to buy landlord's products); *Windward Partners v Delos Santos* (Haw 1978) 577 P2d 326.

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2. Proof of Retaliatory Motive

§8.129 a. Sole or Dominant Motive

For a tenant to assert a retaliatory eviction defense successfully, must retaliation be the landlord's sole motive or may it be one of several motives? This question is not answered by any of the California cases on retaliation decided under the common law or by CC §1942.5 in its present form. (Section 1942.5 formerly provided that it was sufficient for the tenant to show that the landlord's "dominant purpose" was retaliation, but that language was deleted from the statute (Stats 1970, ch 1280, §5).)

The California Supreme Court concluded that under §1942.5(d)-(e), a landlord's bona fide intent to withdraw rental property from the market under applicable state law (see §7.64G) defeats the statutory defense of retaliatory eviction. See *Drouet v Superior Court* (2003) 31 C4th 583, 3 CR3d 205. The opinion suggests that trial courts first determine whether, under CC §1942.5(e), the landlord's withdrawal of the property was bona fide, because a finding of bona fide intent would overcome the statutory defense of retaliatory eviction set forth in CC §1942.5(a) and (c). This formula seems to preclude the possibility of the court finding that the landlord was motivated by numerous factors; however, a tenant may argue that evidence establishing several motives, some of which are retaliatory, could defeat a finding of bona fide intent under CC §1942.5(e).

In labor law cases, the courts have held that discrimination against union activity need not be an employer's sole motive, but must be a substantial or motivating reason to sustain a claim of wrongful termination. In *NLRB v Whitin Mach. Works* (1st Cir 1953) 204 F2d 883, 885, the court held that:

> In order to supply a basis for inferring discrimination, it is necessary to show that one reason for the discharge is that the employee was engaging in protected activity. It need not be the only reason but it is sufficient if it is a substantial or motivating reason, despite the fact that other reasons may exist.

See *Mt. Healthy City Sch. Dist. Bd. of Educ. v Doyle* (1977) 429 US 274, 50 L Ed 2d 471, 97 S Ct 568; *Western Land Office, Inc. v Cervantes* (1985) 175 CA3d 724, 220 CR 784, discussed in §8.130.

Similarly, in *Sand v Queen City Packing Co.* (ND 1961) 108 NW2d 448, 452, the court reversed a judgment for the employer, holding improper a jury instruction requiring employees to prove that the employer's "sole" motive for firing them was their union affiliation. The court ruled that the employees needed to prove only that their union affiliation was the "real or motivating cause" for the discharge. 108 NW2d at 452.

In *NLRB v Transportation Mgmt. Corp.* (1983) 462 US 393, 76 L Ed 2d 667, 103 S Ct 2469, an employee claimed to have been fired for union activities. The Supreme Court upheld an NLRB rule that firing an employee was an unfair labor practice if anti-union intent was a "substantial or motivating factor," even if other valid reasons for the firing were shown.

Under the federal test, an employer may have several legitimate grounds for firing an employee, but the firing is wrongful if the employee's union affiliation was the "motivating" ground. *A. P. Green Fire Brick Co. v NLRB* (8th Cir 1964) 326 F2d 910, 916; *NLRB v Howe Scale Co.* (7th Cir 1963) 311 F2d 502, 505. By analogy, evidence that the landlord has some justifiable reasons for evicting a tenant should not defeat a retaliatory eviction defense, if the evidence shows that retaliation was the landlord's "motivating" ground for bringing the action.

When a California agricultural employer fires an employee for both anti-union and legitimate business reasons, determining whether the firing violated the California Agricultural Labor Relations Act (Lab C §§1140-1166.3) depends on whether the firing would not have occurred "but for" the anti-union bias. *Martori Bros. Distribs. v ALRB* (1981) 29 C3d 721, 729, 175 CR 626. A court might apply this "but for" test to a retaliatory eviction case.

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§8.130 b. Presumptions and Burden of Proof

Because retaliation is an affirmative defense to be raised by the tenant, the tenant usually has the burden of proving retaliatory motive. Evid C §500. This burden may not be shifted by a local ordinance. *Fisher v City of Berkeley* (1984) 37 C3d 644, 698, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045. When the basis for the tenant's claim is CC §1942.5(c) (see §8.113), that section expressly imposes the "burden of producing evidence" on the tenant, although it says nothing about the burden of proof. If the termination notice states a reason for termination, however, the landlord has the burden of proving the truth of the reason. CC §1942.5(e). See §8.115.

In *Western Land Office, Inc. v Cervantes* (1985) 175 CA3d 724, 220 CR 784, the court rejected a tenant's contention that CC §1942.5 creates a rebuttable presumption of retaliation. The court indicated (175 CA3d at 742) that the following procedure should be followed in a retaliation case:

(a) The tenant must prove the "landlord's retaliatory motive by a preponderance of the evidence."

(b) "If the landlord takes action for a valid reason not listed in the unlawful detainer statutes, he must give notice to the tenant of the ground upon which he proceeds…." This requirement is taken from CC §1942.5(e), but the court failed to clarify if and when the notice must specify a reason. The apparent meaning of the phrase, "not listed in the unlawful detainer statutes," is that when the eviction is by means of a 30-day or 60-day notice under CC §1946 or §1946.1, some reason for giving notice or for filing an unlawful detainer action, other than the intent to terminate the tenancy, is required.

(c) If the tenant controverts the reason given in the notice, the landlord must prove the truth of the stated reason by a preponderance of the evidence.

Proof of the existence of a valid reason to evict, however, does not necessarily prove good faith, *i.e.,* that the landlord is seeking to evict *because* of the valid reason rather than to punish the tenant for exercising some right. Therefore, even if the landlord proves the existence of a valid reason, the tenant may prove retaliation by showing that the landlord does not seek to evict in good faith.

The tenant may be able to shift the burden of proof to the landlord by showing that the landlord's *conduct* is "'inherently destructive' of tenants' rights, or unavoidably chills their exercise." *Robinson v Diamond Hous. Corp.* (DC Cir 1972) 463 F2d 853, 865. See Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 Calif L Rev 1444, 1497 (1974). Such a showing was held to raise a "presumption" of retaliatory *motive,* requiring the landlord "to rebut it by demonstrating that he is motivated by some legitimate business purpose rather than by the illicit motive which would otherwise be presumed." *Robinson v Diamond Hous. Corp., supra*.

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c. Evidence

§8.131 (1) Typically Circumstantial and Inferential

A retaliatory motive might be difficult to prove because it turns on the landlord's subjective state of mind (unless the CC §1942.5(e) presumption is available because the landlord stated the reason for termination in the notice (see §§8.115, 8.130)). Testimony concerning statements by the landlord is the best evidence of retaliatory intent, of course, but a careful landlord will be circumspect about expressing this intent verbally. Landlords' attorneys need to counsel their clients carefully concerning their conduct in this area. (See generally chap 4.)

Usually, the tenant must rely on circumstantial evidence from which the factfinder can infer a retaliatory motive. Often, the timing of the landlord's act gives rise to a legitimate inference of retaliatory intent. In *Hosey v Club Van Cortlandt* (SD NY 1969) 299 F Supp 501, the tenant filed complaints with city officials and then met in his room with other tenants to consider making further complaints. The following day he was informed that his rent would be raised; 5 days later he was told that he would have to leave the premises. The court found that "the coincidence of the tenants' meeting and the landlord's threat to evict," along with the absence of threats to evict before the tenants' meeting, probably furnish proof that retaliation was "the overriding reason" for the eviction threats. 299 F Supp at 503. See also *Kriz v Taylor* (1979) 92 CA3d 302, 308, 154 CR 824 (notice to quit served 1 week after tenant won prior eviction action).

A landlord who contends that the tenant's misbehavior is the reason for the eviction must show that the misbehavior arose after the tenant's act allegedly giving rise to the retaliation. (If the misbehavior had occurred earlier, and that act were the basis for the eviction, presumably the landlord would have objected and begun the eviction at that point.) See *Kriz v Taylor* (1979) 92 CA3d 302, 309, 154 CR 824.

In *Karas v Floyd* (Ohio Ct App 1981) 440 NE2d 563, the court upheld the trial court's finding that the landlord's purpose in evicting was retaliatory, rather than an attempt to close the premises because necessary repairs were economically unfeasible. The court held that the landlord's evidence regarding economic unfeasibility was "vague and general" because it failed to define "extensive" repairs and to show the landlord's financial resources. 440 NE2d at 567.

If an employee incurs a discriminatory discharge, and the employer then seeks to evict the employee from company housing, it may be proper to infer that the eviction was also discriminatory. *Rivcom Corp. v ALRB* (1983) 34 C3d 743, 763, 195 CR 651.

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§8.132 (2) Analogy to Labor Law Cases

Labor law cases might be instructive on the issue of the landlord's motive because retaliation is often an issue in wrongful termination cases (see §8.129). In *NLRB v Melrose Processing Co.* (8th Cir 1965) 351 F2d 693, the employee had worked in the defendant's turkey-processing plant, but was not rehired for a particular season. The court affirmed the NLRB's finding that the defendant refused to rehire the employee because of her union affiliation. In finding substantial evidence to support the NLRB's finding, the court relied on several items of evidence.

First, the court held that the lack of evidence of a justifiable reason for the refusal to rehire was evidence of an improper motive (351 F2d at 698):

> If one can show that every other alternative except the fact sought to be proved is not true, you indirectly prove that fact is true.... By showing that there was no other reasonable explanation for [the employee's] not being rehired, her union activity stood out as the logical explanation of her employer's action.

Second, the court ruled that the employer's refusal to give the employee an explanation for why she was not rehired might be enough to support an inference that the refusal to rehire was discriminatory. 351 F2d at 699.

Third, the court held that the employer's failure to reprimand the employee for alleged rule infractions also supported an inference that the refusal to rehire was discriminatory. 351 F2d at 699.

Finally, the court relied on evidence that employees guilty of far more serious rule infractions had not been treated as severely as this employee. 351 F2d at 699. See *A. P. Green Fire Brick Co. v NLRB* (8th Cir 1964) 326 F2d 910, 916.

PRACTICE TIP: To prove a retaliatory eviction defense, the tenant's attorney might use evidence similar to that introduced in labor law cases, such as facts showing that:

- The client was a model tenant (*e.g.,* always paid rent on time, behaved properly); therefore, the landlord could have no reason for eviction other than retaliation;
- The landlord refused to answer the tenant, or was evasive, when asked the reason for the termination notice;
- The landlord never reprimanded or warned the tenant about paying the rent late or being noisy; or
- Other tenants were late in paying rent for longer periods and more frequently than the tenant.

Attorneys can avoid these kinds of evidentiary struggles by counseling their landlord clients carefully. When the landlord has a clear nonretaliatory purpose for terminating the tenancy, that purpose should be stated (although stating it in the notice might shift the burden on this issue to the landlord under CC §1942.5(e)). The landlord should issue warnings and document tenant infractions as they occur in order to be able to establish the existence of independent grounds. The landlord should also be prepared to show that the tenant is not being treated less fairly than other tenants.

For further discussion of problems of proving and defending against claims of retaliatory motive, see Player, *Motive and Retaliatory Eviction of Tenants*, U Ill L Forum 610 (1974); Comment, *California's Common Law Defense Against Landlord Retaliatory Conduct*, 22 UCLA L Rev 1161 (1975); Note, *Landlord and Tenant-Burden of Proof Required To Establish Defense of Retaliatory Eviction*, 1971 Wis L Rev 939 (1971); Comment, *Landlord-Tenant: Proving Motive in Retaliatory Eviction-Minnesota's Solution*, 61 Minn L Rev 523 (1977).

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3. Remedies for Retaliation

§8.133 a. Defense to Unlawful Detainer Action

When the landlord files an unlawful detainer action, the tenant may raise retaliatory eviction as an affirmative defense in the answer. *Vargas v Municipal Court* (1978) 22 C3d 902, 150 CR 918; *S. P. Growers Ass'n v Rodriguez* (1976) 17 C3d 719, 131 CR 761; *Kriz v Taylor* (1979) 92 CA3d 302, 154 CR 824.

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§8.134 b. Injunctive and Declaratory Relief

Instead of waiting to defend an eviction lawsuit, the tenant may sue to enjoin an impending retaliatory action by the landlord, and for a declaration that such action is unlawful. See *Aweeka v Bonds* (1971) 20 CA3d 278, 97 CR 650. See also *Atkisson v Kern County Hous. Auth.* (1976) 59 CA3d 89, 130 CR 375.

Note, however, that a tenant whose claim is based solely on the U.S. Constitution probably cannot sue to enjoin the landlord's termination of the tenancy because there had been no "state action" at the point that the termination notice was served (see §8.127). *Newby v Alto Riviera Apartments* (1976) 60 CA3d 288, 131 CR 547.

In *Hernandez v Stabach* (1983) 145 CA3d 309, 193 CR 350, the court upheld an injunction against the landlord's filing of any unlawful detainer action without a showing of good cause. The court held that the landlord's practice of renting to families knowing that they would overcrowd the apartments, and then evicting them for overcrowding when they sought to organize other tenants and assert their right to the repair-and-deduct remedy (see §§3.12-3.15), constituted retaliation under CC §1942.5(a). For other cases approving injunctive relief against unlawful detainer actions, see *Byrne v Baker* (1963) 221 CA2d 1, 7, 34 CR 178; *Dennis v Overholtzer* (1957) 149 CA2d 101, 307 P2d 1012.

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§8.135 c. Action for Damages

A tenant may sue for actual and punitive damages for the landlord's retaliatory conduct. *Aweeka v Bonds* (1971) 20 CA3d 278, 97 CR 650. If the landlord's act is covered by CC §1942.5, then the tenant may recover damages as set out in CC §1942.5(f)-(g). See §8.116. (Because CC §1942.5(h) provides that the remedies in CC §1942.5 are not exclusive, the tenant might invoke the decision in *Aweeka* and attempt to recover punitive damages beyond the $2000 permitted by CC §1942.5(f). See §8.117. But see *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v De Anza Santa Cruz Mobile Estates* (2001) 94 CA4th 890, 114 CR2d 708.) While a jury may consider the fact that a defendant harmed nonparties in determining the reprehensibility of defendant's conduct, it may not consider the injuries to nonparties when setting the amount of punitive damages. Because such nonparties are not before the court, their injuries are speculative; allowing the jury to consider them would deny the defendant due process. *Philip Morris USA v Williams* (2007) 549 US 346, 166 L Ed 2d 940, 127 S Ct 1057.

Damages for violation of the Unruh Civil Rights Act (CC §51) are discussed in §§2.58, 8.121.

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§8.136 4. Beyond Retaliatory Eviction: Good Cause to Evict

California presently has no good-cause requirement applicable to tenants in general. Because the Unruh Civil Rights Act (CC §51) forbids "arbitrary" discriminatory conduct (see §8.119), however, tenant advocates argue that a logical extension of this concept would be a rule that a landlord must show "good cause" in order to evict a tenant (or to terminate a month-to-month tenancy, or to refuse to renew a lease). "Good cause" might be found, for example, if the tenant failed to pay rent or breached some other term of the lease, or if the landlord intends to occupy the rental unit. Landlord advocates would, on the other hand, argue that good cause requirements constitute an unlawful taking of their property without just compensation and deny their right to due process and equal protection under the law, and that requiring good cause not to renew a periodic tenancy or lease would drastically alter the foundations of landlord-tenant law.

California has enacted good-cause requirements protecting owners of mobilehomes being evicted from mobilehome parks (CC §§798.55-798.56) and filling-station lessees (Bus & P C §20999.1; CCP §1174(a); see §6.68; see also *E. S. Bills, Inc. v Tzucanow* (1985) 38 C3d 824, 215 CR 278). In addition, most tenants in public housing and government-subsidized housing cannot be evicted without good cause.

Some California cities have enacted local rent control laws that require landlords to show good cause to evict. See also §§8.126, 7.54-7.76. For discussion of good cause to evict, see Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 Harv CR-CL L Rev 1 (1976).

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§8.137 B. "Self-Help" Not Permitted

Case law clearly establishes that landlords may not use "self-help" to recover possession of real property. *Daluiso v Boone* (1969) 71 C2d 484, 499, 78 CR 707. Landlords are afforded the rights and remedies provided by the unlawful detainer statutes in place of a common-law right to use "self-help" to evict the tenant. *Superior Motels, Inc. v Rinn Motor Hotels, Inc.* (1987) 195 CA3d 1032, 1066, 241 CR 487. The summary remedy of an unlawful detainer lawsuit "is a complete answer to any claim that self-help is necessary." *Jordan v Talbot* (1961) 55 C2d 597, 604, 12 CR 488. In *Stone v Center Trust Retail Props., Inc.* (2008) 163 CA4th 608, 77 CR3d 556 (discussed in §§3.68C, 13.33D), the court stated: "Unlawful detainer actions substitute for a landlord's self-help to avoid, in part, the conflict and possible violence of a landlord trying on its own initiative to physically evict a defaulting tenant." 163 CA4th at 613.

Society will tolerate a forcible eviction only when it is both necessary and judicially authorized, *i.e.,* when the eviction is carried out by a marshal under a writ of possession issued on a valid judgment. *Bedi v McMullan* (1984) 160 CA3d 272, 206 CR 578. When the tenant has abandoned the premises, however, the landlord may use self-help to retake possession (see §§8.8-8.16). *Kassan v Stout* (1973) 9 C3d 39, 106 CR 783; *Martin v Cassidy* (1957) 149 CA2d 106, 307 P2d 981.

PRACTICE TIP: Landlords' attorneys must counsel their clients carefully concerning the possible pitfalls of self-help evictions. Problems frequently arise in "gray areas," *e.g.,* when it is unclear whether the tenant abandoned the premises (see §§8.8-8.16), or when it is unclear whether an occupant is a "tenant" and thus subject to landlord-tenant law generally (see §§1.3-1.7, 8.83-8.84). Whenever there is doubt, the landlord should be advised to exercise caution by strictly following the statutory abandonment procedures for terminating the tenancy. See §§8.8-8.16.

An occupant who is in peaceable possession of the premises—even after the tenancy has been terminated—enjoys the protections of CC §1954 (limiting situations in which a landlord may enter a dwelling unit) and §789.3 (preventing a landlord from engaging in self-help). In *Spinks v Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 90 CR3d 453, the occupant's employer rented an apartment and identified the occupant by name. Her employment agreement provided that she would vacate after her temporary assignment ended. Because of an injury, the occupant was unable to complete her assignment. The employer told her to vacate and then requested that the landlord change the locks. The landlord notified the occupant that the locks would be changed and thereafter changed the locks. The court held that CC §1954 is intended to protect people who are actually living in the dwelling—even though it seemed that the tenancy had been validly terminated by the occupant's employer. 171 CA4th at 1050. Also, CC §789.3 is broad and protects such an occupant from landlord's self-help. 171 CA4th at 1050. See §8.148.

If the landlord uses self-help to terminate the tenancy, several remedies are available to the tenant. The tenant may seek restitution of the premises and damages by bringing an action for forcible entry, forcible detainer, or both (see §§8.138-8.146). The tenant may also invoke remedies for wrongful termination by bringing an action under CC §789.3 (see §§8.147-8.149), suing for the tort of wrongful eviction (see §8.150), or seeking criminal prosecution of the landlord (see §8.152). A landlord's improper use of the police to effect eviction was held to show sufficient "state action" to allow the tenants to bring an action under 42 USC §1983 in *Howerton v Gabica* (9th Cir 1983) 708 F2d 380. See Depriest, Self-Help Evictions, 25 Clearinghouse Rev 798 (1991). Strategies for dealing with self-help terminations are discussed in §§5.20-5.23, 8.153.

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§8.138 1. Forcible Entry and Detainer

In CCP §§1159-1160, the legislature provided tenants with causes of action for restitution of the premises and damages for the landlord's "self-help" efforts to recover possession of the premises. According to the court in *Daluiso v Boone* (1969) 71 C2d 484, 495, 78 CR 707 (quoting from *San Francisco & Suburban Home Bldg. Soc'y v Leonard* (1911) 17 CA 254, 262, 119 P 405), the purpose of these statutes is

> to secure a judicial adjustment of differences [concerning the right to possession of real property,] and thus prevent the parties themselves from redressing or attempting to redress their own wrongs which is likely to lead to serious wrongs against the public or society.

See also *Bedi v McMullan* (1984) 160 CA3d 272, 206 CR 578 (forcible entry and detainer statutes designed to ensure that the only forcible evictions carried out are those that are necessary and judicially authorized). For a case distinguishing *Bedi v McMullan, supra,* see *Glass v Najafi* (2000) 78 CA4th 45, 92 CR2d 606 (landlord who evicts tenant under writ of possession that is later found invalid is not liable for forcible entry and detainer).

PRACTICE TIP: The statutes and the cases interpreting them express a strong public policy in favor of legal resolution of landlord-tenant disputes and against self-help measures that may unfairly cut off the tenant's legal rights or result in violence. Landlords' attorneys should ensure that their clients are aware of this policy so as to avoid liability for using self-help measures.

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a. Elements of Cause of Action

(1) Forcible Entry

§8.139 (a) Tenant's Possession Prerequisite

The tenant must show, and the complaint must allege, that he or she was in actual peaceable possession of the premises at the time of the landlord's entry. CCP §1172; *Knowles v Crocker Estate Co.* (1899) 125 C 264, 57 P 998; *Shusett, Inc. v Home Sav. & Loan Ass'n* (1964) 231 CA2d 146, 154, 41 CR 622. To be in "actual possession," the tenant need not be present at the time of the landlord's entry. *Karp v Margolis* (1958) 159 CA2d 69, 74, 323 P2d 557; *Martin v Cassidy* (1957) 149 CA2d 106, 307 P2d 981. No particular length of time of possession by the tenant is required; possession for less than a full day has been held sufficient. *Highland Park Oil Co. v Western Minerals Co.* (1905) 1 CA 340, 82 P 228.

For a forcible entry action to lie, the landlord must take possession away from the tenant. A landlord who simply enters and leaves is guilty of a trespass, but not a forcible entry. *Merrill v Forbes* (1863) 23 C 379; *Davis v Stark* (1914) 25 CA 519, 144 P 315. See also *Shusett, Inc. v Home Sav. & Loan Ass'n* (1964) 231 CA2d 146, 41 CR 622 (to maintain action for forcible entry, plaintiff must seek possession).

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§8.140 (b) Statutory Definitions and Judicial Applications

Under CCP §1159, a person who performs the following acts is guilty of a forcible entry:

- breaks open "doors, windows, or other parts of a house, or by any kind of violence or circumstances of terror enters upon or into real property"; or
- "after entering peaceably upon any real property, turns out by force, threats, or menacing conduct, the party in possession."

Under CCP §1159(2), an entry is "forcible" if the landlord "turns out by force, threats, or menacing conduct, the party in possession"—even if the entry itself is peaceable. Here again, not much of a "threat" by the landlord is required. In *Jordan v Talbot* (1961) 55 C2d 597, 607, 12 CR 488, the court held that this element was satisfied when the tenant found her apartment occupied by the landlord's employee, who said, "Get the hell out of here. You're out of this place." The court held that all the tenant must show is a reasonable belief that any attempt to retake possession would have been met by force. *Jordan v Talbot, supra*.

Some of the language in CCP §1159(1) (*e.g.,* "breaking open doors," "any kind of violence or circumstances of terror") indicates that the word "forcible" should be taken literally. The courts reviewing this issue, however, have not required a showing of violence and terror. In fact, forcible entry and detainer may occur through the legal eviction process even if the sheriff's eviction is based on a writ of possession. *Bedi v McMullan* (1984) 160 CA3d 272, 206 CR 578. But see *Glass v Najafi* (2000) 78 CA4th 45, 92 CR2d 606 (no forcible entry and detainer when owner entered under orderly legal process that was later found invalid).

Forcible entries have been found when the landlord:

(a) Entered with a passkey when the tenant was not at home (*Jordan v Talbot* (1961) 55 C2d 597, 12 CR 488; *Winchester v Becker* (1906) 4 CA 382, 88 P 296);

(b) Paid a locksmith to change the locks (*Lamey v Masciotra* (1969) 273 CA2d 709, 78 CR 344); and

(c) Opened a closed door or window in order to enter (*Winchester v Becker, supra*).

In view of these cases, and the policy that the availability of an unlawful detainer lawsuit "is a complete answer to any claim that self-help is necessary" (see §8.138; *Jordan v Talbot* (1961) 55 C2d 597, 604, 12 CR 488), any entry to take possession might constitute a forcible entry if the landlord could have brought an unlawful detainer action instead and had the marshal execute the judgment under a valid writ. See Young, *The Law of Forcible Entry and Detainer in California*, 10 Lincoln L Rev 1, 24 (1977).

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§8.141 (2) Forcible Detainer

Under CCP §1160, a person who performs the following acts is guilty of a forcible detainer:

(1) By force, or by menace and threats of violence, unlawfully holds and keeps the possession of any real property, whether it was acquired peaceably or otherwise; or

(2) At night, or during the occupant's absence, unlawfully enters on real property and, after demanding its surrender, refuses to surrender it within 5 days after a demand by the former occupant.

An "occupant" under CCP §1160(2) is one who was in peaceable and undisturbed possession of the property within 5 days preceding the unlawful entry.

The language of CCP §1160(1) is very similar to that of CCP §1159(2). See §§8.139-8.140. In *Jordan v Talbot* (1961) 55 C2d 597, 607, 12 CR 488, the court relied on the same statement by the landlord's employee ("Get the hell out of here. You're out of this place") to find violations of both CCP §§1159(2) and 1160(1). In construing §1159(2), the court held that the key issue is whether the tenant reasonably believes that the landlord will use force to keep him or her off the premises. *Jordan v Talbot, supra*. See also *Dickinson v Maguire* (1858) 9 C 46. Improper or invalid use of the judicial process to keep the tenant off the premises may constitute a forcible entry and detainer. See *Bedi v McMullan* (1984) 160 CA3d 272, 206 CR 578. For a case distinguishing *Bedi,* see *Glass v Najafi* (2000) 78 CA4th 45, 92 CR2d 606 (landlord who evicts tenant under writ of possession that is later found invalid is not liable for forcible entry and detainer).

If the tenant had the right to possession-but not actual possession-when the landlord entered the property, there might be an advantage to invoking CCP §1160(1) to prove forcible *detainer,* rather than to invoke CCP §1159(2) to prove forcible entry. Under CCP §1172, the tenant must show "actual possession" to prove forcible *entry,* but only that he or she was *entitled* to possession to prove forcible *detainer.* See, *e.g., White v Pfieffer* (1913) 165 C 740, 134 P 321.

There appears to be no particular advantage to the tenant's invoking CCP §1160(2), as opposed to §1160(1). Although subsection (2) contains no explicit language requiring a display of "force," the force required under subsection (1) is so minimal that it is usually easy to prove. See *Jordan v Talbot* (1961) 55 C2d 597, 608, 12 CR 488. Subsection (2) has the disadvantage of requiring the tenant to wait 5 days after making a demand for possession before filing suit.

For a forcible detainer action to lie, the landlord must actually bar the tenant's possession of the property, not merely trespass on it. *Dickinson v Maguire* (1858) 9 C 46.

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§8.142 b. Kinds of Occupants Protected

An occupant of real property who is forcibly evicted by the owner may invoke the protection of CCP §§1159 and 1160 (see §§8.139-8.141), whether the occupant is a tenant, an employee, or a licensee. *Eichhorn v De La Cantera* (1953) 117 CA2d 50, 255 P2d 70. It appears that even the legal tenant's spouse may bring the action if the spouse was in possession at the time of the eviction. 117 CA2d at 52.

Lodgers, boarders, and tenants in certain residential hotels are protected from "self-help" evictions by CCP §1159, which defines the party in possession as "any person who hires real property and includes a boarder or lodger, except those persons whose occupancy is described in [CC §1940(b)]." See §1.3. Civil Code §1940(b) exempts a person who either (a) maintains transient occupancy, in a hotel, time-share, or other facility, subject to the hotel tax under Rev & T C §7280, or (b) has not made valid payment for all room and other related charges owing as of the last day on which the occupancy is or would be subject to that tax, or who (c) maintains occupancy in a hotel where the management retains a right to enter and control the rooms, and offers all the following services to every resident: facilities for safeguarding personal property; central telephone service; maid, mail, and room services; occupancy for fewer than 7 days; and food service meeting specified requirements. Landlords may use the unlawful detainer procedure to evict the protected categories of tenants, lodgers, boarders, and residential hotel tenants. "Tenant" for this purpose is defined as "any person who hires real property except those persons whose occupancy is described in [CC §1940(b)]." CCP §1161.

Commercial tenants as well as residential tenants may invoke CCP §§1159 and 1160, even though CCP §1159(1) refers to a "house." *Karp v Margolis* (1958) 159 CA2d 69, 73, 323 P2d 557.

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§8.143 c. Affirmative Defenses

The landlord may deny any of the material allegations of the complaint and thus put at issue the factual question of whether a forcible entry or detainer occurred. Otherwise, only two affirmative defenses appear to be available: abandonment by the tenant (see §§8.8-8.16) and the 1-year statute of limitations in CCP §1172, which provides that the landlord may defend against the proceedings by showing

> that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year… before the commencement of the proceedings, and that his interest therein is not then ended or determined…

Note that the landlord must prove possession for 1 year, not merely title. *Karp v Margolis* (1958) 159 CA2d 69, 323 P2d 557.

The courts have not authorized any other defenses to actions for forcible entry or detainer. The following proffered defenses have been expressly rejected:

- the landlord's title and right to possession (*Daluiso v Boone* (1969) 71 C2d 484, 78 CR 707; *Jordan v Talbot* (1961) 55 C2d 597, 12 CR 488);
- a lease provision giving the landlord the right to enter on the tenant's breach of the lease (*Kassan v Stout* (1973) 9 C3d 39, 106 CR 783; *Jordan v Talbot, supra*); and
- the landlord's entry in order to assert the right to a baggage lien (*Jordan v Talbot, supra*).

The tenant's breach of the lease or rental agreement does not justify the landlord's use of "self-help" and accordingly is no defense to an action for forcible entry or detainer. This rule applies regardless of the nature of the tenant's breach. For example, tenants' lawsuits have been upheld when the tenant's breach involved nonpayment of rent (*Jordan v Talbot, supra*), an unauthorized assignment of the lease (*Kassan v Stout, supra*), and changing the locks (*Eichhorn v De La Cantera* (1953) 117 CA2d 50, 255 P2d 70).

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§8.144 d. Remedies

A tenant who prevails in an action for forcible entry or detainer is entitled to possession of the premises. CCP §1174(a). Damages may not be awarded unless the tenant recovers possession of the premises. *Brawley v Risdon Iron Works* (1869) 38 C 676; *Edwards v Bodkin* (1919) 43 CA 405, 185 P 423.

When the tenant recovers possession, actual damages caused by the forcible entry or detainer may also be recovered. CCP §1174(b). Recoverable damages include "any damage that was the natural and proximate consequence" of the entry or detainer. *San Francisco & Suburban Home Bldg. Soc'y v Leonard* (1911) 17 CA 254, 266, 119 P 405; *Karp v Margolis* (1958) 159 CA2d 69, 323 P2d 557. In dictum, these cases indicate that the award may include damages for loss of use of personal property left on the premises (*Karp v Margolis* (1958) 159 CA2d 69, 76, 323 P2d 557) and for various business expenses caused by the entry or detainer (*San Francisco & Suburban Home Bldg. Soc'y v Leonard* (1911) 17 CA 254, 265, 119 P 405). Although no reported case has decided this issue, a displaced tenant may be able to recover hotel or other housing expense incurred during the time of dispossession if it is greater than the rental value of the premises, but not both. Loss of reasonable rental value may alternatively be recovered, although the amount must be subtracted from any unpaid rent covering the detention period (to prevent double recovery). *Karp v Margolis* (1958) 159 CA2d 69, 75, 323 P2d 557.

Although the fact that the landlord has title to the property is not a defense to a forcible entry and detainer action (see §8.143), evidence of the landlord's title may be admitted on the issue of the extent of the tenant's damages. See *Karp v Margolis, supra*. See also *Jordan v Talbot* (1961) 55 C2d 597, 603 n3, 12 CR 488.

The tenant's discomfort, annoyance, and mental distress also seem to be elements of actual damages that may be recovered for a forcible entry or detainer of residential property. Although no reported California case discusses this issue, such damages are natural and proximate consequences of the usual residential "self-help" eviction. See §8.150 for discussion of similar damages in actions for the tort of wrongful eviction. See also *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194.

A tenant who fails to prove any actual damages nevertheless may be awarded nominal damages. *Karp v Margolis, supra*; *Pacific States Auxilary Corp. v Farris* (1931) 118 CA 522, 5 P2d 452. Nominal damages might support an award of punitive damages and attorney fees, in appropriate cases. See §§3.40-3.41, 13.40.

A tenant who proves the landlord's "malice" may be awarded actual damages and statutory damages of up to $600 (formerly treble damages). CCP §1174(b); *Daluiso v Boone* (1969) 71 C2d 484, 78 CR 707. To support a claim for statutory damages, the complaint must allege facts constituting malice (*i.e.,* that dispossession of the tenant was intentional, as opposed to negligent or mistaken); a mere conclusory allegation of malice is insufficient. *Cyrus v Haveson* (1976) 65 CA3d 306, 317, 135 CR 246. Evidence of the landlord's title is admissible "[f]or the limited purpose of assisting the [factfinder] in exercising its discretion to treble the damages…." *Karp v Margolis, supra;* see *Jordan v Talbot, supra*.

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§8.145 e. Procedure

The forcible entry and detainer statutes are part of the same chapter of the Code of Civil Procedure as the unlawful detainer statutes, and the procedure is essentially the same for both. (On unlawful detainer procedure, see chaps 9-13.)

Like unlawful detainer, forcible entry and forcible detainer are summary proceedings. *Jordan v Talbot* (1961) 55 C2d 597, 604, 12 CR 488. See also *Daluiso v Boone* (1969) 71 C2d 484, 78 CR 707. The statutes (CCP §§1159-1160) are strictly construed (*House v Keiser* (1857) 8 C 499; *Chase v Peters* (1918) 37 CA 358, 174 P 116), and the tenant must comply strictly with their requirements (*Castro v Tewksbury* (1886) 69 C 562, 11 P 339; *Hoag v Pierce* (1865) 28 C 187; *House v Keiser, supra*). The complaint must be verified and, effective January 1, 2005, include the typed or printed name of the person verifying the complaint. CCP §1166(a)(1).

Like the tenant in an unlawful detainer action, the landlord must respond within 5 days to a forcible detainer summons (CCP §1167), and like an unlawful detainer action, forcible detainer has precedence over other civil actions (CCP §1179a). No cross-complaints are allowed. *Schubert v Lowe* (1924) 193 C 291, 223 P 550; *Warburton v Doble* (1869) 38 C 619.

An unlawful detainer complaint may not include other causes of action; because the relief sought is prompt recovery of possession of the property, the action therefore must be summary. *Vasey v California Dance Co.* (1977) 70 CA3d 742, 746, 139 CR 72. Although there is no reported case law on point, the same rationale should apply to forcible entry and detainer actions because they also seek recovery of possession of the property.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.146 f. Form: Complaint for Forcible Entry and Forcible Detainer

§8.146 f. Form: Complaint for Forcible Entry and Forcible Detainer

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	**COMPLAINT**
vs	)	**Forcible Entry and Forcible**
_ _[*Name(s)*]_ _,	)	**Detainer**
Defendants	)	
_____	)	

Plaintiff(s) allege(s):

FIRST CAUSE OF ACTION
(Forcible Entry by Plaintiff(s) _ _[*name(s)*]_ _ **against Defendant(s)** _ _[*name(s)*]_ _**)**

1. Plaintiff does not know the true names of defendants sued in this action as Doe I through Doe X.

2. At all relevant times, each defendant was acting as the agent of every other defendant.

3. On _ _[*date*]_ _**, plaintiff was in actual and peaceable possession of the premises located at** _ _[*address*]_ _**, in the City of** _ _[*name of city*]_ _**, County of** _ _[*name of county*]_ _ **("the premises").**

4. On or about that date, and without plaintiff's consent, defendant, _ _[*name*]_ _ **and Doe I through Doe X, forcibly entered the premises by the following means:** _ _[*Specify facts demonstrating forcible entry pursuant to CCP §1159*]_ _**.** _ _[*Add, if applicable, circumstances of fraud, force, or violence that may have accompanied the forcible entry and resulting damages; see CCP §1166(b)*]_ _**.**

5. Defendants took possession of the premises, and have continued in possession to the date that this complaint was filed, without plaintiff's consent.

6. At all relevant times, the reasonable value of use of the premises has been $_ _[*amount*]_ _ **per day. Damages have accrued at that rate, and will continue to accrue from the date of the forcible entry, until possession is returned to plaintiff.**

7. As a proximate result of defendants' acts, plaintiff has been unable to use _ _[*his/her*]_ _ **personal property, which was stored on the premises. The reasonable value of the use of plaintiff's personal property is $**_ _[*amount*]_ _ **per day. Damages have accrued at that rate, and will continue to accrue from the date of the forcible entry, until possession of the personal property is returned to plaintiff.**

8. As a proximate result of defendants' acts, plaintiff has suffered mental distress, discomfort, and annoyance to _ _[*his/her*]_ _ **damage in the amount of $**_ _[*amount*]_ _**.**

9. Defendants' actions were committed intentionally, with full knowledge that defendants were forcibly entering and dispossessing plaintiff. Therefore, defendants' acts were committed with malice, and the damages alleged in paragraphs 6 through 8 should be supplemented by statutory damages under Code of Civil Procedure §1174(b).

10. On or about _ _[*date*]_ _, plaintiff and defendant, _ _[*name*]_ _ entered into a written rental agreement that provided that defendants could recover attorney fees if legal action were necessary to enforce the terms of the rental agreement. Under such a provision, plaintiff is entitled to recover attorney fees under Civil Code §1717 if _ _[*he/she*]_ _ is the prevailing party in this action.

SECOND CAUSE OF ACTION
(Forcible Detainer by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _)

1. Plaintiff incorporates by reference paragraphs 1 through 3 and 6 through 10 of the First Cause of Action.

2. On or about _ _[*date*]_ _, without plaintiff's consent, defendants entered and took possession of the premises.

3. Defendants forcibly prevented plaintiff from regaining possession of the premises by the following means: _ _[*specify facts demonstrating defendants' commission of forcible detainer under CCP §1160*]_ _. _ _[*Add, if applicable, circumstances of fraud, force, or violence that may have accompanied the forcible detainer and resulting damages; see CCP §1166(b)*]_ _.

4. Defendants have continued in possession of the premises to the date on which this complaint was filed, without plaintiff's consent.

5. Defendants' actions were committed intentionally, with full knowledge that defendants were forcibly entering and dispossessing plaintiff. Therefore, defendants' acts were committed with malice, and the damages incurred by plaintiff should be supplemented by statutory damages under Code of Civil Procedure §1174(b).

WHEREFORE, plaintiff prays for judgment as follows:

1. For possession of the premises.

2. For damages of:

a. $_ _[*amount*]_ _ per day for each day defendants have continued in possession of the premises, until judgment is entered;

b. $_ _[*amount*]_ _ per day for each day defendants have prevented plaintiff from using plaintiff's personal property, until judgment is entered; and

c. $_ _[*amount*]_ _ for plaintiff's mental distress, discomfort, and annoyance.

3. For statutory damages.

4. For reasonable attorney fees.

5. For costs of this action.

6. For further relief that the Court considers just and proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for plaintiff(s)

[*Verification*]

Copies: Original (filed with court clerk); copies for service (one for each defendant to be served); office copies.

Comment: A complaint for forcible entry and detainer must be verified including the typed or printed name of the person verifying it. CCP §1166(a)(1). The facts usually give rise to causes of action that can be pleaded for both forcible entry (CCP §1159) and forcible detainer (CCP §1160). See §8.138. The attorney preparing the complaint should allege, in as much detail as possible, facts indicating the manner in which the landlord was guilty of forcible entry, forcible detainer, or both, following the elements of the cause of action and allowable damages set forth in CCP §§1159-1160, 1166, 1174. See §§8.139-8.141.

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2. Denial of Tenant's Use of, or Access to, Premises

§8.147 a. Utility Cutoffs

By cutting off utility service to the premises, with the intention of denying the tenant use of the premises and thus terminating the tenancy, the landlord may have committed a violation of CC §789.3(a), which provides:

> A landlord shall not with intent to terminate the occupancy under any lease or other tenancy or estate at will, however created, of property used by a tenant as his residence willfully cause, directly or indirectly, the interruption or termination of any utility service furnished the tenant, including, but not limited to, water, heat, light, electricity, gas, telephone, elevator, or refrigeration, whether or not the utility service is under the control of the landlord.

Note that under §789.3(a), it must be proved that the landlord caused the utility service to be cut off "with intent to terminate the occupancy." Although it may be difficult to obtain direct evidence of the landlord's subjective intent, an intent to terminate might be inferred if the landlord knows that absence of the utility will make the premises uninhabitable. Civil Code §789.3(a) also forbids the landlord to interrupt or terminate the utility service "directly or indirectly." Thus, the landlord should be liable if he or she indirectly causes the cutoff by failing to pay the utility bill (if this is done with intent to terminate the occupancy). See *Kinney v Vaccari* (1980) 27 C3d 348, 165 CR 787. On remedies for violation of §789.3(a), see §8.149.

A landlord's direct interference with utility equipment may constitute criminal conduct. See Pen C §591.

In *O'Neal v City of Seattle* (9th Cir 1995) 66 F3d 1064, the court held that a city policy of denying water service to a new tenant because of a previous tenant's unpaid water bill denied the new tenant equal protection of the laws.

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§8.148 b. Access to Premises; Removal of Personal Property

Under CC §789.3(b), a landlord who does any of the following acts with intent to terminate the tenant's occupancy may incur liability:

- prevents the tenant from gaining reasonable access to the property by changing the locks or using a bootlock or any similar method or device;
- removes the outside doors or windows;
- removes from the premises the tenant's personal property, furnishings, or any other item without the tenant's prior written consent, except when the tenant has abandoned the premises.

Spinks v Equity Residential Briarwood Apartments (2009) 171 CA4th 1004, 90 CR3d 453; *Tooke v Allen* (1948) 85 CA2d 230, 192 P2d 804. (See §§8.8-8.16 on abandonment.)

Nothing in CC §789.3(b) prohibits the tenant's lawful eviction by legal authorities, and the subsection does not apply to hotel occupancies as defined in CC §1940(b) (see §8.83).

Regarding removal of personal property, note that CC §1861a gives an apartment-house landlord a lien on the tenant's baggage and other property. This lien seldom permits the landlord to take possession of the tenant's personal property, however, because (a) the lien is subject to numerous exemptions (see §8.161); and (b) the landlord may take possession of nonexempt property only after final judgment in an action for the rent, or under an interim court order obtained after service of a 10-day notice of motion on the tenant showing that the property is "about to be destroyed, substantially devalued, or removed from the premises." CC §1861a. If the affidavit is true, the tenant will probably remove the property as soon as he or she reads the notice, thus mooting the motion. To counter such removal, the landlord's attorney might attempt to obtain a temporary restraining order to be served with the motion.

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§8.149 c. Remedies Under CC §789.3

If the landlord violates either CC §789.3(a) (see §8.147) or §789.3(b) (see §8.148), the tenant may recover one or more of the following:

- actual damages;
- up to $100 for each day that the landlord violates CC §789.3, but not less than $250 for each separate cause of action, and subsequent or repeated violations being treated as separate causes of action subject to separate awards of damages;
- attorney fees; or
- injunctive relief.

Those remedies are not exclusive and do not prohibit the tenant from pursuing any other legal remedies. CC §789.3(c)-(d). See *Spinks v Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 90 CR3d 453.

The tenant may alternatively have a common law tort cause of action against a landlord who discontinues utility service. See *Jones v Kelly* (1929) 208 C 251, 280 P 942; *Tooke v Allen* (1948) 85 CA2d 230, 192 P2d 804. Punitive damages (not affected by the limits of CC §789.3(c)) may be recoverable in such an action. See *Kinney v Vaccari* (1980) 27 C3d 348, 165 CR 787.

In *Hale v Morgan* (1978) 22 C3d 388, 149 CR 375, the court held that a *mandatory* $100-per-day penalty (provided by CC §789.3 at that time) was not itself unconstitutional, but that the penalty awarded to the tenant was so large that the landlord was denied due process. The court noted that the landlord's trailer park was "a modest operation by a relatively unsophisticated landlord" and, although the monthly rent was only $65, the penalty awarded was $17,300 ($100 for each of the 173 days that the water and electricity were cut off), an award the court characterized as "confiscatory." 22 C3d at 405.

In *Kinney v Vaccari* (1980) 27 C3d 348, 165 CR 787, in which the landlord discontinued utility service to families living in six cabins for 2 months, the court upheld an award under CC §789.3 of $7901 in compensatory damages, $36,000 in penalties ($100 per cabin per day for 60 days), and $1750 in punitive damages. In upholding the statutory awards, the court relied primarily on the landlord's egregious conduct and the tenants' efforts to mitigate and to seek judicial relief promptly. The court rejected the tenants' argument that each individual tenant (as opposed to each tenant-family) should be entitled to recover the $100-per-day penalty. 27 C3d at 357.

Hale and *Kinney* are discussed in *City & County of San Francisco v Sainez* (2000) 77 CA4th 1302, 92 CR2d 418.

In *Camacho v Schaefer* (1987) 193 CA3d 718, 238 CR 609, the court considered the effect of a fee agreement between tenants and their attorney on the landlord's liability for fees under CC §789.3(d). The trial court awarded $15,600 in statutory, compensatory, and punitive damages. The court also awarded the tenants $17,500 in attorney fees under the statute. The tenants' agreement with their attorney had provided that if attorney fees were awarded under CC §789.3, the attorney would accept that as full payment; otherwise, the attorney would receive 25 percent of any recovery. On appeal, the landlord argued that attorney fees should be limited to 25 percent of $15,600. The court of appeal rejected this contention, holding that, when making an award of reasonable attorney fees under §789.3, the fact that the attorney worked under a contingent fee agreement is relevant but not necessarily controlling.

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§8.149A d. Remedies Under Public Utilities Code and CC §1942.2

If a corporation, public utility, or publicly owned utility provides electricity, gas, heat, or water through individual metering to residential occupants of a detached single-family dwelling, a multiunit residential structure, mobilehome park, or permanent residential structures in a labor camp, and the owner, manager, or operator is listed by the utility provider as the customer of record, the provider is required to make a good faith effort to inform the residential occupants, by means of a 10-day notice, when the account is in arrears and that the utility service will be terminated. See Pub Util C §§777, 10009, 12822, 16481. When utility service is provided through master metering, a 15-day notice is required. See Pub Util C §§777.1, 10009.1, 12822.1, 16481.1. These notices must be written in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean.

These utility laws also provide procedures by which those residential occupants may become customers of the provider. For example, if one or more of the residential occupants are willing and able to assume responsibility for the entire account to the satisfaction of the provider, the electrical, gas, heat, or water provider is required to make service available to the residential occupants. After a residential occupant becomes a customer of the utility provider, if the periodic payments due to the landlord, such as rental payments, include charges for residential electrical, gas, heat, or water service, when those charges are not separately stated, these utility laws allow the occupant to deduct the utility payment from the periodic payment due to the landlord.

Civil Code §1942.2 further authorizes a tenant or occupant who has made a payment for utility service under these public utility laws to a corporation, a public utility, or a publicly owned utility to deduct the amount of the payment from the rent when due.

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§8.150 3. Suit for Tort of "Wrongful Eviction"

Forcible entry and forcible detainer (see §§8.138-8.146) are remedies designed to restore the tenant to possession of the premises, and thus are not available when the tenant does not seek to recover possession. In this situation, however, the tenant may sue for damages for the tort of "wrongful eviction." See *Richardson v Pridmore* (1950) 97 CA2d 124, 217 P2d 113; *Spinks v Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 90 CR3d 453; *Emden v Vitz* (1948) 88 CA2d 313, 198 P2d 696. See also *Daluiso v Boone* (1969) 71 C2d 484, 78 CR 707 (forcible entry and detainer action).

Although the cases cited above involved substantial physical intrusions by the landlord, wrongful eviction can be found merely in the landlord's improper use of the legal system to evict the tenant. Landlords' attempts to evade additional eviction controls imposed by local rent control ordinances are prime examples of an area in which a wrongful eviction action might arise. On eviction control provisions, see §§7.54-7.76. In *Zimmerman v Stotter* (1984) 160 CA3d 1067, 207 CR 108, the landlord served the tenants with 30-day notices to quit on the ground that she intended to put relatives in the units as permitted by the Los Angeles rent control ordinance. After the landlord proceeded to judgment and had the tenants evicted, the units were placed back on the rental market at various times without ever being occupied by the landlord's relatives. The court held that the tenant had stated a cause of action for wrongful eviction. Although the landlord's good faith in complying with the rent control ordinance was res judicata at the time judgment was entered, the tenants were entitled to challenge her good faith in obtaining the writ and evicting them 2 weeks later. 160 CA3d at 1074.

The holding in *Zimmerman* seems to go further than that in *Asell v Rodrigues* (1973) 32 CA3d 817, 108 CR 566. In *Asell,* the court suggested that, when the landlord merely served a notice to quit rather than physically intruding on the premises, a cause of action for wrongful eviction would lie only if the complaint alleged malice in service of the notice. 32 CA3d at 825. The court did not seem to require malice in *Zimmerman v Stotter, supra*. See also *Bedi v McMullan* (1984) 160 CA3d 272, 206 CR 578 (forcible entry and detainer lie when landlord merely uses invalid writ to evict tenant, rather than physically intruding); *Aweeka v Bonds* (1971) 20 CA3d 278, 97 CR 650 (tenant may recover for retaliatory eviction when alleged conduct was retaliatory service of rent increase notice); *Tranchina v Arcinas* (1947) 78 CA2d 522, 178 P2d 65 (landlord committed abuse of process by (1) obtaining Office of Price Administration certificate to evict in order to occupy premises himself, (2) successfully suing to evict, and (3) renting premises instead of occupying them).

A tenant who proves a wrongful eviction may recover damages for all injuries to his or her person or property that are the natural and proximate result of the eviction. *Daluiso v Boone* (1969) 71 C2d 484, 498, 78 CR 707. This may include damages for mental distress. *Spinks v Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 90 CR3d 453; *Richardson v Pridmore* (1950) 97 CA2d 124, 129, 217 P2d 113. See also Anno, 6 ALR4th 528 (1981).

Damages may also be allowed for personal injuries (*Goldman v House* (1949) 93 CA2d 572, 209 P2d 639) and amounts advanced for future rent (*Johnson v Snyder* (1950) 99 CA2d 86, 221 P2d 164). When malice is proved, punitive damages may also be recovered. *Tooke v Allen* (1948) 85 CA2d 230, 192 P2d 804. While a jury may consider the fact that a defendant harmed nonparties in determining the reprehensibility of defendant's conduct, it may not consider the injuries to nonparties when setting the amount of punitive damages. Because such nonparties are not before the court, their injuries are speculative; allowing the jury to consider them would deny the defendant due process. *Philip Morris USA v Williams* (2007) 549 US 346, 166 L Ed 2d 940, 127 S Ct 1057.

PRACTICE TIP: Some wrongful eviction suits will be defended and ultimately covered by the landlord's insurance policy. See Gerchick, *Reader Alert: Insurance Coverage for Constructive Eviction*, 21 Cal Real Prop J 22 (Summer 2003). Others will not. See *Swain v California Cas. Ins. Co.* (2002) 99 CA4th 1, 120 CR2d 808, and cases cited in *Swain*. Note: Insurance policies vary and coverage terms often change on policy renewal.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.150A 4. Anti-Harassment Statute (CC §1940.2)

§8.150A 4. Anti-Harassment Statute (CC §1940.2)

If the tenant has been harassed or the landlord has interfered with the tenant's quiet enjoyment of the premises, but the tenant has not been dispossessed, CC §1940.2 gives a tenant additional remedies for wrongful and illegal acts committed by a landlord for the purpose of influencing the tenant to vacate the dwelling. Prohibited acts under CC §1940.2(a) include:

- Theft or extortion as defined in Pen C §§484(a), 518.
- The use, or threatened use, of force, threats, or menacing conduct constituting a course of conduct that interferes with the tenant's right to quiet enjoyment of the premises that would create an apprehension of harm in a reasonable person.
- A significant and intentional violation of CC §1954.

The aggrieved tenant is entitled to a civil penalty of not more than $2000 for each act. CC §1940.2(b).

Section 1940.2 does not prohibit certain warning notices, explanations, and legally authorized acts of the landlord:

- A landlord may give an oral or written warning notice, in good faith, regarding conduct by a tenant, occupant, or guest that violates, may violate, or violated the applicable rental agreement, rules, regulations, lease, or laws. CC §1940.2(c).
- A landlord may give an oral or written explanation of the rental agreement, rules, regulations, lease, or laws in the normal course of business. CC §1940.2(c).

Section 1940.2 is not intended to enlarge or diminish (a) a landlord's right to terminate a tenancy under existing state or local law or (b) any ability of local government to regulate or enforce a prohibition against a landlord harassing a tenant. CC §1940.2(d).

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§8.151 5. Other Injuries to Premises; Common Law Remedies

A landlord who renders the premises unsuitable for habitation may be liable to the tenant for damages, regardless of whether the tenant can show that the landlord's intention was to evict. *Farvour v Geltis* (1949) 91 CA2d 603, 205 P2d 424. In *Farvour,* a person purporting to act on behalf of the landlord removed several doors and windows from the tenant's apartment. They were not replaced until after the action was filed, despite notice from the health department. The court granted compensatory and punitive damages against both the landlord and the remover, holding that the landlord had ratified the remover's action by failing to replace the doors and windows after notice. No proof was necessary that the landlord had ordered the removal. The court did not discuss whether the landlord's motivation was an attempt to evict.

When such acts are motivated by an intent to force the tenant to vacate, a cause of action against the landlord clearly lies. *Tooke v Allen* (1948) 85 CA2d 230, 192 P2d 804. Such acts might also constitute a breach of the implied covenant of quiet enjoyment (see §§3.5-3.7), or of the implied warranty of habitability (see §§3.16-3.48), or may be actionable under CC §789.3(b)(2) or §1940.2 (see §§8.148, 8.150A). On remedies available to commercial tenants, see California Eviction Defense Manual §§19.11-19.19 (2d ed Cal CEB 1993).

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§8.152 6. Criminal Prosecution

As originally enacted, the forcible entry and detainer statutes (CCP §§1159-1160; see §§8.138-8.146) provided for criminal penalties. See Young, *The Law of Forcible Entry and Detainer in California*, 10 Lincoln L Rev 1 (1977). (Note that CCP §§1159 and 1160 still refer to a person who is "guilty" of forcible entry or forcible detainer.) In 1872, these criminal sanctions were moved from CCP §§1159-1160 to Pen C §418, which provides:

> Every person using or procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and in the manner allowed by law, is guilty of a misdemeanor.

Some language of the statute ("entering upon… any lands… of another") might cast doubt that it was meant to apply to landlords, but the supreme court suggested otherwise in *Daluiso v Boone* (1969) 71 C2d 484, 499, 78 CR 707.

In 1961, Pen C §418 was supplemented by Pen C §602.5, which specifically applies to dwelling houses and apartments:

> Every person other than a public officer or employee acting within the course and scope of his employment in performance of a duty imposed by law, who enters or remains in any noncommercial dwelling house, apartment, or other such place without consent of the owner, his agent, or the person in lawful possession thereof, is guilty of a misdemeanor.

The phrase "without consent of the owner" creates a problem in applying this statute to landlords. Is the landlord's own consent a defense to prosecution under this section, or must "the person in lawful possession" (in most cases, the tenant) also consent? This issue has not been discussed in any reported case.

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§8.153 C. Strategy on "Self-Help" Evictions

Five sources of law relating to "self-help" evictions have been discussed in the preceding sections: forcible entry and detainer (see §§8.138-8.146), CC §789.3 (see §§8.147-8.149), CC §1940.2 (see §8.150A), common law torts (see §§8.150-8.151), and criminal prosecution (see §8.152). Because each of these potential remedies has its advantages, the tenant's attorney should consider carefully which one or combination of remedies best fits the circumstances of the case and the client's needs. See discussion in §§5.20-5.23. The landlord's attorney should be aware of the problems that each remedy poses for the client, and of possible ways to combat the tenant's action.

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X. EFFECTS OF TERMINATION

A. Tenant's Personal Property

§8.154 1. Statutory Requirements After Unlawful Detainer, Abandonment, or Vacation by Tenant

If a tenant leaves personal property on the premises after the tenancy is terminated, or if a tenant otherwise vacates the premises, the landlord must comply with statutory procedural requirements in disposing the tenant's personal property. CCP §1174(e)-(*l*); CC §§1980-1991 (residential tenancy), §§1993-1993.09 (commercial tenancy). If the personal property consists of records as defined in CC §§1980(e) and 1993(f), the tenant is presumed to be the owner of the records. CC §§1983(a), 1993.03(a).

A landlord may be liable for conversion if he or she enters the premises wrongfully and holds the tenant's personal property (see *Gilbert v Peck* (1912) 162 C 54, 121 P 315; *Eichhorn v De La Cantera* (1953) 117 CA2d 50, 255 P2d 70) or enters the premises lawfully but takes possession of the tenant's property wrongfully (*Gruber v Pacific States Sav. & Loan Co.* (1939) 13 C2d 144, 88 P2d 137).

When the tenant leaves personal property on the premises after the tenancy has been terminated (*i.e.,* by vacating after service of a notice to quit, after entry of an unlawful detainer judgment, or after actual eviction by a sheriff or marshal under a writ), the landlord may dispose of it either as lost property or as abandoned property. CCP §1174(e); CC §§1982, 1993.01. For purposes of the discussion in §§8.155-8.160, counsel should remember that, if the tenant was evicted by an unlawful detainer action, the procedures are governed by both CCP §1174 and CC §§1980-1993.09; if the tenant vacated voluntarily or abandoned the premises, the procedures are governed by CC §§1980-1993.09. These procedures are complementary for the most part, and counsel should have no difficulty determining the applicable requirements.

If the landlord believes that the property is lost, he or she must deliver it to the local police or sheriff under CC §§2080-2080.9. CCP §1174; CC §§1982(a), 1993.01. If the appropriate authorities refuse to accept the property as lost, the landlord may proceed with the statutory procedures for disposing of abandoned property (CC §§1980-1993.09). CCP §1174; CC §§1982(b), 1993.01.

Under CC §1965, when the tenant vacates the premises, the landlord must surrender personal property left by the tenant on receipt of a written request from the tenant within 18 days after the tenant vacates. The tenant must tender the landlord's removal and storage costs.

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§8.155 a. Landlord Must Store Tenant's Property

In handling the tenant's property as abandoned property, the first step is for the landlord to store it in a safe place. CCP §1174(g); CC §§1986, 1993.06. The storage place may be on the premises, but presumably the landlord will want to remove the property in order to relet the unit. If space is not available on the premises, the landlord should place the property under lock and key in a suitable safe location. In order to avoid later disputes, the landlord should make an inventory of the tenant's property, witnessed by a disinterested person.

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§8.156 b. Notice to Tenant Required

In cases of abandonment of the premises, the landlord must notify the tenant, and any other person that the landlord reasonably believes to be the owner of the abandoned property, that property has been left on the premises. See §§8.8-8.16. The notification must describe the property, and specify that it must be claimed within 15 days of personal delivery of the notice (or within 18 days of mailing), or the property may be sold at public auction. CCP §1174(f); CC §§1983-1984, 1993.03-1993.04. When the tenancy has been terminated by means of an unlawful detainer action, the writ of possession gives the tenant notice covering the personal property, and the landlord need not give the tenant an additional notice under CC §1983 or §1993.03. CCP §§715.010(b)(3), 1174(f). The notice must advise the addressee that storage charges may be imposed as a condition to return of the property. CC §§1983(b), 1993.03(b).

A separate notice is required if the landlord believes the personal property belongs to a person other than the tenant. The format for notices to tenants and other owners of the personal property is specified in CC §§1984-1985 and 1993.04-1993.05 (see §§8.159-8.160). The notice may be delivered personally or mailed to the last known address of the tenant and any other potential owner. CC §§1983(c), 1993.03(c). The writ of possession (see §13.64) must include notification to the tenant that the landlord will dispose of any personal property remaining on the premises by sale or other disposition if the tenant does not pay the storage costs and take possession of the property within 15 days after the landlord takes possession of the premises. CCP §§715.010(b)(3), 1174(d). Mobilehomes are excluded from the tenant's personal property covered by this notice. CCP §710(b)(3).

Note that the notices required by CCP §1174(f) and CC §1983 or §1993.03, and the notification required in the writ, provide a different starting point for the 15-day period: Under CC §1983 or §1993.03, the starting date is the date of delivery or mailing; for the writ, the starting date is the date that the landlord takes possession (CCP §715.010(b)(3)). To ensure full compliance with the statutes, the landlord should make the date specified in the CC §1983 or §1993.03 notice the operative date because that date almost certainly will be later than the date specified in the writ. If the landlord believes that the tenant has abandoned the premises, as opposed to having been evicted, the notice required by CC §1983 or §1993.03 may be combined with the notice of belief of abandonment required by CC §1951.3 (see §8.10), so that the required 15-day (or 18-day, if mailed) time periods run concurrently. CC §§1991, 1993.09.

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§8.157 c. Return of Property on Payment of Storage Costs

During the 15-day (or 18-day) period during which the tenant may reclaim the property (see §8.156), the landlord may return the property to the tenant or other owner, and require payment of reasonable storage costs as a condition of its release. CCP §1174(h). The landlord may not require that the tenant pay any money judgment that has been entered as a condition to return of the tenant's property. CCP §1174(h); *Love v Keays* (1971) 6 C3d 339, 98 CR 811; *Gray v Whitmore* (1971) 17 CA3d 1, 94 CR 904. If the property is returned to the tenant, the landlord is not liable to any other person who may claim a right to it, *e.g.,* a lienor, secured creditor, or person claiming ownership or right to possession of the property. CCP §1174(j). A landlord who has released the property to someone he or she reasonably believes to be its owner is not liable to the tenant or to any other person who received the required notice but may be liable to a person to whom notice was not given if the landlord reasonably should have known of that person's interest in the property and whereabouts. CCP §1174(k).

Under CC §1965, when a tenant vacates the premises, the landlord must surrender personal property left by the tenant on receipt of a written request from the tenant within 18 days after the tenant vacates. The tenant must tender the landlord's removal and storage costs.

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§8.158 d. Disposition of Unclaimed Property

If the property is not claimed and released within the 15-day (or 18-day) period for giving notice under CC §1983 or §1993.03, the landlord may dispose of it under CC §1988 or §1993.07, which essentially provides for the property's sale at public auction if it is worth more than $300. If the notice given to the tenant and other potential owners indicated that the property would be sold if not claimed (see §§8.159-8.160), the landlord still must release the property to the tenant if it is claimed before the sale. If the claim is made after expiration of the 15-day period, the landlord may require payment of reasonable advertising and sale costs in addition to storage costs. CC §§1987(b), 1993.01.

A landlord who reasonably believes that the unreleased property is worth less than $300 (residential) or $750 (commercial) may simply retain it or dispose of it in any manner. CC §§1988(a), 1993.07(a). Otherwise, the property must be sold by competitive bidding at a public auction. CC §§1988(b), 1993.07(b). The notice required by CC §1983 or §1993.03 must state the landlord's intention in this respect. CC §§1984, 1993.04. Notice of the sale must be published in accordance with Govt C §6066, and the landlord's protection against liability extends only to property adequately described in the notice. CC §§1988(b), 1993.07(b). After the sale, the landlord may deduct the costs of storage, advertising, and sale; the balance must be paid to the county treasurer. CC §§1988(c), 1993.07(c). The former tenant or owner of the property may claim the balance within 1 year after it has been paid to the county. CC §§1988(c), 1993.07(c).

When property has been disposed of under CC §1988 or §1993.07, the landlord is not liable to anyone who was given notice under CC §1983 or §1993.03, or to any other person, unless the landlord reasonably should have known of that person's interest in the property and whereabouts. CC §§1989(c), 1993.08(c).

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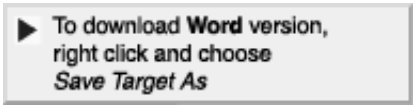
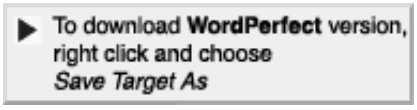
Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.159 e. Form: Notice to Tenant of Right to Reclaim Abandoned Property (CC §1984)

§8.159 e. Form: Notice to Tenant of Right to Reclaim Abandoned Property (CC §1984)





8.159-1 Alternative: Property believed to be worth $300 or more

NOTICE OF RIGHT TO RECLAIM ABANDONED PROPERTY

To _ _[*name of former tenant*]_ _, _ _[*address*]_ _**:**

When you vacated the premises at _ _[*address of premises, including room or apartment number if any*]_ _**, the following personal property remained:** _ _[*Describe personal property*]_ _**.**

You may claim this property at _ _[*address where property may be claimed*]_ _**.**

Unless you pay the reasonable cost of storage for all the above-described property, and take possession of the property which you claim, not later than _ _[S*pecify date not less than 15 days after notice is personally delivered or, if mailed, not less than 18 days after notice is deposited in the mail*]_ _**, this property may be disposed of pursuant to Civil Code §1988.**

If you fail to reclaim the property, it will be sold at a public sale after notice of the sale has been given by publication. You have the right to bid on the property at this sale. After the property is sold and the cost of storage, advertising, and sale is deducted, the remaining money will be paid over to the county. You may claim the remaining money at any time within one (1) year after the county receives the money.

Date: _ _ _ _ _ _ __[*Signature of landlord*]__
_ _[*Typed name of landlord*]_ _
_ _[*Address, telephone*]_ _

8.159-2 Alternative: Property believed to be worth less than $300

NOTICE OF RIGHT TO RECLAIM ABANDONED PROPERTY

To _ _[*name of former tenant*]_ _, _ _[*address*]_ _**:**

When you vacated the premises at _ _[*address of premises, including room or apartment number if any*]_ _**, the following personal property remained:** _ _[*Describe personal property*]_ _**.**

You may claim this property at _ _[*address where property may be claimed*]_ _**.**

Unless you pay the reasonable cost of storage for all the above-described property, and take possession of the property which you claim, not later than _ _[*Specify date not less than 15 days after notice is personally delivered or, if mailed, not less than 18 days after notice is deposited in the mail*]_ _**, this property may be disposed of pursuant to Civil Code §1988.**

Because this property is believed to be worth less than $300, it may be kept, sold, or destroyed without further notice if you fail to reclaim it within the time indicated.

Date: _ _ _ _ _ _ __[*Signature of landlord*]__
_ _[*Typed name of landlord*]_ _
_ _[*Address, telephone*]_ _

Copies: Original (served on tenant and each cotenant); copies for landlord's and attorney's files.

Comment: This form essentially follows that in CC §1984(a). Under CC §1983, the notice must be in "substantially" the format set forth in that subsection. The notice may be delivered personally or sent by mail. See CC §1983(c). The 15-day (or 18-day) period to reclaim the property runs from the date of delivery or mailing, so the applicable date should be inserted when the notice is served. This form may be amended for use in commercial tenancies under CC §§1993-1993.09. See CC §1993.04.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.160 f. Form: Notice to Owner Other Than Tenant of Right to Reclaim Abandoned Property (CC §1985)

§8.160 f. Form: Notice to Owner Other Than Tenant of Right to Reclaim Abandoned Property (CC §1985)

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

8.160-1 Notice to owner other than tenant of right to reclaim abandoned property

NOTICE OF RIGHT TO RECLAIM ABANDONED PROPERTY

To _ _[*name of owner other than former tenant*]_ _**,** _ _[*address*]_ _**:**

When _ _[*name of former tenant*]_ _ **vacated the premises at** _ _[*address of premises including room or apartment number if any*]_ _**, the following personal property remained:** _ _[*Describe personal property*]_ _**.**

If you own any of this property, you may claim it at _ _[*address where property may be claimed*]_ _**.**

Unless you pay the reasonable cost of storage and take possession of the property to which you are entitled not later than _ _[S*pecify date not less than 15 days after notice is personally delivered or, if mailed, no less than 18 days after notice is deposited in the mail*]_ _**, this property may be disposed of pursuant to Civil Code §1988.**

Date: _ _ _ _ _ _ __[*Signature of landlord*]__
_ _[*Typed name of landlord*]_ _
_ _[*Address, telephone*]_ _

Copies: Original (served on each owner to whom notice will be given); copies for landlord's and attorney's files.

Comment: Notice should be given in substantially this form, which follows the content of the form set forth in CC §1985, but not the format. Note that alternative paragraphs describing the action to be taken under CC §1988 need not be given in this form, in contrast to the form given to the tenant (see §8.159). This form may be amended for use in commercial tenancies under CC §§1993-1993.09. See CC §1993.05.

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§8.161 2. Enforcement of Landlord's Lien (CC §§1861-1861a)

A lien against the baggage and other personal property of the tenant is available to some residential landlords for charges due for rent and other services. CC §§1861-1861a.

Civil Code §1861 provides a lien to the keepers of hotels, motels, inns, boardinghouses, and lodginghouses. The primary characteristic distinguishing such keepers from ordinary landlords is that the management retains a right to enter and control the rooms without prior judicial approval. CC §1861.1(a). On filing a complaint to recover charges assessed for rent, board, and lodging, the keeper may seek a writ of possession of the property under detailed notice and hearing procedures set forth in CC §§1861.5-1861.13. The keeper may also obtain a temporary restraining order on a showing of immediate danger that the property will be disposed of before the matter can be heard. CC §1861.16. As a condition for obtaining either a temporary restraining order or a writ of possession, the keeper must post an undertaking. CC §1861.21. The legislature enacted these detailed procedural safeguards because of constitutional objections to the earlier version of CC §1861, which authorized the keeper to take possession of the property by "self-help," without notice and a hearing, and to hold the tenant's property for 60 days. *Klim v Jones* (ND Cal 1970) 315 F Supp 109. See also *Mihans v Municipal Court* (1970) 7 CA3d 479, 87 CR 17.

Civil Code §1861a makes a lien available to the landlords of furnished and unfurnished apartment houses, apartments, cottages, or bungalow courts. Subject to the limited right to obtain a writ of possession if the property is about to be destroyed or removed, the lien may be enforced only after a final money judgment. CC §1861a. There is no provision for a temporary restraining order, in contrast to the lien provided by CC §1861. A writ of possession requires 10 days' written notice. As noted above, the requirement of notice and a hearing, combined with the exclusion of all statutorily exempt property, probably renders this lien an ineffective tool for most landlords. If a money judgment is obtained, and remains unpaid for 30 days, the landlord may sell the tenant's property at a public auction and apply the proceeds to the judgment and costs of enforcing the lien. CC §1861a.

PRACTICE TIP: Counsel for both landlords and tenants should be aware of these statutory liens because one might come into play in a particular case. Landlords do not often invoke the liens, however, apparently for the following reasons:

- The liens do not apply to any of the debtor's property that is exempt from enforcement of a money judgment. Thus, they do not apply to items that most likely would be found on the premises (*e.g.,* household furnishings (CCP §704.020), tools of the tenant's trade or business (CCP §704.060)). Note: §704.060 is amended periodically to raise the exemption amounts.
- Subject to certain limitations regarding the innkeeper's lien (discussed below), prejudgment enforcement of the liens requires notice and a hearing (CC §§1861.5-1861.13, 1861a).
- A prudent tenant probably would remove his or her property from the premises after reading the moving papers. To counter removal, a landlord's attorney might attempt to obtain a temporary restraining order and serve it with the notice of motion.

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§8.162 B. Disposition of Fixtures

Unless the lease or rental agreement expressly provides to the contrary, any improvements made to the premises by the tenant become real property and a part of the premises, and thus become the landlord's property at the end of the lease term. *Peiser v Mettler* (1958) 50 C2d 594, 328 P2d 953; *Long v Keller* (1980) 104 CA3d 312, 321, 163 CR 532.

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§8.163 1. Rule: Fixtures Are Part of Real Property (CC §1013)

A fixture is an item of personal property that the tenant affixes to the rented premises. See CC §1013. The general rule for fixtures, as for improvements, is that they are considered part of the real property, and thus become the owner's property on expiration of the term of the tenancy. CC §1013. (But see the exceptions to this rule, discussed in §§8.164-8.165.) The parties are free, however, to make any disposition they wish concerning the fixtures. The courts will enforce such provisions, whether they give the landlord title to the fixtures (*Wilmerton v Morton* (1946) 74 CA2d 891, 169 P2d 992) or give the tenant a reasonable time after expiration of the term to remove the fixtures (*United Pac. Ins. Co. v Cann* (1954) 129 CA2d 272, 276 P2d 858; *Clark v Talmadge* (1937) 23 CA2d 703, 74 P2d 825). A tenant who removes fixtures in violation of a lease covenant is liable for damages measured by the fixtures' value as part of the property, and not merely as sold on the open market after removal. *Wilmerton v Morton, supra*. On negotiating removal of fixtures by tenant when tenancy terminates, see Retail Leasing: Drafting and Negotiating the Lease, chap 21 (Cal CEB 2007).

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§8.164 2. Tenant's Limited Right to Remove Fixtures (CC §1013.5)

When the lease or rental agreement makes no provision for fixtures, special rules apply to the tenant's right to remove fixtures. If a tenant believes in good faith and under a mistake of law or fact that he or she has a right to install fixtures, then CC §1013.5 permits the tenant to remove them on termination of the tenancy. The tenant must pay the owner (and anyone else with an interest in the land) damages that result from affixing and removing the fixtures. CC §1013.5(a).

Procedures for bringing and litigating an action to enforce the tenant's right to remove fixtures are set forth in CC §1013.5(b)-(d). If the court cannot readily ascertain damages, it may enter an interlocutory judgment authorizing removal on the condition that the tenant pay estimated total damages. CC §1013.5(c).

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§8.165 3. Tenant's Right to Remove Trade Fixtures (CC §1019)

Another exception to the general rule is provided for "trade fixtures," which are defined as "anything affixed [to the premises] for purposes of trade, manufacture, ornament, or domestic use…." CC §1019. The tenant may remove such fixtures any time before expiration of the tenancy if they can be removed without injuring the premises. CC §1019; see *Rinaldi v Goller* (1957) 48 C2d 276, 309 P2d 451. In *Rinaldi*, the court held that the tenant lost this right when the lease was terminated for nonpayment of rent and the landlord reentered the premises.

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§8.166 4. Disposition of Encumbered Fixtures

Special problems arise when the tenant encumbers fixtures that have been attached to the rented premises. The question of who has priority of claim to the fixtures, the landlord or holders of security interests in the fixtures, almost always arises in the context of trade fixtures. Rules for determining priority of claims to the fixtures are established by Com C §9334. Counsel should consult applicable Commercial Code sections (and commentaries on them) to determine who has priority of claim to the fixtures.

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C. Disposition of Tenant's Security Deposit

1. Statutory Framework

§8.167 a. Summary of Security Deposit Law

The law on security deposits is contained almost entirely in CC §1950.5 (residential tenancies) and §1950.7 (commercial tenancies); there is little case law interpreting these sections. Commercial tenants have somewhat fewer protections than residential tenants under these sections. The law applicable to residential tenancies underwent significant amendments between 2002 and 2004. Under CC §1950.5:

(a) The amount that a landlord may charge as a security deposit to a residential tenant is limited (CC §1950.5(c); see §§4.24, 8.169);

(b) For the express purpose of identifying damage caused by the tenant and giving the tenant an opportunity to repair it, the landlord must give the tenant an opportunity to request an inspection within a reasonable time after either party serves a termination notice, except 3-day notices served under CCP §1161(2)-(4) (CC §1950.5(f); see §§4.28, 8.172A-8.172B);

(c) Within 3 weeks after the tenant moves out, the landlord must return all amounts not necessary to remedy tenant defaults with an itemized statement of the security received and its disposition, including copies of receipts or other documents showing amounts expended to repair or clean the unit (CC §1950.5(g); see §§4.28, 8.173-8.173F);

NOTE: A preliminary itemized statement, separate from the one described in §1950.5(g), is required if the tenant requests an inspection before vacating the premises; see §8.172A.

(d) An itemized statement of the disposition of the deposit on termination of the landlord's interest in the dwelling unit is required (CC §1950.5(h)-(i); see §§4.29, 8.172); and

(e) Penalties are imposed on a landlord who retains the deposit in bad faith (CC §1950.5(*l*); see §8.174).

Under CC §1950.7, a commercial tenant has roughly comparable protections, except that no ceiling is set on the amount of a security deposit and an itemized statement of disposition of the deposit is not required. In addition, the definition of a security deposit is much less comprehensive in CC §1950.7 than in §1950.5, affording commercial tenants less protection. See the definition of "security" in §§4.23, 8.168.

For further discussion, including Drafting Tips for landlords on security deposits in leases and rental agreements, the limits on landlords' use of security during tenancy, and increasing deposits during tenancy, see §§4.23-4.29.

NOTE: Special rules apply to refund and disposition of tenants' security deposits for mobilehome leases. See chap 6. Special statutes or regulations may also govern security deposits for rental housing owned or subsidized by a governmental agency. See, *e.g.,* 24 CFR §882.414 on security deposits under the Section 8 certificate or voucher program; California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993).

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.168 b. What Payments Are Covered?

§8.168 b. What Payments Are Covered?

For residential tenancies, it is particularly important to determine whether a specific tenant payment falls within the broad definition of "security" in CC §1950.5(b). If the payment is not covered by CC §1950.5:

(a) There is no ceiling on the amount that the landlord may demand (unless restricted by a local rent control ordinance);

(b) The payment may be considered nonrefundable; and

(c) The requirements regarding return of the payment may not apply.

Civil Code §1950.5(a) applies to security for residential property rental agreements. "Security" is defined in §1950.5(b) as

> including, but not limited to, any payment, fee, deposit, or charge, except as provided in Section 1950.6, that is imposed at the beginning of the tenancy to be used to reimburse the landlord for costs associated with processing a new tenant or that is imposed as an advance payment of rent, used or to be used for any purpose, including, but not limited to, any of the following:
>
> (1) The compensation of a landlord for a tenant's default in the payment of rent.
>
> (2) The repair of damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or by a guest or licensee of the tenant.
>
> (3) The cleaning of the premises upon termination of the tenancy necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy [but same-level-of-cleanliness standard applies only to tenancies created after January 1, 2003; see CC §1950.5(b)(3)].
>
> (4) To remedy future defaults by the tenant in any obligation under the rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied thereto by the rental agreement.

The purposes listed are normally associated with the term "security deposit." The definition in §1950.5(b) indicates, however, that the term "security" includes more than these items. The statute seems to encompass (a) "last month's rent" paid in advance, (b) a "finder's fee" or "bonus" paid on execution of the lease, (c) and a higher rental payment for the first month. Note that §1950.5(b) expressly excludes from the definition of "security" a nonrefundable "screening fee" that a landlord may charge to cover the cost of obtaining information about a residential rental applicant, allowed by CC §1950.6. See also discussion of court interpretations of "security" and attempted legislative reforms in §§4.11, 4.23.

In *Granberry v Islay Invs.* (1984) 161 CA3d 382, 207 CR 652, the landlord rented each of its apartments for an initial 30-day term at a set rent. If the tenant chose to continue the tenancy, the landlord would reduce the rent for subsequent months by $100. A class of tenants sued for a declaration that the additional $100 charged for the first month is a "security" covered by CC §1950.5.

The court of appeal noted that reading CC §1950.5(b) literally, to mean that any advance payment of rent is "security," would lead to an absurd result that would put landlords out of business. On the other hand, the statute was clearly intended to encompass more than just those payments intended to be used for purposes described in CC §1950.5(e) (*e.g.,* to repair damage). Therefore, whether rent is "security" depends on whether the payment is for "legitimate rent" or is a disguised security. 161 CA3d at 389. To answer this question, the trial court should examine whether:

(a) Varying monthly rents are customary (as they may be, *e.g.,* in resort areas);

(b) The landlord has a history of charging payments that resemble security deposits; and

(c) The landlord sincerely intends the payment to induce tenants to stay longer, and thereby "amortize" the payment over more months.

For commercial tenancies, the legislature provided a much less comprehensive definition of "security" in CC §1950.7(a):

> Any payment or deposit of money the primary function of which is to secure the performance of a rental agreement for other than residential property,… other than a payment or deposit, including an advance payment of rent, made to secure the execution of a rental agreement.

However, the legislature specified the type of offsets available to a commercial landlord against the deposit in CC §1950.7(c):

> The landlord may claim of the payment or deposit only those amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, or to clean the premises upon termination of the tenancy, if the payment or deposit is made for any or all of those specific purposes.

Section 1950.7(c) was narrowly construed in *250 L.L.C. v Photopoint Corp.* (2005) 131 CA4th 703, 32 CR3d 296 not to allow an offset from the security deposit for future rent damages the landlord may later recover in a court action under CC §1951.2.

A landlord or landlord's agent may not require cash as the exclusive form of payment of a security deposit, unless the tenant has previously attempted to pay with a check drawn on insufficient funds or stopped payment, in which case the landlord may demand cash for up to the next 3 months. CC §1947.3. Any waiver of the tenant's rights under this section is void. CC §1947.3(c).

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§8.169 c. Statutory Ceiling

A landlord may not demand or receive a total amount of security that exceeds 2 months' rent for an unfurnished dwelling or 3 months' rent for a furnished dwelling. CC §1950.5(c). An advance payment of at least 6 months' rent is not prohibited by CC §1950.5(c) if the lease term is at least 6 months. Moreover, subsection (c) does not preclude the landlord and tenant from entering into an agreement, at the tenant's request, for the landlord to make structural, decorative, furnishing, or other alterations in exchange for a fee.

In *Kraus v Trinity Mgmt. Servs.* (2000) 23 C4th 116, 138, 96 CR2d 485, the supreme court did not disturb the lower court's order requiring the owner of an apartment house to make restitution and enjoining the owner from further collecting any unreasonable liquidated damages (see §4.43). By analogy this remedy would be available to the affected tenants if the required security deposit exceeds the statutory ceiling, and the court may order restitution of the illegal deposit to the tenants.

Civil Code §1950.7 does not impose a ceiling on the amount of the security deposit that may be charged to a commercial tenant.

For further discussion, see §4.24.

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§8.170 d. Landlord's Duty to Maintain Deposit; Interest on Deposit

Civil Code §§1950.5 (residential tenancy) and 1950.7 (commercial tenancy) impose specific duties on landlords with respect to maintenance of the security deposit, including the requirements to

- transfer or refund the deposit if the landlord transfers its interest in the unit,
- allow the tenant to repair and clean the unit before vacating (in residential tenancies), and
- account to the tenant for disposition of the deposit and return any balance to the tenant after the tenant vacates.

These obligations, especially in residential tenancies, involve detailed procedures and documentation that were made more complex by legislation enacted in 2002 and 2003. See discussion of CC §§1950.5(e)-(k), 1950.7(c) in §§8.172-8.173F.

State law does not impose any obligation on the landlord to pay interest on tenant deposits (*Korens v R.W. Zukin Corp.* (1989) 212 CA3d 1054, 261 CR 137) or to segregate them from other assets. Local ordinances may, however, require payment of interest on deposits. See *Small Prop. Owners v City & County of San Francisco* (2006) 141 CA4th 1388, 47 CR3d 121 (upholding local ordinance requiring landlords to pay 5 percent interest on security deposits). But see *Action Apartment Ass'n v Santa Monica Rent Control Bd.* (2001) 94 CA4th 587, 114 CR2d 412 (holding ordinance requiring landlords to pay 3 percent interest on security deposits to be unconstitutional taking). For a general discussion on interest on security deposits, see §4.25.

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§8.171 e. Priority of Tenant's Claim

The security deposit is held for the tenant's benefit, and the tenant's claim to the security has priority over that of any creditor of the landlord. CC §1950.5(d). The rule is the same for commercial tenancies, except that a commercial tenant's claim does not have priority over the claim of the landlord's trustee in bankruptcy. CC §1950.7(b).

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§8.172 f. Termination of Landlord's Interest in Unit

On termination of a residential landlord's interest in the dwelling unit by sale, assignment, death, appointment of a receiver, or otherwise, the landlord (or his or her agent) may avoid further liability for the security deposit under CC §1950.5(h), by

- transferring it to the landlord's successor (less lawful deductions), and notifying the tenant by personal delivery or certified mail of the transferee's name, address, and telephone number, and of any claims made against the security; or
- returning the security (less lawful deductions) to the tenant, with the itemized statement required by CC §1950.5(g).

If the landlord uses the first option, the transferee acquires all the rights and obligations of a landlord holding such security. CC §1950.5(k). The rule is basically the same for commercial tenancies, except that a landlord who uses the first option need not send an itemized statement to the tenant. CC §1950.7(d)-(e).

The landlord's liability with respect to the security deposit continues until expiration of the lease, so that the applicable statute of limitations runs from that point rather than from the point at which the landlord sells the premises and fails to comply with CC §1950.5(h) or §1950.7(d). *Trypucko v Clark* (1983) 142 CA3d Supp 1, 191 CR 165.

Civil Code §1950.5(i) provides that a landlord must give the successor in interest a written statement that (a) indicates the amount of any security deposits, (b) itemizes any lawful deductions from any security received, and (c) specifies the landlord's election under CC §1950.5(h). The successor in interest will be jointly and severally liable to the tenant for repayment of the security deposit if the landlord failed to comply with subdivision (h) (unless the successor believed in good faith that the landlord had so complied) and may not require the tenant to replace any security deposit that was not transferred to the successor by the former landlord. CC §1950.5(j).

For further discussion, see §4.29.

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2. After Termination of Tenancy

§8.172A a. Tenant's Right to Request Inspection of Premises and to Cure Deficiencies

Effective January 1, 2003, CC §1950.5(f) provides a notice and inspection process on termination of a tenancy that gives residential tenants the opportunity to minimize deductions from their security deposits by

- requesting an "initial" inspection after either party gives notice of termination, and
- curing any deficiencies in the condition of the rental unit before vacating it.

NOTE: Legislation enacted later in 2003 clarified that this process does not apply to a tenancy terminated by a 3-day notice (*i.e.*, on tenant's default) under CCP §1161(2)-(4), and this is declaratory of existing law. See CC §1950.5(f)(1), (q); Stats 2003, ch 576.

Under CC §1950.5(f)(1), the landlord must notify the tenant of its right to request an inspection "within a reasonable time"

- after either the landlord or the tenant gives the other a notice of intention to terminate the tenancy; or
- before the end of the lease term.

See sample notice form in §8.172B.

If the tenant requests an inspection, the tenant has the right to be present during the inspection, the landlord must give the tenant 48 hours' notice of it, and the inspection must be conducted by the landlord or its agent during the 2-week period before the termination or end-of-lease date. Unless waived in writing, the 48-hour notice applies whether or not the landlord and tenant mutually agree on an inspection date. If the tenant does not request an inspection, the landlord's obligations under CC §1950.5(f) are discharged. CC §1950.5(f)(1).

After the inspection, CC §1950.5(f)(2) requires the landlord to prepare and deliver to the tenant, or leave inside the rental unit, an itemized statement based on the inspection that both

- specifies proposed repairs or cleaning and the amount for each item the landlord intends to deduct from the security deposit "pursuant to paragraphs (1) to (4), inclusive of subdivision (b)," and
- includes "the texts of paragraphs (1) to (4), inclusive, of subdivision (b)."

The language of §1950.5(f)(2) suggests that the landlord must prepare the itemized statement during or immediately after the inspection, that it be delivered to the tenant the same day of the inspection, and that the tenant need not be present during the inspection to have the opportunity to cure the any deficiencies in the condition of the rental unit before vacating it. (Note that a second itemized statement is required under CC §1950.5(g) after the tenant vacates the premises; see §8.173B.)

Under CC §1950.5(f)(3), the tenant may remedy identified deficiencies "in a manner consistent with the rights and obligations of the parties under the rental agreement" before vacating the unit. A landlord may use the security deposit for deductions that were itemized but not cured by the tenant, "so long as the deductions are for damages" authorized by CC §1950.5(f). See CC §1950.5(f)(4). The landlord may also use the security deposit "for any purpose specified in paragraph (1) to (4), inclusive, of subdivision (b) that"

- occurs between the "initial" inspection and the termination of the tenancy, or
- was not identified during the inspection because of the presence of the tenant's possessions.

See CC §1950.5(f)(5). See also §§8.167-8.168, 8.173A.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.172B b. Form: Notice of Right to Request Inspection of Premises and to Cure Deficiencies

§8.172B b. Form: Notice of Right to Request Inspection of Premises and to Cure Deficiencies

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Notice of Right to Request Inspection of Premises and to Cure Deficiencies

Pursuant to the _ _[*expiration date stated in your lease/notice of termination served on/by you on* _ _[*date*]_ _]_ _**, your tenancy will terminate and you must vacate the premises located at** _ _[*address*]_ _ **on** _ _[*date*]_ _**. Under California law, you have a right to request that the undersigned** _ _[*landlord/landlord's authorized agent*]_ _ **make an initial inspection of the premises to determine its condition before you vacate, and you have the right to be present during the inspection. The purpose of the inspection is to allow you an opportunity to remedy identified deficiencies or damage to the premises, if any, caused by you. If you wish to have such an inspection, please contact the undersigned** _ _[*landlord/landlord's authorized agent*]_ _ **as soon as possible at** _ _[*specify address & telephone number*]_ _**. If you request an inspection, you will be given 48 hours' advance notice of the inspection, but you may waive in writing the required 48 hours' notice and have the inspection done sooner.**

Date: _ _ _ _ _ _ __[*Signature of landlord*]__
_ _[*Typed name of landlord*]_ _

Comment: This notice must be given to the tenant "within a reasonable time" (a) after either the landlord or the tenant gives the other a notice of intention to terminate the tenancy (except terminations based on the tenant's default; see §8.172A); or (b) before the end of the lease term. CC §1950.5(f)(1). Some landlords routinely include an inspection notice in all 30-day or 60-day notices served on tenants. See §8.80.

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§8.173 c. Landlord's Duty to Give Itemized Statement and Return Deposit

Several amendments to CC §1950.5 made by the legislature in 2002, 2003, and 2004 create potential traps for the unwary. Read the statute carefully and be prepared to support arguments on statutory ambiguity by citing relevant legislative history. The procedure is detailed in §§8.173A-8.173F. Note that under CC §1950.6, a landlord may legally charge an applicant for a residential rental unit a nonrefundable "screening fee" to cover the cost of obtaining information about the applicant. See §4.11.

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§8.173A (1) Items to Which Deposit May Be Applied

Despite numerous statutory amendments in 2002, 2003, and 2004, the security deposit statute remains ambiguous about which categories of losses, expenses, or costs the landlord may use the security deposit for after termination of a residential tenancy. See, *e.g*., §4.26. When the tenancy is terminated or the tenant vacates voluntarily, the tenant attorneys should argue that the landlord may retain only as much of the security deposit as is necessary to remedy tenant defaults in rent, to repair tenant-caused damage to the premises (other than ordinary wear and tear), to clean the premises, and to remedy future defaults by the tenant as specified in CC §1950.5(b). Because of the words "including but not limited to" in describing these uses of the security, landlord attorneys should argue that the statute allows for other uses as well, *e.g.,* late charges, insufficient check charges, and attorney fees, especially if the lease or rental agreement expressly allows such uses.

A lease or rental agreement might instead provide for a security deposit with more limited purposes than those set forth for residential leases in CC §1950.5(b) or for commercial leases in CC §1950.7(c). For instance, the lease might provide for a security deposit in the form of a "cleaning deposit" or "last month's rent." Under CC §1950.5(e), it is unclear whether the landlord may apply such a limited deposit to *other* items such as unpaid rent or tenant-caused damage. For example, may a "cleaning deposit" be applied to unpaid rent? Subsection (e) is not clear on this question. It provides that the landlord "may claim of the security only those amounts as are reasonably necessary" to remedy four tenant defaults: unpaid rent, damage to the premises, cleaning, or the tenant's failure to restore, replace, or return personal property or appurtenances, as stated in CC §1950.5(b)(1)-(4). Subsection (e) could mean that the landlord may use the security for any of the first three defaults, even if the agreement specifies only one. An argument can be made, however, that subsection (e) should not be construed to give a landlord the right to use the security for purposes not specified in the original rental agreement. The legislature's use of the word "only" may suggest that it intended this provision, *at most*, to limit the landlord's use of the security to the enumerated uses, even if the rental agreement provides that the security may be used for additional purposes. Whether the legislature intended to *expand* the landlord's right to use the security for other than its originally stated purpose in the rental agreement will need to be clarified in future amendments.

Another question arises when the security deposit is called "last month's rent" (as opposed to "*security for* last month's rent") in the lease, and the rent has increased since the deposit was paid. In this situation, the tenant has a strong argument that the last month's rent has been paid, and the landlord has no right to demand any further rent for the last month of the tenancy. See §1.48.

Civil Code §1950.7 does not permit a landlord of commercial premises to retain a security deposit to cover its damages for *future* rent, *i.e.,* rent accruing after the date on which the deposit is required by statute to be returned to the tenant. *250 L.L.C. v Photopoint Corp.* (2005) 131 CA4th 703, 32 CR3d 296. This can create problems for a landlord who collects a large security deposit on a long-term fixed lease and reserves the right to recover future rent damages under CC §1951.2 if the tenant should abandon the lease. However, the court stated that the parties may waive this aspect of CC §1950.7 in their lease. The amount of an security deposit wrongly retained may not be offset against future damages actually incurred by the landlord before return of the deposit. *250 L.L.C. v Photopoint Corp., supra*.

For further discussion, see §§4.28-4.29, 8.167-8.168, 8.172A.

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§8.173B (2) When Landlord Must Deliver Itemized Statement and Deposit Refund

Within 21 calendar days after the tenant vacates the premises, the landlord must (a) give the tenant an itemized written statement of the basis for the security, the amount received as security, and the disposition of the security (*i.e.,* how the landlord applied it to rent, repairs, or cleaning), and (b) refund the balance, if any. CC §1950.5(g)(1). (Note that a preliminary itemized statement is required under CC §1950.5(f)(2) immediately after the inspection but before the tenant vacates the premises; see §8.172A.)

An amendment to §1950.5(g)(1), effective January 1, 2004, prohibits the landlord from prematurely itemizing and taking deductions from the security deposit. The landlord must give an accounting and refund the balance of the security deposit "[n]o later than 21 calendar days after" the tenant vacates, "but not earlier than" the time that either the landlord or the tenant gives a termination notice under CC §§1946 and 1946.1 or CCP §1161. If the tenant vacates because of the expiration of a fixed term lease, the landlord's obligation cannot be and need not be performed earlier than 60 days before the expiration.

WARNING: As written, this amendment may also have the effect of exonerating a landlord who does not strictly comply with §1950.5(g) after a tenant vacates the unit without properly giving to (or receiving from) the landlord a termination notice.

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§8.173C (3) Contents of Itemized Statement

Within the time period described in §8.173B, the landlord must give the tenant an itemized written statement of the basis for the security, the amount received as security, and the disposition of the security (*i.e.*, how the landlord applied it to rent owed, repairs, or cleaning). Any remaining portion must be returned to the tenant at the same time. CC §1950.5(g)(1). The statement and any refund must be sent to the address provided by the tenant or to the unit that has been vacated if the tenant did not provide one. CC §1950.5(g)(6). A similar refund provision for commercial tenancies exists in CC §1950.7(c), which does not require that the landlord furnish an itemized statement.

Effective January 1, 2004, the residential landlord must include the following information or documents with the itemized statement (CC §1950.5(g)(2)):

- If the landlord or landlord's employee did the work, the statement must reasonably describe the work performed and include the time spent and the reasonable hourly rate charged.
- If the landlord or landlord's employee did not do the work, the landlord must include a copy of the bill, invoice, or receipt supplied by the person or entity performing the work. The itemized statement must contain the name, address, and telephone number of such person or entity, if the bill, invoice, or receipt does not have that information.
- If a deduction is made for materials or supplies, the landlord must include a copy of the bill, invoice, or receipt. If a particular material or supply item is purchased by the landlord on an ongoing basis, the landlord may document its cost by including a copy of a bill, invoice, receipt, vendor price list, or other vendor document that reasonably documents the cost of the item used in the repair or cleaning of the unit.

See exceptions to requirements of §1950.5(g)(2) in §8.173E.

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§8.173D (4) When Repairs Cannot Be Finished Within Required Time

When a repair to be done by the landlord or the landlord's employee cannot reasonably be completed within 21 calendar days after the tenant vacates, or if documents from a person or entity providing services, materials, or supplies are not in the landlord's possession within 21 calendar days after the tenant vacates, CC §1950.5(g)(3), effective January 1, 2004, allows the landlord to use a repair estimate in calculating the security deposit refund.

The landlord may deduct the amount of a good faith estimate of the charges that will be incurred and provide that estimate in or with the itemized statement. If the reason for the estimate is because the documents from a person or entity providing services, materials, or supplies are not in the landlord's possession, the itemized statement shall include the name, address, and telephone number of that person or entity. Within 14 calendar days of completing the repair or receiving the documentation, the landlord shall complete the requirements in CC §1950.5(g)(1)-(2), including refunding the appropriate amount of the security deposit.

See exceptions to requirements of §1950.5(g)(3) in §8.173E.

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§8.173E (5) Exceptions to Required Documentation

Under CC §1950.5(g)(4), the landlord need not give the tenant the documentation required by CC §1950.5(g)(2) or (3) (see §§8.173C-8.173D) if either

- the total amount deducted for repairs and cleaning does not exceed $125, or
- the tenant waived the rights specified in CC §1950.5(g)(2) and (3), but the waiver shall only be effective if signed at the same time as (or after) a notice to terminate under CC §1946 or §1946.1 or CCP §1161 was given, or no earlier than 60 calendar days before the expiration of a fixed-term lease; the waiver (see form in §8.173F) must substantially include the text of paragraph (2).

NOTE: Under CC §1950.5(g)(5), however, if a tenant requests the documentation required by CC §1950.5(g)(2) or (3) within 14 calendar days after receiving the itemized statement, the landlord must comply within 14 calendar days after receiving the tenant's request, despite the existence of a waiver and regardless of the amount deducted for repairs and cleaning.

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Source: Real Property/California Landlord-Tenant Practice/8 Terminating the Tenancy/§8.173F (6) Form: Waiver of Right to Receive Documents With Security Deposit Refund

§8.173F (6) Form: Waiver of Right to Receive Documents With Security Deposit Refund

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Waiver of Right To Receive Documents With Security Deposit Refund

The undersigned _ _[*name of tenant*]_ _ hereby waives the right to receive documents and information specified in California Civil Code §1950.5(g), paragraphs (2) and (3), when _ _[*name of landlord or landlord's agent*]_ _ calculates the deductions to be made from the security deposit paid by the tenant to the landlord in the sum of _ _[*dollar amount*]_ _ at the beginning of the tenancy or on _ _[*date*]_ _.

This waiver is effective only if you sign it at the same time as (or after) a notice to terminate the tenancy under Civil Code §1946 or §1946.1 or Code of Civil Procedure §1161 is (or was) given, or no earlier than 60 calendar days before the expiration of a fixed-term lease.

Civil Code §1950.5(g)(2) provides that a landlord shall send to the tenant certain documents and information at the same time the landlord sends a statement itemizing the deductions made from the tenant's security deposit, as follows (this waiver means you will not get these documents or this information):

(A) If the landlord or landlord's employee did the work, the statement must reasonably describe the work performed and include the time spent and the reasonable hourly rate charged.

(B) If the landlord or landlord's employee did not do the work, the landlord must include a copy of the bill, invoice, or receipt supplied by the person or entity performing the work. The itemized statement must contain the name, address, and telephone number of such person or entity, if the bill, invoice, or receipt does not have that information.

(C) If a deduction is made for materials or supplies, the landlord must include a copy of the bill, invoice, or receipt. If a particular material or supply item is purchased by the landlord on an ongoing basis, the landlord may document its cost by including a copy of a bill, invoice, receipt, vendor price list, or other vendor document that reasonably documents the cost of the item used in the repair or cleaning of the unit.

Further, Civil Code §1950.5(g)(3) allows the landlord to use a repair estimate in calculating your security deposit refund when a repair to be done by the landlord or the landlord's employee cannot reasonably be completed within 21 calendar days after you vacate your unit. It also allows the landlord to provide the name, address, and telephone number of a person or entity providing services, materials, or supplies if documents from that person or entity are not in the landlord's possession within 21 calendar days after you vacate. This waiver means you will not get these documents or this information.

Date: _ _ _ _ _ _ __[*Signature of tenant*]__
_ _[*Typed name*]_ _

Comment: See §8.173E.

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§8.174 d. Remedies for Landlord's Improper Retention of Deposit

A bad faith claim to or retention of any part of a security deposit may subject a residential landlord to a damages award of up to twice the amount of the security, in addition to actual damages. CC §1950.5(*l*). In an action for the landlord's bad-faith retention of the security deposit, the landlord has the burden of proving the reasonableness of the amounts claimed against the security. CC §1950.5(*l*). For commercial tenancies, CC §1950.7(f) contains a similar provision concerning damages, but does not expressly impose the burden of proof on the landlord.

An action to recover security deposit funds and for statutory damages may be brought by the tenant in small claims court if the damages claimed, punitive or actual or both, are within the court's jurisdictional limits (presently $7500 if the tenant is a natural person; see CCP §116.221). CC §1950.5(n). Although Civil Code §1950.7 contains no comparable language for commercial tenancies, small claims courts seem to have jurisdiction over these claims under their general powers, with a jurisdictional limit of $5000 if the tenant is not a natural person. See CCP §116.220(a); 59 Ops Cal Atty Gen 321 (1976).

A landlord's *good faith* failure to furnish the itemized statement or otherwise comply with CC §1950.5 does not preclude the landlord from asserting a setoff against the security deposit for unpaid rent, repairs, and cleaning. *Granberry v Islay Invs.* (1995) 9 C4th 738, 38 CR2d 650. In *Granberry*, the landlord initially charged tenants nonrefundable cleaning deposits, and then stopped charging such deposits and instead increased the first month's rent. A class action was filed on behalf of 10,000 present and former tenants, seeking to recover the excess first month's rent (a fund totaling about $1 million). A jury found that the excess was in fact a "security deposit" that must be refunded under §1950.5 but that the landlord had not acted in "bad faith" in failing to return the deposit. The landlord then sought to offset unpaid rent and costs of cleaning and repairs against the "security deposit," but the trial court held that an offset would not be permitted, because the landlord had failed to supply tenants with an itemized statement of the basis for retention of the security within the time required by §1950.5.

The supreme court reversed, holding that a landlord who has failed in good faith to take advantage of the summary nonjudicial deduct-and-retain procedure allowed under §1950.5 may recover damages for unpaid rent, repairs, and cleaning in a subsequent judicial proceeding, but under §1950.5, the landlord has the burden of proving that he or she has suffered such damages and that the amount claimed is reasonable.

PRACTICE TIP: Some landlords become known for their failure to return security deposits to vacating tenants. When counseling a tenant who has such a landlord, and who does not want to take the time or trouble to sue for return of the deposit, the attorney might consider practical alternatives. For example, the attorney might attempt to negotiate an arrangement under which the tenant would keep the last month's rent, leave the premises in good condition, and abandon the security deposit. Such a solution might satisfy both parties, but caution should be exercised in advising the tenant to undertake this course unilaterally. The landlord could serve a 3-day notice to pay rent or quit, and the tenant could end up liable for costs and attorney fees for an unlawful detainer action.

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§8.175 e. "Nonrefundable" Deposits and Waivers in Leases Prohibited

No residential lease or rental agreement may contain a provision characterizing any security deposit as "nonrefundable." CC §1950.5(m). A provision in a residential lease or rental agreement in which the tenant agrees to waive or modify his or her rights under CC §1950.5 is void as contrary to public policy. CC §1953(a)(1). (There are no comparable nonwaiver provisions for commercial tenancies. A court of appeal held that a commercial tenant may waive its CC §1950.7 security deposit rights. See *250 L.L.C. v Photopoint Corp.* (2005) 131 CA4th 703, 32 CR3d 296.)

Note, however, that under CC §1950.6, a landlord may charge an applicant for a residential rental a nonrefundable "screening fee" to cover the cost of obtaining information about the applicant. See §4.11.

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§8.176 f. Effect on Unlawful Detainer Action

A landlord is under no legal obligation to apply the security deposit before serving a 3-day notice to pay rent or quit, or before bringing an unlawful detainer action for nonpayment of rent. See *Willys of Marin Co. v Pierce* (1956) 140 CA2d 826, 830, 296 P2d 25; *Toplitz v Standard Co.* (1914) 25 CA 575, 576, 143 P 52.

Because the tenant is entitled to have the security deposit applied toward a money judgment obtained by the landlord, and to have any excess over the judgment returned (*Thompson v Swiryn* (1950) 95 CA2d 619, 213 P2d 740), the deposit may be pleaded affirmatively in the answer. In *Thompson,* the tenant's attorney claimed the deposit by counterclaim, and the landlord's attorney presumably did not object. The landlord's attorney might demur or move to strike the answer on the ground that the security deposit is not a basis to defend against the landlord's claim for possession. It could be argued, however, that the tenant may plead the security deposit as a setoff against any money judgment in favor of the landlord. See *Wickstrom v McGrath* (1927) 86 CA 651, 656, 261 P 326 (when lease indicated that security deposit had been given, the amount should have been applied to satisfy the judgment); *Garfinkle v Montgomery* (1952) 113 CA2d 149, 157, 248 P2d 52. The landlord's attorney might argue, however, that the security deposit should not constitute a setoff because the landlord's obligation to return the deposit does not arise until after the tenant vacates, and the security deposit may be applied to items other than rent (*i.e.,* to clean and repair damage to the premises).

If the deposit is not applied to the unlawful detainer judgment, the tenant may institute a separate action to recover it, and the prior unlawful detainer action is not res judicata. *Bacciocco v Curtis* (1938) 12 C2d 109, 82 P2d 385.

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§8.177 g. Effect on Subsequent Action Against Tenant

A landlord who in good faith fails to return a security deposit in the time required by statute may still recover damages for unpaid rent, repairs, and cleaning in a subsequent judicial action. Whether that judgment may be offset against the security deposit must be decided on a case-by-case basis. See *Granberry v Islay Invs.* (1995) 9 C4th 738, 747, 38 CR2d 650, cited in §8.174.

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9

Unlawful Detainer: Preparing and Filing the Action

Andrew J. Wiegel

I. INTRODUCTION
- A. Scope of Chapter §9.1
- B. Statutory Authority §9.2
- C. Applicability of Unlawful Detainer Remedy
  - 1. Grounds In General §9.3
  - 2. Termination of Landlord-Tenant Relationship §9.4

II. NATURE OF UNLAWFUL DETAINER ACTIONS
- A. Suit for Possession §9.5
- B. Summary Remedy §9.6
  - 1. Expedited Procedures; Trial Priority §9.7
  - 2. Issues Limited §9.8
  - 3. Application of Other Procedures §9.9
- C. Compare: Other Actions for Possession §9.10
  - 1. Common Law Ejectment §9.11
  - 2. Quiet Title §9.12
- D. Effect of Local Rent and Eviction Control
  - 1. Legal Background §9.13
  - 2. Recurring Issues in Evictions
    - a. Retroactivity of Ordinance §9.14
    - b. Estoppel Effect of Administrative Decision §9.15
    - c. Pleading and Proving Just Cause to Evict §9.16
      - (1) Pleading in Complaint and Answer §9.16A
      - (2) Burden of Producing Evidence §9.16B
      - (3) Burden of Proof §9.16C
    - d. Pleading and Proving Compliance With Local Ordinance §9.16D

III. SETTLEMENT AND STIPULATIONS
- A. Counseling and Negotiation §9.17
- B. CCP §998 Offers to Settle §9.17A
- C. Participation by Parties Is Essential §9.18
- D. Settlement Terms and Conditions
  - 1. Judgment Versus Dismissal §9.18A
  - 2. Disadvantages of Stipulated Judgment §9.18B
  - 3. Stipulated Judgment Procedure §9.18C
  - 4. Duty to Inform Court of Stay or Settlement §9.18D
- E. Form: Stipulation for Entry of Judgment or Dismissal (Attorney-Drafted) §9.19
- F. Form: Stipulation for Entry of Judgment (Unlawful Detainer) (Judicial Council Form UD-115) §9.19A

IV. REPRESENTING LANDLORDS IN EVICTIONS
- A. Ethical Considerations for Attorney
  - 1. Rules of Professional Conduct §9.20
  - 2. Communicating With Tenant §9.21
- B. Initial Meeting With Landlord §9.22
  - 1. Actions In Propria Persona §9.23
  - 2. Fee Agreement and Limited Scope Representation §9.23A
  - 3. Wrongful Eviction §9.24
  - 4. Information Necessary to Pursue Eviction §9.25
    - a. Defendants Other Than Known Tenant §9.26
    - b. Form: Sample Eviction Questionnaire §9.27
- C. Role of Insurance
  - 1. Wrongful Eviction Coverage §9.28

2. Tenant Claim for Punitive Damages §9.29

V. PREPARING THE COMPLAINT
A. Form of Pleading Optional §9.30
B. Form: Complaint—Unlawful Detainer (Judicial Council Form UD-100) §9.31
C. Selecting the Court
1. Subject Matter Jurisdiction; Limited Versus Unlimited Civil Case §9.32
2. Venue and Trial Court Location §9.33
D. Proper Parties
1. Plaintiffs §9.34
2. Defendants
a. Tenant and Subtenant §9.35
b. Occupant Unnamed in Complaint §9.35A
c. Lender Holding Security Interest in Lease §9.35B
E. Relationship of Parties §9.36
F. Summary of Essential Allegations §9.37
G. Monetary Relief
1. Eviction Based on Rent Default §9.38
2. Eviction Based on Other Grounds §9.39
3. Malicious Holdover, Fraud, Force, or Violence §9.40
H. Relief Other Than Possession and Damages §9.41
I. Verification §9.42
J. Amendments §9.43

VI. FILING AND SERVING THE ACTION
A. When to File Unlawful Detainer Complaint §9.44
B. Service of Summons and Complaint
1. Legal Requirements §9.45
2. Form: Summons (Unlawful Detainer) (Judicial Council Form SUM-130) §9.46
3. Methods of Service
a. Personal Delivery (CCP §415.10) §9.47
b. Substituted Service (CCP §415.20(b)) §9.48
c. Posting and Mailing (CCP §415.45) §9.49
d. Certified Mail After Response to Notice of Abandonment §9.50
4. Occupants Not Named in Complaint: Prejudgment Claim of Right to Possession §9.51
a. Investigating for Occupants Unnamed in Complaint §9.52
b. Serving Unnamed Occupants §9.53
c. Filing Prejudgment Claim: 10-day Limit §9.54
5. Form: Prejudgment Claim of Right to Possession (Judicial Council Form CP10.5) §9.55
C. Writ of Immediate Possession §9.56

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I. INTRODUCTION

§9.1 A. Scope of Chapter

This chapter describes the necessary steps for preparing and serving unlawful detainer actions and discusses preliminary considerations not covered in other chapters. When a tenancy has been terminated (see chap 8), but the tenant remains in possession of the premises, an unlawful detainer lawsuit is the remedy most commonly used by the landlord to evict the tenant and regain possession of the premises. Because the landlord's use of "self-help" eviction is not permitted in California (see §§8.137-8.153), the landlord must use legal means to remove the tenant from the premises. See *Bedi v McMullan* (1984) 160 CA3d 272, 206 CR 578. The process of terminating a tenancy must be distinguished from the process of evicting a tenant by means of a judgment obtained in an unlawful detainer action. The tenancy must have been terminated in some fashion by the landlord or tenant, or by expiration of its term, before an unlawful detainer action will lie. See CCP §§1161-1161a, 1174. See also CCP §1161b, effective July 8, 2008, until the end of 2012, discussed in §8.68C.

The landlord's notice to terminate a tenancy is usually an integral part of the process of evicting a tenant and is governed by a substantial body of law, discussed in chap 8. Because defenses to unlawful detainer actions involve analysis of the substantive rights and obligations of the landlord and tenant, they also are treated elsewhere in this book. For discussion of the tenant's defense that the landlord has breached the implied warranty of habitability, see §§3.24-3.48. On the defense that the eviction is retaliatory, see §§8.109-8.135. For a summary of available defenses, see §§10.53-10.69.

An indigent landlord, such as one renting out an in-law unit or an apartment in a small, owner-occupied apartment building, may not be able to afford court costs and may apply to the court to proceed in forma pauperis. See §§10.5-10.12 for procedures.

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§9.2 B. Statutory Authority

Counsel for both landlord and tenant should become familiar with the statutory framework, because unlawful detainer is a statutory remedy. With the exception of some local rent control ordinances, unlawful detainer substantive rights and procedures are governed by provisions of state law. The principal statutes are CCP §§1159-1179a (unlawful detainer and forcible entry and detainer (see §§8.138-8.146)), CC §§1940-1954.1 (landlord-tenant relationship), and CC §§789-793 (termination of estates in real property). State law governs unlawful detainer procedure but does not preempt substantive law requirements under local ordinances. *Fisher v City of Berkeley* (1984) 37 C3d 644, 704, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045; *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 141, 130 CR 465.

Other statutes that might apply to particular unlawful detainer actions include the following: CC §51 (Unruh Civil Rights Act) (protecting from discrimination on the basis of sex, gender identity and expression, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation); CC §§54-55.1 (protecting from discrimination against blind, physically disabled, and other designated persons); CC §§1859-1864 (baggage lien law); CCP §§71-77 (superior court; unlimited civil cases); CCP §§85-89 (superior court; limited civil cases), CCP §§415.10-415.50 and Govt C §§26662, 71265 (service of process); CCP §§715.010-715.040 (enforcement of judgments for possession of real property); and CC §§1980-1991 (disposition of personal property remaining on premises after termination of tenancy).

PRACTICE TIP: Counsel should be familiar with chapter 8, which thoroughly presents all pre-litigation notice requirements and other considerations in laying a proper foundation for an eviction action. Counsel should determine whether the landlord must also meet local requirements, especially eviction control laws (see chap 9), to obtain an unlawful detainer judgment. The most commonly encountered provisions are "just-cause" eviction ordinances that bar landlords from terminating month-to-month tenancies or from refusing to renew fixed-term tenancies except on grounds specified in the ordinance (see §§7.53-7.72).

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C. Applicability of Unlawful Detainer Remedy

§9.3 1. Grounds In General

An owner of real property must demonstrate that the case falls within the situations enumerated in CCP §§1161-1161a for the unlawful detainer remedy to be available. See *Greene v Municipal Court* (1975) 51 CA3d 446, 124 CR 139. See also CCP §1161b, effective July 8, 2008, until the end of 2012, discussed in §8.68C. The statutes provide for an unlawful detainer action in only four basic situations:

(1) *Termination of landlord-tenant relationship.* When a landlord wishes to remove a tenant who holds over after a fixed-term lease has expired, after service of notice terminating a month-to-month tenancy, after service of notice terminating a tenancy at will pursuant to CC §789, or after a tenant has breached the lease and not complied with a notice to cure the breach, if required (CCP §1161).

(2) *Forcible entry and detainer.* When an owner of real property or a person claiming superior possession wishes to remove another who holds possession by force (CCP §§1159, 1160).

(3) *Termination of employment relationship.* When an owner of real property wishes to remove an employee, agent, or licensee from the premises after that relationship has been terminated (CCP §1161(1)).

(4) *After foreclosure.* When a purchaser at an execution sale, sale by foreclosure, or sale under a power of sale in a mortgage or deed of trust wishes to remove the former owner or person claiming under him or her from the premises (CCP §§1161a, 1161b).

An unlawful detainer action generally will not lie if the plaintiff and defendant are not associated in one of those relationships. See 51 CA3d at 450. An exception exists for unidentified occupants not named in an otherwise appropriate unlawful detainer action against a known tenant. Such occupants may be brought into the unlawful detainer action as defendants by serving them with a prejudgment claim of right to possession under CCP §415.46. See §§9.51-9.55. In addition, see §§8.138-8.146 and 9.5 for further discussion of forcible entry and detainer.

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§9.4 2. Termination of Landlord-Tenant Relationship

This chapter primarily focuses on unlawful detainer actions governed by CCP §1161(1)-(5). A landlord is authorized to use unlawful detainer procedures to remove a tenant in the following situations (subject to conditions imposed by a local eviction control ordinance):

- A fixed-term lease has expired before it has become a month-to-month tenancy by the landlord's acceptance of further rent (CCP §1161(1));
- The landlord has terminated a month-to-month tenancy by serving a 30-day or 60-day notice to terminate as provided in CC §§1946 and 1946.1 (CCP §1161(1));
- The tenant has defaulted in payment of rent, after proper service of a 3-day notice to pay rent or quit (CCP §1161(2));
- The tenant has breached a covenant or condition of the lease, including covenants against subletting and assignment, after proper service of a 3-day notice (to cure the breach or quit, if the breach can be remedied) (CCP §1161(3));
- The tenant has sublet or assigned without the landlord's consent, committed waste or nuisance (including illegal drug dealing, or acts of domestic violence, sexual assault, or stalking), or used the premises for an unlawful purpose (CCP §1161(4)); or
- The tenant has given the landlord written notice of an intent to vacate under CC §1946 or §1946.1, or has made a written offer to surrender the premises that the landlord accepted in writing, and then fails to deliver possession on the date specified (CCP §1161(5)).

NOTE: Section 1161(4) was amended effective September 27, 2008, but the amendment sunsets on January 1, 2012. It provides that a tenant's act of domestic violence, sexual assault, or stalking of a resident on the premises creates a rebuttable presumption affecting the burden of proof that the tenant has committed a nuisance and is subject to a 3-day notice to quit. If the victim has not vacated the premises, the presumption does not apply.

For discussion of basic landlord-tenant relationships, see chap 1. On notice requirements for terminating tenancies under CCP §1161, see chap 8.

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II. NATURE OF UNLAWFUL DETAINER ACTIONS

§9.5 A. Suit for Possession

Unlawful detainer is an action, purely statutory in origin (CCP §§1161, 1174; *Markham v Fralick* (1934) 2 C2d 221, 39 P2d 804) to restore possession of real property to the person entitled to it (*Knowles v Robinson* (1963) 60 C2d 620, 36 CR 33). With limited exceptions (see CCP §1174), the action cannot be used for purposes other than recovery of possession. *Fontana Indus. v Western Grain & Fertilizer Co.* (1959) 167 CA2d 408, 334 P2d 611. It cannot, for example, be used to litigate title to the property (*Tewksbury v Magraff* (1867) 33 C 237; *Yuba River Sand Co. v City of Marysville* (1947) 78 CA2d 421, 177 P2d 642), although the tenant may raise the landlord's lack of title defensively if the landlord first puts title at issue by seeking to quiet title against the tenant (*Greenhut v Wooden* (1982) 129 CA3d 64, 180 CR 786). See §§9.8, 10.54. Moreover, unlawful detainer is not a proper remedy when the tenant already has surrendered possession of the premises. *Markham v Fralick, supra*; *Briggs v Electronic Memories & Magnetics Corp.* (1975) 53 CA3d 900, 126 CR 34. Thus, in order to prevail, the plaintiff must be entitled to possession when the action begins. For discussion of the parties' rights when the tenant surrenders possession after an unlawful detainer action is filed, see §11.51.

The right to bring an unlawful detainer action usually depends on the existence of a landlord-tenant relationship, but there are other grounds for recovery of possession using summary procedures. See §§9.3-9.4. For example, an action for forcible entry may be brought to evict a person who uses force or terror to gain possession of the premises, or who enters peaceably and turns out the party in possession. CCP §1159. A forcible detainer action also may be brought to evict a person who (1) uses force or the threat of violence to unlawfully hold property, or (2) gains possession in the absence of a lawful occupant (who was in possession within the previous 5 days) and then refuses to surrender possession after 5 days' notice. CCP §1160. See §§8.138-8.146.

Another use of the unlawful detainer remedy is to recover possession from a person who occupied the premises as an employee, agent, or licensee of the landlord (*e.g.,* an apartment manager). Such occupants may be evicted by means of an unlawful detainer action, without service of notice, once the relationship of employer-employee, principal-agent, or licensor-licensee has been terminated. CCP §1161(1). *Chan v Antepenko* (1988) 203 CA3d Supp 21, 250 CR 851. See §§1.3-1.7.

Finally, in an otherwise appropriate unlawful detainer action against a known tenant, unidentified occupants not named in the suit may be made subject to the unlawful detainer judgment, even though not named as defendants, by serving them with a prejudgment claim of right to possession under CCP §415.46. See §§9.51-9.55. Even if such occupants do not respond to the service by actually filing a claim, they are subject to the writ of possession and may be evicted. See §§13.67, 13.70.

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§9.6 B. Summary Remedy

Unlawful detainer is frequently described as a "summary remedy" because California law recognizes that an owner of property must be able to recover possession without delay, by means of a relatively uncomplicated action. Thus, the time to plead and set the action for trial is shorter than in other civil actions, and the action has priority over other civil matters (see §9.7). Moreover, the issues that can be raised are strictly limited to possession and closely related ancillary matters such as recovery of back rent, damages, and attorney fees (see §9.8).

In order to take advantage of this specially provided summary remedy, which involves termination of the tenant's right to possession, the owner must demonstrate that the action falls strictly within the statutory provisions (*Horton-Howard v Payton* (1919) 44 CA 108, 186 P 167) and that applicable notice provisions have been followed (*Lamey v Masciotra* (1969) 273 CA2d 709, 78 CR 344; *Baugh v Consumers Assocs.* (1966) 241 CA2d 672, 50 CR 822; *Feder v Wreden Packing & Provision Co*. (1928) 89 CA 665, 265 P 386).

NOTE: Sometimes an unlawful detainer action will be interrupted by the tenant's filing a bankruptcy petition. See chap 14. In that event, Cal Rules of Ct 3.650 requires attorneys (and parties who are not represented) to immediately notify the court and all other counsel or appearing parties. See §§9.18D, 14.57.

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§9.7 1. Expedited Procedures; Trial Priority

For the most part, no civil action regularly proceeds as quickly from filing to trial as unlawful detainer. The courts are required by CCP §1179a to give unlawful detainer actions priority over nearly all other categories of civil actions. The summons in an unlawful detainer action is returnable within 5 days of service (CCP §1167), instead of the usual 30 days (see CCP §412.20(a)(3)).

The court must set the trial date of a contested unlawful detainer action not more than 20 days after the request for setting is filed. CCP §1170.5(a). If the landlord prevails, a writ of execution must be issued immediately. CCP §1170.5(a). The trial date may be extended on agreement of the parties. CCP §1170.5(b). If the trial will not occur within the 20-day period and the court finds that the landlord is likely to prevail in the action, it must order the tenant to deposit into court the damages from the delay, as the rent would otherwise become due. CCP §1170.5(c). For further discussion, see §§11.44-11.50.

PRACTICE TIP: In many trial courts, especially those with a high volume of criminal trials, CCP §1170.5's 20-day deadline is rarely (if ever) met even for nonjury trials. Although the landlord's attorney might consider a mandamus proceeding in an appellate court to compel compliance with CCP §1170.5, such a procedure is unlikely to succeed when the trial court has a large backlog of criminal cases, because criminal trials still have precedence over unlawful detainer actions. CCP §1170.5(i); Pen C §1050(a). In cases in which the occupant is threatening physical harm or damage to the property, an ex parte appearance by the landlord's counsel may be appropriate to request an earlier trial date. See Cal Rules of Ct 3.1203(b).

Under CCP §594(b), the clerk's notice of trial of an unlawful detainer action must be served 10 days before trial, rather than the 20 days required in other cases. For further discussion of setting the case for trial, see §§11.41-11.43. Other pretrial proceedings are similarly expedited for unlawful detainer actions. For example, the time to respond to discovery is greatly foreshortened (see §§11.5, 11.8, 11.17, 11.20, 11.23-11.24) as are the notice provisions for motion for summary judgment (see §11.36). The California Judicial Council adopted case disposition time goals for unlawful detainer actions. See Cal Rules of Ct, Standards of J Admin 2.2(i).

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§9.8 2. Issues Limited

An unlawful detainer is an action designed to restore possession of real property to the owner expeditiously. It is generally limited to issues concerning the right to possession; neither the landlord nor the tenant may raise other issues. See *Knowles v Robinson* (1963) 60 C2d 620, 36 CR 33; *Union Oil Co. v Chandler* (1970) 4 CA3d 716, 84 CR 756. Exceptions to this general rule, however, can be found in statutes and case law. The landlord may set forth in the complaint any circumstances of fraud, force, or violence that accompanied the unlawful detention, and claim damages based on such facts. CCP §1166(b). Also at issue in an unlawful detainer action are the landlord's damages resulting from the unlawful detention (*i.e.,* reasonable rental value of the premises from the date of termination of the tenancy through the date of judgment), the amount of rent due if the action is based on default in payment of rent, and statutory damages of up to $600 if the tenant is guilty of malice. CCP §1174(b). See §§12.32-12.34.

The landlord may not seek damages beyond those permitted in unlawful detainer actions by CCP §§1166(b) and 1174. *Roberts v Redlich* (1952) 111 CA2d 566, 244 P2d 933. Thus, damages for breaches of the lease not connected with the unlawful detention may not be recovered in an unlawful detainer action. *Vasey v California Dance Co.* (1977) 70 CA3d 742, 139 CR 72. See also *Greene v Municipal Court* (1975) 51 CA3d 446, 124 CR 139. Although landlords often attempt to seek relief in unlawful detainer actions for physical damage to the rental premises, CCP §§1166(b) and 1174 do not authorize this relief unless the damages were a result of fraud, force, or violence that accompanied the unlawful detainer or forcible entry. See §9.40. The landlord must utilize the security deposit, or file a separate action, to recover for injury to the property. Neither party may use an unlawful detainer action to litigate title (see *Tewksbury v Magraff* (1867) 33 C 237; *Yuba River Sand Co. v City of Marysville* (1947) 78 CA2d 421, 177 P2d 642), but the tenant may raise the landlord's lack of title defensively if the landlord puts title at issue by filing a separate quiet title action against the tenant (*Greenhut v Wooden* (1982) 129 CA3d 64, 180 CR 786) or if the plaintiff alleges acquisition of title by foreclosure under CCP §1161a (see *Vella v Hudgins* (1977) 20 C3d 251, 142 CR 414).

The issues that the tenant may raise defensively in an unlawful detainer action are strictly limited. There are almost no situations in which the tenant is permitted to cross-complain against the landlord. See §§10.73-10.75. Although affirmative defenses generally may not be asserted in unlawful detainer actions, the courts and the legislature have created a number of exceptions to this rule. See, *e.g., Green v Superior Court* (1974) 10 C3d 616, 111 CR 704 (implied warranty of habitability (see §§3.24-3.48)); *Schweiger v Superior Court* (1970) 3 C3d 507, 90 CR 729 (retaliatory eviction (see §§8.109-8.135)); *Abstract Inv. Co. v Hutchinson* (1962) 204 CA2d 242, 22 CR 309 (racial discrimination (see chap 2)); *McAlister v Essex Prop. Trust* (CD Cal 2007) 504 F Supp 2d 903 (failure of landlord to provide accommodation for person with disability and one of his children). Some of them permit the tenant to offset delinquent rent with damages incurred by the tenant during the tenancy. See, *e.g., Green v Superior Court, supra*. (For a summary of permitted affirmative defenses, see §§10.53-10.69. See also California Eviction Defense Manual §§19.11-19.26 (2d ed Cal CEB 1993).

NOTE: Because of the summary nature of (and limitation on issues in) an unlawful detainer action, the limitation on allowable affirmative defenses (see §10.53), and the unavailability of relief by cross-complaint (see §10.73), unlawful detainer judgments have collateral estoppel or res judicata effect when an issue could have been raised, or actually was adjudicated, in the unlawful detainer proceeding. See *Vella v Hudgins* (1977) 20 C3d 251, 142 CR 414, and discussion in §13.39.

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§9.9 3. Application of Other Procedures

Although unlawful detainer is described as a summary remedy because the action is accelerated and the issues are limited, the parties to the action are entitled to some of the same benefits and protections afforded by other civil litigation, such as the rights to discovery, summary judgment, and a jury trial. See Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L Rev 759 (1994).

Practice rules that apply to civil actions generally (see Code of Civil Procedure, Part II) also apply to unlawful detainer actions, except as provided in CCP §§1159-1179a. CCP §1177. The "economic litigation" statutes (CCP §§90-107.65), however, which impose certain limitations on litigation tactics (including restricting discovery), expressly do not apply to unlawful detainer actions. CCP §91(b).

Thus, for example, the parties have the right to conduct discovery as in any other civil action, although time periods are foreshortened (see chap 11). For purposes of the discovery statutes, CCP §2016.020 defines "action" to include a "special proceeding of a civil nature." Such a proceeding falls under Part III of the Code of Civil Procedure, which includes CCP §§1159-1179a for unlawful detainer actions. See *Tide Water Assoc. Oil Co. v Superior Court* (1955) 43 C2d 815, 279 P2d 35; *Turem v Texaco, Inc.* (1965) 236 CA2d 758, 46 CR 389.

Whenever an issue of fact is presented by the pleadings in an unlawful detainer action, the parties have the right to have the case tried before a jury. CCP §1171. See §§11.53-11.55.

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§9.10 C. Compare: Other Actions for Possession

A landlord who wishes to remove a tenant from the premises may bring one of three judicial actions:

- ejectment,
- quiet title, or
- unlawful detainer.

In practice, a landlord usually chooses to file an unlawful detainer action because it affords the most expeditious means of regaining possession of the property. Of the three remedies, only unlawful detainer is a summary proceeding that has precedence over other civil matters (see §9.7) and in which only the right to possession of the property, and not title, is at issue (see §9.5).

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§9.11 1. Common Law Ejectment

The nonstatutory action in ejectment is also a suit to recover possession of real property and damages, but differs from unlawful detainer in the following respects:

- No termination notice is required as a preliminary step;
- The tenant has the usual 30 days to respond to the summons;
- The tenant may cross-complain;
- The issue of title may be raised and tried; and
- The class of defendants is not limited.

Moreover, special provisions in CCP §1174 governing unlawful detainer judgments and their enforcement, including statutory damages of up to $600 for malicious holding over, do not apply. See California Real Property Remedies and Damages, chap 10 (2d ed Cal CEB 2002).

For all those reasons, an action in ejectment usually is a less desirable remedy for the landlord than unlawful detainer. There is one exception: In limited circumstances (especially for commercial tenancies), the landlord may be awarded greater damages by proceeding in ejectment than by filing an unlawful detainer action. See Real Property Remedies §10.17. A complaint that fails to state a cause of action in unlawful detainer may be construed as a complaint in ejectment. The court may grant relief on that basis if the complaint alleges the essential elements of a cause of action for ejectment. *Chinese Hosp. Found. Fund v Patterson* (1969) 1 CA3d 627, 81 CR 795; *Baugh v Consumers Assocs.* (1966) 241 CA2d 672, 50 CR 822. This rule apparently applies only when the tenant makes a general appearance (and thus has conceded jurisdiction) and does not otherwise object by way of a demurrer or an affirmative defense, because of the shorter time for service in unlawful detainer actions than in other actions for possession. A tenant wishing to force a landlord to start a new lawsuit may move to quash service of the 5-day summons. See §§10.20-10.21. Actions for unlawful detainer are improper when the buyer is in possession under a land sale contract or other purchase agreement and the buyer has made payment towards the purchase of the subject premises. In these cases, an action for ejectment must be filed. See §9.36.

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§9.12 2. Quiet Title

An action to quiet title under CCP §§760.010-764.080 may be used to recover possession of real property, and a judgment quieting title may include an order for possession. See *South Shore Land Co. v Peterson* (1964) 226 CA2d 725, 38 CR 392. See also California Real Property Remedies and Damages, chap 7 (2d ed Cal CEB 2002). The primary advantage of a quiet title action is that the owner not only may litigate title, but also may obtain a judgment with *in rem* effect, binding known and unknown persons who may have a claim to the property. See Real Property Remedies §7.5. Thus, when the occupant of real property holds under some claim of title, the landlord might wish to proceed by a quiet title action. As with ejectment actions, the statutes that expedite procedure in unlawful detainer actions (CCP §§1159-1179a) are not available in actions to quiet title. Therefore, such actions normally take an owner much longer to regain possession of the property. For further discussion of the advantages and disadvantages of quiet title actions, see Real Property Remedies §7.18.

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D. Effect of Local Rent and Eviction Control

§9.13 1. Legal Background

A number of local California jurisdictions have enacted rent control ordinances in past decades. Accordingly, attorneys for both landlords and tenants should be aware that the premises may be regulated by a local ordinance. Local rent control ordinances may have a substantial impact on substantive and procedural rights of the parties in unlawful detainer proceedings. (For discussion of such ordinances, see chap 7.)

Rent control ordinances typically affect unlawful detainer actions by controlling the amount of rent that the landlord may lawfully charge, and by limiting the grounds on which the landlord may evict a tenant. For example, if the landlord's demand for rent in a 3-day notice to pay rent or quit exceeds the amount to which he or she is entitled under a rent control ordinance, the notice is defective and the court cannot award possession of the premises to the landlord. See §§7.56, 7.73, 10.31, 10.59; *Dertiman v Almey* (1949) 92 CA2d 724, 207 P2d 615. For a case in which the tenant was allowed to assert as an affirmative defense to an unlawful detainer action the landlord's charging of rent over the amount allowed by a rent control ordinance, see *Nourafchan v Miner* (1985) 169 CA3d 746, 215 CR 450. Similarly, the eviction control provisions found in most rent control ordinances limit evictions to those with "just cause," and prohibit those sought for any reason other than the reasons enumerated in the ordinance. Permitted grounds may include:

- nonpayment of the lawful rent,
- commission of a nuisance or unlawful act on the premises,
- breach of a covenant of the lease or rental agreement,
- refusal to allow the landlord to enter the premises to make necessary repairs,
- the landlord's intention to reside on the premises or to have specified family members reside on the premises,
- the landlord's performance of major improvements that require the unit to be vacant for a substantial period of time, or
- permanent removal of the premises from the rental market.

See §§7.54-7.72.

PRACTICE TIP: Landlord's counsel should closely examine the rent control ordinance (and rules and regulations promulgated under it) before counseling the client on the right to evict the tenant. As the scope of rent control ordinances varies widely, the attorney must determine whether the unit is governed by the ordinance and whether the ordinance permits the reasons on which the landlord wishes to evict. Relying on thinly disguised grounds in an effort to regain possession of the unit and raise the rent could subject the landlord to liability for wrongful eviction. See, *e.g., Zimmerman v Stotter* (1984) 160 CA3d 1067, 207 CR 108. See also §8.150. For discussion of additional effects of rent control ordinances on unlawful detainer actions, see §§9.14-9.16. On practicing under rent control ordinances generally, see chap 7.

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2. Recurring Issues in Evictions

§9.14 a. Retroactivity of Ordinance

Rent control ordinances either specify their own effective date or become effective under applicable local or state law. Rarely, however, do rent control ordinances address the issue of their applicability to cases not reduced to final judgment on the ordinance's effective date. The applicability of a newly enacted or amended rent control ordinance to a pending unlawful detainer action might be questioned:

- if a termination notice had been served, but had not expired, as of the ordinance's effective date;
- when the time period under a notice expired prior to the effective date; or
- if an unlawful detainer action was on file, but not reduced to judgment, as of the ordinance's effective date.

Rent control enactments presumably are substantive rather than procedural. See *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 149, 130 CR 465; *Fisher v City of Berkeley* (1984) 37 C3d 644, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045. Accordingly, their retroactive application turns on legislative intent. *City of Sausalito v County of Marin* (1970) 12 CA3d 550, 557, 90 CR 843. When an ordinance or amendment is not explicit on retroactivity, its "statement of purpose" (especially any reference to forced displacement of tenants) might be held to indicate that the enactment applies to all cases not reduced to final judgment on its effective date. See *City of Sausalito v County of Marin, supra* (Govt C §65801 is substantive in nature, but nevertheless applicable to all cases not reduced to final judgment); *Marriage of Silvers* (1972) 23 CA3d 910, 911, 100 CR 731 (Family Law Act, former CC §§4000-5174, applicable to case at issue before, but tried after, its effective date; partial or incomplete right vests only when reduced to final judgment).

A notice terminating the tenancy, given under CCP §1161 or CC §§1946, 1946.1, terminates the tenancy on the expiration of the notice period. See chap 8. Arguably, the rights of the parties become vested at that point.

Although there is no California case directly on point, courts in other jurisdictions have given rent control ordinances retroactive effect. See *Scholtz Partnership v District of Columbia Rental Accommodations Comm'n* (DC Ct App 1981) 427 A2d 905, 913 (rent control act in effect at the time is applicable to agency decision unless manifest injustice would result or statutory direction or legislative history exists to the contrary); *Huard v Forest St. Hous., Inc.* (1974) 316 NE2d 505 (rent rollback provision of newly enacted ordinance applies to preexisting lease; no unconstitutional impairment of contract).

Rules of construction applicable to statutes in general also apply to the interpretation of local ordinances. *Evola v Wendt Constr. Co.* (1959) 170 CA2d 21, 338 P2d 498. Presumably, this principle also applies to construction of a rent control scheme enacted by initiative.

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§9.15 b. Estoppel Effect of Administrative Decision

Some rent control enactments allow tenants to petition the agency that administers the ordinance for a rent reduction based on reduction in housing services, prior collection of amounts over the controlled rent, and the like. After notice and a hearing, the agency may establish the lawful rent if it finds for the tenant. See chap 7. The question raised by such proceedings is whether the landlord may then maintain an unlawful detainer action based on nonpayment of the rent demanded (which exceeds the amount administratively determined as legal); *i.e.,* is the administrative determination binding on the trial court in the ensuing unlawful detainer action?

In California, the rule appears to be that an administrative decision must be challenged directly through judicial review and may not be attacked collaterally in a separate action. In *Hazon-Iny Dev. v Unkefer* (1980) 116 CA3d Supp 1, 172 CR 191, the landlord filed a petition with the rent board for determination of a vested right to convert his rental property to condominiums. The day after the board's denial of his petition, the landlord served 30-day notices terminating the tenancies of the premises' occupants. The appellate court reversed a judgment in favor of the landlord, holding that the trial court exceeded its jurisdiction in permitting the landlord to attack the rent board's decision collaterally. The appellate court held that the landlord's proper remedy was to challenge the rent board's decision directly in an administrative mandamus action (under CCP §1094.5) rather than to attempt an indirect challenge in an unlawful detainer action. 116 CA3d at Supp 4. See also *Hollywood Circle, Inc. v Department of Alcoholic Beverage Control* (1961) 55 C2d 728, 13 CR 104 (board's dismissal of appeal from revocation of liquor license not void, even if erroneous, and therefore res judicata in later judicial proceedings); *Holder v California Paralyzed Veterans Ass'n* (1980) 114 CA3d 155, 170 CR 455 (tort action for damages arising out of quasi-judicial proceeding must be preceded by successful mandamus action overturning agency's decision); *City & County of San Francisco v Ang* (1979) 97 CA3d 673, 159 CR 56 (determination of city's board of permit appeals res judicata and beyond collateral attack).

Administrative decisions are given res judicata or collateral estoppel effect when the agency is acting in a quasi-judicial capacity (*i.e.,* when resolving disputed issues of fact that the parties have an adequate opportunity to litigate, and when the proceeding results in a final decision). See *People v Sims* (1982) 32 C3d 468, 186 CR 77. Under this test, most individual rent adjustment hearings probably qualify as quasi-judicial proceedings and thus have a collateral estoppel effect on the issue of the proper rent in later unlawful detainer proceedings. See also *Mahon v Safeco Title Ins. Co.* (1988) 199 CA3d 616, 245 CR 103, for a discussion of when administrative findings and conclusions are accorded res judicata or collateral estoppel effect in later judicial proceedings.

Similarly, if a landlord proceeds with an unlawful detainer action after the tenant files a rent board petition but before the board conducts a hearing or issues an order, the unlawful detainer action may be subject to temporary abatement. See *Vargas v Municipal Court* (1978) 22 C3d 902, 150 CR 918, cited in §§10.30-10.31.

WARNING: In view of *Hazon-Iny Dev. v Unkefer, supra,* and *Vargas v Municipal Court, supra,* attorneys should be extremely cautious about advising landlords to proceed with unlawful detainer actions based on nonpayment of rent if a rent board action is pending or the board has ordered the rent reduced or authorized the tenant to withhold rent for past overcharges. In such a situation the proper course is for the landlord to attack the rent board's decision directly in an administrative mandamus action rather than litigate the propriety of the order in an unlawful detainer action. When an administrative decision is the result of an invalid administrative rule, regulation, or policy, however, a party prejudiced by the decision might argue that the agency exceeded its jurisdiction and that the decision has no collateral estoppel effect. But a court may opine that even this kind of attack may not be made collaterally.

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§9.16 c. Pleading and Proving Just Cause to Evict

Rent control ordinances usually limit evictions from regulated units to those based on grounds permitted by the ordinance. See §§7.53-7.72. In those jurisdictions having a rent control ordinance which restricts evictions unless a landlord has a specified "just cause," the parties must determine how the ordinance provisions affect the pleadings, the burden of producing evidence, and, if the matter is tried, which party has the burden of proof. In most instances, rent control ordinances not only list the permitted grounds for eviction (*e.g.,* to allow the landlord or a family member to move into a rented unit, or to have the unit vacated to allow major construction or repair projects; see §§7.65-7.67), but also require that the landlord proceed under the permitted ground in good faith and without ulterior motive. Both elements (the substantive ground and the underlying motive) must be considered in determining these issues.

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§9.16A (1) Pleading in Complaint and Answer

Code of Civil Procedure §459 provides:

> In pleading … an ordinance of county or municipal corporation, or a right derived therefrom, it is sufficient to refer to such statute or ordinance by its title and the day of its passage. In pleading the performance of conditions precedent under a statute or an ordinance of a county or municipal corporation, or of a right derived therefrom, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part required thereby; if such allegations be controverted the party pleading must establish in the trial the facts showing such performance.

Moreover, the court in *People v Gordon* (1951) 105 CA2d 711, 724, 234 P2d 287 held that if a party relies on a statute that contains an exception in the enacting clause, or clause creating and defining the asserted right, "such exception must be negatived in the initial pleading."

The application of the rule in *Gordon* and CCP §459 allocates to the landlord the obligation to plead compliance with the conditions that enable an eviction to be brought, because most ordinances set forth permissible grounds for eviction as exceptions to eviction control. Moreover, it is the practice in some rent control jurisdictions to require the landlord to allege compliance with the local ordinance. Also, most (if not all) eviction control ordinances require that the landlord state the ground for eviction in the termination notice. In addition, the landlord must allege service of proper notice of termination in the complaint under CCP §1161. Some ordinances mandate compliance with habitability standards as a prerequisite to eviction actions. These requirements appear to make compliance with an applicable eviction control ordinance an element of the landlord's case and thus to impose on the landlord at least the obligation of pleading that the landlord has complied with the local ordinance.

The defendant tenant, however, may not simply rely on a denial of the landlord's allegations in the complaint that the landlord has complied with the subject rent control ordinance. Since the supreme court in *Fisher v City of Berkeley* (1984) 37 C3d 644, 697, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045, characterized rent control ordinances as creating substantive defenses to eviction, the tenant must plead that the plaintiff landlord has violated the ordinance as an affirmative defense and probably needs to allege factual matters that support the defense.

This apparent dichotomy is reflected in the Judicial Council's unlawful detainer complaint and answer forms. The complaint form (¶14) contains a provision for the landlord to allege whether the tenant's unit is subject to a local rent control ordinance and, if so, that plaintiff has met all applicable requirements of the ordinance (see form in §9.31). The answer form allows the tenant to deny statements made in the complaint, but contains in the list of affirmative defenses an allegation (¶3.g) that the landlord's demand for possession violates an applicable rent control ordinance (see §10.51). See also §10.59.

PRACTICE TIP: To withstand a demurrer, a landlord should allege compliance with the applicable rent control ordinance in the language established and required by CCP §459. A general allegation is probably sufficient for the pleading stage. Similarly, the defendant, in order to raise the defense properly, must comply with pleading requirements for new matter in the nature of an affirmative defense.

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§9.16B (2) Burden of Producing Evidence

The pleading requirements for both landlords and tenants appear to dictate the minimum obligations on both parties as to the burden of producing evidence, but with the same apparent duality as the pleading issues discussed in §9.16A. As part of the plaintiff landlord's case in chief, the landlord must introduce competent evidence to demonstrate that the landlord has complied with the applicable ordinance.

EXAMPLE 1: In a case based on the landlord's personal intention to move into the tenant's apartment, the landlord must testify as to the desire to occupy the apartment in addition to the factual matters that would tend to demonstrate that the landlord (in efforts to obtain possession) is operating in good faith and with no ulterior motives. See §§7.55, 7.65-7.68.

EXAMPLE 2: Similarly, if habitability is a precondition of an owner move-in, or if obtaining final building permits is a requirement for a repair or capital improvement project, the plaintiff must introduce evidence that he or she has obtained and complied with the proper applications, permits, and orders. See §§7.63-7.64.

The attorney representing the plaintiff landlord's case must be prepared to introduce evidence that will be sufficient to withstand a motion by the defendant tenant for nonsuit under CCP §581c (jury trial) or for judgment under CCP §631.8 (nonjury trial).

Once the landlord's case in chief has been presented, the tenant has the burden of producing evidence to negate the contentions of the landlord or to introduce new evidence which would demonstrate that the landlord is not acting in good faith, is retaliating for some reason against the tenant, or has failed to obtain a permit or other governmental order that is a precondition for the action which the landlord seeks to take. If the defendant tenant does not meet the burden of producing evidence that negates the landlord's case in chief, then at the conclusion of the tenant's defense the landlord should move for a directed verdict or judgment. See CCP §§630, 631.8.

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§9.16C (3) Burden of Proof

Determining which party has the ultimate burden of proof after each party has met the burden of producing evidence is unsettled on the issue of just cause for eviction. No court of appeal has squarely addressed that issue in the context of local eviction control laws.

Such was not the case in decisions which interpreted federal price control regulations during and immediately following World War II. In interpreting the eviction restrictions of the federal enactments, that often used the same terminology as modern rent control ordinances in California cities and counties, courts frequently held that the matter of "good faith" was an ultimate fact to be determined by the trier of fact and, therefore, the landlord had the burden of proof. See, *e.g., Janise v Bryan* (1948) 89 CA2d Supp 933, 201 P2d 466. See §7.55.

In *Janise*, the court did not apply California law in interpreting the federal regulation. Under California law the issue of which party has the ultimate burden of proof is far less clear, and the result ultimately may be the opposite from the holdings of the cases interpreting the World War II federal price regulations.

Evidence Code §500 provides that a party has the burden of proof on each fact the existence (or nonexistence) of which is essential to establish its claim or defense, unless provided otherwise by law. The supreme court in *Fisher v City of Berkeley* (1984) 37 C3d 644, 698, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045, held that the phrase "unless otherwise provided by law" did not refer to local or municipal ordinances. The court held that the creation of any presumption affecting the burden of proof in a municipal ordinance is preempted by state law.

The party on whom the law places the burden of proof bears the risk of nonpersuasion if the trier of fact, after hearing all the evidence, believes that the evidence is evenly weighted between the parties. This consequence could be particularly significant in a close case tried before a jury. See discussion in §§12.38, 12.60-12.63 regarding allocation of the burden of proof on the defense of retaliatory eviction. For further discussion of burden of proof generally, see Hazard, Tait & Fletcher, Cases and Materials on Pleading and Procedure: State and Federal (7th ed 1994).

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§9.16D d. Pleading and Proving Compliance With Local Ordinance

A few rent control ordinances (*e.g.,* those in Berkeley and Santa Monica) require in unlawful detainer actions that a landlord plead and prove general compliance with the ordinance in addition to allegations of just cause for eviction under the ordinance. Such requirements, insofar as they affect the pleading of a complaint, may be subject to challenge as impermissible attempts to regulate unlawful detainer procedure under *Fisher v City of Berkeley* (1984) 37 C3d 644, 209 CR 682, aff'd (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045. See §9.16C. In any event, the application of CCP §459 (discussed in §9.16A) would require at a minimum that the landlord generally plead compliance with the substantive conditions of the ordinance. See also §§7.73-7.75 for discussion of notice and pleading requirements, presumptions, and burdens of proof.

If lack of compliance is expected to be disputed, the landlord should be aware of CC §1947.7(a), which may exempt the landlord from fines and penalties imposed by a local rent ordinance containing registration requirements if the landlord attempted in good faith to comply with the ordinance. Landlords who have so acted in good faith should also plead in the unlawful detainer complaint substantial compliance under CC §1947.7(b) to counter an affirmative defense based on any violation of the ordinance (see §10.59). In a jurisdiction that requires registration of the units, such as the City of Berkeley, a landlord who attempted to comply, in good faith, with those requirements may plead compliance under CC §1947.7(c), but must have substantially complied as provided in CC §1947.7(e) prior to initiating the unlawful detainer action.

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III. SETTLEMENT AND STIPULATIONS

§9.17 A. Counseling and Negotiation

Unlawful detainer litigation poses unusual problems for the attorney because it touches on basic values, expectations, and fears, and thus often engenders emotional responses to the situation in the client. Landlords frequently express anger and frustration when the tenant asserts a defense to the action that not only delays the eviction but also appears to accuse the owner of improper conduct. Tenants commonly express emotions ranging from resigned despair to anger at the prospect of losing their home. At the extreme, the attorney may encounter the "deadbeat," destructive tenant or the unscrupulous landlord who pursues profit without the corresponding responsibilities of ownership.

The client's intense feelings are frequently compounded by economic realities. For landlords who operate on narrow profit margins, lost rent, attorney fees, and court costs may cut deeply into their standard of living. The financial condition of many tenants may prevent them from finding other housing, meeting the expenses of a move, or retaining counsel. Clients' emotional responses to the situation may be heightened by a lack of understanding of the law and procedure regulating the landlord-tenant relationship. Typically, the parties also feel righteous about their own position and remain insensitive to the trauma that the other party may be experiencing. Landlords may focus, for example, on their violated property rights but overlook the fact that an unlawful detainer action may force the tenant to leave his or her home, with all its emotional attachments. Tenants, on the other hand, may be caught up in asserting what they perceive to be their rights but lose sight of the fact that the landlord may depend on the rent for the necessities of life from month to month.

These emotional, ideological, and decidedly nonlegal factors pose significant challenges to the attorney who handles a number of landlord-tenant cases. Attorneys who make no effort to understand the needs and fears of their client and the opposing party, and who do not inform their client of the advantages and disadvantages of the alternative courses of action, will tend to negotiate from a "take it or leave it/win at all costs" perspective. As a result, options are frequently not explored and the problems that may have caused the litigation are left unresolved (*e.g.,* an abusive manager or lack of maintenance unknown to the landlord). After settlement or trial, the client may leave the courthouse just as confused and upset as before. The attorney's failure to explore alternative means of resolving problems may result in more unlawful detainer actions going to trial and engender public distrust of the judicial system and lawyers in general. From the attorney's perspective, ethical problems may arise (see, *e.g., Snyder v State Bar* (1976) 18 C3d 286, 133 CR 864, discussed in §10.2), and future business may be lost. For discussion of counseling landlords and tenants generally, see chaps 4-5.

On first being retained by a landlord, the attorney should attempt to uncover the various financial and emotional factors underlying the client's desire to evict the tenant. Dissuading the landlord from relying on nonfinancial factors may benefit the client in the long run. See, *e.g., Clarion Corp. v American Home Prods. Corp.* (7th Cir 1974) 494 F2d 860, 864, in which the court set out "a model of the kind of 'evaluation' letter an embattled lawyer might send a difficult client" (from Mellinkoff, Lawyers and the System of Justice (1976)), including the following excerpt (p 76):

> The sole objective of the litigation is to get money for you; it is not to visit some kind of revenge on the defendants, nor is it to make an example of them so that, for fear of further repercussions, they will mend their ways.
> [I]t is a major mistake to let extraneous factors—such as "proving" something to someone—get in the way of a hard-headed, dollars and cents, monetary evaluation of the case.

The tenant's attorney must not only evaluate the merits of the defense, but also pay close attention to the real needs of the client. Whether a residential or commercial tenant, the client may need only additional time to move or may be willing to meet the landlord's reasonable expectations regarding some underlying problem. In addition, the attorney must advise the tenant concerning the economic cost of litigation and vindication of "rights."

Because each case is different, no generalizations can be made about a lawyer's "appropriate" response. Increased

awareness of the client's genuine needs, however, will often eliminate unnecessary litigation and result in the client's long-range satisfaction with the legal process.

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§9.17A B. CCP §998 Offers to Settle

An offer to settle before trial under CCP §998 can be an effective litigation fee-shifting tool and provide an incentive to settle. A party who refuses the offer and then fails to get a more favorable judgment will have to pay the other party's postoffer costs (including attorney fees as costs), and possibly expert witness fees, that otherwise would have been borne by the other party. CCP §998(c)-(d). The following are examples of landlord-tenant actions ruling on an award of fees and costs under §998:

- *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 118 CR2d 276.
- *Meissner v Paulson* (1989) 212 CA3d 785, 260 CR 826.

For further discussion, see California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004).

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§9.18 C. Participation by Parties Is Essential

Under CCP §664.6, a party to a settlement agreement may enforce the agreement in a law and motion proceeding filed in the underlying action. This procedure is not available unless an action is pending. *Kirby v Southern Cal. Edison Co.* (2000) 78 CA4th 840, 93 CR2d 223. If a confession of judgment under CCP §§1132-1134 is used (*e.g.*, to collect delinquent rent) before an action is filed, that process requires that the party confessing judgment (defendant) be represented by independent counsel.

All parties must meaningfully participate in the negotiations and must personally sign the stipulation for judgment or dismissal, or orally agree to the settlement on the record in court. *Harris v Rudin, Richman & Appel* (1999) 74 CA4th 299, 87 CR2d 822 (*Harris I*). Note, however, that a settlement agreement may be mutually rescinded. In *Harris v Rudin, Richman & Appel* (2002) 95 CA4th 1332, 116 CR2d 552 (*Harris II*), lawyers who had all signed the settlement agreement were permitted to rescind it in light of later-discovered information about the Governor's signing into law an amendment that materially changed the controlling statute on which the agreement was based.

The attorney's signature or representation to the judge in lieu of a party's signature or appearance will not suffice in an enforcement motion under CCP §664.6. See *Levy v Superior Court* (1995) 10 C4th 578, 41 CR2d 878, in which, on the defendant's motion to enforce the settlement agreement signed only by the plaintiff's attorney, the court ruled that under §664.6 the term "party" means the litigant, not the litigant's attorney. Participation by a party's insurer instead of the party itself has also invalidated a settlement agreement. *Elnekave v Via Dolce Homeowners Ass'n* (2006) 142 CA4th 1193, 48 CR3d 663. See also *Williams v Saunders* (1997) 55 CA4th 1158, 64 CR2d 571.

The *Levy* decision presents a technical problem about the immediate ability of the attorneys to put on the record a settlement made at the courthouse, if the principal having the authority to enter into the settlement is absent. Having a client on telephone standby during courthouse negotiations is not sufficient. See *Johnson v Department of Corrections* (1995) 38 CA4th 1700, 1709, 45 CR2d 740.

PRACTICE TIP: Counsel for landlords in particular may prepare for the possibility of settlements reached "on the courthouse steps" by having the principals themselves appear at all scheduled settlement conferences and at the day of trial (for an informal conference), or by obtaining in advance a special, written power of attorney giving authority to settle the case to the principal's representative who will attend the court proceedings.

In *Stewart v Preston Pipeline, Inc.* (2005) 134 CA4th 1565, 36 CR3d 901, the court of appeal affirmed a summary judgment award enforcing a settlement agreement following mediation that had not been signed by all parties, but rather by defendants' attorney with authority. The challenge came from the plaintiff who had (with his former counsel) signed the agreement. The court also found that the agreement contained a clause that waived the confidentiality provisions of Evid C §1152.

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D. Settlement Terms and Conditions

§9.18A 1. Judgment Versus Dismissal

Unless the parties are irreconcilably opposed on the issue of possession, unlawful detainer suits are generally amenable to settlement. If the tenant is willing to vacate the premises, for example, the landlord might waive all or a portion of back rent and damages, give the tenant additional time to vacate, or both. It may also benefit the landlord to offer to pay the tenant's moving expenses when these expenses pose a major stumbling block for the tenant in vacating the premises. Conversely, if the tenant's proof of breach of the implied warranty of habitability is compelling, the landlord might agree to dismiss the unlawful detainer action, to allow the tenant to pay a reduced sum for the months during which rent was withheld, and to devise a schedule under which needed repairs will be made and a commensurate rent will be paid.

When a settlement restores possession to the landlord and compromises the remaining issues of money and time for the tenant to vacate, the most common settlement takes the form of a stipulation for entry of judgment and a judgment that (a) awards possession to the landlord and (b) stays execution of the judgment until a specified date, perhaps on the condition that the tenant pay a specified sum by a certain date. A judgment entered on such a stipulation may not include damages beyond the date on which it is entered (see §§10.40, 12.27). However, many courts will uphold a stipulation for judgment that makes the acceptance of payments due under the stipulated judgment conditioned upon the current rent being paid. If the landlord waives past-due rent and damages in exchange for possession, the stipulation should so provide in order to protect the tenant against a later action for back rent, damages, or both. To protect the landlord's interests in the event of a default, the stipulation may provide that, if the defendant does not vacate the premises as specified (or pay back rent or damages as agreed), the landlord may file a verified application to obtain a writ of possession without further notice or hearing. Some judges will require notice in this situation even if the tenant has waived it.

If the parties are unable to agree on attorney fee allocation, the settlement agreement may expressly provide for a court award of attorney fees at a later time if certain conditions are satisfied or if the lawsuit will be dismissed after certain actions have been taken. See *Jackson v Homeowners Ass'n Monte Vista Estates-East* (2001) 93 CA4th 773, 113 CR2d 363.

WARNING: Always check the underlying lease or rental agreement for an attorney fee provision, and always provide for a resolution of attorney fee and cost issues in any settlement offer. A court of appeal enforced a commercial lease clause (that allowed the landlord to recover attorney fees in any enforcement action that "determined" that the tenant was in default) after the landlord accepted the tenant's CCP §998 offer (which was silent on costs and fees). See *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 263, 118 CR2d 276.

Other issues that should be considered in settling an unlawful detainer action include disposition of a security deposit and waivers of claims by both parties. A stipulation for judgment without a proper waiver of claims, even if judgment is entered in favor of the landlord, does not preclude a subsequent suit by the tenant for claims arising out of the tenancy. *Landeros v Pankey* (1995) 39 CA4th 1167, 1174, 46 CR2d 165. See *Morris v Blank* (2001) 94 CA4th 823, 114 CR2d 672. Some attorney errors, however, are correctable under CCP §473. For example, entry of judgment following acceptance of an erroneous CCP §998 offer (see §9.17A) resulting from attorney mistake, neglect, or inadvertence may be vacated under the discretionary relief clause in CCP §473. *Zamora v Clayborn Contracting Group* (2002) 28 C4th 249, 121 CR2d 187. However, a voluntary dismissal entered pursuant to a settlement agreement is not subject to mandatory relief from dismissal resulting from attorney mistake, neglect, or inadvertence under CCP §473. *Huens v Tatum* (1997) 52 CA4th 259, 60 CR2d 438. Whether the *Huens* rule applies with equal force to entry of judgment pursuant to a settlement has not been the subject of decisional law, but it is likely to be the same, given the reasoning of the supreme court in *Zamora* and the court of appeal in *Huens* (52 CA4th at 262) and the specific referral to "default judgment" in the mandatory relief clause in CCP §473.

PRACTICE TIP: A landlord settling an eviction suit by compromising substantial back rent owed, or making other concessions, will expect that the settlement is comprehensive. In view of the opinions in *Landeros* and *Huens,* counsel for the landlord should either insist that any settlement include a waiver and release of all known and unknown potential claims by the tenant, including an express waiver of the provision of CC §1542, or counsel the client carefully with regard to the risk of further claims. From the landlord's point of view, it is also desirable to have a tenant having potential claims based on the condition of the premises or wrongful eviction expressly acknowledge and release those claims.

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§9.18B 2. Disadvantages of Stipulated Judgment

Attorneys for both landlords and tenants should be aware that stipulated judgments contain potential for abuse. In *Little v Sanchez* (1985) 166 CA3d 501, 213 CR 297, a landlord of low-income residential units followed a practice of using a stipulation for judgment form in unlawful detainer actions. In the stipulations, the tenants obtained stays of execution in return for their agreement to pay all past-due rent and to make monthly payments that often were in excess of the maximum legal rent. The court of appeal held that the judgments entered under these stipulations were void for removing the tenants' statutory protections. The court further held that a class action attacking these judgments should have been certified by the trial court.

In *Pelletier v Alameda Yacht Harbor* (1986) 188 CA3d 1551, 230 CR 253, the court held that a stipulated judgment in an unlawful detainer action was not a bar to a later action for retaliatory eviction. The court reasoned that the defense "was not fully and fairly litigated in an adversary hearing, and thus was not conclusively established." 188 CA3d at 1557. This result could have been avoided if the landlord had insisted on a clause in the stipulated judgment releasing the parties from any further liability arising out of the tenancy. See also *Landeros v Pankey* (1995) 39 CA4th 1167, 46 CR2d 165, discussed in §3.35, in which the tenant was not collaterally estopped (by the settlement of the unlawful detainer action) from suing the landlord for damages for breach of the implied warranty of habitability. Careful drafting of the settlement documents could have avoided this problem.

Even though it represents a legitimate agreement settling the parties' differences, a stipulation allowing for immediate entry of judgment may affect the tenant's ability to obtain rental premises in the future. In some localities, landlords pay private reporting services to search judicial records to determine whether a prospective tenant has previously been sued. Because these services often report only that an unlawful detainer action was filed, or that judgment was entered against the tenant, the actual nature of a stipulated judgment might not be reported. Thus, a future rental application submitted by the tenant might be rejected, even though the prior judgment may have represented a significant compromise on both sides.

PRACTICE TIP: To minimize the negative impact of an actual judgment against the tenant, the parties might stipulate that the action be dismissed with prejudice on the tenant's performance of certain conditions (*i.e.,* vacating the premises and paying rent or damages, or both, by a specified date), rather than stipulate to immediate entry of judgment. The stipulation could further provide that the landlord would be authorized to file the stipulation and obtain an immediate judgment and writ of possession if the conditions were not performed. For a form for such a stipulation, see §9.19.

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§9.18C 3. Stipulated Judgment Procedure

In order for the landlord to obtain immediate entry of judgment and issuance of a writ, the stipulation must cover all the essentials of the judgment. When a stipulation sets forth all the terms of a judgment agreed on by the parties, the mere filing of the stipulation normally provides a sufficient basis for entry of judgment on either party's ex parte application. See *Heller v Dyerville Mfg. Co.* (1897) 116 C 127, 47 P 1016. If the stipulation omits any essential element, however, judgment cannot be entered until the missing element is supplied by proof or further stipulation. See *Rooney v Vermont Inv. Corp.* (1973) 10 C3d 351, 368, 110 CR 353. Although it delays the landlord more than a stipulation for immediate entry of judgment, a conditional stipulation for entry of judgment might mitigate the adverse impact of a report to a prospective landlord by allowing the tenant to point out that a dismissal with prejudice does not reflect negatively on his or her future prospects as a responsible tenant. In addition, the landlord would normally want the stipulation to contain provisions whereby the tenant expressly waives the right to seek any appeal or any further stay of any proceeding beyond that which is expressly set out in the stipulation.

PRACTICE TIP: The type of stipulation that best protects the landlord from further delay in the event of non-performance by the tenant is one that provides for filing of the stipulation, entry of judgment thereon, issuance of a writ of possession, and the posting of the sheriff's notice, with a stay only on the final act of eviction by the sheriff. Under such a stipulation, default by the tenant will create minimum prejudice to the landlord. Conditional stipulations that do not allow for entry of judgment prior to default by the tenant generally result in at least two weeks of further delay before the landlord can recover possession of the premises. This arrangement may be resisted by the tenant. See §9.18B.

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/§9.18D 4. Duty to Inform Court of Stay or Settlement

§9.18D 4. Duty to Inform Court of Stay or Settlement

California Rules of Court 3.650 and 3.1385 require attorneys (and parties who are not represented) to notify the court and all other counsel or appearing parties immediately if a case is stayed (Rule 3.650) or if it is settled (Rule 3.1385). Rule 3.1385 also requires the plaintiff to notify an arbitrator or other court-connected neutral of the settlement immediately in writing. Oral notice must also be given if the settlement occurs within 10 days of a hearing, conference, or trial. Sanctions are awardable if the responsible party does not notify all opposing counsel or parties and the arbitrator or neutral at least two days before a scheduled hearing or settlement conference. Cal Rules of Ct 3.1385(a)(2). Rule 3.1385 further provides that, except for good cause, the plaintiff or party seeking affirmative relief must dismiss any case within 45 days after the date of settlement, or the court must do so. If it is a conditional settlement, the date of filing the dismissal must be specified in the notice to the court that a settlement has occurred, and the party or, failing that, the court, must dismiss the case, unless good cause is shown, within 45 days of the date when the last act is to be accomplished.

NOTE: Use the mandatory forms Notice of Termination or Modification of Stay (Judicial Council Form CM-181) (in §14.67A) or Notice of Settlement of Entire Case (Judicial Council Form CM-200).

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/§9.19 E. Form: Stipulation for Entry of Judgment or Dismissal (Attorney-Drafted)

§9.19 E. Form: Stipulation for Entry of Judgment or Dismissal (Attorney-Drafted)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Attorney for _ _[*e.g., Plaintiff*]_ _, _ _[*Name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	
	)	**STIPULATION FOR ENTRY OF**
vs	)	**JUDGMENT OR DISMISSAL**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	

The parties to this action stipulate as follows:

1. Plaintiff filed this unlawful detainer action on _ _[*date*]_ _**, to recover possession of the rental premises located at** _ _[*address*]_ _ **together with back rent, damages, costs** _ _[*and attorney fees*]_ _**.**

2. The parties enter into this stipulation freely in order to resolve this action without further litigation, and without admission by either party of fault or liability.

3. Defendant will vacate the premises no later than _ _[*time & date*]_ _**.**

[*Alternative 1: Total waiver of claims*]

4. Plaintiff waives all claim to back rent, damages, and attorneys' fees.

[*Alternative 2: Partial or total payment of claims*]

4. Defendant shall pay to plaintiff, no later than _ _[*date*]_ _ **the following:**

[*Include one or more of the following, if applicable*]

Back rent in the sum of _ _[*dollar amount*]_ _**;**

Damages in the sum of _ _[*dollar amount*]_ _**;**

Costs in the sum of _ _[*dollar amount*]_ _**; and**

Attorney fees in the sum of _ _[*dollar amount*]_ _**.**

[*Continue*]

5. If defendant complies with the terms of paragraphs 3 and 4, by the dates set forth therein, plaintiff shall dismiss this action with prejudice forthwith.

6. If defendant does not comply in any material respect with each term of paragraphs 3 and 4, on plaintiff's filing and service on defendant of this stipulation and a verified declaration setting forth the manner and extent of defendant's noncompliance with the terms of paragraphs 3 and 4, the parties authorize the Court to conduct an ex parte hearing, to consider counterdeclarations of defendant, if any, and if appropriate:

a. To enter judgment in favor of plaintiff for possession of the premises and an award of:

[*Include one or more of the following, if applicable*]

Back rent in the sum of _ _[*dollar amount*]_ _;

Damages in the sum of _ _[*dollar amount*]_ _;

Costs in the sum of _ _[*dollar amount*]_ _; **and**

Attorney fees in the sum of _ _[*dollar amount*]_ _.

[*Continue*]

b. To issue immediately a writ of possession directing the _ _[*sheriff/marshal*]_ _ of _ _ _ _ _ **County to take all steps necessary to remove defendant from possession of the premises and restore possession to plaintiff.**

Date: _ _ _ _ _ _ __[*Signature of plaintiff*]_ _
_ _[*Typed name of plaintiff*]_ _

Approved as to form: __[*Signature of attorney*]__
_ _[*Typed name of attorney*]_ _
Attorney for _ _[*name of party*]_ _

Date: _ _ _ _ _ _ __[*Signature of defendant*]__
_ _[*Typed name of defendant*]_ _

Approved as to form: __[*Signature of attorney*]__
_ _[*Typed name of attorney*]_ _
Attorney for _ _[*name of party*]_ _

Copies: Original (to be filed with court if conditions are not met); copies for each attorney of record and unrepresented party; office copies.

Comment: The landlord's attorney should ensure that the stipulation spells out all the essential elements of the proposed judgment, so that entry of judgment and issuance of a writ of possession will be essentially ministerial acts on the tenant's failure to comply with the stipulation. See §9.18. The parties may alternatively stipulate to immediate entry of judgment with execution stayed so long as the tenant complies with the stipulated terms. See §9.18. Or they may instead stipulate to immediate dismissal, with a provision for the trial court to retain jurisdiction under CCP §664.6 for enforcement of settlement, to prevent the tenant's name from being published by credit reporting agencies. See §5.25. In some cases, the landlord may wish to include a waiver and release of all known and unknown potential claims by the tenant, including an express waiver of CC §1542. A judgment must declare in its terms the specific names of the parties against whom and in whose favor the judgment is to be entered. A judgment must also separately state the amounts of principal damages, costs, and attorney fees. On the obligations regarding dismissal of court actions after settlement, see §9.18D. See also California Civil Procedure Before Trial, chaps 40, 46-48 (4th ed Cal CEB 2004).

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/§9.19A F. Form: Stipulation for Entry of Judgment (Unlawful Detainer) (Judicial Council Form UD-115)

§9.19A F. Form: Stipulation for Entry of Judgment (Unlawful Detainer) (Judicial Council Form UD-115)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and state bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	
STIPULATION FOR ENTRY OF JUDGMENT (Unlawful Detainer)	CASE NUMBER:

1. IT IS STIPULATED by plaintiff *(name each):* and defendant *(name each):*

2. ☐ Plaintiff ☐ Defendant *(specify name):* is awarded
   a. ☐ possession of the premises located at *(street address, apartment number, city, and county):*

   b. ☐ cancellation of the rental agreement. ☐ forfeiture of the lease.
   c. ☐ past due rent $
   d. ☐ total holdover damages $
   e. ☐ attorney fees $
   f. ☐ costs $
   g. ☐ deposit of $ ☐ See item 3.
   h. ☐ other *(specify):*
   i. Total $ to be paid by ☐ *(date):* ☐ installment payments (see item 5)

3. ☐ Deposit. If not awarded under item 2g, then plaintiff must
   a. ☐ return deposit of $ to defendant by *(date):*
   b. ☐ give an itemized deposit statement to defendant within three weeks after defendant vacates the premises (Civ. Code, § 1950.5).
   c. ☐ mail the ☐ deposit ☐ itemized statement to the defendant at *(mailing address):*

4. ☐ A writ of possession will issue immediately, but there will be no lockout before *(date):*

5. ☐ AGREEMENT FOR INSTALLMENT PAYMENTS
   a. Defendant agrees to pay $ on the *(specify day)* day of each month beginning on *(specify date)* until paid in full.

   b. If any payment is more than *(specify)* days late, the entire amount in item 2i will become immediately due and payable plus interest at the legal rate.

6. a. ☐ Judgment will be entered now.
   b. ☐ Judgment will be entered only upon default of payment of the amount in item 2i or the payment arrangement in item 5a. The case is calendared for dismissal on *(date and time)* in department *(specify)* unless plaintiff or defendant otherwise notifies the court.
   c. ☐ Judgment will be entered as stated in *Judgment —Unlawful Detainer Attachment* (form UD-110S), which is attached.
   d. ☐ Judgment will be entered as stated in item 7.

Form Approved for Optional Use
Judicial Council of California
UD-115 [New January 1, 2003]

Code of Civil Procedure, § 664.6

Print

PLAINTIFF: DEFENDANT:	CASE NUMBER:

7. ☐ Plaintiff and defendant further stipulate as follows *(specify):*

8. a. **The parties named in item 1 understand that they have the right to (1) have an attorney present and (2) receive notice of and have a court hearing about any default in the terms of this stipulation.**

b. Date:

(TYPE OR PRINT NAME)	▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY)
(TYPE OR PRINT NAME)	▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY)

☐ Continued on *Attachment* 8b (form MC-025).

c. Date:

(TYPE OR PRINT NAME)	▶ (SIGNATURE OF DEFENDANT OR ATTORNEY)
(TYPE OR PRINT NAME)	▶ (SIGNATURE OF DEFENDANT OR ATTORNEY)
(TYPE OR PRINT NAME)	▶ (SIGNATURE OF DEFENDANT OR ATTORNEY)

☐ Continued on *Attachment* 8c (form MC-025).

9. IT IS SO ORDERED.

Date:

JUDICIAL OFFICER

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IV. REPRESENTING LANDLORDS IN EVICTIONS

A. Ethical Considerations for Attorney

§9.20 1. Rules of Professional Conduct

California attorneys are bound by the Rules of Professional Conduct of the State Bar of California, the most recent version of which was promulgated May 27, 1989. Bus & P C §6077. The rules are also found in the California Rules of Court. The conduct of California attorneys is governed by these rules, and not by the American Bar Association's Model Rules of Professional Conduct, although the two sets of rules are similar in many respects. *People v Ballard* (1980) 104 CA3d 757, 164 CR 81. An attorney who violates professional rules risks more than state bar disciplinary action. Under CCP §128.7(c), by presenting any pleading, petition, written notice of motion, or other similar paper to the court, an attorney is certifying that a variety of conditions relating to the proper motive and good faith of the document are met, and may be subject to sanctions if any of the conditions is not met.

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§9.21 2. Communicating With Tenant

Any communication between an attorney and an adverse party known to be represented by counsel is clearly prohibited. Cal Rules of Prof Cond 2-100. Communication with an unrepresented adverse party is not prohibited. *McMillan v Shadow Ridge at Oak Park Homeowner's Ass'n* (2008) 165 CA4th 960, 81 CR3d 550. Because of limited scope representation (see §§4.2A, 5.4A), confusion may arise about whether an adverse party is represented by counsel. If an attorney is aware that the adverse party may have been assisted by counsel who is not counsel of record, the attorney should clarify that fact and tell the opposing party not to reveal the content of any communications with counsel.

When the tenant is not represented by counsel, the landlord's attorney must be extremely cautious about suggesting the propriety of a settlement to the tenant. For instance, the landlord's attorney may inadvertently make certain "suggestions" to the tenant, such as "If I were you, I would settle this case," or "How soon can you move?" If the tenant perceives such statements as legal advice, grounds for disciplinary action may exist. California Rules of Prof Cond 3-310(B) provides that an attorney may not represent even potentially conflicting interests, except with the written consent of each client. If the attorney makes any statements to the tenant at all, they should be accompanied by a clear notification that the attorney represents the opposing party.

Misrepresentations of fact or law to an opponent appearing in propria persona may also constitute grounds for disciplinary action. California Rules of Prof Cond 5-220 prohibits an attorney from suppressing "any evidence that [the attorney or his or her client] has a legal obligation to reveal or to produce," and Cal Rules of Prof Cond 5-200(B) prohibits an attorney from seeking "to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." It appears that counsel's duty to be accurate and complete in representing fact and law would extend to an unrepresented opponent. Although attorneys frequently exaggerate the facts and law when negotiating with opposing counsel, they are trained to expect and meet such tactics. The average landlord or tenant who is unable to secure counsel, however, is more vulnerable to being misled by misrepresentation by experienced, and often intimidating, counsel. Attorneys should avoid any conduct that smacks of impropriety.

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§9.22 B. Initial Meeting With Landlord

During the initial meeting with the landlord, the landlord's attorney should establish by written agreement the attorney's scope of legal representation (see §§4.2-4.2B, 9.23A) and obtain sufficient information to make at least a preliminary determination of whether the landlord is likely to prevail in an unlawful detainer action. Among other things, the attorney should determine:

- the nature of the breach of the rental agreement;
- the materiality of the breach;
- whether the property is regulated by a local rent control law; and
- whether the tenant has any defenses to the action.

In jurisdictions that have adopted eviction controls as part of a rent control scheme, the attorney must also determine whether the owner has complied with the law and whether one of the enumerated "good causes" for eviction exists (see §§7.53-7.72, 9.13, 9.16).

Even if a landlord has a completely meritorious cause of action for unlawful detainer, it is always prudent to explore with the client whether the dispute could be resolved by negotiation. The practitioner should be aware, however, that no agreement with the tenant will be enforceable unless it is made a part of the unlawful detainer action (see §9.18). Confessions of judgment are extremely difficult to prepare properly, they require the participation of counsel for the defendant (see CCP §1132(b)), and courts are sometimes reluctant to enforce them. If the landlord is amenable to negotiating a settlement but also wishes to have a remedy if the tenant fails to perform, the only viable mechanism is to file a stipulation in an unlawful detainer action, providing for entry of judgment if the tenant breaches and for dismissal on the tenant's performance of the settlement.

Before filing an eviction action, the attorney should also advise the landlord of any risks that may exist if the case is not successful. These include the risk of having to pay the tenant's attorneys fees and costs if they are provided for in a written agreement and the tenant prevails, and, in rent-controlled jurisdictions, the potential that the tenant might file an "attempted wrongful eviction" action against the landlord.

If the landlord decides to proceed with the eviction, the attorney should explain eviction procedures to the client. Some attorneys hand out fact sheets that explain court procedures and answer questions most commonly asked by landlords. Some property owners may not be aware of the delays that may occur in litigation and the time it may take to bring the case to trial.

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§9.23 1. Actions In Propria Persona

A landlord may initiate an unlawful detainer action in propria persona in a limited civil case. If the eviction is uncontested, allowing the landlord to win by default, a pro per action is adequate. If the tenant resists the eviction, however, the landlord is unlikely to be able to handle the case competently without legal guidance. Some attorneys provide assistance to pro per landlords by drafting pleadings, completing judicial council forms, and advising the landlords on procedure. See §9.23A. Before doing so, an attorney should consider the fact that he or she will have no control over the litigation and may later be accused of inadequate representation if the landlord misunderstands advice, fails to follow it, or fails to inform the attorney of a significant circumstance or development in the case.

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§9.23A 2. Fee Agreement and Limited Scope Representation

Attorneys representing landlords should use written retainer agreements. See §4.2. The scope of the employment should be described in detail. Limited scope representation (sometimes called "unbundling") is a "relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks the attorney will perform for the person." Cal Rules of Ct 3.35(a). The State Bar of California has created guidelines to assist attorneys in limited scope representation. See full discussion and a useful checklist in §§4.2-4.2B.

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§9.24 3. Wrongful Eviction

An attorney must explain to a landlord client the legal restrictions on eviction, the rights of a tenant faced with eviction, and the potential liability for wrongful eviction, especially if there is any suspicion of impropriety on the landlord's part. See generally chaps 7-8. The landlord's need to understand tenant rights is even more pronounced in rent-controlled jurisdictions where any eviction that would enable the landlord to raise the rent on a vacated unit is vulnerable to challenge as being motivated by the intent to increase rent. See §§7.4, 7.25-7.28, 7.54-7.55, 7.78, 8.150. Attorneys should consider providing the landlord with excerpts of local rent or eviction control ordinances (or attaching copies to a written retainer agreement), so that the landlord has written notice of both the permitted grounds for eviction and the penalties for wrongful eviction. Some attorneys also provide copies of the state retaliatory eviction law (CC §1942.5; see §§8.109-8.135).

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§9.25 4. Information Necessary to Pursue Eviction

To evaluate the legality and potential success of an eviction, and to commence eviction proceedings, the landlord's attorney must obtain detailed information from the client concerning the tenancy. The attorney may use this information to determine, for example, whether:

- There are any circumstances that may invite a wrongful eviction claim;
- The landlord's motive may be (or appear to be) retaliation;
- Any notices already served by the landlord were proper; and
- There are any persons other than those the landlord considers to be "tenants" who should be made parties to the litigation (see §§9.26, 9.51).

Section 9.27 contains an example of an eviction information form that the client can complete and return to the attorney, or that the attorney can complete based on the client's answers in the initial interview. The former procedure should not be viewed as a substitute for an interview, however, and the client should be encouraged to ask questions about any aspect of eviction procedures.

The attorney has an obligation to examine the landlord for all facts relevant to the case. If the attorney fails to investigate the facts adequately before proceeding with an eviction, he or she could be liable to the landlord for malpractice or to the tenant for malicious prosecution, if the eviction action lacked probable cause. See *Norton v Hines* (1975) 49 CA3d 917, 924, 123 CR 237.

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§9.26 a. Defendants Other Than Known Tenant

Landlords sometimes believe that if they rent an apartment to one or more named parties, anyone else who occupies the unit is a trespasser or an "illegal subtenant" with no right to be part of an eviction proceeding even if the rental agreement did not limit occupancy to specified persons. In an action to regain possession of real property, however, unless a prejudgment claim of right to possession has been served on occupants in accordance with CCP §415.46, any occupant not named in the judgment for possession who occupied the premises on the date the action was filed may object to enforcement of the judgment against him or her by filing a claim of right to possession under CCP §1174.3. At a minimum, the filing of such a claim will delay the landlord's recovery of the premises. The landlord can usually avoid this problem by serving a prejudgment claim of right to possession on any person who appears to be occupying or claims to have occupied the premises at the time the unlawful detainer action is filed. On serving and evicting unnamed occupants, see §§9.51-9.55.

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/§9.27 b. Form: Sample Eviction Questionnaire

§9.27 b. Form: Sample Eviction Questionnaire

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

EVICTION INFORMATION

Client/Plaintiff

Name_____

Address_____

Business Telephone No. _____ Home Telephone No. _____

Plaintiff's Name (if different from client's)_____

Address_____

Business Telephone No. _____ Home Telephone No. _____

If plaintiff's name is fictitious, state whether plaintiff has filed name with county and published fictitious name statement:

_____

Property

Address _____ Cross Street _____

Unit Occupied by Tenant(s)_____

Number of Units_____

Name of Owner (if different from client)_____

Date Property Acquired_____

Name of Manager (or person providing similar services)

_____

Address and Business Telephone No._____

_____

Name of Rental Agent_____

Address and Business Telephone No._____

_____

If property consists of three or more units, state whether owner holds valid occupancy permit:

Describe general condition of property (including common areas) and rental unit occupied by Tenant(s):

_____

_____

Tenant(s)/Defendant(s)

Name(s)_____
_____

Date Tenant(s) Moved in_____

If Tenant(s) serve(s) in U.S. military, state branch: _____

Specify employment information for each Tenant (including whether Tenant is self-employed):

Tenant's Name	*Employer's Name*
_____	_____
_____	_____
_____	_____

Address	*Telephone No.*	*Tenant's Supervisor*
_____	_____	_____
_____	_____	_____
_____	_____	_____

Description of Tenant(s)

Name	*Age*	*Sex*	*Height*	*Weight*
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Hair Color	*Race*	*Driver's License No.*	*Social Security No.*
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Reason for Eviction

Describe reason for evicting Tenant(s):_____
_____
_____
_____

Rental Agreement

Date_____

Written or Oral_____

Term_____

List names of persons who made or signed agreement:

As, or on Behalf of, Landlord	*As Tenant(s)*
_____	_____
_____	_____
_____	_____

Original Amount of Rent _____ Present Amount _____

Name(s) of Occupant(s) From Whom Landlord Has Accepted Rent____
_____
_____
_____

Name of Party to Whom Rent Is Paid_____

Location at Which Rent Is Paid_____

Deposits

List deposits held (include type (*e.g.,* last month's rent, security, cleaning, key) and amount) and accounting of deductions from deposits:

Type of Deposit	*Amount*	*Deductions; Reason for Deduction*
_____	_____	_____
_____	_____	_____
_____	_____	_____

Rent Increases During Occupancy

Amount of Increase	*Date Increase Effective*
_____	_____
_____	_____
_____	_____

Date Tenant Notified of Increase	*Manner in Which Tenant Notified*	*Manner in Which Written Notices Delivered*

_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

If Tenant(s) did not make at least one full payment of rent at increased amount, explain why:

_____

_____

Notices

List notices (*e.g.,* notice to pay rent, notice to perform lease provisions, notice of termination, notice to vacate) served on Tenant(s) in last six months:

Date Served	*Type of Notice*	*Manner of Service*	*Person Served*
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

History of Relationship Between Landlord and Tenant(s)

List correspondence or other writings between Landlord (or persons acting on behalf of Landlord) and Tenant(s) in last six months:

Date	*Parties*	*Nature of Correspondence*
_____	_____	_____
_____	_____	_____
_____	_____	_____

List dates and general content of conversations between Landlord (or persons acting on behalf of Landlord) and Tenant(s) that concerned terms of rental agreement or any other matter relevant to case, and conduct of Tenant(s) meant to convey a message:

Date	*Parties*	*Nature of Conversation or Conduct*
_____	_____	_____
_____	_____	_____
_____	_____	_____

List complaints made by Tenant(s) regarding defects in premises or other matters relating to occupancy:

Date	*Nature of Complaint*	*Resolution*
_____	_____	_____
_____	_____	_____

_____ _____ _____

Miscellaneous

If process server or sheriff will need key to enter building (not door to Tenant's unit), describe how to obtain copy of key:

_____
_____

Specify times Tenant(s) likely to be on premises:_____
_____

Add other relevant information:_____
_____
_____
_____

Comment: The form above illustrates the kinds of detailed information that an attorney should obtain from the landlord before commencing eviction proceedings. The attorney should request that the landlord provide copies of any documents relevant to the case (*e.g.,* rental agreement, notices served on tenant, or correspondence between landlord and tenant). See §9.25.

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C. Role of Insurance

§9.28 1. Wrongful Eviction Coverage

Attorneys should take particular care to evaluate the landlord's insurance coverage. Landlords, especially those who purchase a single-family dwelling with the intent of occupying it themselves and renting the premises out at a later time, or of renting out a portion of the premises, might obtain only "homeowner" rather than "landlord" insurance. Homeowner insurance generally excludes coverage for "business pursuits" and is provided at a lower rate. Such insurance usually does not afford the landlord any protection from a tenant's claim for damages, so the attorney should read the client's policy rather than taking at face value the client's assertion that coverage exists.

Most owners of rental properties carry fire and general liability insurance. When deciding whether to pursue an eviction action, the attorney should inquire whether the landlord's liability insurance is in full force and effect and whether it contains "wrongful eviction" coverage. Moreover, before giving the tenant an eviction notice, it is prudent to advise a landlord who does not appear to have such coverage to attempt to obtain it. See §§1.35, 8.150.

In California, earthquake risks have increased the number of availability and cost cycles for property insurance. Coverage for "wrongful eviction" had been expressly listed as a covered item in many liability policies or had been included as part of a general liability policy. Some insurers, noting an increase in eviction-related claims and perhaps suspecting that landlords are depending on insurance "payoffs" to permit them to proceed with questionable evictions, now expressly exclude coverage for wrongful eviction.

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§9.29 2. Tenant Claim for Punitive Damages

Landlords should be informed that an insurance carrier will not pay a judgment based on a finding of intentional wrongful misconduct by the landlord. Tenants often allege that a wrongful eviction was based on willful, oppressive, or malicious conduct as a basis for claiming punitive damages. Such tenant claims might prompt a "reservation of rights" by the insurance company, on the basis of possible noncoverage under the policy. The landlord then may hire independent counsel at the insurance company's expense under *San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, 208 CR 494. This right is now codified in CC §2860.

Not every reservation of rights entitles an insured to independent counsel (sometimes called *Cumis* counsel). See cases discussed in *Dynamic Concepts, Inc. v Truck Ins. Exch.* (1998) 61 CA4th 999, 71 CR2d 882. A mere allegation of punitive damages, *e.g.,* will not by itself trigger the obligation to pay for independent counsel. *Foremost Ins. Co. v Wilks* (1988) 206 CA3d 251, 253 CR 596 (insurers barred by statute from indemnifying for punitive damages). And when a reservation of rights is based on coverage disputes that have nothing to do with the issues being litigated in the underlying action, the insurer need not pay for independent counsel. *Dynamic Concepts, Inc. v Truck Ins. Exch., supra*.

Another possible coverage problem is highlighted by *Insurance Co. of the W. v Haralambos Beverage Co.* (1987) 195 CA3d 1308, 241 CR 427. The court held that, when the terms of the policy apply only in the event of an "occurrence," defined as an accident neither expected nor intended from the standpoint of the insured, the insurer had no duty to defend if liability is based on claims of intentional misconduct. The inclusion of causes of action for negligence or other insured claims will generally require the insurer to defend the entire action. See *Buss v Superior Court* (1997) 16 C4th 35, 65 CR2d 366; California Liability Insurance Practice: Claims & Litigation §§4.14-4.15 (Cal CEB 1991).

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V. PREPARING THE COMPLAINT

§9.30 A. Form of Pleading Optional

The Judicial Council has approved optional complaint and answer forms for use in unlawful detainer actions. Cal Rules of Ct 1.30, 1.35, App A. Although many trial court judges prefer that landlords use the Judicial Council form because it facilitates the process of locating the essential allegations of the complaint, the form complaint may be difficult to complete and may contain pitfalls in rent control jurisdictions. Clerks of each trial court must make copies of the forms available. CCP §425.12(c).

The discussion in §9.37 on necessary allegations applies to both the approved complaint form and a drafted complaint. The Judicial Council form (see §9.31) should be sufficient in most residential unlawful detainer actions. The form (¶7) is best suited for the most commonly encountered type of unlawful detainer action by a landlord against a tenant after service of a 3-day notice for nonpayment of rent, breach of a covenant of the lease, nuisance, or using the premises for an unlawful purpose (CCP §1161(2)-(4)), or after service of a 30-day or 60-day notice terminating a month-to-month tenancy (CC §§1946, 1946.1). The form (¶9) also accommodates pleading an eviction after the expiration of a fixed-term tenancy for which no notice is required. CCP §1161(1). See §8.82. For the eviction of an employee, agent, or licensee (no notice required other than that terminating the relationship; see §8.84) (CCP §1161(1)), counsel will need to modify the form to meet the needs of the case. The form (¶15) specifically provides for attachment of additional allegations. At the bottom of the first page of the form, there is a note indicating that the form should not be used for evictions after a sale or foreclosure of the property (3-day or 30-day notice required; see §§8.68A-8.68D). CCP §1161a. See also CCP §1161b, effective July 8, 2008, until the end of 2012, discussed in §8.68C.

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/§9.31 B. Form: Complaint--Unlawful Detainer (Judicial Council Form UD-100)

§9.31 B. Form: Complaint—Unlawful Detainer (Judicial Council Form UD-100)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT: ☐ DOES 1 TO _____	
COMPLAINT — UNLAWFUL DETAINER*	CASE NUMBER:
☐ **COMPLAINT** ☐ **AMENDED COMPLAINT *(Amendment Number):*** _____	

Jurisdiction *(check all that apply):*

☐ **ACTION IS A LIMITED CIVIL CASE**
Amount demanded ☐ **does not exceed $10,000**
☐ **exceeds $10,000 but does not exceed $25,000**

☐ **ACTION IS AN UNLIMITED CIVIL CASE (amount demanded exceeds $25,000)**

☐ **ACTION IS RECLASSIFIED by this amended complaint or cross-complaint *(check all that apply):***
☐ **from unlawful detainer to general unlimited civil (possession not in issue)**
☐ **from unlawful detainer to general limited civil (possession not in issue)**
☐ **from limited to unlimited**
☐ **from unlimited to limited**

1. PLAINTIFF *(name each):*

   alleges causes of action against DEFENDANT *(name each):*

2. a. Plaintiff is (1) ☐ an individual over the age of 18 years. (4) ☐ a partnership.
   (2) ☐ a public agency. (5) ☐ a corporation.
   (3) ☐ other *(specify):*

   b. ☐ Plaintiff has complied with the fictitious business name laws and is doing business under the fictitious name of *(specify):*

3. Defendant named above is in possession of the premises located at *(street address, apt. no., city, zip code, and county):*

4. Plaintiff's interest in the premises is ☐ as owner ☐ other *(specify):*
5. The true names and capacities of defendants sued as Does are unknown to plaintiff.
6. a. On or about *(date):* defendant *(name each):*

   (1) agreed to rent the premises as a ☐ month-to-month tenancy ☐ other tenancy *(specify):*
   (2) agreed to pay rent of $ payable ☐ monthly ☐ other *(specify frequency):*
   (3) agreed to pay rent on the ☐ first of the month ☐ other day *(specify):*

   b. This ☐ written ☐ oral agreement was made with
   (1) ☐ plaintiff.
   (2) ☐ plaintiff's agent.
   (3) ☐ plaintiff's predecessor in interest.
   (4) ☐ other *(specify):*

*** NOTE:** Do not use this form for evictions after sale (Code Civ. Proc., § 1161a).

Form Approved for Optional Use
Judicial Council of California
UD–100 [Rev. July 1, 2005]

COMPLAINT—UNLAWFUL DETAINER

Civil Code, § 1940 et seq.
Code of Civil Procedure §§ 425.12, 1166
www.courtinfo.ca.gov

Print

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

6. c. ☐ The defendants not named in item 6a are
   (1) ☐ subtenants.
   (2) ☐ assignees.
   (3) ☐ other *(specify)*:
   d. ☐ The agreement was later changed as follows *(specify)*:

   e. ☐ A copy of the written agreement, including any addenda or attachments that form the basis of this complaint, is attached and labeled Exhibit 1. *(Required for residential property, unless item 6f is checked. See Code Civ. Proc., § 1166.)*
   f. ☐ *(For residential property)* A copy of the written agreement is **not** attached because *(specify reason)*:
   (1) ☐ the written agreement is not in the possession of the landlord or the landlord's employees or agents.
   (2) ☐ this action is solely for nonpayment of rent (Code Civ. Proc., § 1161(2)).

7. ☐ a. Defendant *(name each)*:

   was served the following notice on the same date and in the same manner:
   (1) ☐ 3-day notice to pay rent or quit
   (2) ☐ 30-day notice to quit
   (3) ☐ 60-day notice to quit
   (4) ☐ 3-day notice to perform covenants or quit
   (5) ☐ 3-day notice to quit
   (6) ☐ Other *(specify)*:
   b. (1) On *(date)*: the period stated in the notice expired at the end of the day.
   (2) Defendants failed to comply with the requirements of the notice by that date.
   c. All facts stated in the notice are true.
   d. ☐ The notice included an election of forfeiture.
   e. ☐ A copy of the notice is attached and labeled Exhibit 2. *(Required for residential property. See Code Civ. Proc., § 1166.)*
   f. ☐ One or more defendants were served (1) with a different notice, (2) on a different date, or (3) in a different manner, as stated in Attachment 8c. *(Check item 8c and attach a statement providing the information required by items 7a–e and 8 for each defendant.)*

8. a. ☐ The notice in item 7a was served on the defendant named in item 7a as follows:
   (1) ☐ by personally handing a copy to defendant on *(date)*:
   (2) ☐ by leaving a copy with *(name or description)*:
   a person of suitable age and discretion, on *(date)*: at defendant's
   ☐ residence ☐ business AND mailing a copy to defendant at defendant's place of residence on *(date)*: because defendant cannot be found at defendant's residence or usual place of business.
   (3) ☐ by posting a copy on the premises on *(date)*: ☐ AND giving a copy to a person found residing at the premises AND mailing a copy to defendant at the premises on *(date)*:
   (a) ☐ because defendant's residence and usual place of business cannot be ascertained OR
   (b) ☐ because no person of suitable age or discretion can be found there.
   (4) ☐ *(Not for 3-day notice; see Civil Code, § 1946 before using)* by sending a copy by certified or registered mail addressed to defendant on *(date)*:
   (5) ☐ *(Not for residential tenancies; see Civil Code, § 1953 before using)* in the manner specified in a written commercial lease between the parties.
   b. ☐ *(Name)*:
   was served on behalf of all defendants who signed a joint written rental agreement.
   c. ☐ Information about service of notice on the defendants alleged in item 7f is stated in Attachment 8c.
   d. ☐ Proof of service of the notice in item 7a is attached and labeled Exhibit 3.

Print

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

9. ☐ Plaintiff demands possession from each defendant because of expiration of a fixed-term lease.
10. ☐ At the time the 3-day notice to pay rent or quit was served, the amount of **rent due** was $
11. ☐ The fair rental value of the premises is $ per day.
12. ☐ Defendant's continued possession is malicious, and plaintiff is entitled to statutory damages under Code of Civil Procedure section 1174(b). *(State specific facts supporting a claim up to $600 in Attachment 12.)*
13. ☐ A written agreement between the parties provides for attorney fees.
14. ☐ Defendant's tenancy is subject to the local rent control or eviction control ordinance of *(city or county, title of ordinance, and date of passage):*

    Plaintiff has met all applicable requirements of the ordinances.
15. ☐ Other allegations are stated in Attachment 15.
16. Plaintiff accepts the jurisdictional limit, if any, of the court.
17. **PLAINTIFF REQUESTS**
    a. possession of the premises.
    b. costs incurred in this proceeding:
    c. ☐ past-due rent of $
    d. ☐ reasonable attorney fees.
    e. ☐ forfeiture of the agreement.
    f. ☐ damages at the rate stated in item 11 from *(date):* for each day that defendants remain in possession through entry of judgment.
    g. ☐ statutory damages up to $600 for the conduct alleged in item 12.
    h. ☐ other *(specify):*
18. ☐ Number of pages attached *(specify):* _____

UNLAWFUL DETAINER ASSISTANT (Bus. & Prof. Code, §§ 6400–6415)

19. *(Complete in all cases.)* An unlawful detainer assistant ☐ did **not** ☐ did for compensation give advice or assistance with this form. *(If plaintiff has received **any** help or advice for pay from an unlawful detainer assistant, state:)*
    a. Assistant's name:
    b. Street address, city, and zip code:
    c. Telephone No.:
    d. County of registration:
    e. Registration No.:
    f. Expires on *(date):*

Date:

▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PLAINTIFF OR ATTORNEY)

VERIFICATION

(Use a different verification form if the verification is by an attorney or for a corporation or partnership.)

I am the plaintiff in this proceeding and have read this complaint. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PLAINTIFF)

Copies: Original (filed with court clerk); one copy for each person to be served; office copies.

Comment: This Judicial Council form was revised effective July 1, 2005. If the landlord's attorney anticipates postjudgment claims to possession (see §§13.70-13.73) by persons not named by their true names in the complaint (and consequently not named in the judgment or writ), those persons should not be labeled as "subtenants" in ¶6.c of the form unless that status is definite. Conceding the status of subtenant to a claimant would enhance his or her chances of successfully challenging the eviction. Therefore, the "other (*specify*)" box should be marked, the allegation "present status unknown" inserted, and a prejudgment claim form served with the complaint. See §§9.51-9.55. In such instances, using the Judicial Council form may be preferable to an attorney-drafted complaint.

In ¶6.d, modifications to the contract at the time relevant to the action should be alleged with sufficient completeness to support the existence of the cause of action. More information than this is not required. For example, every rent increase in a 20-year tenancy need not be listed, only the current rent.

Attaching a copy of the agreement as stated by ¶6.e of the form is optional. Landlords should be advised that the more items that are attached, the more likely errors in copying or assembly will occur, increasing exposure to a successful motion to quash. See chap 10.

There is some authority for the proposition that a complaint based on a written contract must either quote the relevant provisions verbatim or attach and incorporate the contract. See *Harris v Rudin, Richman & Appel* (1999) 74 CA4th 299, 307, 87 CR2d 822; *Otworth v Southern Pac. Transp. Co.* (1985) 166 CA3d 452, 458, 212 CR 743.

Landlord counsel should ensure that the defendant's name is inserted after the colon in the first line of ¶7.a, in addition to checking the appropriate boxes concerning which notice or notices were served.

An award of postjudgment damages is not proper in an unlawful detainer judgment. See *Lehr v Crosby* (1981) 123 CA3d Supp 1, 10, 177 CR 96. Thus, ¶17.f should be checked in every case.

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/ C. Selecting the Court/§9.32 1. Subject Matter Jurisdiction; Limited Versus Unlimited Civil Case

C. Selecting the Court

§9.32 1. Subject Matter Jurisdiction; Limited Versus Unlimited Civil Case

Subject matter jurisdiction is losing relevance as an issue in unlawful detainer actions because of trial court unification statewide. Under CCP §86(a)(4), unlawful detainer actions in which the total amount of claimed damages does not exceed $25,000 are considered "limited civil cases" for which the superior court has subject matter jurisdiction. Actions in which the total amount of claimed damages exceeds $25,000 are considered "unlimited civil cases" for which the superior court also has subject matter jurisdiction. See CCP §88; Cal Const art VI, §10. Unlawful detainer actions may not be brought in small claims courts. See CCP §116.220(a)(3).

Current focus is on whether an unlawful detainer action is properly designated as a limited or an unlimited civil case and whether it is filed in the proper venue and trial court location. (On venue, see §9.33.) Under CCP §422.30(b), unlawful detainer actions classified as "limited civil cases" are to be identified as such in the caption of each pleading.

In calculating damages for classifying the action properly, the rental value of the premises for the time the tenant continues to occupy the premises after termination of the tenancy is probably the most significant form of damages in an unlawful detainer action when no back rent can be collected. See §§9.37-9.40. If statutory damages (formerly treble damages) under CCP §1174 are sought, that amount must be included in calculating whether the case is an unlimited or a limited civil case. See *Hoban v Ryan* (1900) 130 C 96, 62 P 296.

A prayer for damages that could exceed limited civil case jurisdiction probably does not require transfer to another court location for trial and reclassification as an unlimited civil case if the landlord is willing to remit any excess recovery, exclusive of costs over the jurisdictional amount. See *Stokus v Marsh* (1990) 217 CA3d 647, 266 CR 90; *Babcock v Antis* (1979) 94 CA3d 823, 156 CR 673. If the landlord does not want to remit excess recovery, the parties may stipulate (or the landlord may make a motion) to amend the complaint to reclassify the case. See CCP §§403.020-403.030, 471.5-473; Cal Rules of Ct 2.111(11). See also §9.43.

Costs (including attorney fees) that are incidental to the unlawful detainer action are not included in calculating whether the aggregate amount claimed exceeds the jurisdictional limit; the court has jurisdiction to award costs and attorney fees that, when added to the substantive award, exceed the jurisdictional limit. *Bakkebo v Municipal Court* (1981) 124 CA3d 229, 177 CR 239. See *Henigan v Ervin* (1895) 110 C 37, 42 P 457. Therefore, any statement that the landlord is willing to remit any excess over the jurisdictional amount (*e.g.,* complaint form ¶16, in §9.31) should be understood to apply only to damages and not costs or attorney fees.

WARNING: A judgment in an action filed as an unlimited civil case that awards a principal amount less than the jurisdictional maximum of a limited civil case may lead to a denial in whole or in part of costs of suit. See CCP §1033(a).

A complaint that indicates on its face that the court lacks subject matter jurisdiction over the action is subject to demurrer under CCP §430.10(a). See §10.31.

A court with proper subject matter jurisdiction is not deprived of power to try an unlawful detainer action by the fact that the tenant first filed a declaratory relief action in a neighboring county for a determination of the amount of rent owed. *Childs v Eltinge* (1973) 29 CA3d 843, 105 CR 864. The court in *Childs* held that the tenant's remedy in such a situation is to pay the amount of the landlord's demand under protest, and to seek a judgment in the declaratory relief action to establish the correct amount. Of course, the tenant could also defend the unlawful detainer action on the ground that the notice incorrectly stated the amount of rent due. When the landlord and tenant file actions in the same court, the question of which action may proceed to trial is one of precedence, and not of jurisdiction. *Mobil Oil Corp. v Superior Court* (1978) 79 CA3d 486, 493, 145 CR 17. As a summary action (see §§9.6-9.9), the unlawful detainer will usually be tried first, but might not be entitled to precedence if the tenant seeks a preliminary injunction under CCP §527 (see §§11.63-11.64). The preferred procedure will often be to consolidate or coordinate the cases (see §§11.65-11.69).

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§9.33 2. Venue and Trial Court Location

The proper court for filing an unlawful detainer action is the superior court in the county where all or part of the leased premises is located. CCP §392(a)(1); see *Childs v Eltinge* (1973) 29 CA3d 843, 851, 105 CR 864. For residential tenancies, this rule coincides with the general civil rule that venue is proper in the county where the defendant resides. See CCP §395(a). Further, the proper court location for trial (*i.e.*, branch or district office of the superior court) is the courthouse where the court tries unlawful detainer actions and that is nearest or most accessible to the premises. CCP §392(b). Many counties have local policies or rules requiring limited civil cases for unlawful detainer to be filed and/or tried in the court branch or district that would have been the proper municipal court for the action before trial court unification.

Improper venue is not usually a jurisdictional defect. Thus, an ordinary action filed in a court constituting improper venue may proceed to trial and judgment unless the defendant moves for an order transferring the action to the proper court. CCP §396b; see *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 101 CR 745. When an action for unlawful detainer is filed in an improper venue or court location for trial, however, an order transferring the action to the proper county or court location appears to be mandated by CCP §396a(b), unless the tenant is represented by counsel and consents to keeping the action in the county or court location where commenced. If the tenant files a transfer motion under CCP §396b, the court may award "reasonable expenses and attorney's fees incurred in making or resisting the motion." Code of Civil Procedure §§398-399 specify the procedures for designating the court to which the action will be transferred, and for transmitting the action to that court. For further discussion see California Civil Procedure Before Trial, chap 20 (4th ed Cal CEB 2004).

A landlord should be wary of filing an unlawful detainer action in a court outside the county or court location where the premises are located, and then refusing to transfer the action voluntarily. Law and motion judges often view such actions as deliberate attempts to prejudice the tenant's rights and frequently impose sanctions on landlords for this conduct. See, *e.g.*, CCP §396a(a), under which the landlord must allege facts in either the complaint or a separately filed affidavit, verified by either the landlord or its attorney, showing that the action was commenced in the proper county and court location for trial. If this statement does not appear in the complaint or an affidavit, the court may dismiss the action without prejudice. If the complaint is verified by a different individual (*e.g.*, by a property manager when the named plaintiff is the landlord), a separate declaration of proper venue signed by the plaintiff or the plaintiff's attorney must be filed and served with the complaint. See CCP §396a.

See also CCP §128.7, under which an attorney, by presenting any pleading, petition, written notice of motion, or other similar paper to the court, is certifying that a variety of conditions relating to the proper motive and good faith of the document are met, and may be subject to sanctions if any of the conditions is not met. A landlord who follows a pattern of filing unlawful detainer actions in the wrong county or judicial district may be liable for an unlawful business practice under Bus & P C §§17200-17209. See *Barquis v Merchants Collection Ass'n, supra,* in which the court condemned such a pattern in collection suits.

NOTE: The caption of each pleading in an action must state the name of the court and the county, and, if the action is brought as a limited civil case, the caption must also state that the case is a limited civil case. CCP §422.30. See example in §9.19.

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D. Proper Parties

§9.34 1. Plaintiffs

The general provisions of the Code of Civil Procedure relating to proper parties apply to plaintiffs in unlawful detainer actions. See CCP §1165. Under these general provisions, the landlord must have the legal capacity to sue. See CCP §430.10(b). A complaint that fails to state whether the landlord is a corporation, an individual doing business under a fictitious name, or a partnership or other unincorporated association—or whether the landlord is licensed to do business in the jurisdiction—is subject to demurrer under CCP §430.10(b), (f).

When the lease or rental agreement is between the tenant and a management firm or resident manager, the issue of capacity to sue becomes important. A management firm that has entered into the lease or rental agreement in its own name and has the right to possession (generally provided in sophisticated management arrangements, often including a power of attorney) probably has the capacity to bring an unlawful detainer action in its own name without joining the owner. See CCP §369, which provides that persons who may sue without joining as parties those for whose benefit the action is prosecuted include, among others, a trustee of an express trust and (except for one on whom a power of sale has been conferred under a deed of trust or mortgage) a person with whom, or in whose name, a contract is made for the benefit of another. See also *Cheney v Trauzettel* (1937) 9 C2d 158, 69 P2d 832 (in unlawful detainer, the right to possession alone is involved; the broad question of title cannot be raised as a defense); *Builders' Control Serv. v North Am. Title Guar. Co.* (1962) 205 CA2d 68, 76, 22 CR 712 (assignee of sale proceeds has standing to sue escrow holder to recover amounts allegedly withheld without authority, even though assignee was required under terms of assignment to pay funds to assignor).

This conclusion does not conflict with the real-party-in-interest rule (CCP §367) because both the tenant and property owner would be bound by the judgment, and thus would be spared from further litigation brought in the owner's name. See *Giselman v Starr* (1895) 106 C 651, 657, 40 P 8 (purpose of real-party-in-interest rule (now CCP §367) is "to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand"). See also *Friendy Village Community Ass'n v Silva & Hill Constr. Co.* (1973) 31 CA3d 220, 107 CR 123 (plaintiff who has sold property, and therefore is no longer entitled to possession, is probably not "real party in interest" and has no standing to bring action). If the sale took place after the unlawful detainer action was filed, the new owner may, upon motion to the court, be substituted in place of the plaintiff as the real party plaintiff in the cause of action. CCP §368.5.

If a manager entered into the lease or rental agreement as an agent for the owner, and does not have the right to possession, then the owner must be joined as a plaintiff in an unlawful detainer action. Unlike a management firm, a resident manager rarely has the right to possession. In most cases, the manager either did not execute the lease, or executed it on behalf of the owner (see §§1.16-1.20). Even when the lease was made between the tenant and the management company, an unlawful detainer action may be brought by the owner suing in his or her own name. See *Schader v White* (1916) 173 C 441, 160 P 557 (undisclosed principal can sue in own name). For multi-unit residential property, the lease must identify the property owner or agent authorized to manage the premises and receive process, all notices, and demands on behalf of the owner. CC §§1961-1962.7. See §1.76.

A successor in interest of the landlord is a proper plaintiff in an unlawful detainer action even though he or she is not in privity of contract with the tenant. CC §821; *Hewitt v Justice's Court of Brooklyn Township* (1933) 131 CA 439, 21 P2d 641. When leased property is transferred, an unlawful detainer action may continue in the name of the transferor or the court may allow the transferee to be substituted in the action. See CCP §368.5. The right to accrued but unpaid rents remains, however, with the transferor unless it is expressly assigned to the transferee. *Ginsberg v Austin* (Fed Cir 1992) 968 F2d 1198. Purchasers who anticipate evicting a tenant in default on rent payments should request an express assignment from the seller of accrued rents and causes of action arising out of the assigned rental agreement.

A stock cooperative can sue in its own name to evict a tenant-shareholder. *Sun Terrace Manor v Municipal Court* (1973) 33 CA3d 739, 108 CR 307. It is doubtful, however, that an association of condominium or community apartment

owners can sue in its own name to evict a tenant who has rented from an owner of an individual unit. See, *e.g., Laguna Royale Owners Ass'n v Darger* (1981) 119 CA3d 670, 174 CR 136.

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2. Defendants

§9.35 a. Tenant and Subtenant

The tenant and any subtenant in possession are proper "parties defendant" to an unlawful detainer action. CCP §1164. If the name of the tenant or subtenant is unknown, the complaint may state a fictitious name. CCP §474. A "Doe" allegation is allowable unless the plaintiff actually knows the defendant's name. *Munoz v Purdy* (1979) 91 CA3d 942, 154 CR 472. Constructive knowledge of a defendant's name does not prevent a plaintiff from alleging a fictitious name. *Grinnell v Fire Protection Sys. Co.* (1986) 183 CA3d 352, 228 CR 292. For a default to be entered against a "Doe," CCP §474 requires that the summons allege that the defendant is being served either as an individual or on behalf of the person sued under the fictitious name. See *Fuss v City of Los Angeles* (1958) 162 CA2d 643, 646, 328 P2d 831; *Armstrong v Superior Court* (1956) 144 CA2d 420, 424, 301 P2d 51. On service of process, see §§9.45-9.51.

Subtenants need not be named in the complaint if a landlord wishes to evict only the tenant, but not the subtenants. *Markham v Fralick* (1934) 2 C2d 221, 39 P2d 804; *Briggs v Electronic Memories & Magnetics Corp.* (1975) 53 CA3d 900, 126 CR 34. If a landlord wishes to evict both the tenants and the subtenants under a month-to-month tenancy with a 30-day or 60-day notice, the landlord need not serve all of them with the notice, but must name and serve each of them in the unlawful detainer action. See *Four Seas Inv. Corp. v International Hotel Tenants' Ass'n* (1978) 81 CA3d 604, 146 CR 531. *Markham v Fralick* (1934) 2 C2d 221, 39 P2d 804. A 3-day notice, however, must be served on each party from whom possession is demanded. See CCP §1161(2)-(3). See §§7.27-7.28 on rent control provisions conferring tenant status on subtenants.

A tenant who sublets the premises may use the unlawful detainer remedy to evict the subtenant. CCP §1161(3); *Reed v South Shore Foods, Inc.* (1964) 229 CA2d 705, 711, 40 CR 575. When a tenant makes a valid assignment of the entire leasehold estate, the tenant (assignor) is not a necessary defendant in an action by the landlord against the assignee to recover possession of the premises, even though the tenant remains liable for rent under the lease. *Chase v Peters* (1918) 37 CA 358, 174 P 116.

Landlords frequently encounter unidentified persons on the premises who entered after the tenancy began. Every effort should be made to identify these persons immediately, at least before service of notice, so that they can be served with notice and named in the complaint. Many courts require a physical description of the "Doe" defendant before entering a judgment for possession against the defendant. "Doe" allegations and service in both termination notices and summonses and complaints may be used to avoid claims of right to possession (see §§9.26, 9.35A, 13.70-13.73) by persons whose existence as occupants is only suspected, or whose names are best left unspecified, until potentially unlawful detention can be confirmed. This tactic reduces landlord exposure for malicious prosecution.

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§9.35A b. Occupant Unnamed in Complaint

An occupant unnamed in the complaint may be made subject to an unlawful detainer action and evicted under a writ of possession if the landlord employs the procedures provided in CCP §§415.46, 1174.25. See §§9.51-9.55. Even if a landlord fails to comply with these procedures, the exclusive remedy for contesting the eviction by a known occupant who is not named in the judgment for possession is a postjudgment claim for possession under CCP §1174.3, not a writ of mandate ordering the sheriff to restore possession to the tenant. *Cardenas v Noren* (1991) 235 CA3d 1344, 1 CR2d 367. See §§13.70-13.73. Compare *Cardenas* with *Arrieta v Mahon* (1982) 31 C3d 381, 182 CR 770 (occupant not named in judgment is not bound by writ of possession), decided prior to the enactment of CCP §§415.46, 1174.25 (Stats 1990, ch 1535, Stats 1991, ch 57, effective June 14, 1991).

Under CCP §1164, the court is specifically authorized to enter judgment against any tenant or subtenant who is served with process or who appears in the proceeding. Nonjoinder of a person who might have been named as a defendant is not available as a defense to a served defendant in an unlawful detainer action. CCP §1164. Subtenants who enter the premises after service of a notice to pay rent or quit under CCP §1161(2) may be named in the action; the fact that they were not served with notice is not a defense. CCP §1164. Persons who enter the premises under the tenant after commencement of the action are bound by the judgment as if they had been parties to the action. CCP §1164.

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§9.35B c. Lender Holding Security Interest in Lease

Whether a lender who holds a security interest in the lease is a necessary party to the action depends on the lender's relationship with the landlord. In *Glendale Fed. Bank v Hadden* (1999) 73 CA4th 1150, 87 CR2d 102, a bank lent money to a tenant and obtained a deed of trust on the lease as security for the loan, but the bank failed to obtain from the landlord any lease amendment or other agreement giving the bank the right to cure any default in the payment of rent. The court held that the bank was not an indispensable party to an unlawful detainer action against the tenant for nonpayment of rent, because the bank had no right to possession. Also, the judgment for possession in the unlawful detainer action terminated the bank's security interest, even though the bank was not a party to the action.

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§9.36 E. Relationship of Parties

The existence of a landlord-tenant relationship is a prerequisite to maintenance of an action to remove a tenant under CCP §1161(1)-(5), and the relationship must be alleged in the complaint. *Francis v West Virginia Oil Co.* (1917) 174 C 168, 162 P 394; *Fredericksen v McCosker* (1956) 143 CA2d 114, 299 P2d 908. The existence of some other relationship (*e.g.,* an employer and an employee or tenant at will (CCP §1161(1)) or a foreclosure-purchaser and a defaulting owner (CCP §§1161a, 1161b) may also form a basis for an unlawful detainer action. For additional facts regarding the relationship of the purchaser to the tenant that must be pleaded and proved in unlawful detainer actions following foreclosure, see *Cheney v Trauzettel* (1937) 9 C2d 158, 69 P2d 832.

The complaint must allege that the tenant entered into possession under a written or oral lease or rental agreement and remains in possession without the landlord's permission after termination of the tenancy or expiration of the term. The landlord-tenant relationship continues for purposes of CCP §§1161 and 1174 if the tenancy has expired, or has been terminated, but the tenant remains in possession. *O'Dell v Buttrick* (1899) 126 C 551, 59 P 133.

Except for certain relationships stated in CCP §1161(1), the owner cannot remove an occupant, whose relationship to the owner began in some form other than landlord and tenant, by later characterizing the relationship as that of landlord and tenant in order to employ the unlawful detainer statutes. In *Harper v Raya* (1984) 154 CA3d 908, 201 CR 563, the owner purchased real property for his mistress. When their relationship ended, he sent the mistress a notice to pay rent or quit the premises, and then filed an unlawful detainer action. The court held that the summary remedy was unavailable because the mistress was never a tenant; sending a 3-day termination notice did not make her one. The landlord-tenant relationship must begin by mutual consent or by operation of law.

In a proceeding under CCP §1161a, the court in *Evans v Superior Court* (1977) 67 CA3d 162, 136 CR 596, held that the successor in interest of the purchaser at a foreclosure sale may maintain an unlawful detainer action against the defaulting owner. For discussion of termination notice requirements after foreclosure and the issues that arise when a foreclosure-purchaser attempts to evict a tenant who leased for a fixed term from the defaulting owner, see §§8.68A-8.68D.

When the relationship between the parties does not meet the definitions in CCP §§1161-1161b, unlawful detainer is not available—regardless of the manner in which the parties characterize their relationship. For example, when a transaction is actually a sale of real property, rather than a hiring, the courts will not permit use of unlawful detainer against the defaulting buyer. Thus, in *Greene v Municipal Court* (1975) 51 CA3d 446, 124 CR 139, the court held that the buyer's breach of an installment land sale contract, which allowed the seller to retain the downpayment and subsequent payments as rent in the event of breach, did not allow the seller to proceed in unlawful detainer. See also *Marvell v Marina Pizzeria* (1984) 155 CA3d Supp 1, 202 CR 818, in which the court held that the defaulting buyer of a business (including the leasehold interest) was neither a licensee nor a tenant at will, and therefore could not be removed by an unlawful detainer action. But see *Provouskivitz v Snow* (1977) 74 CA3d 554, 141 CR 531, in which the court held unlawful detainer to be proper when a simultaneously executed lease and installment land sale contract provided that the buyers were taking possession under the lease. See also *Klein v Loeffler* (1929) 96 CA 383, 274 P 373.

A landlord may maintain an unlawful detainer action only if the tenant is in possession or asserts a right to possession of the premises when the action is filed; if the tenant has vacated or otherwise surrendered possession, an unlawful detainer action will not lie. *Markham v Fralick* (1934) 2 C2d 221, 225, 39 P2d 804. See §9.5. In such an event, the landlord's proper remedy is a civil action for back rent and damages. *Briggs v Electronic Memories & Magnetics Corp.* (1975) 53 CA3d 900, 126 CR 34. On the effect of a tenant's vacating after the unlawful detainer suit is filed, see §11.51.

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§9.37 F. Summary of Essential Allegations

Whether the landlord's attorney uses the Judicial Council's complaint form (see §9.31) or prepares an original pleading, the complaint must contain the following allegations and prayers:

(1) *Legal capacity.* The complaint must allege the plaintiff's legal capacity (*e.g.,* an individual, a partnership, a corporation) and plaintiff's interest in the premises. See ¶¶2, 4 of the Judicial Council form in §9.31. If the lease or rental agreement was entered into between the tenant and a manager (or a management firm), counsel must decide in whose name the action will be brought. See §9.34.

(2) *Relationship.* The complaint must allege the existence of the requisite relationship between plaintiff and defendant (*e.g.,* landlord and tenant, subtenant, or assignee). *Fredericksen v McCosker* (1956) 143 CA2d 114, 299 P2d 908. See form in §9.31, ¶6; §9.36. The alleged relationship must be one that arose by mutual consent; the plaintiff landlord cannot create the relationship unilaterally. *Harper v Raya* (1984) 154 CA3d 908, 201 CR 563.

(3) *Lease or rental agreement.* Failure to allege the existence of a lease or rental agreement, or whether it is written or oral, may subject the complaint to demurrer. CCP §430.10(g). See form in §9.31, ¶6.b; §§10.29, 10.31. A copy of any applicable written lease or rental agreement for a residential tenancy, including addenda, attachments, and exhibits, must be attached to the complaint, unless the landlord or agent does not have it or the action is based on a default in the payment of rent. CCP §1166(c)(1)(B).

(4) *Venue.* In an unlawful detainer action brought under CCP §1161, the complaint must allege facts showing that the action has been commenced in both the proper county and the proper court location for trial. CCP §396a(a). See form in §9.31, ¶3; see also §9.33.

(5) *Premises.* The complaint must describe the premises sufficiently to permit the sheriff or marshal to serve a writ of possession and physically evict the tenant, CCP §§455, 1166(a)(3). Alleging the street address is sufficient. *Olcovich v Deremberg* (1915) 27 CA 194, 149 P 375. See form in §9.31, ¶3. If the designation of the street is not indicated or is incorrect, *i.e.,* "avenue" instead of "street," the marshal or sheriff may decline to enforce the writ of possession.

(6) *Notice.* If notice is required, the complaint must allege that the required notice was served on the tenant and expired. *Zucco v Farullo* (1918) 37 CA 562, 568, 174 P 929. The complaint must allege the method used to serve the required notice by either completing all related items on the Judicial Council form or attaching to the complaint the proof of service of the notice. CCP §1166(a)(5). This applies in residential and nonresidential tenancies alike. The Judicial Council form alleges both the fact of service (¶7) and the manner of service (¶8). If notice is required, a copy may be attached to the complaint as an exhibit and incorporated by reference, or the notice may be recited verbatim in the complaint or pleaded according to its legal effect. *Wilson v Sadleir* (1915) 26 CA 357, 146 P 1061. In residential tenancies, a copy of the notice of termination that was served on the residential tenant must be attached to the unlawful detainer complaint. CCP §1166(c)(1)(A). An inconsistency between a notice attached as an exhibit and references to the notice in the complaint may subject the complaint to a demurrer. CCP §430.10(f).

(7) *Supporting facts.* Under CCP §1166(a)(2), the complaint must allege facts supporting the plaintiff's recovery:

- When the proceeding is based on the tenant's nonpayment of rent, the complaint must allege (a) the fact of default and the amount of unpaid rent, (b) that a written notice was served on the tenant after the rental due date, and (c) that the notice stated the precise amount of rent due and demanded that the tenant pay the rent or quit the premises within 3 days. CCP §§1161(2), 1166(a)(4). See ¶¶7-8, 10 of the complaint form in §9.31.
- When the action is based on breach of a covenant other than to pay rent, the complaint must allege (a) the covenant allegedly breached, (b) that the tenant breached it, and (for a curable breach) (c) that the notice demanded that the tenant either cure the breach or quit the premises within 3 days. CCP §1161(3). See ¶¶7-8 of the form in §9.31.
- When the action is based on expiration of the lease term, the complaint must allege (a) expiration of the term, and (b) that the tenant remains in possession without the landlord's permission. See CCP §§1161(1), 1166(a)(2); *Earl Orchard Co. v Fava* (1902) 138 C 76, 70 P 1073. See ¶¶3, 9 of the form in §9.31. No termination notice is needed for an unlawful detainer action based on expiration of the term of a lease, unless a

local rent control ordinance requires that the grounds for termination be stated in a notice. See CCP §1161(1).

- When the proceeding is based on sale of the property by foreclosure under CCP §§1161a, 1161b, the complaint must allege the circumstances under which title was acquired. *Cheney v Trauzettel* (1937) 9 C2d 158, 69 P2d 832; *Evans v Superior Court* (1977) 67 CA3d 162, 136 CR 596 (proof that sale complies with statutes and security instrument). See §§8.68A-8.68C. The complaint form provides at ¶7 (see §9.31) an allegation that the 3-day notice to quit was served on the tenant, but does not contain other allegations essential to eviction on sale of the property under CCP §1161a. Counsel might want to add these allegations in ¶15 of the form. But see note at bottom of form, warning counsel not to use form with CCP §1161a (postforeclosure) evictions.
- When the action is based on termination of a month-to-month tenancy, the complaint must allege (a) that written notice was served on the tenant declaring the tenancy terminated in 30 or 60 days (or less, if the written lease or rental agreement so provides; see §8.70) and requiring the tenant to surrender possession of the premises on or before expiration of that period, and (b) that 30 or 60 days (or a lesser period, if applicable) has passed since service of the notice. CC §§1946, 1946.1; CCP §§1161(1), 1166(a)(2). See ¶¶7-8 of complaint form in §9.31.

(8) *Possession of premises.* The tenant must be in possession of the premises when the unlawful detainer action is filed (see §9.5), and the complaint must allege this fact. CCP §§1161-1161b; *Shusett, Inc. v Home Sav. & Loan Ass'n* (1964) 231 CA2d 146, 154, 41 CR 622. See ¶¶3, 7.b(2) of complaint form in §9.31. Landlord attorneys should argue that "possession" includes not only actual possession but also a right to possession, especially if the defendant asserts control over the property without having physical possession.

(9) *Restitution of premises.* The prayer must request restitution of the premises. *Shusett, Inc. v Home Sav. & Loan Ass'n, supra*. See ¶17.a of complaint form in §9.31. Under *Shusett,* a complaint that seeks only damages, and not restitution of the premises, fails to state a cause of action for forcible entry. Presumably, the same rationale would apply to an unlawful detainer. If the termination notice served on the tenant did not contain a declaration of forfeiture, the plaintiff may not pray for forfeiture in the complaint. CCP §1174. Paragraph 17.e permits the landlord to seek forfeiture of the lease or rental agreement. Note that CCP §1174(a) limits forfeiture to breach of the lease and rent default cases.

(10) *Rent control*. If the premises are subject to a local rent control or eviction control ordinance, the application of that ordinance and compliance with it should be alleged. See complaint form ¶14. On the impact of rent control see §§7.24, 7.73-7.75, 9.13-9.16D.

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G. Monetary Relief

§9.38 1. Eviction Based on Rent Default

The plaintiff may allege, and pray for, both back rent and damages "occasioned" by the unlawful detainer if the action is based on a default in the payment of rent. CCP §1174(b). Back rent accrues from the tenant's last rent payment through the expiration of the 3 days provided in the notice. After the tenancy terminates by expiration of the notice, rent cannot be awarded for the period following the expiration date, even if the tenant does not vacate. Damages "occasioned" by the unlawful detainer, however, may be awarded and are calculated *per diem* from the date of expiration of the termination notice through the date of judgment. They are characterized as the reasonable rental value of the premises after termination of the tenancy and are usually, but not necessarily, measured by the contract rent. See §§10.40-10.41.

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§9.39 2. Eviction Based on Other Grounds

Back rent may be recovered only in an unlawful detainer action based on a 3-day notice to pay rent or quit under CCP §1161(2) (see §§8.35-8.81, 9.38); it may not be recovered when the tenancy was terminated under CCP §1161(1), (3)-(5), or §§1161a-1161b (see §§8.46-8.59, 8.81-8.84). Rent, as distinct from damages, also cannot be recovered in an unlawful detainer action based on a 30-day or 60-day notice terminating a month-to-month tenancy under CC §1946 or §1946.1 (see §§8.69-8.80). *Castle Park No. 5 v Katherine* (1979) 91 CA3d Supp 6, 154 CR 498. See CCP §1174(b). In such cases only damages occasioned by the unlawful detainer are recoverable. The unlawful detainer does not begin until the expiration of the lease term (CCP §1161(1)), expiration of a 3-day termination notice (CCP §1161(2)-(4)), expiration of a termination notice given by a tenant (CCP §1161(5)), or expiration of a 30-day or 60-day termination notice given by a landlord (CCP §1161(1); CC §§1946, 1946.1). Accordingly, any damages resulting from the unlawful detainer accrue only after that date, and are based on the reasonable rental value of the premises from that date until entry of judgment. See *Glouberman v Coffey* (1955) 138 CA2d Supp 906, 292 P2d 681. See discussion of rent and damages in §§10.40-10.41 and chaps 12-13.

EXAMPLE: If a tenant fails to pay rent when lawfully due after being served with a 30-day or 60-day notice terminating the tenancy, the landlord must proceed in unlawful detainer on that notice (and, under the decision in *Castle Park No. 5 v Katherine, supra,* effectively waive the back rent in that action), or also serve a 3-day notice to pay rent or quit (being careful to apportion the precise amount of rent due if the 30-day or 60-day notice period expires earlier than 30 or 60 days from the date that the rent was due). A landlord who chooses the latter course should plead two causes of action: one for recovery of possession of the premises and damage (based on the 30-day or 60-day notice), and the other for back rent (based on the 3-day notice), and should wait to file and serve the complaint after both notices have expired. See §9.44.

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§9.40 3. Malicious Holdover, Fraud, Force, or Violence

If statutory damages are sought, the complaint must allege evidentiary facts showing malice in defendant's holding over, not mere conclusions. CCP §1174(b). See §§9.8, 10.42. See also Judicial Council form, ¶12 (see §9.31), which requires specific facts to be set forth in an attachment.

PRACTICE TIP: The landlord's attorney should emphasize the "mental element" when pleading "malicious holding over." Counsel should plead actual intent to injure or reckless disregard for the known negative financial consequences to the landlord by a holdover tenant who could have lodged elsewhere rather than cost the landlord additional lost rents. The landlord's attorney also may allege that the defendant-tenant actually is aware that he or she has no lawful right to remain and that the tenant's intent is to be unjustly enriched at the landlord's expense. Courts rarely award statutory damages in residential eviction cases; alleging such damages in the termination notice and the complaint may cause tenants to defend vigorously when they would otherwise default.

The plaintiff also may allege any circumstances of fraud, force, or violence that have accompanied the alleged unlawful detainer, and may claim damages based on them. CCP §1166(b). The attorney may add such allegations to ¶15 of the Judicial Council form (see §9.31).

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§9.41 H. Relief Other Than Possession and Damages

One of the most common pitfalls for a landlord's attorney is the pleading and demand of monetary or other relief not authorized by the unlawful detainer statutes. This can be fatal to (or cause considerable pretrial delay of) the proceedings. Under CCP §1174(b), the plaintiff's right to claim damages is limited to those "occasioned" by the unlawful detainer. Except for additional damages caused by the tenant's fraud, force, or violence accompanying the unlawful detainer (CCP §1166(b)), a request for any other category of damages is improper. See §§9.38-9.40.

In *Vasey v California Dance Co.* (1977) 70 CA3d 742, 139 CR 72, the landlord obtained a judgment on causes of action for both unlawful detainer and breach of lease provisions relating to alterations. On appeal, however, the court modified the judgment, holding that the trial court exceeded its jurisdiction in entering judgment for the alteration damages. The court ruled that even though a tenant who is guilty of unlawful detainer may also have breached the terms of the lease, damages resulting from that breach do not necessarily result from the unlawful detainer. Thus, the landlord may not recover such damages in an unlawful detainer action. 70 CA3d at 748. The landlord, however, may recover damages for other breaches of the lease under CC §1952.3 if the tenant vacates the premises before trial. See §11.51.

A prayer for "such other and further relief as the court deems just" is sufficient, at least in a contested case, to justify an award for damages authorized but not otherwise requested in an unlawful detainer action. Furthermore, an award for interest is permitted even if the complaint contains no prayer for interest. *Superior Motels, Inc. v Rinn Motor Hotels, Inc.* (1987) 195 CA3d 1032, 1067, 241 CR 487.

For causes of action on relief other than possession and authorized damages, the landlord must proceed in a regular civil action, using the standard 30-day summons (*Greene v Municipal Court* (1975) 51 CA3d 446, 124 CR 139), or prosecute them in the summary proceeding with the tenant's consent (*Vasey v California Dance Co.* (1977) 70 CA3d 742, 747, 139 CR 72).

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§9.42 I. Verification

Complaints in unlawful detainer actions must be verified and include the typed or printed name of the person verifying it. CCP §1166(a)(1). A complaint that is not properly verified is subject to a motion to strike. CCP §436. The Judicial Council's unlawful detainer complaint form (see §9.31) contains a verification appropriate only for an individual plaintiff. A different verification form should be used if the complaint is verified by the landlord's attorney or by an individual representing a corporation or partnership. On verification generally, see California Civil Procedure Before Trial, chap 15 (4th ed Cal CEB 2004).

PRACTICE TIP: Attorney verifications of unlawful detainer complaints are quite common, but sometimes of questionable validity. Counsel should be aware of *DeCamp v First Kensington Corp.* (1978) 83 CA3d 268, 147 CR 869, in which the court noted that the object of the verification is to insure good faith in the averments of the party. While CCP §446 allows attorneys to sign verifications when their clients are out of the county, this practice is discouraged. The court in *DeCamp* held that CCP §446 "does not authorize attorney verifications where the absence of the party creates no inability on his part to verify." 83 CA3d at 275.

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§9.43 J. Amendments

Unlawful detainer actions are subject to CCP §§471.5-473, governing amendments to complaints in civil actions. To avoid delaying the summary nature of the proceeding by amending the complaint, the landlord's attorney should ensure that the original complaint is as thorough as possible. But see CCP §1173, allowing amendments at trial in unlawful detainer actions to conform to proof. The statute specifically discourages continuances when such amendments are made.

Attorneys for landlords sometimes serve two or more notices with differing response times (*e.g.,* a 3-day notice to pay rent or quit together with a 30-day or 60-day notice to vacate). See §9.39 for another alternative on the timing of service of such notices. Aside from the need to avoid possible "confusion" defenses that a tenant might raise, counsel should note that, if only one action is intended to be filed, the landlord must wait to bring an action covering both notices until the longer notice period expires, even if an earlier action could be based on the shorter notice period.

PRACTICE TIP: A landlord might wish to file an action on the shorter-term notice immediately, to allow the landlord to conduct discovery without waiting to file a combined action after the longer notice period has expired. It may be that a second action then could be filed when the statute permits, and the two cases could be consolidated. See chap 11 on consolidation motions.

An amendment to a complaint may not introduce a new theory of recovery based on facts first arising after institution of an action; amendments relate to facts as they existed when the original complaint was filed. *California Farm & Fruit Co. v Schiappa-Pietra* (1907) 151 C 732, 91 P 593; *Cohen v Superior Court* (1966) 244 CA2d 650, 53 CR 378. Matters occurring after the complaint has been filed may be raised only by a supplemental complaint, filed after a noticed motion, and not by an amendment to the original complaint to conform to proof. *Earp v Nobmann* (1981) 122 CA3d 270, 175 CR 767. For further discussion of amendments and supplemental complaints, see chap 12. See also California Civil Procedure Before Trial, chap 16 (4th ed Cal CEB 2004).

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VI. FILING AND SERVING THE ACTION

§9.44 A. When to File Unlawful Detainer Complaint

An unlawful detainer cause of action arises on expiration of the period required to be specified in the termination notice (CCP §1161(2)-(5)), or on expiration of the lease term (CCP §1161(1)). *Downing v Cutting Packing Co.* (1920) 183 C 91, 95, 190 P 455. See §§8.1-8.4, 8.20, 8.22-8.24. If the expiration date specified in the termination notice falls on a weekend or holiday (as defined in Govt C §6700; CCP §§12-12b, 135), the opportunity to perform is extended to and including the next day that is not a holiday. CCP §§12-13. Thus, if a 3-day notice to pay rent or quit expires on a Saturday or Sunday, the tenant has until Monday to perform or vacate, and the cause of action does not accrue until Tuesday. See §§8.28-8.29, 8.42, 8.77. A 3-day notice provides a period of time within which a tenant might perform an act or pay rent or quit. A 30-day notice terminating a tenancy presumably requires the tenant to vacate within the 30 days. Arguably, the provisions of CCP §§12, 12a and 13 which extend the time for the performance of an act also apply to a 30-day notice.

EXAMPLE: On how weekends and holidays extend the time to perform under a 3-day notice, see *Lamanna v Vognar* (1993) 17 CA4th Supp 4, 22 CR2d 501, discussed in §8.28. For further discussion of effects of holidays on notice periods, including a list of legal holidays, see California Eviction Defense Manual §§6.7, 6.25-6.26 (2d ed Cal CEB 1993).

In other reported decisions, courts have held that CCP §12 applies to notices served in related situations such as the following: a notice for incorporation of a municipality (*City of Pleasanton v Bryant* (1965) 63 C2d 643, 47 CR 807); a physician's affidavit supporting a petition for commitment (*In re Rodriguez* (1964) 60 C2d 822, 36 CR 609); a notice of a disciplinary hearing (*Cooper v Board of Med. Exam'rs* (1975) 49 CA3d 931, 123 CR 563); a tort claim filed with a government agency (*Adams v City of Modesto* (1960) 53 C2d 833, 3 CR 561); and a notice of road improvement (*Municipal Improvement Co. v Thompson* (1927) 201 C 629, 258 P 955).

Some practitioners believe that there is additional time to respond to a 3-day notice when it is served by mail as a secondary procedure, *e.g.,* to complete either substituted service (CCP §1162(2)) or posting of a copy of the notice on the premises (CCP §1162(3)). See §§8.64-8.65 on these service methods. Under CCP §1013(a), when a legally required notice in a pending suit (see CCP §§1003-1020) is served by mail, the time for responding to it is extended by 5 calendar days if the place of mailing and the place of address are both within California.

According to CCP §1013(a), the extensions apply "in the absence of a specific exception" stated in CCP §1013, another statute, or court rule. This quoted language, which was added by a 1995 amendment, arguably supersedes the conflicting decisions in *Davidson v Quinn* (1982) 138 CA3d Supp 9, 10 n2, 188 CR 421 (service of 3-day notice by mail is not effective until tenant actually receives mailed notice) and *Walters v Meyers* (1990) 226 CA3d Supp 15, 18, 277 CR 316 (time to respond to 3-day notice served by posting and mailing is not extended by CCP §1013 and service is effective on date notice is posted and mailed, not when tenant actually receives mailed notice). Assuming that CCP §1013 applies to a 3-day notice served by substituted service or by posting and mailing, the unlawful detainer action may not be filed until at least 8 days after the notice is mailed. See §8.29 for more detailed information on CCP §1013.

It is equally arguable that CCP §1013 does not apply to service of a 3-day notice because no action is pending at the time of service. See reasoning in *Walters v Meyers, supra*. Under this assumption, the action may be filed 3 days after the date of mailing. See also *Losornio v Motta* (1998) 67 CA4th 110, 78 CR2d 799, holding that CCP §1013(a), which extends the time to respond to motions served by mail in pending litigation, does not extend the statutory notice period for a 30-day termination notice served under CCP §1162(2)-(3). See extended analyses in §§8.28-8.29, 8.65.

NOTE: A trial court may adopt local rules that permit parties to file their documents electronically with the court; the Judicial Council has adopted uniform rules that apply statewide for electronic filing and service of papers on parties. CCP §1010.6; Cal Rules of Ct 2.250-2.261. Practitioners should pay particular attention to the January 1, 2008, California Rules of Court amendments, which contain detailed requirements for electronic service of

pleadings. See, *e.g.,* Cal Rules of Ct 2.253, 2.260. On the effect of underpayment of filing fees, see §10.1B.

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/ B. Service of Summons and Complaint/§9.45 1. Legal Requirements

B. Service of Summons and Complaint

§9.45 1. Legal Requirements

As in most civil actions, service of process is necessary in an unlawful detainer action for the court to obtain personal jurisdiction over the defendant. Chapter 4 of Title V of the Code of Civil Procedure, which governs service of summons in civil actions (CCP §§413.10-417.40), also applies to unlawful detainer suits. CCP §1177. Thus, service may be accomplished by the methods generally available to plaintiffs in all civil actions, which include:

- personal delivery under CCP §415.10 (usually applicable to individuals; see §9.47);
- if not by personal delivery after reasonable diligence, by "substituted service," which is effected by leaving copies of the summons and complaint with a person at the individual defendant's residence or place of business, and mailing copies to the defendant at the same address (CCP §415.20(b); see §9.48);
- mailing under CCP §415.30, with service completed on the defendant's execution of a written acknowledgment of service (impractical in unlawful detainer);
- publication under CCP §415.50 if the defendant cannot with reasonable diligence be served and a publication has been ordered by the court (also impractical in unlawful detainer);
- service on a defendant corporation or other business or public entity in lieu of personal delivery by leaving a copy of the summons and complaint at the office during usual office hours or, if no physical address is known, at the entity's usual mailing address (other than a United States Postal Service post office box), with the person apparently in charge, and mailing copies to the defendant at the same address under CCP §415.20(a); and
- personal service on a business organization, form unknown, by leaving summons and complaint with "the person who is in charge of the office" and then mailing a copy to that office address under CCP §415.95.

Service by mailing or publication is rarely used because of the delay and cost involved, and because the "post and mail" (or constructive service) method is available in unlawful detainer suits under CCP §415.45. Under this procedure, if the plaintiff shows that the defendant cannot be served with reasonable diligence by using either the personal delivery or the substituted service method, the plaintiff may obtain a court order for service by posting the summons on the premises and mailing a copy to the defendant. See §9.49. Code of Civil Procedure §415.47 also allows service by certified mail following a tenant's written response to a landlord's notice of belief of abandonment under CC §1951.3. See §9.50. For further discussion, see California Civil Procedure Before Trial, chap 17 (4th ed Cal CEB 2004).

The Judicial Council has approved a summons form for use in unlawful detainer actions; it contains a 5-day rather than a 30-day response limit and is reproduced in §9.46. See CCP §§1167, 1167.3. Errors in the summons served on a tenant might prevent the landlord from obtaining the necessary personal jurisdiction and precipitate a motion to quash. See *Beck v Ransome-Crummey Co.* (1919) 42 CA 674, 679, 184 P 431 (service of summons that omits any statement expressly required by statute does not give the court jurisdiction to proceed against the defendant); *Armstrong v Superior Court* (1956) 144 CA2d 420, 424, 301 P2d 51 (summons not endorsed to show that defendant was served as fictitious party, as required by CCP §474, was fatally defective). See also §§10.18-10.23.

On the other hand, technical errors that do not mislead the tenant, or affect substantive rights, may not render the summons defective. *Hershenson v Hershenson* (1962) 205 CA2d 382, 23 CR 185 (copy of summons lacking case number, date of issuance, and name of issuing clerk was not defective). See CCP §412.20 for the requirements for a proper summons. Proper use of the Judicial Council's unlawful detainer summons form should prevent problems caused by defective summons.

NOTE: There are forms (separate from the summons) for proving service of summons and complaint; the landlord must file (with the original summons) either a Proof of Service of Summons (Judicial Council Form POS-010) or a Notice And Acknowledgment of Receipt—Civil (Judicial Council Form POS-015). See CCP §417.10(a).

Amendment or verification of the complaint after service of summons does not necessitate service of a new summons on a defendant over whom the court already has jurisdiction. Only the amended complaint must be served,

and it may be served by mail in the manner provided in CCP §§1010-1020 for service of papers in civil actions. *Cyrus v Haveson* (1976) 65 CA3d 306, 315, 135 CR 246.

A complaint and summons, if it is the first contact the attorney has with the debtor, is exempt from the Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692o) written validation requirement. 15 USC §1692g. See §§8.26A, 13.74.

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/§9.46 2. Form: Summons (Unlawful Detainer) (Judicial Council Form SUM-130)

§9.46 2. Form: Summons (Unlawful Detainer) (Judicial Council Form SUM-130)

SUMMONS
(CITACION JUDICIAL)
UNLAWFUL DETAINER—EVICTION
(RETENCIÓN ILÍCITA DE UN INMUEBLE—DESALOJO)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

You have 5 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. (To calculate the five days, count Saturday and Sunday, but do not count other court holidays. If the last day falls on a Saturday, Sunday, or a court holiday then you have the next court day to file a written response.) A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.

*Tiene 5 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. (Para calcular los cinco días, cuente los sábados y los domingos pero no los otros días feriados de la corte. Si el último día cae en sábado o domingo, o en un día en que la corte esté cerrada, tiene hasta el próximo día de corte para presentar una respuesta por escrito). Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (*www.sucorte.ca.gov*), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.*

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

1. The name and address of the court is:
   (El nombre y dirección de la corte es):

CASE NUMBER:
(Número del caso):

2. The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
   (El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

3. *(Must be answered in all cases)* An **unlawful detainer assistant (Bus. & Prof. Code, §§ 6400–6415)** ☐ did **not** ☐ did for compensation give advice or assistance with this form. *(If plaintiff has received **any** help or advice for pay from an unlawful detainer assistant, complete item 6 on the next page.)*

Date:
(Fecha)

Clerk, by *(Secretario)* _____, Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, *(POS-010)).*

[SEAL]

4. **NOTICE TO THE PERSON SERVED:** You are served
   a. ☐ as an individual defendant.
   b. ☐ as the person sued under the fictitious name of *(specify):*
   c. ☐ as an occupant
   d. ☐ on behalf of *(specify)*:
      under: ☐ CCP 416.10 (corporation)
      ☐ CCP 416.20 (defunct corporation)
      ☐ CCP 416.40 (association or partnership)
      ☐ CCP 415.46 (occupant)
      ☐ CCP 416.60 (minor)
      ☐ CCP 416.70 (conservatee)
      ☐ CCP 416.90 (authorized person)
      ☐ other *(specify):*
5. ☐ by personal delivery on *(date):*

Form Adopted for Mandatory Use
Judicial Council of California
SUM-130 [Rev. July 1, 2009]

CEB Code of Civil Procedure, §§ 412.20, 415.456. 1167
www.courtinfo.ca.gov

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

6. **Unlawful detainer assistant** *(complete if plaintiff has received any help or advice for pay from an unlawful detainer assistant)*:
   a. Assistant's name:
   b. Telephone no.:
   c. Street address, city, and zip:
   d. County of registration:
   e. Registration no.:
   f. Registration expires on *(date)*:

Copies: Original (issued by court clerk and then filed (with reverse completed after service)); one copy for each

person served; office copies.

Comment: The unlawful detainer summons is different from a general summons because it provides for a 5-day response time. Use of the wrong form could result in a motion to quash the service (see §9.45) and would delay the action and prevent prompt entry of default.

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3. Methods of Service

§9.47 a. Personal Delivery (CCP §415.10)

Personal service means actual delivery of a copy of the summons and complaint to the tenant by the person effecting service. Service is considered to be complete at the time of the delivery. CCP §415.10; see *Sternbeck v Buck* (1957) 148 CA2d 829, 307 P2d 970. If the tenant can be served with reasonable diligence, service is not properly made by the process server's leaving copies of the summons and complaint with a member of the household, even if the tenant actually receives them. CCP §415.20(b) (see §9.48); *Sternbeck v Buck, supra*.

Although the concept of personal service means the actual handing of copies of the summons and complaint to the tenant, when the process server and the tenant are within speaking distance of each other and a reasonable person could assume that service of a legal document is being attempted, the tenant cannot avoid service by moving away and refusing to touch the documents. See *Trujillo v Trujillo* (1945) 71 CA2d 257, 162 P2d 640; *In re Ball* (1934) 2 CA2d 578, 38 P2d 411. On personal service generally, see California Civil Procedure Before Trial, chap 17 (4th ed Cal CEB 2004).

A summons may be served by any person who is at least 18 years old and not a party to the action. CCP §414.10. Accordingly, service is defective if the landlord or a minor serves the summons.

Neither substituted service (see §9.48) nor constructive service (see §9.49) can be used unless the process server exercises "reasonable diligence" in attempting to serve the tenant personally. To demonstrate reasonable diligence, the process server must:

- attempt service when the tenant is most likely to be on the premises;
- ask people who might know the whereabouts of the tenant (*e.g.,* neighbors, employers) or at what times the tenant is available; and
- inquire at the local post office whether the tenant has left a forwarding address.

For further discussion of reasonable diligence, see §§9.48-9.49.

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§9.48 b. Substituted Service (CCP §415.20(b))

If the tenant cannot be served personally after exercise of "reasonable diligence," process may be served by the process server's leaving a copy of the summons and complaint at the tenant's residence or place of business, in the presence of a competent member of the household or a person apparently in charge of the business. CCP §415.20(b). Afterwards, the process server must mail copies of the summons and complaint to the tenant at the same address. CCP §415.20(a). When service is effected on a natural person by substituted service, the process server must inform the person actually served of the contents. CCP §415.20(b). Because service is considered to be complete on the tenth day after the copies have been mailed (CCP §415.20(a)-(b)), the answer is due 5 days after that date (see §§10.1, 13.2).

Substituted service may be used only after the landlord has exercised reasonable diligence to have the tenant served personally. Ordinarily, two or three attempts at personal service at a proper place should fully satisfy the reasonable diligence requirement of CCP §415.20. See *Ellard v Conway* (2001) 94 CA4th 540, 114 CR2d 399 (substituted service at private, commercial post office box held proper); *Bein v Brechtel-Jochim Group, Inc.* (1992) 6 CA4th 1387, 8 CR2d 351 (service on residential gate guard considered service on competent member of household, and person apparently in charge, for purposes of CCP §415.20). See also CCP §415.21 (gated community access requirements). Landlords' agents for service should be instructed to document their efforts to effect personal service. When substituted service is used, the agent for service must recite facts showing that service was legally performed. CCP §417.10(a).

Service on a managing agent employed by the party, but not specifically authorized to accept service of summons and complaint and not shown to be in "regular and frequent contact" with the party, was insufficient under CCP §416.90 despite the party's actual receipt of the summons and complaint. *Summers v McClanhan* (2006) 140 CA4th 403, 44 CR3d 338.

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§9.49 c. Posting and Mailing (CCP §415.45)

Under CCP §415.45, the court in which the action is pending may, on application of the plaintiff, order constructive service, by posting the summons on the premises and mailing a copy of the summons and complaint by certified mail to the defendant's last known address. Curiously, CCP §415.45(a) requires that the summons be posted on the premises but does not mention the complaint, and CCP §415.45(b) directs that a copy of both summons and complaint be mailed. To avoid a claim that the tenant has been denied due process, however, the landlord should post and mail copies of both the summons and the complaint. Service is deemed to be complete on the tenth day after posting and mailing. CCP §415.45(c).

Constructive service is authorized if the court finds that the defendant cannot with reasonable diligence be served in any authorized manner other than publication. CCP §415.45(a). The Judicial Council Comment construing the parallel "reasonable diligence" requirement of CCP §415.50 (service by publication) states:

> The term… denotes a thorough, systematic investigation and inquiry conducted in good faith by the party or his agent or attorney. [Citations.] A number of honest attempts to learn defendant's whereabouts or his address by inquiry of relatives, friends, and acquaintances, or of his employer, and by investigation of appropriate city and telephone directories, the voters' register, and the real and personal property index in the assessor's office… are generally sufficient.

Under CCP §415.50(e), the court must not "require that a search be conducted of public databases where access by a registered process server to residential addresses is prohibited by law or by published policy of the agency…" (*e.g.*, Department of Motor Vehicles database search).

For further discussion of reasonable diligence, see §9.47.

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§9.50 d. Certified Mail After Response to Notice of Abandonment

When a landlord has given a tenant a notice of belief of abandonment under CC §1951.3 and the tenant has answered the notice by denying abandonment and providing an address for service of unlawful detainer summons and complaint (see CC §1951.3, discussed in §§8.8-8.13), CCP §415.47 authorizes service by certified mail of the summons in an unlawful detainer action. Service by this method must be accomplished within 60 days after the landlord's receipt of the tenant's notice.

If the tenant's notice denied abandonment but failed to provide an address for service, the summons and complaint may be mailed to the address to which the landlord's notice of belief of abandonment was mailed or to the address of the subject property if the notice of belief of abandonment was personally served on the tenant. CCP §415.47(b). In addition, compliance with CC §1951.3 often requires that the notice of belief of abandonment be mailed to more than one address (see §8.11). Under those circumstances a copy of the summons and complaint should be mailed to each such address, even if the return address on the tenant's responding notice matches only one of the addresses to which the notice of belief of abandonment was sent. Proof of multiple delivery in this way may assist a landlord in opposing a motion to vacate a default judgment.

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/§9.51 4. Occupants Not Named in Complaint: Prejudgment Claim of Right to Possession

§9.51 4. Occupants Not Named in Complaint: Prejudgment Claim of Right to Possession

Occupants at the premises who are not named in the complaint may be brought into an unlawful detainer action whether or not they are ultimately identified. They are served with the summons and complaint under a procedure that in effect allows the landlord to elect the process of a prejudgment claim of right to possession by such occupants. See CCP §415.46. This procedure should be used whenever a landlord wants to prevent postjudgment claims of right to possession under CCP §1174.3 from delaying prompt enforcement of a judgment for possession. See §§13.70-13.73. Only a marshal, sheriff, or registered process server may serve process on unnamed occupants using this procedure. CCP §415.46(b).

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/§9.52 a. Investigating for Occupants Unnamed in Complaint

§9.52 a. Investigating for Occupants Unnamed in Complaint

When serving an unlawful detainer summons and complaint on a tenant or subtenant, the process server must make a reasonably diligent effort to ascertain whether there are other adult occupants of the premises who are not named in the summons and complaint by inquiring of the persons being personally served, or any person of suitable age and discretion who appears to reside at the premises. CCP §415.46(c).

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§9.53 b. Serving Unnamed Occupants

An unnamed occupant whose identity is disclosed and who is present at the premises must be personally served with a prejudgment claim of right to possession form, attached to a copy of the summons and complaint. See CCP §415.46(c). If personal service cannot be made at the time the occupant's identity is ascertained by the process server, service is made by (1) leaving the prejudgment claim form, attached to the summons and complaint and addressed to the occupant, with a person of suitable age and discretion at the premises, (2) affixing copies of the same documents on the premises, and (3) sending copies of the same documents addressed to that occupant by first class mail. CCP §415.46(c).

If no unnamed occupant is disclosed, or if substituted service is made on the known tenant or any known subtenant, service of a prejudgment claim of right to possession for all other persons who may claim to occupy the premises may be made by (1) leaving the prejudgment claim form, attached to the summons and complaint, at the same time service is made on the tenant or any subtenant, (2) affixing copies of the same documents on the premises, and (3) sending copies of the same documents, addressed to "all occupants in care of the named tenant" to the premises by first class mail. The process server must write in the date of service on the claim form, but omitting the date will not invalidate the claim. CCP §415.46(c). See §9.55 for Judicial Council form.

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§9.54 c. Filing Prejudgment Claim: 10-day Limit

When the prejudgment claim of right to possession procedure is implemented in accordance with the service provisions of CCP §415.46, no occupant of the premises, whether named in the judgment for possession or not, may object to the enforcement of the judgment as allowed in CCP §1174.3 (postjudgment claim of right to possession; see §§13.70-13.73). CCP §715.020(d). Instead, an occupant served with a prejudgment claim of right to possession must file a claim with the court within 10 days after the date of service. CCP §§415.46(f), 1174.25(a).

At the time of filing the prejudgment claim of right to possession, the claimant is added as a defendant in the action for unlawful detainer and the court clerk notifies the plaintiff. CCP §1174.25(b).

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Source: Real Property/California Landlord-Tenant Practice/9 Unlawful Detainer: Preparing and Filing the Action/§9.55 5. Form: Prejudgment Claim of Right to Possession (Judicial Council Form CP10.5)

§9.55 5. Form: Prejudgment Claim of Right to Possession (Judicial Council Form CP10.5)

NOTICE: EVERYONE WHO LIVES IN THIS RENTAL UNIT MAY BE EVICTED BY COURT ORDER. READ THIS FORM IF YOU LIVE HERE AND IF YOUR NAME IS NOT ON THE ATTACHED SUMMONS AND COMPLAINT.

1. If you live here and you do not complete and submit this form within 10 days of the date of service shown on this form, you will be evicted without further hearing by the court along with the persons named in the Summons and Complaint.
2. If you file this form, your claim will be determined in the eviction action against the persons named in the Complaint.
3. If you do not file this form, you will be evicted without further hearing.

CLAIMANT OR CLAIMANT'S ATTORNEY *(Name and Address)*: TELEPHONE NO.:	***FOR COURT USE ONLY***
ATTORNEY FOR *(Name)*:	
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	
PREJUDGMENT CLAIM OF RIGHT TO POSSESSION	CASE NUMBER:

Complete this form only if ALL of these statements are true:

1. **You are NOT named in the accompanying Summons and Complaint.**
2. **You occupied the premises on or before the date the unlawful detainer (eviction) Complaint was filed.**
3. **You still occupy the premises.**

(To be completed by the process server)

DATE OF SERVICE:

(Date that this form is served or delivered, and posted, and mailed by the officer or process server)

I DECLARE THE FOLLOWING UNDER PENALTY OF PERJURY:

1. My name is *(specify)*:
2. I reside at *(street address, unit No., city and ZIP code)*:
3. The address of "the premises" subject to this claim is *(address)*:
4. On *(insert date)*: _____, the landlord or the landlord's authorized agent filed a complaint to recover possession of the premises. *(This date is the court filing date on the accompanying Summons and Complaint.)*
5. I occupied the premises on the date the complaint was filed *(the date in item 4)*. I have continued to occupy the premises ever since.
6. I was at least 18 years of age on the date the complaint was filed *(the date in item 4)*.
7. I claim a right to possession of the premises because I occupied the premises on the date the complaint was filed *(the date in item 4)*.
8. I was not named in the Summons and Complaint.
9. I understand that if I make this claim of right to possession, I will be added as a defendant to the unlawful detainer (eviction) action.
10. *(Filing fee)* I understand that I must go to the court and pay a filing fee of $ or file with the court the form "Application for Waiver of Court Fees and Costs." I understand that if I don't pay the filing fee or file with the court the form for waiver of court fees within 10 days from the date of service on this form (excluding court holidays), I will not be entitled to make a claim of right to possession.

(Continued on reverse)

Print

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

NOTICE: If you fail to file this claim, you will be evicted without further hearing.

11. *(Response required within five days after you file this form)* I understand that I will have *five days* (excluding court holidays) to file a response to the Summons and Complaint after I file this Prejudgment Claim of Right to Possession form.

12. **Rental agreement.** I have *(check all that apply to you)*:
    a. ☐ an oral rental agreement with the landlord.
    b. ☐ a written rental agreement with the landlord.
    c. ☐ an oral rental agreement with a person other than the landlord.
    d. ☐ a written rental agreement with a person other than the landlord.
    e. ☐ other *(explain)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

WARNING: Perjury is a felony punishable by imprisonment in the state prison.

Date:

. . . . . ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF CLAIMANT)

NOTICE: If you file this claim of right to possession, the unlawful detainer (eviction) action against you will be determined at trial. At trial, you may be found liable for rent, costs, and, in some cases, treble damages.

—NOTICE TO OCCUPANTS—

YOU MUST ACT AT ONCE if all the following are true:

1. **You are NOT named in the accompanying Summons and Complaint.**
2. **You occupied the premises on or before the date the unlawful detainer (eviction) complaint was filed.** *(The date is the court filing date on the accompanying Summons and Complaint.)*
3. **You still occupy the premises.**

(Where to file this form) You can complete and SUBMIT THIS CLAIM FORM WITHIN 10 DAYS from the date of service (on the reverse of this form) at the court where the unlawful detainer (eviction) complaint was filed.

(What will happen if you do not file this form) If you do not complete and submit this form (and pay a filing fee or file the form for proceeding in forma pauperis if you cannot pay the fee), YOU WILL BE EVICTED.

After this form is properly filed, you will be added as a defendant in the unlawful detainer (eviction) action and your right to occupy the premises will be decided by the court. *If you do not file this claim, you will be evicted without a hearing.*

Copies: Original (served in blank by plaintiff) to be filed with court (after occupant completes information); office

copies.

Comment: A prejudgment claim of right to possession form (prescribed by CCP §415.46(f)) must be served on occupants by the plaintiff, and then filed with the court by the occupant making the claim within 10 days of service. See §§9.53-9.54.

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§9.56 C. Writ of Immediate Possession

Under CCP §1166a, a landlord who files an unlawful detainer complaint may at the same time file a motion for a writ of immediate possession. The writ may be granted if the court, after a hearing, finds that the tenant:

- resides out of the state,
- has left the state,
- cannot be found within the state after due diligence, or
- has concealed himself or herself to avoid service of process.

WARNING: The wording of this statute indicates that the writ may be issued, for example, if the defendant resides out of state or has left California, regardless of whether the defendant was actually served with the summons and complaint. Counsel for the landlord may wish to restrict this procedure to situations in which the landlord cannot effectively achieve service of the summons and complaint because of one of the four grounds enumerated in the statute.

The motion must state that the writ applies to all tenants, subtenants, named claimants, and any other occupants of the premises. CCP §1166a(a). Presumably, the writ must also indicate the same. The defendants must be served with written notice of the motion as provided in CCP §1011. CCP §1166a(b).

At the hearing on the motion, the landlord must prove the existence of a ground for issuance of the writ by affidavits or oral testimony, and the tenant may appear and contest this evidence. CCP §1166a(a)-(b). Before the writ will be issued, the landlord must file an undertaking (in a sum fixed by the court) to cover the tenant's damages from the forced move if the landlord ultimately loses the action. CCP §1166a(c). For discussion of procedures under CCP §1166a, see Clark, *Landlord-Tenant: Possession Before Trial-A Still Viable Procedure*, 8 Bev Hills BJ 27 (Jan.-Feb. 1974).

Applications for writs of immediate possession are not often filed in current unlawful detainer practice because the narrow grounds on which the writs may be issued rarely arise. This was not always the case. Before 1970, a writ could be obtained on two additional grounds under an earlier version of CCP §1166a: (1) if the tenant were insolvent; or (2) if the tenant had no property subject to execution and sufficient to satisfy the damages sought by the plaintiff. Landlords used these grounds to obtain possession when they anticipated a protracted legal battle to recover possession in the main action. In *Mihans v Municipal Court* (1970) 7 CA3d 479, 87 CR 17, however, the grounds were held to violate due process and equal protection. The legislature amended CCP §1166a shortly after the *Mihans* decision to delete them.

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10

Unlawful Detainer: Responsive Pleadings

Sonya Bekoff Molho

I. INTRODUCTION
- A. Shortened (5-Day) Response Time §10.1
- B. Local Rules Preempted §10.1A
- C. Relief for Underpayment of Filing Fee §10.1B

II. ATTORNEY ETHICS
- A. Delaying Tactics §10.2
- B. Group Representation §10.3
- C. Fee Agreement and Limited Scope Representation §10.3A
- D. Paying Rent for the Tenant §10.4

§§10.5-10.12 have been deleted

III. COURT FEES; IN FORMA PAUPERIS PROCEDURES (OPERATIVE JULY 1, 2009) §10.13

§§10.14-10.17 have been deleted

IV. MOTION TO QUASH
- A. Statutory Basis and Tactical Considerations §10.18
- B. Grounds
  - 1. Defective Service of Summons §10.19
  - 2. Defective Complaint
    - a. No Cause of Action Stated in Unlawful Detainer
      - (1) Judicial Reasoning §10.20
      - (2) Compare: Demurrer §10.21
    - b. Unauthorized Relief Sought in Unlawful Detainer
      - (1) Judicial Reasoning §10.22
      - (2) Compare: Motion to Strike §10.23
- C. Procedure
  - 1. Shortened Hearing Notice §10.24
  - 2. Supporting Documents §10.25
  - 3. Order After Hearing §10.26
  - 4. Review by Writ of Mandate §10.27
- D. Form: Notice of Motion to Quash Service of Summons §10.28
- E. Form: Memorandum Supporting Motion to Quash Service of Summons (Improper Service Case) §10.28A
- F. Form: Declaration Supporting Motion to Quash Service of Summons §10.28B

V. DEMURRER
- A. Legal Basis and Grounds §10.29
- B. Practical Considerations and Tactics §10.30
- C. Checklist: Demurrable Defects in Complaint §10.31
- D. Procedure
  - 1. Scheduling the Hearing §10.32
  - 2. Supporting Documents §10.33
  - 3. Order After Hearing
    - a. Demurrer Overruled §10.34
    - b. Demurrer Sustained §10.35
- E. Form: Demurrer to Complaint §10.36
- F. Form: Memorandum Supporting Demurrer (Defective 3-Day Notice Case) §10.36A
- G. Frivolous Demurrers §10.37

VI. MOTION TO STRIKE

A. Legal Basis and Tactical Considerations
1. Under CCP §§435-437 (Irrelevant, False, or Improper Matter) §10.38
2. Under CCP §425.16 (Anti-SLAPP Motion) §10.38A
B. Grounds §10.39
1. Improper Request for Damages §10.40
2. Improper Request for Back Rent §10.41
3. Lack of Allegations for Statutory Damages §10.42
4. No Attorney Fees in Rental Agreement §10.43
5. Irrelevant, False, or Improper Matter §10.44
6. Unverified Complaint §10.45
C. Procedure §10.46
D. Form: Notice of Motion to Strike §10.47
E. Form: Memorandum Supporting Motion to Strike Allegations of Improper Damages §10.47A

VII. EXTENSION OF TIME TO PLEAD
A. Legal Basis §10.48
B. Form: Application for Order Extending Time to Respond; Order §10.49

VIII. ANSWER TO COMPLAINT
A. Legal Basis §10.50
B. Form: Answer—Unlawful Detainer (Judicial Council Form UD-105) §10.51
C. Denials §10.52
D. Principal and Affirmative Defenses §10.53
1. Title Dispute, Improper Foreclosure, or Improper Notice Following Foreclosure §10.54
2. Landlord Fraud §10.55
3. Breach of Covenant of Quiet Enjoyment §10.56
4. Setoff for Preexisting Debt §10.57
5. Equitable Defenses §10.58
6. Violation of Rent Control Ordinance §10.59
7. Waiver or Estoppel §10.60
8. Breach of Express Promise to Repair §10.61
9. Lack of Certificate of Occupancy §10.62
10. Rental Agreement Not Translated Into Required Language §10.63
11. Breach of Implied Warranty of Habitability §10.64
12. Retaliatory Eviction §10.65
13. Lack of Good Cause to Evict From Government Housing §10.66
14. Discriminatory Eviction
a. Unruh Civil Rights Act §10.67
b. Other Fair Housing Acts and Protections §10.68
15. Notice Served More Than 1 Year After Rent Due §10.69
16. Fair Debt Collection Practices Act §10.69A
E. Verification of Answer §10.70
F. Amendment to Answer §10.71

IX. AFFIRMATIVE RELIEF §10.72
A. Right to Cross-Complain Limited §10.73
B. Exception: If Tenant Has Vacated Premises §10.74
C. Failure to Object to Cross-Complaint §10.75
D. Procedure §10.76

X. CHECKLIST: COMMON DEFECTS IN UNLAWFUL DETAINER COMPLAINTS §10.77

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I. INTRODUCTION

§10.1 A. Shortened (5-Day) Response Time

This chapter presents the alternatives available to a tenant in making the initial response to an unlawful detainer action. Unless an order or stipulation extending the time to plead is issued (see §10.48), or an occupant unnamed in the complaint responds to service by means of a prejudgment claim of right to possession (see §9.54), a defendant has only 5 days after service in which to respond to an unlawful detainer action. CCP §§1167, 1167.3, 1170. On the face of the unlawful detainer summons, information is provided that a response must be filed within 5 calendar days after service of the summons and complaint, that weekends count in the 5-day period, but that court holidays do not count. See §9.46. While trial courts are closed the third Wednesday of each month due to budget issues, the Wednesdays on which the courts are closed are treated as holidays and should not be counted as part of the 5-day period. See Govt C §68106. In addition to (or in lieu of) an answer (see §§10.50-10.71), a tenant may have available a motion to quash (see §§10.18-10.28), a demurrer (see §§10.29-10.37), a motion to strike (see §§10.38-10.47), a cross-complaint (see §§10.72-10.76), or a combination of these responses. A tenant may move to quash, demur, move to strike, and answer simultaneously without making a general appearance. See CCP §418.10(e), discussed in §10.18.

The chapter begins with a discussion of ethical considerations pertaining to the representation of tenants (see §§10.2-10.4), and waiver of court fees for indigent parties who meet the statutory criteria for appearing in the action in forma pauperis (see §§10.5-10.12). At the end of the chapter is a checklist of common defects found in unlawful detainer complaints with corresponding alternatives for challenging the defects (see §10.77; see also §10.31).

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§10.1A B. Local Rules Preempted

Much of this chapter covers motion procedures that may be used by a tenant with or in lieu of an answer to the complaint. Local rules concerning pleadings, pretrial law and motion proceedings, ex parte applications, and other pretrial matters are preempted by the state rules. Cal Rules of Ct 3.20(a). Certain exceptions are listed in Cal Rules of Ct 3.20(b). See also Cal Rules of Ct 2.100 (state preemption of form and format rules for papers presented for filing in the trial courts). California Rules of Court 1.200 requires that citations to cases and other authorities in all filed documents either be in the style established by the California Style Manual or The Bluebook: A Uniform System of Citation. The party filing the document may choose either style but must be consistent throughout the document. An important change to the state rules allows for shorter notice on ex parte applications in unlawful detainer actions. See Cal Rules of Ct 3.1203(b).

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§10.1B C. Relief for Underpayment of Filing Fee

When a paper is filed with the court and the check for the filing fee is later returned without payment by the bank, the court clerk shall mail notice to the party, and the party will have 20 days from the mailing date to pay the fee by cash, certified check, or other means specified by the court, plus an administrative charge for processing the returned check. Similarly, if a filing is accompanied by an amount less than the required fee, the clerk will accept the filing and give the same type of 20-day notice, but will not issue a summons until fully paid. If the filing person is not a party or his or her attorney (*e.g.,* a messenger), the party *or* that party's attorney must also be notified. CCP §§411.20-411.21. Under CCP §§411.20(e), 411.21(f), "[i]f any trial or other hearing is scheduled to be heard prior to the expiration of the 20-day period … the fee shall be paid prior to the trial or hearing. Failure of the party to pay the fee… shall cause the court to void the filing and proceed as if it had not been filed."

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II. ATTORNEY ETHICS

§10.2 A. Delaying Tactics

California attorneys are bound by the Rules of Professional Conduct of the State Bar of California, the most recent version of which was promulgated May 27, 1989. Bus & P C §6077. The rules are also found in the California Rules of Court. The conduct of California attorneys is governed by these rules, and not by the American Bar Association's Model Rules of Professional Conduct, although the two sets of rules are similar in many respects. *People v Ballard* (1980) 104 CA3d 757, 164 CR 81. Counsel should note that an attorney who violates professional rules risks more than state bar disciplinary action. Under CCP §128.7, by presenting any pleading, petition, written notice of motion, or other similar paper to the court, an attorney is certifying that a variety of conditions relating to the proper motive and good faith of the document are met, and may be subject to sanctions if any of the conditions is not met.

California Rules of Prof Cond 3-200 prohibits the filing of an action or assertion of a defense solely to harass or delay the other party in obtaining his or her legal rights. Because the essence of an unlawful detainer action and the summary nature of the proceeding is speed in restoring possession to the landlord (see §9.5), Rule 3-200 may be violated if the tenant's attorney asserts technicalities merely for purposes of delay. An attorney who files an answer in the form of a general denial, knowing that the defendant has no defense, might be considered to have violated Rule 3-200. Assertion of a defense could constitute delay in an unlawful detainer action, but it seems that Rule 3-200 was not intended to apply to assertion of a defense that merely requires the plaintiff to prove his or her case.

In *Snyder v State Bar* (1976) 18 C3d 286, 133 CR 864, the supreme court upheld an order disbarring an attorney for conduct in an unlawful detainer action. The attorney, in violation of a court order, advised his client not to attend a deposition and in bad faith filed an involuntary bankruptcy petition against the landlord to delay the eviction, falsely alleging that the tenant was a creditor of the landlord. See also *In re Bithoney* (1st Cir 1973) 486 F2d 319 (discipline imposed on attorney for repeated filing of frivolous immigration review petitions); *Gullo v Hirst* (4th Cir 1964) 332 F2d 178, 179 (monetary sanction and discipline proper for attorney's "recklessly invoking court action in frivolous causes or by foot dragging and delaying in order to deny or postpone the enjoyment of unquestioned rights").

Although counsel must always be sure that a given procedure is merited by the law or facts of the case, a mere finding that a position advanced was frivolous should not be the sole cause for disciplining an attorney. *In re Bithoney* (1st Cir 1973) 486 F2d 319, 322. The court in *Bithoney* reasoned that such discipline might inhibit the bar from vigorous advocacy of clients' positions, and thus restrict meaningful access to the court. Sensitivity to these concerns requires that courts indulge every presumption in favor of the attorney who presents or defends a position that is found to lack merit. There are limits, however, to the exercise of advocacy. Thus, the court stated that under former ABA Code Prof Resp EC-1, a lawyer has a duty to represent his or her client zealously, but only within legal bounds.

A tenant's attorney who repeatedly files frivolous motions or asserts defenses without any basis in law or fact, solely for the purpose of delay, clearly risks liability as well as disciplinary action. See CCP §128.7(b), under which an attorney, by presenting any pleading, petition, written notice of motion, or other similar paper to the court, is certifying that a variety of conditions relating to the proper motive and good faith of the document are met, and may be subject to sanctions if any of the conditions is not met.

Much of this chapter is devoted to discussion of procedures available to tenant's defense, use of which will often result in some delay in the prosecution of an unlawful detainer action. Discussion of such procedures should not be construed as condoning their abuse. An attorney should not, however, be dissuaded from filing motions or demurrers to clarify the issues or defeat the landlord's case, or from pursuing complete discovery in a case that may go to trial. Failure to pursue all possibilities of prevailing on procedural matters or the merits might expose the attorney to a claim of malpractice.

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§10.3 B. Group Representation

Representing tenants as a group may be more efficient and effective than representing each as an individual under certain circumstances. For example, an attorney may be retained by a tenant complaining of defective conditions on the premises and discover that other tenants in the building have the same problem. Courts have indicated that prosecuting an action on behalf of a class of tenants may be appropriate when they share a common cause of action against the landlord, and when the respective causes of action have common questions of fact and law. See *Little v Sanchez* (1985) 166 CA3d 501, 213 CR 297 (class action permissible in municipal court); *Rich v Schwab* (1984) 162 CA3d 739, 209 CR 417. See also *Granberry v Islay Invs.* (1995) 9 C4th 738, 38 CR2d 650.

When, if ever, may the attorney suggest the advisability of a collective response to the underlying problems and his or her availability to provide legal representation to other interested tenants? On the one hand, Cal Rules of Prof Cond 1-400 prohibits counsel from soliciting business. On the other hand, group representation appears to be contemplated by Cal Rules of Prof Cond 1-600. See generally Schoor, *Class Actions: The Right to Solicit*, 16 Santa Clara L Rev 215 (1976).

Thus, if a collective response reasonably and in good faith appears to be in the client's best interests, it does not appear improper for the attorney to have the client make the attorney's advice and availability known to the client's neighbors. An attorney invited to the building by the client may wish to present a short discussion on the legal points and answer questions so that other tenants in the group may make an informed decision as to whether to join in any concerted action. Group representation, however, appears to violate rules of professional conduct when the attorney has no reasonable expectation that it would favorably affect the original client's legal position.

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.3A C. Fee Agreement and Limited Scope Representation

§10.3A C. Fee Agreement and Limited Scope Representation

Attorneys representing tenants should always use written retainer agreements (see §4.2) regardless of whether the attorney agrees to provide full services or limited scope representation. Limited scope representation (sometimes called "unbundling") is a "relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks the attorney will perform for the person." Cal Rules of Ct 3.35(a). The State Bar of California has created guidelines to assist attorneys in limited scope representation. For a full discussion and a useful checklist, see §§5.4A-5.4B.

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§10.4 D. Paying Rent for the Tenant

In an unlawful detainer action for nonpayment of rent, in which breach of the implied warranty of habitably has been raised as an affirmative defense, a tenant who has paid no rent whatsoever may nevertheless become the "prevailing party" by tendering rent within 5 days following the decision of the court (see §13.36). When there is an attorney fee provision in the rental agreement, and the tenant is of limited means and can neither post the rent nor pay the fees requested by the attorney, there is a strong motivation for the tenant's attorney to post the back rent in order to obtain an attorney fee award against the landlord and collect accordingly. California Rules of Professional Conduct 4-210, which prohibits an attorney from paying personal expenses for a client, forbids doing so; rent is obviously a personal expense, and such funds cannot be advanced on a tenant's behalf by an attorney.

NOTE: A landlord who brings an unlawful detainer action based on the tenant's nonpayment of rent, and who is liable for a violation of the habitability standards in CC §1942.4, shall be liable for reasonable attorney fees and costs of the suit in an amount to be fixed by the court. CCP §1174.21. See §§3.15A, 3.41.

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§§10.5-10.12 [Deleted]

§§10.5-10.12 [Deleted]

Previous procedures for court fee waivers for indigent parties were repealed; current procedures are summarized in §10.13 and detailed in California Eviction Defense Manual, chap 10 (2d ed Cal CEB 1993).

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.13 III. COURT FEES; IN FORMA PAUPERIS PROCEDURES (OPERATIVE JULY 1, 2009)

§10.13 III. COURT FEES; IN FORMA PAUPERIS PROCEDURES (OPERATIVE JULY 1, 2009)

Effective July 1, 2009, Govt C §§68630-68641 replaced the procedures in former Govt C §68511.3, which were repealed on the same date. The Judicial Council adopted rules that govern fee waivers, also effective July 1, 2009. See Cal Rules of Ct 3.50-3.58 (trial courts), 8.26, 8.818 (appellate courts). Legislative findings and declarations supporting the standards for waiver of court costs and fees are stated in Govt C §68630. Under Govt C §68632, the class of eligible parties for waiver of court fees and costs was expanded and includes the following:

- Parties receiving benefits under:
- Supplemental Security Income (SSI);
- State Supplemental Payments (SSP);
- California Work Opportunity and Responsibility to Kids Act (CalWORKS) program;
- Tribal Temporary Assistance for Needy Families (Tribal TANF) grant program;
- Federal food stamp or California food assistance program;
- County relief, general relief, or general assistance;
- Cash Assistance Program for Aged, Blind, and Disabled Legal Immigrants (CAPI);
- In-Home Supportive Services (IHSS); or
- Medi-California program.
- Parties whose gross monthly income is 125 percent or less of the current monthly poverty threshold.
- Parties who are unable to proceed without using money that is needed to provide for the common necessaries of life.

See Govt C §68632(c) for the required showing of indigency in the last category for the court to consider in determining whether to allow the party to proceed in forma pauperis. The required information and documentation for obtaining the fee and cost waiver was also expanded. See Govt C §68633.

The court clerk must accept for filing all applications for an initial fee waiver. If an applicant submits an application without providing all required information, the clerk may request that the applicant supply the omitted information, but must not refuse to file the application, or refuse to file any pleadings on the basis that the fee has not been paid. Govt C §68634(b).

The court must grant an initial fee waiver at any stage of the proceedings "at both the appellate and trial court levels if an applicant meets the standards of eligibility and application requirements." An initial fee waiver "excuses the applicant from paying fees for the first pleading or other paper, and other court fees and costs as specified in rules adopted by the Judicial Council," unless the court orders the applicant to make partial payments. Govt C §68631.

Under Govt C §68634(e), on reviewing the initial fee waiver application, the court must do one of the following:

- Grant the application if the information establishes that the applicant "meets the criteria for eligibility and application requirements" in Govt C §§68632-68633.
- Deny the application if it is incomplete; if the application is denied on that basis, the applicant must be given notice of the specific reason for denial and an opportunity to submit a revised application.
- Deny the application if the information "conclusively establishes that the applicant is not eligible for an initial fee waiver." If the application is denied on that basis, the applicant must be given notice of the specific reason for denial and an opportunity to request a hearing, at which the applicant may submit additional information.
- Schedule an eligibility hearing if the court has good reason to doubt the truthfulness truth of factual statements in the application. The applicant must be given 10 days' notice of the hearing and the specific reason why the court doubts the truthfulness of the statements.
- Schedule an eligibility hearing if the information does not establish that the applicant meets the criteria for eligibility and application requirements, but the information does not conclusively establish that the applicant is not eligible for an initial fee waiver on the bases requested. The applicant must be given 10 days' notice and the specific reason why the court did not grant the application.

Fee waivers in the appellate courts are governed by Govt C §68634.5. Special procedures for prisoners are in Govt C §68635. Procedures governing the continuation of the fee waiver if the applicant's financial condition or eligibility changes after the court has granted an initial fee waiver are in Govt C §68636.

The fee waiver law provides for reimbursement to the court of waived court fees and costs when the party who obtained a fee waiver subsequently collects money as part of a satisfaction of judgment or settlement in Govt C §§68637-68638. A special exception applies in unlawful detainer actions. See Govt C §68637(b)(3)(A). An initial fee waiver expires 60 days after the judgment, dismissal, or other final disposition of the case. Govt C §68639. The Judicial Council may adopt a rule allowing parties who are not eligible for a fee waiver to pay court fees in installments. Govt C §68640.

In an appropriate case, the court may decline to award attorney fees against an indigent party. See *Garcia v Santana* (2009) 174 CA4th 464, 94 CR3d 299.

For detailed discussion of fee waiver procedures, see California Eviction Defense Manual, chap 10 (2d ed Cal CEB 1993).

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§§10.14-10.17 [Deleted]

Judicial Council fee waiver forms previously published here are available from any courthouse, on the internet, and in appendixes of California Eviction Defense Manual (2d ed Cal CEB 1993). On conducting legal research on the internet, including where to find Judicial Council forms, legislation, rules of court (both statewide and local), jury instructions, court fees, law libraries, and other resources, see The Cybersleuth's Guide to the Internet: Conducting Effective Investigation and Legal Research on the Web (IFL Press 2006).

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IV. MOTION TO QUASH

§10.18 A. Statutory Basis and Tactical Considerations

If any aspect of the summons or the manner in which it was served is defective, the tenant's attorney may file a motion to quash service of summons based on the court's lack of jurisdiction over the tenant. CCP §418.10(a)(1). A notice of motion to quash must be served and filed within the 5-day period to answer after the alleged service of the summons (see §10.1), unless the court allows an extension of time. See CCP §418.10(a). The landlord cannot take the tenant's default if a motion to quash has been filed. CCP §585(b).

In challenging service of process, the tenant's attorney must be careful to designate on the pleadings that the attorney is making a "special appearance," which does not by itself subject the tenant to the court's jurisdiction. A party's "general appearance" in a case is considered to be equivalent to personal service of summons, confers personal jurisdiction over the party, and waives its right to contest jurisdiction. See CCP §§410.50(a), 1014. A special appearance is made only if the tenant files and serves a motion to quash without taking other steps inconsistent with a special appearance (*e.g.,* entering stipulations (other than a stipulation to extend the time to plead), moving for a trial continuance, or moving to disqualify a judge). Filing an ex parte application for an order setting a deposition constitutes a general appearance and, therefore, waives the right to challenge personal jurisdiction. *Factor Health Mgmt. v Superior Court* (2005) 132 CA4th 246, 33 CR3d 599. See CCP §1014.

Under CCP §418.10(d)-(e), however, the tenant may move to vacate a default, request an extension of time to plead, or when it files a motion to quash, simultaneously answer, demur, or move to strike the complaint without making a general appearance. If the court denies the motion to quash, the tenant's general appearance is effective on the date the order denying the motion is entered. CCP §418.10(e)(1)-(2). Failure to make a motion to quash under §418.10 at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of personal jurisdiction, inadequacy of process, or inadequacy of service of process. CCP §418.10(e)(3).

Filing a motion to quash extends the tenant's time to plead until 5 days after service of an order denying the motion; the court may extend this time by an additional 15 days for good cause. CCP §1167.4(b). When a motion to quash is granted, the tenant has 5 days to respond after a new or amended summons and complaint are served. Thus, a motion to quash can delay an unlawful detainer action considerably.

PRACTICE TIP: The tenant's attorney should make a motion to quash only when justified, and not merely for purposes of delay. Cal Rules of Prof Cond 3-200. Landlord counsel should monitor proceedings under CCP §418.10 to discover delaying tactics, *e.g.*, commencing writ proceedings and then taking no action, or setting hearings on extremely long notice.

Tenant advocates have attacked CCP §1167's 5-days-to-answer requirement by means of motions to quash, contending that it violates the due process and equal protection clauses of the U.S. and California Constitutions. Such challenges have been rejected by the courts. In *Lindsey v Normet* (1972) 405 US 56, 31 L Ed 2d 36, 92 S Ct 862, the Supreme Court upheld the constitutionality of an Oregon statute requiring the case to go to trial within 6 days after service of the summons. Citing the *Lindsey* decision as dispositive, the court in *Deal v Municipal Court* (1984) 157 CA3d 991, 997, 204 CR 79, held that California's requirement that the tenant file a responsive pleading within 5 days of service violates neither the due process nor equal protection clause because:

- The tenant may use a simplified answer form; and
- The court may extend the time to answer for good cause.

For further discussion, see California Eviction Defense Manual §11.33 (2d ed Cal CEB 1993).

PRACTICE TIP: If the tenant only contacts the practitioner as the 5-day time to plead is about to run, the practitioner can prepare a simple answer, sometimes just a general denial of all allegations, and file it to prevent a default. The tenant may then file an amended answer within 10 days and include appropriate defenses. See CCP

§430.40(b), and discussion in §10.71.

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B. Grounds

§10.19 1. Defective Service of Summons

Personal service means actual delivery of a copy of the summons and complaint to the defendant by the process server. A summons may be served by "any person who is at least 18 years of age and not a party to the action." CCP §414.10. Consequently, service of process is defective if made by the landlord or a minor.

Service is considered to be complete at the time of delivery. See *Sternbeck v Buck* (1957) 148 CA2d 829, 832, 307 P2d 970. In *Sternbeck*, service of summons did not satisfy the requirements of personal service when process was served on the defendant's wife while he was out of view, some 100 feet away. After the wife promised the process server that she would deliver the summons to her husband, she immediately did so. Even though the defendant had actual knowledge of the summons and its contents, the court held service to be defective because the statute was not strictly obeyed. 148 CA2d at 833.

The court's language in *Sternbeck* emphasized that strict compliance with the technical requirements of service of process is necessary. The court stated that, unless the technical requirements are strictly followed, "the court has no jurisdiction whatsoever over the defendant, its judgment is a complete nullity and should, after proper proceedings, be set aside." 148 CA2d at 834. The court explained that the legislature, and not the courts, has responsibility for liberalizing the procedures of service of process (148 CA2d at 834):

> Merely because an action sounds in equity, it does not justify the court in rewriting the code sections relating to personal jurisdiction by proclaiming that "substituted service" is just as good as "personal service". … If such reasoning were sound, service by mail would similarly suffice where the defendant actually opened the envelope and received the documents.

See *Lettenmaier v Lettenmaier* (1962) 203 CA2d 837, 22 CR 156. See also *Waller v Weston* (1899) 125 C 201, 203, 57 P 892. If service is made by mail with a notice and acknowledgment of receipt under CCP §415.30, the summons is deemed served on the date that written acknowledgment of receipt is executed, not on the date the documents are mailed.

When the affidavit of proof of service (required by CCP §417.10) states that service was made by personal delivery, a motion to quash should be granted if the process server did not actually hand the summons and complaint to the defendant. When the process server and the defendant are within speaking distance of each other, however, and a reasonable person could assume that service of a legal document is being attempted, the defendant cannot avoid service by moving away and refusing to touch the documents. See *Trujillo v Trujillo* (1945) 71 CA2d 257, 162 P2d 640 (defendant remained inside locked car and refused to open door); *In re Ball* (1934) 2 CA2d 578, 38 P2d 411.

As with an attack on jurisdiction grounded on defective personal service, a defendant served with process through another authorized method of service may use the motion to quash if the method did not strictly comply with statutory requirements. Such an attack might arise if the landlord did not use "reasonable diligence" to effect personal service before using substituted service (CCP §415.20; see §9.48) or constructive service (CCP §415.45; see §9.49).

PRACTICE TIP: Defense counsel will generally know after an initial interview whether a motion to quash service based on defective service might be made, and could raise the possibility of waiving the motion in exchange for a longer time in which to plead. The landlord's attorney may wish to bargain with defense counsel over the length of an extension to answer, *i.e.,* to vary the length of time based on representations of what kind of response might be made.

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2. Defective Complaint

a. No Cause of Action Stated in Unlawful Detainer

§10.20 (1) Judicial Reasoning

Service of a complaint accompanied by the 5-day summons expressly reserved for unlawful detainer (CCP §1167) may be challenged by a motion to quash if the complaint does not state a cause of action for unlawful detainer. *Smith v Municipal Court* (1988) 202 CA3d 685, 688, 245 CR 300; *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 1036, 194 CR 685 (complaint failed to allege service of proper 3-day notice to perform or quit as required by CCP §1161(3)). A denial of a motion to quash on this ground is reviewable by a writ of mandate. 146 CA3d at 1035. See §10.27.

Because strict compliance with the specifically prescribed notice conditions is a condition precedent to bringing an unlawful detainer, lack of compliance with the jurisdictional prerequisites is properly tested by a motion to quash. In *Parsons v Superior Court* (2007) 149 CA4th Supp 1, 58 CR3d 48, *e.g*., the court upheld a motion to quash which challenged the use of a 30-day notice to terminate a houseboat tenancy when a 60-day notice is required by CC §800.70. The court held that a motion to quash is the only method to test whether the complaint states a cause of action for unlawful detainer when the pleading defect affects personal jurisdiction.

The same reasoning in *Parsons* and *Delta Imports* applies by analogy to an unlawful detainer action in a rent control jurisdiction if the notice attached to the complaint fails to comply with requirements of the rent control law (*e.g.,* fails to state the "just cause" basis of the eviction, usually with a required recitation of specific facts). Following the logic of the *Delta Imports* decision even further means that a complaint failing to allege any element essential to an unlawful detainer action is vulnerable to a motion to quash. These conclusions follow from the principle that unlawful detainer, as a summary remedy, is limited to recovery of possession and ancillary relief allowed by statute. Statutory procedures for recovery of possession must be strictly followed. *Greene v Municipal Court* (1975) 51 CA3d 446, 450, 124 CR 139.

When a complaint fails to state an unlawful detainer cause of action, but states some other cause of action, a 30-day rather than a 5-day summons is appropriate, and the court does not acquire personal jurisdiction over a tenant who is served such a complaint with a 5-day summons. 51 CA3d at 451. If a complaint otherwise properly states a cause of action for unlawful detainer, but also seeks relief that is not properly the subject of an unlawful detainer action, alternatives are a motion to quash the service of the summons and complaint or a motion to strike the improper allegations, both of which may be filed simultaneously without making a general appearance. See §§10.18, 10.22-10.23, 10.38-10.47.

Claims falling outside the scope of unlawful detainer must be treated as ordinary civil actions in which the 30-day summons (CCP §412.20(a)(3)) must be used. *Delta Imports, Inc. v Municipal Court, supra*; *Martin v Pacific S.W. Royalties, Inc.* (1940) 41 CA2d 161, 167, 106 P2d 443; *Tropical Inv. Co. v Brown* (1919) 45 CA 205, 210, 187 P 133. Thus, an action that seeks possession of the premises without alleging compliance with the unlawful detainer notice requirements, and requests relief not recoverable in an unlawful detainer action, would effectively be an ejectment, trespass, or quiet title action requiring service of a 30-day summons.

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§10.21 (2) Compare: Demurrer

A complaint that fails to allege facts essential to an unlawful detainer cause of action may also be attacked by a demurrer. See §§10.29-10.37. The difference between the procedures is that a motion to quash attacks service of the summons and complaint for lack of personal jurisdiction, while a demurrer tests the legal sufficiency of the allegations in the complaint. A motion to quash is frequently decided on factual evidence, while a demurrer assesses the legal sufficiency of the pleading by reviewing the complaint and matters of which the court may take judicial notice; a demurrer is not an evidentiary motion. See §§10.24-10.25, 10.33. A motion to quash may be made by specially appearing, but the filing of a demurrer without simultaneously moving to quash constitutes a general appearance. See CCP §418.10(e), discussed in §10.18.

When a motion to quash is granted, a defective complaint (if amendable) must be amended and personally served with a summons on the defendant. When a demurrer is sustained and the complaint is capable of being amended, the amended pleading may be served on defendant's counsel. The time for the defendant to answer after service of the amended complaint is the same in either case, unless counsel is served by mail after a demurrer is sustained. CCP §1013. Another major difference between the two motions is that the notice period for a hearing on a motion to quash is shortened by CCP §1167.4(a) (see §10.24), while a demurrer may only be scheduled on a *minimum* of 16 court days' notice under CCP §1005(b) (see §10.32).

PRACTICE TIP: Whether counsel for defendant employs a motion to quash or a demurrer to address deficient allegations in an unlawful detainer complaint depends on a number of factors including local court attitudes and practices, and the needs and circumstances of the case. In Los Angeles County, for example, at the hearing on a motion to quash, the judge will often allow the landlord's attorney to serve the defendant with the summons and complaint in the courtroom, take the motion to quash service off calendar, and tell the defendant that he or she has 5 days to respond.

Another important factor is whether the defect appears on the face of the complaint or whether it must be proved by extrinsic evidence. Because a motion to quash challenges service of summons for lack of personal jurisdiction, certain jurisdictional facts must be proved by competent evidence at the hearing. If, for example, the challenge to the termination notice extends beyond the face of the complaint to the issue of what kind of notice applies, the issue can and must be resolved by extrinsic evidence, and a motion to quash is the proper procedure. *Parsons v Superior Court* (2007) 149 CA4th Supp 1, 58 CR3d 48; *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 1036, 194 CR 685 (motion to quash is "only method" by which defendant can test whether complaint states cause of action in unlawful detainer). See also §10.29.

NOTE: If the motion to quash is granted because an improper termination notice was used or it appears on the face of the complaint that the notice was improperly served, the defect is fatal, the complaint cannot be amended, and the landlord must start over.

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b. Unauthorized Relief Sought in Unlawful Detainer

§10.22 (1) Judicial Reasoning

When an unlawful detainer complaint seeks relief beyond what is expressly permitted by the unlawful detainer statutes, use of the 5-day summons is improper. *Castle Park No. 5 v Katherine* (1979) 91 CA3d Supp 6, 8 n1, 154 CR 498 (unlawful detainer complaint, based on 30-day notice to quit, improperly requested back rent). In such circumstances, a motion to quash or a motion to strike is available to attack the pleadings served on the tenant. 91 CA3d Supp at 9. But see *Saberi v Bakhtiari* (1985) 169 CA3d 509, 517, 215 CR 359 (motion to strike, not motion to quash, is proper method of objecting to unauthorized relief in an otherwise valid unlawful detainer complaint). Under the reasoning in the *Castle Park* decision, a motion to quash is appropriate even if the complaint otherwise properly states a cause of action in unlawful detainer. This reasoning appears to be inconsistent with the statutory and constitutional framework governing a court's personal jurisdiction over a defendant generally. If a complaint were adequately pleaded to state a cause of action in unlawful detainer, the defendant would have proper notice and an opportunity to be heard on the unlawful detainer issues, and the court would have jurisdiction over the defendant to enter a judgment awarding possession irrespective of superfluous and improper claims for damages. See California Civil Procedure Before Trial, chaps 6, 17, 19, 24 (4th ed Cal CEB 2004).

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§10.23 (2) Compare: Motion to Strike

An unlawful detainer action that demands relief unauthorized by the summary unlawful detainer procedures may also be challenged by a motion to strike the improper allegations. See §§10.40-10.44. The essential difference between these methods is that a motion to quash attacks service of the summons and complaint for lack of personal jurisdiction, while a motion to strike seeks to eliminate improper allegations or prayer for relief from the complaint. See §§10.38-10.47. The procedural differences between a motion to quash and a motion to strike are nearly the same as those between a motion to quash and a demurrer. See §§10.21, 10.46. Landlord attorneys claim that since unlawful detainer actions are unique in that they are to recover possession of premises unlawfully detained by the defendant, the landlord's attorney may verify the complaint if the plaintiff is "otherwise unable to do so" the same day the unlawful detainer action is to be filed. CCP §446. But see discussion in §9.42.

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C. Procedure

§10.24 1. Shortened Hearing Notice

The statutory authority for a motion to quash is CCP §418.10, as limited by CCP §1167.4. To make a motion to quash, the attorney must file a notice of motion, a factual declaration, and a supporting memorandum. See notice form in §10.28. The notice of motion must be filed within the 5-day period in which to file responsive pleadings to the complaint, unless the court extends the time on a showing of good cause. CCP §418.10(a). An extension might be required if the motion contends that the alleged service was never made, because the tenant in such a case might not have knowledge of the action early enough to allow preparation and filing of the motion within the 5-day period. See §10.48.

According to the precise statutory language peculiar to unlawful detainer actions, a motion to quash must be *made* not less than 3, nor more than 7, days after the date that the notice of motion is filed. CCP §1167.4(a). Presumably, this means that the motion must be *heard* within that 3- to 7-day period. This statutory language, however, is literally inconsistent with CCP §1005.5, which states that a motion is deemed to have been made when notice of the motion is filed.

Service of a motion to quash in an ordinary civil action is generally governed by CCP §1005. See CCP §1005(a)(4). Under CCP §1005(b), serving the motion by mail extends the notice period of 16 court days by 5 days, and serving by express mail, or other method of overnight delivery, or (by stipulation) facsimile transmission, extends the notice period by 2 calendar days. A notice of motion governed by CCP §1005(b) is expressly excluded from the extension rules of CCP §1013. Because motions to quash in unlawful detainer actions are governed by both CCP §418.10 and CCP §1167.4, which are silent on the effect of alternative methods of service on the shortened notice prescribed by CCP §1167.4(a), it is arguable that the extension rules of either CCP §1005(b) or CCP §1013 apply when the motion is not personally served. The rules are effectively the same in any event. The Los Angeles Superior Court as a matter of practice applies CCP §1013.

PRACTICE TIP: This shortened notice period under CCP §1167.4(a) may actually work to the landlord's detriment. Under it, the tenant theoretically could file and personally serve a motion to quash on Friday afternoon, to be heard on Monday morning. Under Cal Rules of Ct 1327, which governs the time periods and methods for opposing a motion to quash in an unlawful detainer action, the landlord may either present oral opposition at the hearing or file and serve written opposition on or before the court day of the hearing. The landlord's attorney should file opposition prior to the hearing and as quickly as possible after being served with the motion.

Code of Civil Procedure §1005(c) requires that all papers opposing a motion and all reply papers be served by personal delivery, facsimile transmission, express mail, or other means that are reasonably calculated to ensure delivery to the other party by the close of the next business day after the papers are filed with the court.

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§10.25 2. Supporting Documents

The notice of motion must state the specific grounds on which the motion is based. CCP §1010; Cal Rules of Ct 3.1110(a). Failure to file and serve a supporting memorandum may be cause for denial of the motion. Cal Rules of Ct 3.1113(a).

NOTE: Cal Rules of Ct 3.1114(a) dispenses with the need for a supporting memorandum for certain civil motions, applications, and petitions filed on Judicial Council forms, including applications for an order extending the time to serve a pleading and a motion to be relieved as counsel. However, a party may submit or the court may order submission of a supporting memorandum if it would further the interests of justice. Rule 3.1114(b).

The declarations setting forth specific facts in support of the motion should be based on firsthand knowledge, and avoid conclusions of law or statements made on information and belief. Even if no objection is made, the court may ignore an unverified declaration or one that contains inadmissible hearsay, opinion, or supposition. *Inselberg v Inselberg* (1976) 56 CA3d 484, 489, 128 CR 578. See notice, supporting memorandum, and declaration forms in §§10.28-10.28B.

Some trial courts allow oral testimony concerning the manner of service at the hearing on the motion; others do not. It is a mistake, therefore, to prepare a supporting declaration hastily, in the hope that oral testimony can cure its deficiencies. If the claimed defect is in the manner of service, the landlord's attorney should have the process server in court or file an opposing declaration to contest the tenant's claim with admissible evidence.

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§10.26 3. Order After Hearing

Unless tenant's counsel waives notice of the ruling during the hearing on the motion, the landlord's attorney must serve some form of notice of the ruling denying the motion to start the 5-day period to answer. See alternatives for notice discussed in §10.34. See also Cal Rules of Ct 3.1312; CCP §664.5.

The tenant has 5 days to answer after service of notice of an order or the ruling denying the motion to quash, but the court may extend this time up to 15 additional days for good cause. CCP §1167.4(b). The court clerk will not enter the tenant's default until 6 days after service of the notice (11 days if service is made by mail).

If the trial court grants the defendant's motion to quash service of process and to dismiss the case, the trial court loses jurisdiction to reconsider its ruling after judgment is entered. *APRI Ins. Co. v Superior Court* (1999) 76 CA4th 176, 90 CR2d 171. In *APRI,* the defendant successfully moved to quash service of the summons and to dismiss the case. The plaintiff moved for reconsideration. The defendant filed the order granting her motion. The trial court then granted the plaintiff's motion for reconsideration. The Second District Court of Appeal held that a written order of dismissal is a judgment, and that, once the trial court enters a judgment, it lacks the power to grant reconsideration.

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§10.27 4. Review by Writ of Mandate

It is generally impractical for a landlord to appeal a trial court's grant of a motion to quash; it is more economical to re-serve the summons and complaint as quickly as possible. The tenant may attack the trial court's denial of a motion to quash by seeking a writ of mandate from the applicable reviewing court. See, *e.g., Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 194 CR 685. A petition for a writ of mandate should be filed with the appropriate reviewing court within 10 days after service of notice of entry of an order denying the motion, or within up to an additional 20 days if allowed by the trial court for good cause. CCP §418.10(c). When a writ petition is filed, and notice of the filing is served on the plaintiff and filed with the court before the time prescribed for filing a responsive pleading:

- The time to respond in the main action is extended to 10 days (plus up to an additional 20 days if allowed by the trial court) after service of notice of denial of the writ petition (see CCP §418.10(c)); and
- The defendant is not considered to have made a general appearance until the writ proceedings conclude (see CCP §418.10(e)(2)).

It is unclear whether the CCP §418.10(c) automatic stay of proceedings is applicable in unlawful detainer actions while a petition for a writ is pending following the denial of a motion to quash. Code of Civil Procedure §1177 states that the general rules of civil procedure (CCP §§307-1062.10) apply in unlawful detainer actions except as provided in CCP §§1159-1179a. Both CCP §§1167.4(a) and 418.10(b) set the time for hearing of a motion under §418.10(a), but §1167.4(a) provides for a shorter time. Similarly, both CCP §§1167.4(b) and 418.10(b) prescribe the time to plead after denial of a motion to quash, except that the unlawful detainer statute shortens the time to file a responsive pleading to 5 days after service of notice of an order denying the defendant's motion; the court may extend the defendant's time to plead for an additional 15 days on a showing of good cause (CCP §1167.4(b)).

Code of Civil Procedure §1167.4(b) thus requires a general appearance within, at the most, 20 days after denial of a motion to quash service. This timing may have the practical effect of denying defendant-tenants the right to mandate proceedings under CCP §418.10(c), because it would be impossible to prepare and file a mandate petition and supporting memorandum, allow any time for the respondent court and real parties in interest to respond, and have a hearing on the merits before the 5- to 20-day time period of CCP §1167.4(b) elapses.

PRACTICE TIP: Code of Civil Procedure §1167.4 may be interpreted to mean that the 5-to-20-day response time runs from either denial of a motion to quash or, if a writ petition is timely filed, from the denial of the petition. Arguably, the 2002 amendment (see Stats 2002, ch 69) adding CCP §418.10(e)(2) expresses a legislative intent that any defendant may wait until after the conclusion of the writ proceedings to appear. Without this interpretation, it arguably denies tenants equal protection of the law. See California Eviction Defense Manual §11.43 (2d ed Cal CEB 1993).

For further discussion of the procedure for a motion to quash, see California Civil Procedure Before Trial, chap 19 (4th ed Cal CEB 2004). For discussion of writ of mandate proceedings, see §13.63 and California Civil Writ Practice (4th ed Cal CEB 2008).

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.28 D. Form: Notice of Motion to Quash Service of Summons

§10.28 D. Form: Notice of Motion to Quash Service of Summons

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant, _ _[*Name*]_ _
Specially Appearing

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION TO QUASH SERVICE OF SUMMONS; SUPPORTING MEMORANDUM; DECLARATIONS**
vs	)	
_ _[*Name(s)*]_ _ **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*name*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _ **of the above Court, located at** _ _[*address*]_ _**, defendant** _ _[*name*]_ _ **will specially appear and move for an order from the Court to quash service of summons in this action.**

This motion is made on the ground that the Court lacks jurisdiction over defendant in that _ _[*state reasons, e.g., defendant has not been properly served with summons, as demonstrated in the attached declarations/the complaint states a cause of action or seeks damages or other relief not cognizable in an unlawful detainer action*]_ _**, which makes improper a service of summons that gives only 5 days to respond.**

This motion is based on this notice; all pleadings, papers, and records on file in this action; matters of which the court takes judicial notice; the accompanying supporting memorandum and declaration(s) of _ _[*name(s)*]_ _**;** _ _[*and on such evidence as may be presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name of attorney*]_ _
Attorney for _ _[*name*]_ _**,**
Specially Appearing

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The first page of each court paper must show the date, time, and location (if ascertainable) of the hearing, the name of the hearing judge (if ascertainable), the nature or title of any attached document other than an exhibit, the

filing date of the action, and the trial date (if set). Cal Rules of Ct 3.1110(b). For rules pertaining to format of court papers and to law and motion generally, see Cal Rules of Ct 1.200, 2.100-2.306, 3.1100-3.1362. On procedure for motions to quash, see §§10.24-10.27 and California Civil Procedure Before Trial, chap 19 (4th ed Cal CEB 2004). On captions for court papers, see Civ Proc Before Trial, chap 11.

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.28A E. Form: Memorandum Supporting Motion to Quash Service of Summons (Improper Service Case)

§10.28A E. Form: Memorandum Supporting Motion to Quash Service of Summons (Improper Service Case)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant, _ _[*name*]_ _
Specially Appearing

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**MEMORANDUM IN SUPPORT**
vs	)	**OF MOTION TO QUASH**
	)	**SERVICE OF SUMMONS**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*name*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

SUPPORTING MEMORANDUM

A MOTION TO QUASH IS AUTHORIZED WHEN A DEFENDANT HAS NOT BEEN PROPERLY SERVED WITH THE SUMMONS AND COMPLAINT

1. California CCP §1167.4, in conjunction with CCP §418.10, gives authority for a motion to quash in unlawful detainer proceedings. Absent proper service of summons, the court has no jurisdiction over a party who does not voluntarily appear. See also CCP §§415.45, 410.50.

JURISDICTION IS REQUIRED FOR AN ENFORCEABLE JUDGMENT

2. A judgment entered without jurisdiction over the party subject to that judgment is void. *Sternbeck v Buck* (1957) 148 CA2d 829, 307 P2d 970. Service of summons is a jurisdictional requirement, without which the court has no jurisdiction in the action. *Chaplin v Superior Court* (1927) 81 CA 367, 253 P 954; CCP §1917. In an unlawful detainer action, it is of particular importance that proper service of summons be achieved. *Greene v Municipal Court* (1975) 51 CA3d 446, 124 CR 139.

3. Defective service of summons is not service and confers no jurisdiction over the party. *Smith v Jones* (1917) 174 C 513, 163 P 890; *Sternbeck v Buck* (1957) 148 CA2d 829, 307 P2d 970. Mere knowledge of the action, absent voluntary appearance by the party, is not sufficient for the court to assert its jurisdiction over the party. *Coulston v Cooper* (1966) 245 CA2d 866, 54 CR 302; *Varra v Superior Court* (1960) 181 CA2d 12, 4 CR 920. See CCP §§415.10-415.50.

4. California CCP §§415.10-415.50 govern the methods by which a summons and complaint may be served on a defendant in an unlawful detainer action. They include personal delivery to the defendant (CCP §415.10); substituted service by personal delivery to home or business, in the presence of or to the appropriate person there, and thereafter mailing (CCP §415.20); and posting and mailing under court order (CCP §415.45).

PROPER SERVICE IN THIS MATTER HAS NOT BEEN ACHIEVED

5. As can be seen from the declaration of _ _[*name of defendant*]_ _, attached to this motion, no personal, substituted, or "nail and mail" service has been achieved on Defendant.

WHEREFORE, AND FOR ALL OF THE ABOVE REASONS, Defendant prays that the court grant this motion and order service of summons quashed.

Respectfully submitted,

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _,
Specially Appearing

Copies: As with all papers for filing (except confidential documents like fee waiver applications), one copy is served on each opposing attorney or unrepresented party, the original with the completed original proof of service is filed with the court clerk, and one copy should be stamped at the clerk's office, and retained by the tenant, to prove the date and fact of filing.

Comment: The "appearance" of the tenant/defendant must be "special" because the tenant does not admit that the court has obtained jurisdiction over him or her through service of process. On the format of court-filed papers, see Cal Rules of Ct 1.200, 2.100-2.119, 3.1110; on additional information regarding the grounds and procedures for a motion to quash, see §§10.24-10.27 and California Eviction Defense Manual, chap 11 (2d ed Cal CEB 1993). See generally California Civil Procedure Before Trial, chap 19 (4th ed Cal CEB 2004). On civil law and motion rules and pretrial procedures generally, see Cal Rules of Ct 3.1100-3.1362. On conducting legal research on the Internet, including legislation, rules of court (both statewide and local), jury instructions, court fees, law libraries, Judicial Council forms, and other valuable resources, see The Cybersleuth's Guide to the Internet: Conducting Effective Investigation and Legal Research on the Web (IFL Press 2006).

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.28B F. Form: Declaration Supporting Motion to Quash Service of Summons

§10.28B F. Form: Declaration Supporting Motion to Quash Service of Summons

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant, _ _[*name*]_ _
Specially Appearing

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	**DEFENDANT** _ _[*NAME*]_ _ **IN**
	)	**SUPPORT OF MOTION TO**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**QUASH SERVICE OF SUMMONS**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*name*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

I, _ _[*tenant's name*]_ _**, hereby declare:**

I am named as a defendant in this matter and reside at _ _[*address*]_ _**, which premises is the subject of this action. I have never been personally served with a copy of the summons and complaint in this case. I am informed and believe that on or about** _ _[*date*]_ _**,** _ _[*e.g., someone dropped some legal documents onto my front porch/handed some legal documents to my 12-year-old daughter*]_ _**. I have never received a copy of the summons and complaint in this case through the mail.** _ _[*I have received a notice from this court that my landlord has filed an eviction lawsuit against me*]_ _**.**

Except as described above, I have no knowledge of the delivery to me of the summons and complaint in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name of tenant*]_ _**,**
Specially Appearing

Copies: As with all papers for filing (except confidential documents like fee waiver applications), one copy is served on each opposing attorney or unrepresented party, the original with the completed original proof of service is filed with the court clerk, and one copy should be stamped at the clerk's office, and retained by the tenant, to prove the date and fact of filing.

Comment: The "appearance" of the tenant/defendant must be "special," because the tenant does not admit that the court has obtained jurisdiction over him or her through service of process. A tenant may demur, answer, move to strike,

and move to quash simultaneously without making a general appearance. See CCP §418.10(e), discussed in §10.18.

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V. DEMURRER

§10.29 A. Legal Basis and Grounds

Demurrer is a procedure used at the pleading stage to obtain the trial court's ruling on the formal or legal sufficiency of allegations in an adverse party's complaint, cross-complaint, or answer. See CCP §§430.10-430.80, 589, 591. (For a discussion of demurrers generally, see California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004).) The grounds for objecting to a complaint or cross-complaint by demurrer are set forth in CCP §430.10. Recodification in 1971 of the statutes governing demurrers abolished the historical distinction between "general" demurrers (complaint fails to state a cause of action) and "special" demurrers (all other grounds). See §§10.32-10.36 for a complete discussion of demurrer procedures.

The grounds for objecting to an answer by way of demurrer are set forth in CCP §430.20. See, *e.g., Evans v Superior Court* (1977) 67 CA3d 162, 136 CR 596 (unlawful detainer action). The discussion in this chapter focuses on demurrers to complaints (not answers) because they are common in unlawful detainer actions. Grounds for demurrer are limited to those enumerated in CCP §§430.10, 430.20.

A complaint is not immune from demurrer merely because the plaintiff uses a Judicial Council form complaint. *People ex rel Dep't of Transp. v Superior Court* (1992) 5 CA4th 1480, 7 CR2d 498. The court noted (5 CA4th at 1486):

> In some cases, merely checking a box on a Judicial Council form complaint will be sufficient. In other cases, such as this one, where specific allegations need be alleged, the form complaint is like a partially completed painting. It is up to the pleader to add the details that complete the picture.

Under CCP §1170, the tenant has the right to demur in an unlawful detainer action. Under CCP §430.10(a)-(c), (e), a demurrer may be used to attack the following defects:

- The court lacks subject matter jurisdiction;
- The complaint fails to state a cause of action in unlawful detainer;
- The plaintiff lacks legal capacity to sue; and
- Another action is pending between the same parties on the same cause of action (court must take judicial notice of the other action).

See §10.31 for a checklist. Although CCP §430.10(e) includes the failure of a pleading to state facts sufficient to constitute a cause of action as a ground for demurrer, there is authority that such defect must be attacked by a motion to quash rather than a demurrer, particularly if the defect is jurisdictional and the court must review extrinsic evidence to decide the issue. See *Parsons v Superior Court* (2007) 149 CA4th Supp 1, 58 CR3d 48; *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 1036, 194 CR 685. See §§10.20-10.21. A motion to quash, rather than a demurrer, arguably must also be used if the complaint improperly pleads a cause of action for unlawful detainer, but does plead a cause of action for something else, as such a case may not be served on a 5-day summons. See analogous discussion on motion to strike and conflicting appellate decisions in §10.22.

In *Delta Imports, Inc. v Municipal Court, supra,* the court stated that a motion to quash service "is the only method by which the defendant can test whether the complaint states a cause of action for unlawful detainer." The court also remarked that a general demurrer tests only "whether the complaint states a cause of action for *something* even if it is on a theory other than unlawful detainer." This language is confusing but it does not preclude the use of a demurrer to attack the sufficiency of the allegations for a cause of action in unlawful detainer, particularly if the demurrer can be resolved solely by reviewing the face of the pleading. See, *e.g.,* California Eviction Defense Manual §§11.28, 13.3 (2d ed Cal CEB 1993).

The supreme court, however, noted the *Delta Imports* decision and remarked (in dicta) that the only circumstance in which a motion to quash "has been approved as a procedure by which to challenge the sufficiency of the complaint is in unlawful detainer, where a demurrer is unavailable." *Greener v WCAB* (1993) 6 C4th 1028, 1036, 25 CR2d 539. That statement, which caused further confusion, was explained in a superior court reported opinion, which noted that

Greener may be properly read "to approve the use of a motion to quash to attack an unlawful detainer complaint" if the pleading defect affects personal jurisdiction under the 5-day summons, because a demurrer is "unavailable" in the sense that a demurrer, as a general appearance, "would deprive the defendant of the relief he seeks in challenging personal jurisdiction." *Parsons v Superior Court* (2007) 149 CA4th Supp 1, 6, 58 CR3d 48. The court also noted that if the jurisdictional basis of the complaint is challenged, such as the service of a proper notice to quit, that issue frequently extends beyond the face of the complaint and must be resolved by an evidentiary review; a motion to quash rather than a demurrer is the proper procedure for doing this.

PRACTICE TIP: Prudent counsel will investigate local court interpretation of the *Delta Imports* decision and the manner in which it is applied. A motion to quash cannot be filed after a defendant appears by a demurrer, but both of these motions may be filed simultaneously without making a general appearance. See §10.18. See also CCP §1014; *Delta Imports, Inc. v Municipal Court, supra,* discussed in §§10.20-10.21.

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§10.30 B. Practical Considerations and Tactics

Landlord's Considerations

If the tenant demurs, and the landlord can cure the defect, a demurrer will delay the action, but will not terminate it in favor of the tenant because a court will likely give the landlord leave to amend the complaint. See CCP §472a(c); Cal Rules of Ct 3.1320(g); *Wennerholm v Stanford Univ. Sch. of Medicine* (1942) 20 C2d 713, 128 P2d 522.

When the complaint is fatally defective and amending it is not possible, the landlord should consider dismissing the action without prejudice. This should be done, for example, when the eviction notice is defective or was improperly served. Dismissing immediately and starting over will save the landlord great expense and avoid further delays. If the landlord has pleaded an otherwise meritorious cause of action improperly, it is more expeditious to amend and serve the amended complaint, thereby making the demurrer moot. CCP §472.

Service of an amended complaint can be accomplished by mail addressed to tenant's counsel because the tenant's demurrer constitutes a general appearance in the action (unless the tenant demurs and moves to quash simultaneously; see CCP §418.10(e), discussed in §10.18). Personal service of an amended complaint, however, will require the tenant to respond to the amended complaint within 5 days, whereas mailing would extend the time to respond. When a landlord wishes to oppose the demurrer rather than amend the complaint, an order advancing the hearing date on the demurrer may be obtained. See §§10.32-10.37 for a complete discussion of demurrer procedures.

Tenant's Considerations

If a rent board case involving the primary issues in the eviction action was filed before the unlawful detainer and a hearing has either already occurred or is about to take place, counsel may wish to file a motion to abate alongside of a demurrer in the eviction action to permit the administrative agency to rule on the issues. See, *e.g., Vargas v Municipal Court* (1978) 22 C3d 902, 150 CR 918 (trial court had authority to postpone unlawful detainer trial temporarily to afford administrative agency opportunity to speedily resolve unfair labor practice charge pending against employer). For instance, if the eviction is based on nonpayment of rent, and there is a dispute about the maximum allowable rent, and the rent board has either ruled on or is about to rule on the issue of the maximum allowable rent for the unit, the trial court should abate the eviction for a reasonable period to allow the administrative agency to act. Obviously, the further along the administrative proceeding is, the more likely the trial court is to abate the unlawful detainer.

A demurrer may not always be the best strategy. If the landlord voluntarily dismisses the action because a demurrer for failure to state a cause of action is meritorious, the tenant cannot recover attorney fees under a provision in the lease or rental agreement. CC §1717. Accordingly, tenants' attorneys sometimes prefer to raise *incurable* defects in the answer, rather than by demurrer, in order to preserve the right to recover attorney fees after a trial on the merits. Apart from delay, demurring for *curable* defects may actually work to the tenant's detriment by enabling the landlord to cure defects in the complaint that otherwise might keep him or her from prevailing when the case goes to trial. On the other hand, a special demurrer may serve an important discovery function, especially in light of the shortened time for setting unlawful detainer actions for trial. Such demurrers may also preserve issues for trial and appeal.

When the ground for objection does not appear on the face of the complaint, the objection may be stated as an affirmative defense in the answer. CCP §430.30(b). In some instances, a motion to strike may be able to reach defects in a complaint that are not within the grounds enumerated in CCP §430.10, or that do not strictly appear on the face of the complaint (see §§10.38-10.47). Thus, it is not uncommon for the tenant to file a demurrer and motion to strike simultaneously in an unlawful detainer action.

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.31 C. Checklist: Demurrable Defects in Complaint

§10.31 C. Checklist: Demurrable Defects in Complaint

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The following is a checklist of the permitted grounds for demurrer, with cross-references to pertinent sections of statutory procedure and sections in this book where the allegation is discussed. In some cases a motion to quash under *Parsons v Superior Court* (2007) 149 CA4th Supp 1, 58 CR3d 48 and *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 194 CR 685 may be preferable because of local court interpretation of decisional law or other considerations. See §§10.20-10.21, 10.29. A tenant may demur, answer, move to strike, and move to quash simultaneously without making a general appearance. See CCP §418.10(e), discussed in §10.18.

___ 1. Plaintiff lacks legal capacity to sue. CCP §430.10(b); see §§7.64, 9.34, 9.37.

___ 2. Defect or misjoinder of parties. CCP §430.10(d); see §9.35.

___ 3. Lack of requisite relationship. CCP §430.10(e); see §§9.36-9.37. Motion to quash should be considered.

___ 4. No subject matter jurisdiction. CCP §430.10(a); see §9.32.

___ 5. Premature filing of complaint. CCP §430.10(e); see §9.44. Motion to quash should be considered.

___ 6. Inadequate description of premises. CCP §430.10(e) or (f); see §9.37.

___ 7. Failure to allege existence of lease or rental agreement, or whether lease or rental agreement is written or oral. CCP §430.10(e) or (g); see §9.37.

___ 8. Failure to attach to complaint written lease or rental agreement, as required in residential tenancies by CCP §1166(c)(1)(B), unless agreement is oral or eviction is based on rent default. CCP §430.10(e) or (g); see §9.37.

___ 9. Failure to attach to complaint copy of required termination notice, as required in residential tenancies by CCP §1166(c)(1)(A). CCP §430.10(e); see §9.37. Motion to quash should be considered.

___ 10. Failure to allege fact of prior service of required termination notice. CCP §430.10(e); see §9.37. Motion to quash should be considered.

___ 11. Failure either to allege method of service of required termination notice or to attach to complaint copy of proof of service of required notice, as required by CCP §1166(a)(5). CCP §430.10(e) or (f); see §9.37. Motion to quash should be considered.

___ 12. Notice, if required, not pleaded according to legal effect, verbatim, or attached as exhibit. CCP §430.10(e) or (f); see §9.37.

___ 13. No allegation of facts on which landlord seeks recovery. CCP §430.10(e) or (f); see §§9.37-9.40. Motion to quash should be considered.

___ 14. No allegation that tenant remains in actual possession. CCP §430.10(e); see §9.37. Motion to quash should be considered.

___ 15. Allegations uncertain. CCP §430.10(f); see §9.37.

___ 16. No request for possession of premises in complaint. CCP §430.10(e); see §9.37.

___ 17. Request for forfeiture when not requested in prior notice. CCP §430.10(e). This defect is also subject to a motion to strike; see §§8.34, 9.37.

___ 18. Request for relief not appropriate to unlawful detainer action. CCP §430.10(e). This defect also may be subject to a motion to quash or a motion to strike; see §§9.37-9.41, 10.22, 10.39-10.45.

___ 19. Failure to allege compliance with applicable rent or eviction control law. CCP §430.10(e); see §§9.16, 9.37. Motion to quash should be considered. If the complaint does not reveal that the premises are subject to rent control, the tenant should raise the issue by answer if appropriate.

___ 20. Request for prospective damages until possession returned to landlord. CCP §430.10(e); see §§9.37-9.41, 10.40. Motion to strike should be considered.

___ 21. Another action pending. CCP §430.10(c). See also *Vargas v Municipal Court* (1978) 22 C3d 902, 150 CR 918. May apply when rent board case is pending, but not yet decided. See §§9.15, 10.30.

___ 22. After a foreclosure, failure to allege that plaintiff acquired title by a foreclosure sale that was conducted in compliance with statutory law and the deed of trust, followed by purchase at the sale. See §§8.68B, 10.54.

___ 23. After a foreclosure, failure to allege that plaintiff served the 3-day or 60-day notice on the former owner or tenant required by CCP §1161a or §1161b. See §§8.68A, 8.68C.

___ 24. After a foreclosure, failure to allege that plaintiff's title is superior to defendant's interest in the lease. See §8.68E.

NOTE: The Appendixes in California Eviction Defense Manual (2d ed Cal CEB 1993) contain numerous sample supporting memoranda for situations described in the above checklist.

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D. Procedure

§10.32 1. Scheduling the Hearing

Unless a motion to quash service of summons has been filed (see §§10.18-10.28) or an extension of time to plead has been granted, a demurrer must be filed within 5 days after the unlawful detainer summons was served. CCP §1167. Failure to demur within this time waives all objections subject to demurrer except lack of subject matter jurisdiction and failure to allege facts sufficient to state a cause of action. CCP §430.80(a). The tenant may demur and answer at the same time. CCP §430.30(c). Or the tenant may first demur, and then answer after the ruling on the demurrer. CCP §§472a-472b. The tenant may also demur, answer, move to strike, and move to quash simultaneously without making a general appearance. See CCP §418.10(e), discussed in §10.18.

The scheduling of a hearing on a demurrer is generally governed by CCP §1005, which applies to many civil motions, except that a demurrer must be set for hearing within 35 days after it was filed or on the first date available to the court thereafter, except that the court may set the hearing for an earlier or a later date on a showing of good cause. Cal Rules of Ct 3.1320(c)-(d). Notice of the motion must be given at least 16 court days before the hearing; add 5 calendar days if the notice is served by regular mail within California and 2 calendar days if service is by express mail or another method of overnight delivery or (by agreement of the parties) facsimile transmission. Opposing papers must be filed *at least* 9 court days before the hearing, and reply papers *at least* 5 court days before the hearing. CCP §1005(b). Late-filed papers will likely be disregarded by the court. All opposing and reply papers must be served by personal delivery, facsimile transmission, express mail, or other means that are reasonably calculated to ensure delivery to the other party by the close of the next business day after the papers are filed with the court. CCP §1005(c). It is usually not in the tenant's interest to obtain an order shortening time for scheduling a demurrer, but the landlord may wish to seek an order advancing the hearing date. In Los Angeles County, some courts advance the hearing on a demurrer on their own initiative so that the case is not unduly delayed. This is particularly true with *pro per* demurrers, which may be summarily denied.

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§10.33 2. Supporting Documents

The demurrer must specify the grounds on which the tenant objects to the complaint. CCP §430.60. See §§10.30-10.31. Each ground must be stated in a separate paragraph, which must also state whether the ground applies to the entire complaint or to specified causes of action. Cal Rules of Ct 3.1320(a). A ground for objection to a pleading may be raised by demurrer only if the defect appears on the face of the pleading, or arises from a matter of which the court may take judicial notice. CCP §430.30(a); *James v Superior Court* (1968) 261 CA2d 415, 67 CR 783. With few exceptions, the demurring party may not allege facts or introduce evidence to prove the grounds for a demurrer. See *Middlebrook-Anderson Co. v Southwest Sav. & Loan Ass'n* (1971) 18 CA3d 1023, 1039, 96 CR 338.

When a ground for demurrer is based on a matter of which the court may take judicial notice, the matter to be judicially noticed must be specified in the demurrer or in the supporting memorandum unless the court permits otherwise; copies of the matter to be judicially noticed must be provided to the court and each party. CCP §430.70; Cal Rules of Ct 3.1306(c). Judicial notice of documents submitted as legislative history will only be granted to cognizable legislative history documents. *Kaufman & Broad Communities, Inc. v Performance Plastering, Inc.* (2005) 133 CA4th 26, 34 CR3d 520 (contains lists of documents that do and do not constitute cognizable legislative history in the Court of Appeal, Third District). The demurrer may be combined with a notice of hearing or prepared as a separate document. Cal Rules of Ct 3.1112(a), (c). A supporting memorandum must be filed with the demurrer and support each ground. The absence of a supporting memorandum may be taken as a waiver of all grounds not supported. Cal Rules of Ct 3.1113(a). See forms in §§10.36-10.36A.

Under Cal Rules of Ct 3.1320(f), if either party fails to appear at the hearing, the party who appears may ask the court to dispose of the demurrer on the merits, and the court must do so, unless the hearing is continued for good cause. If neither party appears, the court may dispose of the matter on its merits, drop the matter from the calendar, or continue the hearing. The tenant's failure to appear in support of a special demurrer (presumably, one premised on CCP §430.10(b)-(d), (f)-(h)) may be construed as an admission that the demurrer has no merit, and that all grounds stated in it are waived. See Cal Rules of Ct 3.1320(f).

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3. Order After Hearing

§10.34 a. Demurrer Overruled

If the demurrer is overruled, leave to answer is considered to be granted unless otherwise ordered. Cal Rules of Ct 3.1320(g). Most often, the court will state orally from the bench that the demurrer is overruled and that the tenant has 5 calendar days to answer. See Cal Rules of Ct 3.1320(g). Some courts will try to obtain a waiver of written notice under CCP §472b. If the tenant asks for written notice, it may be given by counsel for the landlord. California Rules of Court 3.1312 requires an order to be prepared by the prevailing party, approved as "conforming to the court's order" by the other party, and then submitted to the court for approval and signature. In limited civil cases, some courts bypass that rule by entering a minute order at the hearing and requiring the prevailing party to unilaterally prepare and sign a notice of ruling. Whatever procedure is used, the order or notice must be served by the landlord's attorney (to start the running of the time to answer) and ultimately must be filed with the court with a proof of service. Attorneys for landlords should bring a proposed "notice of ruling" or "order" to court with copies to conform when an opponent is represented in propria persona so that personal service may be made.

In unlawful detainer actions, unless otherwise ordered, the demurring party has 5 calendar days to answer from service of notice of an adverse ruling on the demurrer (with an additional 5 calendar days if service is by regular mail and the place of address and place of mailing are within California, or an additional 2 court days if service is by express mail, another method of overnight delivery, or (with the parties' agreement) by facsimile transmission). CCP §§472b, 1013; Cal Rules of Ct 3.1320(g). If the demurrer is overruled, and the tenant fails to answer within the time allowed, the landlord may seek and obtain a default judgment. CCP §586(a)(2). See §13.3. The court clerk will not enter the tenant's default unless the clerk or the landlord has filed and served a proper notice of ruling or order on the demurrer, or notice was waived in open court and noted in the court file. See CCP §472b; Cal Rules of Ct 3.1109, 3.1320(g).

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§10.35 b. Demurrer Sustained

If the defect in the complaint cannot be cured, the demurrer may be sustained without leave to amend. *Lemoge Elect. v County of San Mateo* (1956) 46 C2d 659, 297 P2d 638; *Andrews v Joint Clerks Port Labor Relations Comm.* (1966) 239 CA2d 285, 300, 48 CR 646. If, however, the complaint raises a reasonable possibility that its defects can be cured by amendments, the landlord should be given leave to amend and has 5 calendar days in which to amend. CCP §472a(c); Cal Rules of Ct 3.1320(g); *Harman v City & County of San Francisco* (1972) 7 C3d 150, 157, 101 CR 880.

The court must state its grounds for sustaining a demurrer. CCP §472d. However, a plaintiff's failure to notify the court of its failure to state grounds waives the error. *Krawitz v Rusch* (1989) 209 CA3d 957, 257 CR 610. The court will dismiss the complaint after a demurrer is sustained without leave to amend. Whether or not the plaintiff has requested leave to amend, the judgment entered after an order sustaining a demurrer without leave to amend may be appealed on the question of whether the court abused its discretion. CCP §472c(a).

If a demurrer is sustained with leave to amend the complaint, but the plaintiff does not amend within the time permitted in the order, the court will dismiss the complaint after the defendant files a noticed motion or makes an ex parte request with notice to the plaintiff. See *Datig v Dove Books, Inc.* (1999) 73 CA4th 964, 87 CR2d 719. In this situation, the landlord's attorney must be prepared to respond quickly. If plaintiff files no opposition to the demurrer and then attempts to dismiss the case after a tentative ruling is made to sustain the demurrer without leave to amend but before the hearing on the motion, the trial court has jurisdiction to vacate the voluntary dismissal and grant the demurrer without leave to amend. *Groth Bros. Oldsmobile, Inc. v Gallagher* (2002) 97 CA4th 60, 118 CR2d 405. In an appropriate case, the tenant may then seek reasonable attorney fees under CC §1717.

PRACTICE TIP: Counsel for the landlord may concede a meritorious demurrer before the hearing through the use of a permissive amendment under CCP §472 to expedite the case, particularly when personal service of the amended complaint on the tenant's counsel is convenient.

If the amended complaint is served by mail, the tenant has an additional 5 calendar days to respond, and if the amended complaint is served by express mail, another method of overnight delivery, or, on the parties' agreement, facsimile transmission, the tenant has an additional 2 court days to respond. CCP §1013. If the complaint is amended (before or after a ruling on demurrer), the tenant's pleading to the amended complaint must be filed within 5 days after service. CCP §1167.3. Of course, the tenant may also demur to the amended complaint.

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.36 E. Form: Demurrer to Complaint

§10.36 E. Form: Demurrer to Complaint

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant, _ _[*Name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	_ _[*NAME*]_ _**'S DEMURRER**
vs	)	**TO COMPLAINT OF**
	)	_ _[*NAME*]_ _**; SUPPORTING**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**MEMORANDUM; NOTICE OF HEARING**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*name*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Defendant, _ _[*name*]_ _, hereby demurs to the complaint of plaintiff, _ _[*name*]_ _, on each of the following grounds:

[*State each ground for objection in a separately numbered paragraph*]

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name of attorney*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This form must either be accompanied by a notice of hearing or be combined with it (see §§10.33, 10.47). See Cal Rules of Ct 3.1112(a) for papers required to support a demurrer. Under Cal Rules of Ct 3.1320(e), the name of the party filing the demurrer, and the name of the party whose pleading is the subject of the demurrer, must appear immediately below the case number. The first page of each court paper must show the date, time, and location (if ascertainable) of the hearing, the name of the hearing judge (if ascertainable), the nature or title of any attached document other than an exhibit, the filing date of the action, and the trial date (if set). Cal Rules of Ct 3.1110(b). For rules pertaining to format of court papers and to law and motion generally, see Cal Rules of Ct 1.200, 2.100-2.306, 3.1300-3.1312. Although this sample form is styled in the format of a demurrer to a complaint, the same basic format may be adapted for a demurrer to a cross-complaint or an answer. Because cross-complaints are not permitted in unlawful detainers, the landlord should demur to any such pleading. In addition to other supporting documents, this form should be accompanied by a notice of hearing of the demurrer. See forms in §§10.28, 10.47, which may be modified. For further discussion of format and forms for moving papers, opposition, and order, see California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004). On captions for court papers, see Civ Proc Before Trial, chap 11.

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.36A F. Form: Memorandum Supporting Demurrer (Defective 3-Day Notice Case)

§10.36A F. Form: Memorandum Supporting Demurrer (Defective 3-Day Notice Case)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**MEMORANDUM IN SUPPORT**
vs	)	**OF** _ _[*NAME'S*]_ _
	)	**DEMURRER TO**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*NAME'S*]_ _ **COMPLAINT**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*name*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

SUPPORTING MEMORANDUM

AUTHORITY FOR DEMURRER

1. California CCP §430.10(e) permits a party to object to a pleading, by demurrer, if "[t]he pleading does not state facts sufficient to constitute a cause of action."

2. A party may also object to a pleading by demurrer if "[t]he pleading is uncertain." "Uncertain" includes ambiguous and unintelligible. CCP §430.10(f).

TERMINATION NOTICE REQUIREMENTS MUST BE STRICTLY FOLLOWED IN UNLAWFUL DETAINER ACTIONS

3. "The statutory situations in which the remedy of unlawful detainer is available are exclusive, and the statutory procedure must be strictly followed. [*Citations.*]**" *Greene v Municipal Court* (1975) 51 CA3d 446, 450, 124 CR 139. Among other statutory situations, a tenant is guilty of unlawful detainer for continuing in possession, without permission of the landlord, after default in the payment of rent required by the lease or rental agreement. CCP §1161(2).**

4. When the claim is nonpayment of rent, the tenant must have been served with a written notice stating the exact amount of rent alleged to be due, and must have been given 3 days within which to pay the rent or quit the premises. *Baugh v Consumers Assocs.* (1966) 241 CA2d 672, 674, 50 CR 822. The notice must also state the name, telephone number, and address of the person to whom the rent payment shall be made, and either the usual days and hours that person will be available to receive it or the number of an account in a financial institution into which the payment may be made and the name and street address of the institution (which must be within five miles of the rental property). CCP §1161(2). "A notice to pay rent or quit which overstates the rent due is ineffective and will not support an action for unlawful detainer." *Ernst Enters. v Sun Valley Gasoline, Inc.* (1983) 139 CA3d 355, 359, 188 CR 641. See *Nourafchan v Miner* (1985) 169 CA3d 746, 215 CR 450. "Strict compliance with this provision of the unlawful detainer statute is mandatory." *Baugh v Consumers*

***Assocs., supra*.**

THE 3-DAY NOTICE OVERSTATES THE AMOUNT OF RENT ALLEGED DUE, BY INCLUDING A SECURITY DEPOSIT

5. Plaintiff's Exhibit 2 demands a total of $_ _[*dollar amount*]_ _ to be paid within 3 days to avoid forfeiture. The notice conflicts with the demand of the complaint at ¶10, and a demand for security deposit may not be included in a 3-day notice. See, *e.g., Werner v Sargeant* (1953) 121 CA2d 833, 836, 264 P2d 217, and California Eviction Defense Manual §6.18 (2d ed Cal CEB 1993). It is no argument for Plaintiff to claim that the 3-day notice separates "rent" from "deposit." Clearly the notice demands payment of the full amount including the deposit to cure the alleged default. The notice therefore does not comport with the law.

THE AMOUNT OF RENT STATED IN THE 3-DAY NOTICE CONFLICTS WITH THE CONTRACT

6. In the present complaint, Plaintiff alleges a written rental agreement, at a monthly rental of _ _[*dollar amount*]_ _. A copy of the rental agreement, attached to the complaint as Exhibit 1, confirms that allegation. The 3-day notice, attached to the complaint as Exhibit 2, demands _ _[*dollar amount*]_ _ for the period _ _[*e.g., January 1 through January 31*]_ _. There is no explanation in the complaint of the differing amounts. "A notice to pay rent or quit which overstates the rent due is ineffective and will not support an action for unlawful detainer." *Ernst Enters. v Sun Valley Gasoline, Inc.* (1983) 139 CA3d 355, 359, 188 CR 641; *Nourafchan v Miner* (1985) 169 CA3d 746, 753, 215 CR 450.

THE COMPLAINT ALLEGES AMBIGUOUS CONTRACT TERMS

7. In the present complaint, Plaintiff alleges that the parties entered into a written agreement and that it is attached to the complaint as Exhibit 1. Complaint, ¶6. Plaintiff further alleges, supported by Exhibit 1, that the rental agreement provides for a monthly rent of _ _[*dollar amount*]_ _. The 3-day notice attached to the Complaint as Exhibit 2 conflicts with the alleged terms of the rental agreement by demanding more than the monthly rent alleged in the Complaint. There is no explanation in the Complaint of the reasons for the amount of the demand. The only hint of a rental amount different from that alleged in the Complaint and contained in the Rental Agreement is by three unreferenced pages purporting to be notices of rent increases. Paragraph 6.d. of the Complaint, however, is not checked, nor is there any verified allegation as to the meaning of these documents. At a minimum, an allegation that Plaintiff has complied with the notice and service provisions of CC §827 is required.

THE ALLEGED TENANCY WAS TERMINATED, ACCORDING TO PLAINTIFF'S COMPLAINT, WHEN THE 3-DAY NOTICE WAS SERVED

8. The expiration of a notice to quit is the act that terminates the tenancy for the purposes of rent. See *Roberts v Redlich* (1952) 111 CA2d 566, 568, 244 P2d 933; *Kriz v Taylor* (1979) 92 CA3d 302, 313, 154 CR 824.

9. Plaintiff alleges service of both a 30-day notice terminating the tenancy as of _ _[*date*]_ _, and a 3-day notice demanding rents from _ _[*date*]_ _ through _ _[*date*]_ _. Complaint, ¶7, and Exhibits 2 and 3. If the tenancy had terminated through operation of the 30-day notice, no rent, based on a contractual relationship or agreement of the parties, could be due beyond _ _[*date*]_ _.

10. Plaintiff's complaint is hopelessly inconsistent. Its allegations are ambiguous and unintelligible, and fail to state a cause of action for unlawful detainer.

THE COMPLAINT DEMANDS RENT THAT ALLEGEDLY BECAME DUE MORE THAN 1 YEAR BEFORE SERVICE OF THE NOTICE

11. When nonpayment of rent is the basis of the action, the exact amount of rent claimed to be due must be stated in the statutory notice to pay rent or quit. *Baugh v Consumers Assocs.* (1966) 241 CA2d 672, 674, 50 CR 822. The tenant must have been served with a written notice stating the amount of rent due, and must have been given at least 3 days within which to cure any default. CCP §1161(2). "Such notice may be served at any time within one year after the rent becomes due." CCP §1161(2). "Strict compliance with this provision of the unlawful detainer statute is mandatory." *Baugh v Consumers Assocs.* (1966) 241 CA2d 672, 674, 50 CR 822. "A notice to pay rent or quit which overstates the rent due is ineffective and will not support an action for unlawful detainer." *Ernst Enters. v Sun Valley Gasoline, Inc.* (1983) 139 CA3d 355, 359, 188 CR 641; see

Nourafchan v Miner **(1985) 169 CA3d 746, 753, 215 CR 450.**

12. "If a landlord waits over one year to sue for unpaid rent he is relegated to an ordinary breach of contract action, which results only in a money judgment without restitution of the demised property." *Cal-American Income Prop. Fund IV v Ho* (1984) 161 CA3d 583, 585, 207 CR 532.

13. In the present action, Plaintiff claims that a 3-day notice was served on _ _[*date*]_ _. Complaint, ¶8.a. The notice demands rent for the period of _ _[*date*]_ _ to _ _[*date*]_ _, which period spans over 1 year. Exhibit 2 to the Complaint. The rent demanded in the 3-day notice includes rent that became due, if at all, for the months of _ _[*e.g., May, 1999 through July, 2000, inclusive*]_ _. According to the written agreement attached as Exhibit 1 to the Complaint, the rent is due in advance, _ _[*e.g., on the first day of the month*]_ _. Exhibit 1, _ _[*specify page and paragraph*]_ _. According to the allegations of the Complaint, rent for the month(s) of _ _[*e.g., May and June, 2000*]_ _ became due on _ _[*specify due date(s)*]_ _, which _ _[*is/are*]_ _ more than 1 year before the date the notice was allegedly served. Because Plaintiff cannot maintain an action for unlawful detainer based on a notice that demands rent more than 1 year past due, and the notice predates the complaint and cannot be amended after service, the defect is fatal, and the complaint should be dismissed.

WHEREFORE Defendants pray that the Court will sustain their demurrer, and order this matter dismissed with prejudice.

Respectfully submitted,

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: As with all papers for filing (except confidential documents like fee waiver applications), one copy is served on each opposing attorney or unrepresented party, the original with the completed original proof of service is filed with the court clerk, and one copy should be stamped at the clerk's office, and retained by the tenant, to prove the date and fact of filing.

Comment: This form will need to be modified if a 60-day termination notice is a basis for the unlawful detainer action. See §8.69. On the format of court-filed papers, see Cal Rules of Ct 1.200, 2.100-2.119, 3.1110; on drafting and serving a demurrer based on a 3-day notice defect, see chap 8 and §§10.29-10.33; California Eviction Defense Manual, chaps 6, 13 (2d ed Cal CEB 1993); Cal Rules of Ct 3.1112-3.1113, 3.1320. See generally California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004). On civil law and motion rules and pretrial procedures generally, see Cal Rules of Ct 3.1100-3.1362.

For additional sample supporting memoranda on a demurrer in unlawful detainer actions, see Appendixes in California Eviction Defense Manual (2d ed Cal CEB 1993). On conducting legal research on the Internet, including legislation, rules of court (both statewide and local), jury instructions, court fees, law libraries, Judicial Council forms, and other valuable resources, see The Cybersleuth's Guide to the Internet: Conducting Effective Investigation and Legal Research on the Web (IFL Press 2006).

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§10.37 G. Frivolous Demurrers

A demurrer, as opposed to an answer, cannot be stricken on the grounds of being a sham or frivolous. *Larco v Casaneuava* (1866) 30 C 560, 565. Attorneys should be aware, however, that a court may impose sanctions under CCP §128.7 against a party or an attorney who files a frivolous demurrer or frivolously opposes a meritorious demurrer. A court also might regard a patently frivolous demurrer as evidence of the requisite malice in holding over to justify an award of statutory damages of up to $600, in addition to actual damages, including rent found due. CCP §1174 (see §§12.31-12.34). Many attorneys include a statement in the demurrer that it is filed in good faith and not for purposes of delay, but there is no legal requirement for such a statement.

Code of Civil Procedure §128.7(a) requires that every pleading must be signed by at least one attorney of record in the attorney's individual name, or if the party is pro per, the party must sign. The attorney or pro per party who signs the pleading thereby certifies that, to the best of the person's knowledge, the following are true:

- The pleading is not presented primarily for an improper purpose;
- Allegations and other factual contentions have evidentiary support;
- Denials of factual contentions have evidentiary support; and
- Claims, defenses, and other contentions are warranted by existing law or by a nonfrivolous argument for extension, modification, or reversal of existing law or establishment of new law.

CCP §128.7(b). Violation may subject the responsible attorney and/or party to sanctions. CCP §128.7(c).

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VI. MOTION TO STRIKE

A. Legal Basis and Tactical Considerations

§10.38 1. Under CCP §§435-437 (Irrelevant, False, or Improper Matter)

Any party to an action may move to strike all or any part of a pleading, within the time allotted to respond to that pleading. CCP §435(b)(1). Thus, a motion to strike is available to both landlord and tenant, although (like a demurrer) it is used primarily by tenants to attack the complaint. On grounds under CCP §436, see §10.39. A trial court also has power to strike a pleading that is filed in disregard of established procedural requirements or that would otherwise violate orderly judicial administration. *Neal v Bank of America* (1949) 93 CA2d 678, 209 P2d 825.

Although a party may not demur to a portion of a cause of action, a substantive defect on the face of a portion of a cause of action (such as a claim barred by the statute of limitations or an improper claim for punitive damages) may be subject to a motion to strike. *PH II, Inc. v Superior Court* (1995) 33 CA4th 1680, 40 CR2d 169. The court emphasized that using the motion should be "cautious and sparing," so that the defendant would not have a "line item veto" over the complaint.

A motion to strike filed within the time allotted to answer extends the time to answer, but not the time to demur. CCP §§435(c)-(d), 585(b)-(c). Thus, when a pleading is arguably open to attack by demurrer or motion to strike, both should be filed at the same time and noticed for hearing at the same date and time. See Cal Rules of Ct 3.1322(b). Filing a motion to strike also generally constitutes a general appearance in the action (see CCP §1014), unless the tenant moves to strike and moves to quash simultaneously (see CCP §418.10(e), discussed in §10.18), and precludes entry of a default judgment (CCP §§585-586). Filing a motion to strike by itself, however, may not preclude entry of a default in an unlawful detainer action. In such actions, "the defendant may appear and answer or demur." CCP §1170. This statute suggests that a tenant who wishes to avoid default must at least file an answer or demurrer within the time to respond.

PRACTICE TIP: A safer practice would be for the tenant to file either an answer or a demurrer along with a motion to strike. A scorched-earth policy in litigation, however, even if it does not lead to sanctions, can lead to a large attorney fee award to an opposing party who prevails. See *Stokus v Marsh* (1990) 217 CA3d 647, 266 CR 90, in which the appellate court affirmed an attorney fee award of $75,000 to the landlord and against the tenant. If the unlawful detainer defense is weak on the merits, dragging the case out by motions that do not ultimately benefit the tenant may result in a large judgment against the tenant for costs and attorney fees, in addition to loss of the premises.

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§10.38A 2. Under CCP §425.16 (Anti-SLAPP Motion)

If the landlord responds to the tenant's complaints to government agencies about numerous code violations by suing the tenant, the tenant may be able to file a special motion to strike under CCP §425.16 on the ground that the landlord's suit is a strategic lawsuit against public participation (SLAPP). (See Making and Opposing Special Motions to Strike Under the California Anti-SLAPP Statute (Cal CEB Action Guide March 2009). See also §§5.18A, 8.110.) If the tenant prevails, attorney fees are available under CCP §425.16(c). See *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377. (See chap 13 on procedures for recovering attorney fees after entry of judgment.) No other reported case validates filing an anti-SLAPP motion in an unlawful detainer case, so counsel should proceed cautiously in this as-yet uncharted area. If the court were to find that a special motion to strike is presented for an improper purpose, such as to harass, cause unnecessary delay, or increase litigation costs, or is frivolous and unwarranted by existing law, an award of costs and reasonable attorney fees to the plaintiff prevailing on the motion or other sanctions may be available under CCP §128.7. Moreover, it is a breach of ethics to take an action solely to cause unnecessary delay.

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§10.39 B. Grounds

The following may be stricken from a pleading under CCP §436:

- Any irrelevant, false, or improper matter; and
- All or part of any pleading not drawn or filed in conformity with state law, a court rule, or a court order.

A motion to strike may be based on matter appearing on the face of the challenged pleading, or on matters of which the court takes judicial notice. CCP §437. Both of these statutes were enacted in 1982 (Stats 1982, ch 704), but it is unclear what effect they have on two established common law principles governing motions to strike:

- A motion to strike may be used to raise objections to a pleading that do not fall within the grounds for demurrer enumerated in CCP §430.10 (see California Civil Procedure Before Trial, chap 24 (4th ed Cal CEB 2004)).
- A motion to strike may be used to attack defects not apparent on the face of a pleading (*White Lighting Co. v Wolfson* (1968) 68 C2d 336, 353, 66 CR 697).

The motion is most commonly used to attack the following procedural or technical defects on the face of the complaint:

- Lack of or improper verification (see CCP §1166(a)(1); *Pearlman v Municipal Court* (1979) 99 CA3d 568, 575, 160 CR 567);
- Late filing of a pleading (see *Buck v Morrossis* (1952) 114 CA2d 461, 250 P2d 270); and
- Unauthorized filing of a pleading (see *Estate of Walters* (1949) 89 CA2d 797, 202 P2d 89 (unauthorized intervention); *Gilbert v Sherrod* (1925) 75 CA 437, 243 P 30 (amended pleading without leave of court)).

NOTE: Many of the cases cited below in §§10.40-10.44 were decided before the effective date of CCP §§436-437. The decisions must be read with that fact in mind. The cases will probably still be relevant, but it is unclear how each might be decided under CCP §§436-437.

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§10.40 1. Improper Request for Damages

The prayer in an unlawful detainer complaint is improper under CCP §436 if it seeks to recover damages not arising from the unlawful detainer itself, because CCP §1174(b) allows only damages occasioned by the unlawful detainer. Consequently, a request for other damages for breaches that occurred during or before the unlawful detainer would be improper and subject to a motion to strike. See, *e.g., Vasey v California Dance Co.* (1977) 70 CA3d 742, 748, 139 CR 72 (in action for unlawful detainer, trial court improperly awarded damages for tenant's breach of lease in making alterations to premises). See §9.41.

There are few exceptions; for example, a landlord can recover both back rent and damages resulting from the unlawful detainer under CCP §1174(b), when the action is brought for default in the payment of rent after the expiration of a 3-day notice under CCP §1161(2), but only damages resulting from the unlawful detainer, when the action follows the expiration of a 30-day or 60-day notice under CC §1946 or §1946.1. See *Saberi v Bakhtiari* (1985) 169 CA3d 509, 515, 215 CR 359 (request for pretermination rent when action based on 30-day notice is subject to motion to strike). See discussion of additional monetary relief allowed in §§9.38-9.40.

A defective *prayer for relief* is not within the grounds enumerated in CCP §430.10 and is not subject to demurrer. See *Neblett v Neblett* (1936) 13 CA2d 304, 56 P2d 969; *Grisingher v Shaeffer* (1938) 25 CA2d 5, 76 P2d 149. Thus, if only the *prayer* requests an improper item of damages, this defect should be challenged by a motion to strike. If a complaint seeks damages by way of a cause of action not proper in an unlawful detainer (*e.g.,* cause of action for injury to the property), a motion to quash is appropriate because it is not proper to serve such a complaint on a 5-day summons. *Parsons v Superior Court* (2007) 149 CA4th Supp 1, 58 CR3d 48; *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 194 CR 685.

Prospective damages for the tenant's continued possession of the premises after the date of judgment cannot be awarded in unlawful detainer proceedings. *Cavanaugh v High* (1960) 182 CA2d 714, 722, 6 CR 525; *Roberts v Redlich* (1952) 111 CA2d 566, 569, 244 P2d 933. A prayer for damages that uses language such as "while the defendant remains in unlawful possession," is improper, therefore, and should be stricken. A court may find a motion to strike sanctionable, however, if brought primarily to cause unnecessary delay or needless cost in the litigation. CCP §128.7(b)(1). See §§10.2, 10.37 and Practice Tip in §10.38.

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§10.41 2. Improper Request for Back Rent

When a landlord bases an unlawful detainer action on a 30-day notice terminating a month-to-month tenancy (see §8.69), recovery of pretermination ("back") rent is not allowed; the landlord is limited to recovery of possession and damages. See *Saberi v Bakhtiari* (1985) 169 CA3d 509, 215 CR 359; *Castle Park No. 5 v Katherine* (1979) 91 CA3d Supp 6, 154 CR 498. *Castle Park* was a consolidated appeal of two cases. In one, the trial court had quashed service of the 5-day summons; in the other, the trial court had stricken the allegations and prayer for back rent. The court of appeal affirmed both orders. In *Saberi,* however, the court of appeal stated that a motion to strike is the exclusive remedy for improper matter in an otherwise valid unlawful detainer complaint. See §10.22.

Thus, when an unlawful detainer action is based on termination of a month-to-month tenancy, and the landlord has not served a 3-day notice to pay rent or quit, inclusion of an allegation and a prayer for back rent may subject the summons and complaint to either a motion to quash, based on the theory that a claim for back rent, not properly preceded by a 3-day notice, is invalid (see §10.20), or a motion to strike. If an unlawful detainer cause of action is otherwise properly stated in the complaint, a motion to strike may be directed at the request for improper damages. *Saberi v Bakhtiari, supra*. See §§9.38-9.41, 10.40 concerning recovery of both back rent and damages.

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§10.42 3. Lack of Allegations for Statutory Damages

Under CCP §1174(b), if a defendant is found guilty of unlawful detainer and malice is shown, the plaintiff may be awarded statutory damages of up to $600, in addition to actual damages (including rent found due). Before January 1, 1994, §1174(b) provided for treble damages. Because the requirement of "malice" remains the same, cases addressing malice under the former treble-damages version of the statute should continue to apply to the current statutory scheme.

To support a prayer for statutory damages, the complaint must allege specific facts indicating that the tenant's continued possession is malicious. CCP §1174(b); *Cyrus v Haveson* (1976) 65 CA3d 306, 316, 135 CR 246 (to recover treble damages for forcible entry and detainer, complaint must allege specific facts constituting malice; conclusory allegations are insufficient).

A motion to strike the prayer for statutory damages is proper if the complaint fails to allege facts showing a malicious holdover. On the other hand, a motion to strike may only educate the landlord and permit him or her to file an amended complaint in which the facts are pleaded with great specificity. An alternate method would be to file a motion in limine at the time of trial. Landlord attorneys may file a motion at trial to amend the complaint for statutory damages based on facts supporting "malice" that were unknown to the parties when the complaint was served. See §§12.39-12.40. But see *North 7th St. Assocs. v Constante* (2001) 92 CA4th Supp 7, 111 CR2d 815 (landlord may not amend unlawful detainer complaint at trial to add new cause of action when amendment not based on same general facts).

The allegations of the complaint must be considered as a whole in determining whether a complaint sufficiently states facts to support statutory damages. *Monge v Superior Court* (1986) 176 CA3d 503, 222 CR 64. Thus, when a complaint alleges tenant conduct that is, *e.g.,* malicious, intentional, and obstinate, without supporting facts, the tenant's attorney should determine whether the complaint contains specific language elsewhere that supports statutory damages. See *Perkins v Superior Court* (1981) 117 CA3d 1, 6, 172 CR 427 (conclusory allegations based on language in CC §3294 are not objectionable when sufficient foundational facts are also pleaded).

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§10.43 4. No Attorney Fees in Rental Agreement

If the complaint seeks to recover the landlord's attorney fees, it must allege the existence of a provision in the lease or rental agreement authorizing an award of attorney fees. *Stockton Theatres, Inc. v Palermo* (1954) 124 CA2d 353, 268 P2d 799. Unless the complaint prays that reasonable attorney fees be determined by the court, the landlord may not recover them. *Flournoy v Everett* (1921) 51 CA 406, 408, 196 P 916. A trial court arguably would not abuse its discretion, however, by awarding attorney fees under a general prayer if the lease or rental agreement were to provide for fees and it is pleaded by legal effect, verbatim, or by incorporation and attachment as an exhibit. A prayer for attorney fees will likely be stricken if it is not supported by the necessary allegations.

NOTE: A landlord who brings an unlawful detainer action based on the tenant's nonpayment of rent, and who is liable for a violation of the habitability standards in CC §1942.4, shall be liable for reasonable attorney fees and costs of the suit in an amount to be fixed by the court. CCP §1174.21. See §§3.32, 3.36.

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§10.44 5. Irrelevant, False, or Improper Matter

Under CCP §436(a) the court may strike from any pleading any matter that is "irrelevant, false or improper." It is unclear to what extent this standard differs from the "irrelevant and redundant" matter under former CCP §453. Cases in which the courts struck sham pleadings (*i.e.,* pleadings in proper form but false in fact and not pleaded in good faith) might still apply under this standard. See, *e.g., Tostevin v Douglas* (1958) 160 CA2d 321, 325 P2d 130; *Neal v Bank of America* (1949) 93 CA2d 678, 209 P2d 825. See generally California Civil Procedure Before Trial, chap 24 (4th ed Cal CEB 2004). The tenant's attorney should move to strike from the complaint irrelevant material that might prove injurious to the tenant if the complaint were read to the jury.

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§10.45 6. Unverified Complaint

An unlawful detainer complaint must be verified and include the typed or printed name of the person verifying it. CCP §1166(a)(1). The landlord's attorney may verify the complaint when the client is out of the county where the attorney has his or her office or is otherwise unable to do so. CCP §446. If the complaint is not properly verified, it should be subject to a motion to strike on the ground that it is not drawn or filed in conformity with state law. CCP §436(b).

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§10.46 C. Procedure

A motion to strike must be filed within the 5-day period required for a responsive pleading. CCP §§435, 1167.3. Under CCP §1170, a motion to strike may not be sufficient alone to prevent entry of the tenant's default. Filing a motion to strike in conjunction with a demurrer (see §10.32) or an answer (see §10.50) is the safer practice. A motion to strike does not extend the time to demur (CCP §435(d)); therefore, a demurrer, if applicable, must be filed and scheduled for hearing concurrently with the motion to strike. Cal Rules of Ct 3.1322(b). Notice of the motion must be given at least 16 court days before the time set for hearing; add 5 calendar days if the notice is served by regular mail within California and add 2 calendar days if service is by express mail or another method of overnight delivery or (by agreement of the parties) facsimile transmission. CCP §1005(b).

If directed at objectionable portions of a complaint, the motion to strike must specify the portions sought to be stricken. Every word sought to be stricken must be quoted in the motion, unless the motion seeks to strike an entire paragraph, cause of action, count, or defense. Cal Rules of Ct 3.1322(a). When the motion seeks to strike a portion of a pleading, mere reference to certain words, sentences, or paragraphs (*e.g.,* by page and line references) is inadequate. See notice form in §10.47.

A supporting memorandum must be submitted with the motion to strike. Cal Rules of Ct 3.1113(a). See form in §10.47A. Some courts require the moving party also to meet and confer before filing a motion to strike. Opposing papers must be filed *at least* 9 court days before the hearing and reply papers *at least* 5 court days before the hearing. CCP §1005(b). Late-filed papers will likely be disregarded by the court. Unless otherwise ordered, all opposing and reply papers must be served by personal delivery, facsimile transmission, express mail, or other means that are reasonably calculated to ensure delivery to the other party by the close of the next business day after the papers are filed with the court. CCP §1005(c); Cal Rules of Ct 3.1300(a).

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.47 D. Form: Notice of Motion to Strike

§10.47 D. Form: Notice of Motion to Strike

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant, _ _[*Name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF** _ _[*NAME'S*]_ _
vs	)	**MOTION TO STRIKE**
	)	_ _[*PORTION OF*]_ _ **THE**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*COMPLAINT/CROSS-COMPLAINT/ANSWER*]_ _ **OF**
	)	_ _[*NAME*]_ _**; SUPPORTING**
	)	**MEMORANDUM**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*name*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _ **of the above-entitled Court, located at** _ _[*address*]_ _**,** _ _[*defendant/cross-defendant*]_ _**,** _ _[*name*]_ _**, will move for an order from the Court to strike**

[*Add if moving to strike entire pleading*]

the _ _[*complaint/cross-complaint/answer*]_ _ **filed by** _ _[*name*]_ _**.**

[*Add if moving to strike a cause of action, defense, or paragraph*]

the _ _[*e.g., first*]_ _ _ _[*cause of action/defense/paragraph*]_ _ **in the** _ _[*complaint/cross-complaint/answer*]_ _ **filed by** _ _[*name*]_ _**, beginning at page** _ _[*number*]_ _**, line** _ _[*number*]_ _**, and ending at page** _ _[*number*]_ _**, line** _ _[*number*]_ _**.**

[*Add if moving to strike particular sentences, clauses, or words*]

the following quoted matter from the _ _[*complaint/cross-complaint/answer*]_ _ **filed by** _ _[*name*]_ _**, from page** _ _[*number*]_ _**, line** _ _[*number*]_ _**, through page** _ _[*number*]_ _**, line** _ _[*number*]_ _**:** _ _[*quote verbatim material to be stricken*]_ _**.**

[*Continue; see §§10.39-10.45*]

This motion is made on the grounds that _ _[*, e.g., the cause of action/defense/damages/quoted matter is improper in an action for unlawful detainer*]_ _**.**

This motion is based on this notice; all pleadings, papers, and records on file in this action; matters of which the court takes judicial notice; the accompanying declarations; the attached supporting memorandum _ _[*and on such evidence as may be presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name of attorney*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The notice of motion must be carefully prepared so that both the court and the opposing parties are fully informed about the specific allegations the defendant is seeking to have the court strike (see Cal Rules of Ct 3.1322(a)). The first page of each court paper must show the date, time, and location (if ascertainable) of the hearing, the name of the hearing judge (if ascertainable), the nature or title of any attached document other than an exhibit, the filing date of the action, and the trial date (if set). Cal Rules of Ct 3.1110(b). For rules pertaining to format of court papers and to law and motion generally, see Cal Rules of Ct 1.200, 2.100-2.306, 3.1100-3.1362. For discussion of procedure, see §10.46. On grounds for motions to strike in unlawful detainer actions, see §§10.39-10.45. For further discussion of motions to strike generally, see California Civil Procedure Before Trial, chap 24 (4th ed Cal CEB 2004). On captions for court papers, see Civ Proc Before Trial, chap 11.

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.47A E. Form: Memorandum Supporting Motion to Strike Allegations of Improper Damages

§10.47A E. Form: Memorandum Supporting Motion to Strike Allegations of Improper Damages

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**MEMORANDUM IN SUPPORT**
vs	)	**OF MOTION TO STRIKE**
	)	**PORTIONS OF COMPLAINT**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*name*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

SUPPORTING MEMORANDUM

AUTHORITY FOR MOTION TO STRIKE IN UNLAWFUL DETAINER ACTIONS

1. A party may move to strike the whole or a part of any pleading. CCP §435(b)(1). A motion to strike is authorized in an unlawful detainer action. *Saberi v Bakhtiari* (1985) 169 CA3d 509, 517, 215 CR 359.

2. The court may strike from any pleading any irrelevant, false, or improper matter. CCP §436(a). The court may also strike all or any part of a pleading that is "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." CCP §436(b). The complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language and a demand for judgment, stating the amount of damages demanded. CCP §425.10(a).

THE COMPLAINT FAILS TO ALLEGE A BASIS FOR PLAINTIFF TO RECOVER UNPAID RENT

3. Code of Civil Procedure §1174 allows damages to a successful plaintiff only when they are "occasioned" by an unlawful detainer. See *Roberts v Redlich* (1952) 111 CA2d 566, 569, 244 P2d 933. To avail itself of the summary proceeding, the landlord must state a complaint squarely within the terms of the statute and pray only for such damages as are allowed under it. *Markham v Fralick* (1934) 2 C2d 221, 39 P2d 804. To support a claim for rent, an unlawful detainer complaint must be based on allegations of service of the statutorily required 3-day notice to pay rent or quit. CCP §1161(2); *Baugh v Consumers Assocs.* (1966) 241 CA2d 672, 675, 50 CR 822.

4. No rent at all can be recovered in an unlawful detainer action unless both the notice to quit and the complaint are based on a default in the payment of rent. CCP §1174(b); *Harris v Bissell* (1921) 54 CA 307, 313, 202 P 453. A tenant is not guilty of unlawful detainer for nonpayment of rent unless a 3-day notice, stating the precise amount of rent, has been properly served. CCP §1161(1). An unlawful detainer complaint praying for rent does not state a cause of action unless service of a 3-day notice is alleged. *Samuels v Singer* (1934) 1 CA2d 545, 549, 36 P2d 1098. Therefore, when only a 30-day notice is alleged, no rent at all can be recovered.

Castle Park No. 5 v Katherine **(1979) 91 CA3d Supp 6, 11, 154 CR 498; *Glouberman v Coffey* (1955) 138 CA2d Supp 906, 292 P2d 681.**

5. In the present complaint, Plaintiff has prayed for "past due rent of _ _[*dollar amount*]_ _." Complaint, ¶17.c. There is no allegation of service of a 3-day notice. Because the complaint is based only on a purported _ _[*30-day/60-day*]_ _ notice, no rent can be awarded in this action. The demand for rent should be stricken.

PLAINTIFF HAS FAILED TO PROPERLY STATE THE AMOUNT OF DAMAGES SOUGHT

6. Code of Civil Procedure §425.10(a) requires a complaint to state the amount of damages demanded by the plaintiff. Although damages for the reasonable rental value of premises unlawfully detained are uncertain at the time of filing the complaint, that uncertainty comes only from ignorance of the date the tenant may vacate, or of the date judgment may be entered. No uncertainty should exist as to the date the rental value damages commence.

7. In the present complaint, Plaintiff has failed to _ _[*e.g., check the box of ¶11 to indicate the fact and amount of damages/allege in ¶11 the exact fair or daily rental value of the premises*]_ _. The unlawful detention, if any, commences after expiration of the termination notice. Plaintiff cannot recover damages in this action, and therefore, Plaintiff's demand for damages should be stricken.

IMPROPER PRETERMINATION DAMAGES MAY BE STRICKEN: PLAINTIFF DEMANDS "DOUBLE DAMAGES" ON 3-DAY NOTICE

8. Paragraph 17.f. of the Complaint requests daily damages from _ _[*date*]_ _ to date judgment is entered. However, Plaintiff's 3-day notice demands rent of _ _[*dollar amount*]_ _ for the rental period from _ _[*date*]_ _ through the end of _ _[*date*]_ _ (*i.e.,* the same period described in ¶17.f.). Plaintiff therefore seeks both damages and rents for the same period. Code of Civil Procedure §1174 allows a successful plaintiff damages only when they are "occasioned" by an unlawful detainer. See *Roberts v Redlich* (1952) 111 CA2d 566, 569, 244 P2d 933. To avail itself of the summary proceeding, the landlord must state a complaint squarely within the terms of the statute and pray only for such damages as are allowed under it. *Markham v Fralick* (1934) 2 C2d 221, 39 P2d 804. In most cases, the damages that may be assessed are those that result from the detention itself, up to the time of trial. *Roberts v Redlich, supra*. The unlawful detention, if any, commences after expiration of the termination notice. CCP §1161(3); *Roberts v Redlich, supra*. Plaintiff may therefore claim rents up through the end of the period covered by the 3-day notice, and damages thereafter, but not both rents and damages for the same period. See California Eviction Defense Manual §11.30 (2d ed Cal CEB 1993).

9. Paragraph 11 of the Complaint alleges that the reasonable rental value of the premises is _ _[*dollar amount*]_ _ and that damages to Plaintiff are accruing at that rate per day. _ _[*Plaintiff's prayer (e.g., Complaint, ¶17.h) asks "For rent and damages according to proof"*]_ _. Plaintiff fails to allege, however, the date on which it claims that the daily rental value damages commenced, *i.e.,* when the termination notice expired. _ _[*It should be stressed that Plaintiff also failed to allege the manner by which it claims the notice was served*]_ _. It cannot be ascertained from the complaint, therefore, when Plaintiff's alleged rental value damages began to accrue, and whether Plaintiff is improperly seeking <u>damages</u> for a period <u>before</u> the expiration of the notice period or whether Plaintiff is improperly seeking <u>rent</u> for a period <u>after</u> the expiration of the notice period.

10. The unlawful detention, if any, commences only after expiration of the termination notice. Given the hopeless uncertainty, Plaintiff can recover neither damages nor rent in this action. Plaintiff's prayers for damages and rent are therefore improper, and both should be stricken.

PLAINTIFF HAS NOT PROPERLY ALLEGED THE RIGHT TO ATTORNEY FEES

11. The allegations of ¶13 of the Complaint are ambiguous under the most liberal reading. Strictly read, they are meaningless with respect to this action. When a written contract is the necessary link in a cause of action, its applicable terms should be quoted in the complaint or set out in haec verba, or the contract attached and incorporated by reference. *A. Teichert & Son, Inc. v State* (1965) 238 CA2d 736, 748, 48 CR 225. Plaintiff has done none of these things. Without a proper allegation of the terms of the written agreement, Plaintiff cannot claim a right to attorney fees. The reference to and demand for attorney fees in ¶17.d of the Complaint should be stricken.

THE COMPLAINT SEEKS DAMAGES NOT PERMITTED IN AN UNLAWFUL DETAINER

12. Attachment 15 to the Complaint alleges that _ _[*e.g., checks of _ _[dollar amount*]_ _ *were returned unpaid*]_ _. Paragraph 17.h. demands that Plaintiff be awarded _ _[*e.g., (1) unpaid checks in the sum of _ _[dollar amount*]_ _*; (2) returned check fees of _ _[dollar amount*]_ _*; and (3) penalties for returned checks as allowed by law*]_ _. These damages are not permitted within the summary process of an action for unlawful detainer. _ _[*Cite direct authority, if any, denying award of specific items claimed*]_ _.

13. Moreover, CCP §1174 allows damages to a successful plaintiff only when they are "occasioned" by an unlawful detainer. See *Roberts v Redlich* (1952) 111 CA2d 566, 569, 244 P2d 933. To avail itself of the summary proceeding, the landlord must state a complaint squarely within the terms of the statute and pray only for such damages as are allowed under it. *Markham v Fralick* (1934) 2 C2d 221, 39 P2d 804. The damages sought must be directly related to the claimed unlawful detention itself, up to the time of trial. *Roberts v Redlich, supra*; *Vasey v California Dance Co.* (1977) 70 CA3d 742, 748, 139 CR 72. Any damages not related to the unlawful detention must be claimed in an independent civil action without the benefit of the summary process of unlawful detainer. *Greene v Municipal Court* (1975) 51 CA3d 446, 450, 124 CR 139; *Hudec v Robertson* (1989) 210 CA3d 1156, 1163, 258 CR 868.

14. The unlawful detention, if any, commences after expiration of the termination notice. CCP §1161(3); *Roberts v Redlich, supra*; California Eviction Defense Manual §§11.30, 26.1-26.13 (2d ed Cal CEB 1993). Damages accruing before the unlawful detainer are therefore improper and must be stricken.

VERIFICATION OF THE COMPLAINT BY PLAINTIFF'S COUNSEL IS INAPPROPRIATE AND A SHAM

15. The complaint in action alleging unlawful detainer shall be verified and include the typed or printed name of the person verifying it. CCP §1166(a)(1). If the complaint is unverified or if the verification does not comply with CCP §446, the court may strike the entire complaint on a motion by defendant. *Ware v Stafford* (1962) 206 CA2d 232, 237, 24 CR 153. Under §446, when a corporation is a party, the verification may be made by any officer of the entity. In the present action, _ _[*state facts as to location of corporate offices, officers, etc.*]_ _.

16. Under §446, an attorney may verify a pleading when "the parties are absent from the county where the attorney has his or her office." Section 446 is silent about the time when the absence from the county permits an attorney verification. However, from the earliest cases, the statute has been subject to judicial restriction. "The practice of attorneys verifying for their clients should be discouraged, and to that end the provisions of the code referred to should receive a strict construction." *Silcox v Lang* (1889) 78 C 118, 20 P 297. Clearly, then, the fact that the client is out of the county at the hour the verification is ready for signature, or even on the day or week, is not sufficient to warrant an attorney verification based on information and belief. But is the bare fact of absence from the county ever sufficient without more?

17. Perhaps the earlier courts placed greater value on a verification executed within the geographic limits of the court. However, as recent statutory and case law has shown, that value has faded, if not disappeared completely. Inability, not inconvenience, is the key concept. Consider CCP §2015.5, which now permits a verification to be executed anywhere if a declaration under penalty of perjury is made "under the laws of the State of California."

18. In a case almost directly on point, the Second District Court of Appeal affirmed the striking of an answer, verified by the attorney, when the facts made known to the trial court demonstrated that the client was not absent from the county for purposes of the statute. *DeCamp v First Kensington Corp.* (1978) 83 CA3d 268, 275, 147 CR 869. After discussing the facts, and finding that the party in question was not, by his temporary absence from the county, "unable to make the verification" (see CCP §446), the *DeCamp* court enlarged on the language of *Silcox v Lang,* quoted in paragraph 16, and ruled that Section 446 does not authorize attorney verifications when the absence of the party creates no inability on its part to verify the pleading.

19. Verification by a party with actual knowledge of the facts would more fully comport with the judicial policy disfavoring attorney verifications and fulfill the object of verification, *i.e.,* to ensure good faith in the averments of a party. *H.G. Bittleston Law & Collection Agency v Howard* (1916) 172 C 357, 360, 156 P 515.

20. In the present case, the verification was made by _ _[*name*]_ _ on _ _[*date*]_ _, but the Complaint was not filed until _ _[*date*]_ _, _ _ days later. Clearly time was not a major consideration in obtaining verification based on personal knowledge. Nor could geography have been the decisive factor because the corporate address of Plaintiff, the premises, and, presumably, the resident manager, are all located in the jurisdictional area of the

court. _ _[*It is only counsel's office that is out of the county*]**_ _.**

21. The practice of attorney verification of unlawful detainer complaints presents special problems in that the allegations of the complaint are quite often the only facts that are presented to the court by Plaintiff at trial. The attorney's verification subjects the attorney to deposition as a witness and to being called to testify at trial. See California Civil Procedure Before Trial, chap 15 (4th ed Cal CEB 2004).

22. For all of the foregoing reasons, the verification of the complaint by the Plaintiff's attorney in this matter was unjustified, and the complaint should be stricken in its entirety.

DEMAND FOR DAMAGES FOR MALICE IS IMPROPER WITHOUT SPECIFIC FACTUAL ALLEGATIONS

23. Plaintiff's allegations in ¶12 do not supply the requisite facts for a claim for statutory damages for malice. To show malice, Plaintiff must establish "that defendant willfully, deliberately, intentionally and obstinately withholds possession of the property with knowledge of the termination of his lease and against the will of the landlord." *Fifth & Broadway Partnership v Kimny, Inc.* (1980) 102 CA3d 195, 204, 162 CR 271. In addition, to support an award of damages for malice, the complaint must allege "ultimate facts of the defendant's oppression, fraud, or malice." CC §3294; *Cyrus v Haveson* (1976) 65 CA3d 306, 316, 135 CR 246. See also *Brousseau v Jarrett* (1977) 73 CA3d 864, 872, 141 CR 200. The form complaint, used by this Plaintiff, clearly requires a party to "State specific facts supporting a claim up to $600 in attachment 12." (Instructions at ¶12.) Without the requisite factual allegations, Plaintiff's complaint cannot support a demand for statutory damages. Paragraph 12 is surplusage that should be stricken.

WHEREFORE, AND ON ALL OF THE ABOVE IMPROPER ALLEGATIONS, Defendant prays that this court grant this motion, and order the offending language stricken from the complaint.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]**_ _**

Copies: As with all papers for filing (except confidential documents like fee waiver applications), one copy is served on each opposing attorney or unrepresented party, the original with the completed original proof of service is filed with the court clerk, and one copy should be stamped at the clerk's office, and retained by the tenant, to prove the date and fact of filing.

Comment: On the format of court-filed papers, see Cal Rules of Ct 2.100-2.119, 3.1110; on drafting and serving a motion to strike, see §§10.38-10.46 and California Eviction Defense Manual, chap 13 (2d ed Cal CEB 1993); Cal Rules of Ct 3.1112-3.1113. See generally California Civil Procedure Before Trial, chap 24 (4th ed Cal CEB 2004). On civil law and motion rules and pretrial procedures generally, see Cal Rules of Ct 3.1100-3.1362.

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VII. EXTENSION OF TIME TO PLEAD

§10.48 A. Legal Basis

Trial courts have the authority to extend a party's time to plead on a showing of good cause. CCP §1054(a). See also Cal Rules of Ct 2.20. In ordinary civil actions, the time to plead may be extended up to 30 days for good cause, and more than 30 days with the adverse party's consent. CCP §1054(a). In unlawful detainer actions, the court's discretion to extend the time is limited by CCP §1167.5, which provides that an extension may not exceed 10 days without the adverse party's consent unless the court orders otherwise for good cause. Thus, even in unlawful detainer actions, the time to plead may be extended more than 10 days on either a showing of good cause or consent of the adverse party.

The tenant's application for an extension of time to plead must be presented to the trial court before expiration of the 5-day period to answer, because an extension granted after expiration of the time allowed to appear and defend is void and may be ignored. The court then has jurisdiction to enter a default judgment. *Start v Heinzerling* (1915) 27 CA 145, 148, 149 P 50. If the tenant's application cannot be filed within the 5 days and default has not yet been entered, the application for an extension should be based also on CCP §473, which allows the court to extend the time to answer or demur, in furtherance of justice and presumably on a showing of good cause. If a default has been entered, a motion to set aside entry of default (see §§13.7-13.16) must be made and be accompanied by proposed responsive pleadings (see §13.10). A party whose attorney failed to file a timely answer without the party's knowing participation is entitled to mandatory relief from a default judgment under CCP §473(b). *Solv-All v Superior Court* (2005) 131 CA4th 1003, 32 CR3d 202.

A stipulation between counsel to extend the time to plead should be considered. In many cases, the landlord's attorney will agree to a short extension of time. Any such stipulation should be memorialized in writing and promptly submitted to opposing counsel.

PRACTICE TIP: An application for an order extending the time to plead is generally heard in the law and motion department or a court assigned to hear ex parte matters. Some courts do not hold ex parte hearings on Fridays. The application invariably is made ex parte in unlawful detainers. Under Cal Rules of Ct 3.1203, a party seeking an ex parte order must notify all parties no later than 10:00 a.m. on the court day before the ex parte appearance, absent "exceptional circumstances," but in an unlawful detainer action shorter notice may be given if reasonable; Rule 3.1202(c) requires "an affirmative factual showing … of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte."

Applications for such orders must disclose in writing the nature of the case and the extensions, if any, previously granted by court order or stipulation. Cal Rules of Ct 2.20(b). The court must grant an extension to plead when all attorneys of record agree by written stipulation. CCP §1054(b). But see *Lorraine v McComb* (1934) 220 C 753, 756, 32 P2d 960, and *County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 784, 140 CR 383, which construed similar language of a mandatory nature in other code sections applicable to postponement of trials and motion hearings. Both cases held that the legislature intended only a directive to the court rather than a strict mandate. The *Lorraine* case based its reasoning on the overriding constitutional right of a court "to control its order of business."

An appearance at a hearing at which a defendant seeks ex parte relief for an extension of the time to plead is not a general appearance and does not constitute a waiver of the right to make a motion under CCP §418.10, authorizing motions to quash. See CCP §§418.10(d), 418.11.

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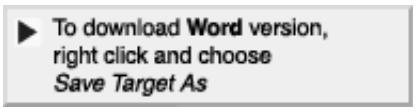
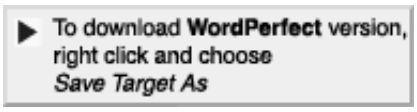
Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.49 B. Form: Application for Order Extending Time to Respond; Order

§10.49 B. Form: Application for Order Extending Time to Respond; Order





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant, _ _[*Name*]_ _
Specially Appearing

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**APPLICATION FOR**
vs	)	**EXTENSION OF TIME TO**
_ _[*Name(s)*]_ _,	)	**RESPOND TO COMPLAINT;**
	)	**ORDER OF THE COURT; CCP**
Defendant(s)	)	**§§1054(a), 1167.5**
_____	)	

Defendant _ _[*name*]_ _ **hereby specially appears and applies for an order extending the time to answer or otherwise respond to the complaint in this action until** _ _[*date*]_ _**. This action is for** _ _[*state nature of action*]_ _**.**

The following extensions previously have been granted: by stipulation of counsel, _ _[*number*]_ _ **days; and by the Court,** _ _[*number*]_ _ **days.**

The basis for requesting this extension is contained in the accompanying declaration of _ _[*name*]_ _ **and is summarized as follows:** _ _[*state reason(s)*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name of attorney*]_ _
Attorney for _ _[*name*]_ _
Specially Appearing

ORDER

Good cause appearing,

IT IS ORDERED that defendant _ _[*name*]_ _ **has until** _ _[*date*]_ _ **to answer or otherwise respond to the complaint in this action.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name of Judge*]_ _
SUPERIOR COURT JUDGE

Copies: Original (for signature by judge and filing); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: For discussion of procedure and formal requirements for the application, see §10.48. The application and proposed order may be presented ex parte to the judge before whom the action is assigned. See Cal Rules of Ct 3.1200-3.1207. Under CCP §1167.5, an extension may not exceed 10 days without the adverse party's consent unless the court orders otherwise for good cause. For further discussion of extensions of time, see California Civil Procedure Before Trial, chap 25 (4th ed Cal CEB 2004). On captions for court papers, see Civ Proc Before Trial, chap 11.

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VIII. ANSWER TO COMPLAINT

§10.50 A. Legal Basis

A tenant served with a summons and complaint in an unlawful detainer action may appear in the action by filing an answer. CCP §1170. A proper answer raising triable issues of fact assures the tenant of the right to a trial. Unless some other pleading has been filed (*e.g.,* a demurrer (see §10.29) or motion to quash (see §10.18)), the answer must be filed within 5 days after service of the summons. CCP §§1167, 1167.3. The tenant may answer, demur, move to strike, and move to quash simultaneously without making a general appearance. See CCP §418.10(e), discussed in §10.18.

In computing the 5 days, Saturdays and Sundays are included, but other judicial holidays are not. The third Wednesday of each month, when the courts are closed for budgetary reasons, is treated as a holiday and should not be counted as part of the 5-day period. See Govt C §68106. If the last day for filing the answer falls on a Saturday or Sunday, the response may be filed on the next court day. CCP §1167. The 5-day requirement also applies to the time to answer an amended complaint (see CCP §1167.3), and to the time to answer the complaint after a demurrer (see Cal Rules of Ct 3.1320(g) or a motion to quash (see CCP §1167.4(b)) has been overruled. It should also apply when a motion to strike has been overruled or a motion to strike part of the complaint has been granted (see CCP §472a), unless otherwise ordered after a showing of good cause.

PRACTICE TIP: Before filing the answer in a rent default case, tenant's counsel should consider having the tenant tender the rent owed, if possible. A landlord cannot be the prevailing party for purposes of an award of attorney fees under CC §1717 if (1) the tenant truthfully alleged in the answer that the full amount of rent was tendered to the landlord; and (2) the tenant deposits this amount into court for the landlord. CC §1717(b)(2). If the court finds the allegation to be true, the tenant would be the prevailing party and thus would be entitled to recover attorney fees under CC §1717. If the tenant tendered the rent due during the 3-day notice period, of course, he or she should prevail in any case and should not need the benefit of this law. See §§8.43-8.45.

The Judicial Council has an answer form for unlawful detainer actions (in addition to a complaint form; see §9.31). Available from local courts and legal publishers, the answer form is reprinted in §10.51. See Cal Rules of Ct 1.45(a). Use of these forms is not mandatory (see CCP §425.12(a)), but the forms provide an efficient means of answering in most residential unlawful detainer actions.

The Judicial Council form Answer—Unlawful Detainer is also available online in both fillable and nonfillable formats. http://www.courtinfo.ca.gov/forms/.

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.51 B. Form: Answer--Unlawful Detainer (Judicial Council Form UD-105)

§10.51 B. Form: Answer—Unlawful Detainer (Judicial Council Form UD-105)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*:	TELEPHONE NO:	*FOR COURT USE ONLY*
ATTORNEY FOR *(Name)*:		
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
PLAINTIFF: DEFENDANT:		CASE NUMBER:

ANSWER—Unlawful Detainer

1. Defendant *(names)*:

answers the complaint as follows:

2. ***Check ONLY ONE of the next two boxes*:**
   a. ☐ Defendant generally denies each statement of the complaint. *(Do not check this box if the complaint demands more than $1,000.*
   b. ☐ Defendant admits that all of the statements of the complaint are true EXCEPT
      (1) Defendant claims the following statements of the complaint are false *(use paragraph numbers from the complaint or explain)*:

      ☐ Continued on Attachment 2b (1).
      (2) Defendant has no information or belief that the following statements of the complaint are true, so defendant denies them *(use paragraph numbers from the complaint or explain)*:

      ☐ Continued on Attachment 2b (2).
3. AFFIRMATIVE DEFENSES *(**NOTE:** For each box checked, you must state brief facts to support it in the space provided at the top of page two (item 3j)).*
   a. ☐ *(nonpayment of rent only)* Plaintiff has breached the warranty to provide habitable premises.
   b. ☐ *(nonpayment of rent only)* Defendant made needed repairs and properly deducted the cost from the rent, and plaintiff did not give proper credit.
   c. ☐ *(nonpayment of rent only)* On *(date)*: before the notice to pay or quit expired, defendant offered the rent due but plaintiff would not accept it.
   d. ☐ Plaintiff waived, changed, or canceled the notice to quit.
   e. ☐ Plaintiff served defendant with the notice to quit or filed the complaint to retaliate against defendant.
   f. ☐ By serving defendant with the notice to quit or filing the complaint, plaintiff is arbitrarily discriminating against the defendant in violation of the Constitution or laws of the United States or California.
   g. ☐ Plaintiff's demand for possession violates the local rent control or eviction control ordinance of *(city or county, title of ordinance, and date of passage)*:

      (Also, briefly state the facts showing violation of the ordinance in item 3j.)
   h. ☐ Plaintiff accepted rent from defendant to cover a period of time after the date the notice to quit expired.
   i. ☐ Other affirmative defenses are stated in item 3j.

Form Approved by the Judicial Council of California
UD-105 [Rev. January 1,2007]

CEB
Civil Code, §1940 et seq.;
Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Print

UD-105

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

3. AFFIRMATIVE DEFENSES (cont'd)
   j. Facts supporting affirmative defenses checked above *(identify each item separately by its letter from page one)*:

   (1) ☐ All the facts are stated in Attachment 3j. (2) ☐ Facts are continued in Attachment 3j.
4. OTHER STATEMENTS
   a. ☐ Defendant vacated the premises on *(date)*:
   b. ☐ The fair rental value of the premises alleged in the complaint is excessive *(explain)*:

   c. ☐ Other *(specify)*:

5. DEFENDANT REQUESTS
   a. that plaintiff take nothing requested in the complaint.
   b. costs incurred in this proceeding.
   c. ☐ reasonable attorney fees.
   d. ☐ that plaintiff be ordered to (1) make repairs and correct the conditions that constitute a breach of the warranty to provide habitable premises and (2) reduce the monthly rent to a reasonable rental value until the conditions are corrected.
   e. ☐ Other *(specify)*:

6. ☐ Number of pages attached *(specify)*:

UNLAWFUL DETAINER ASSISTANT (Business and Professions Code sections 6400- 6415)

7. *(Must be completed in all cases)* An **unlawful detainer assistant** ☐ did not ☐ did for compensation give advice or assistance with this form. *(If defendant has received **any** help or advice for pay from an unlawful detainer assistant, state:*
   a. Assistant's name: b. Telephone No.:
   c. Street address, city, and ZIP:

   d. County of registration: e. Registration no.: f. Expires on (date):

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DEFENDANT OR ATTORNEY)

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DEFENDANT OR ATTORNEY)

(Each defendant for whom this answer is filed must be named in item 1 and must sign this answer unless his or her attorney signs.)

VERIFICATION

(Use a different verification form if the verification is by an attorney or for a corporation or partnership.)

I am the defendant in this proceeding and have read this answer. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DEFENDANT)

Copies: Original (filed with court clerk); one copy for each person to be served; office copies.

Comment: Note that the prayer includes specific relief for violation of the warranty of habitability, the affirmative defense list does not contain an option for failure of the landlord to perform under the rental agreement, and there is no specific phrase for the tenant to claim an offset for deposits held by the landlord, but this may be inserted in ¶5(e) if appropriate. The form also inquires of the responding tenant whether an unlawful detainer assistant gave advice or assistance for compensation, to monitor incidents of the unlawful practice of law.

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§10.52 C. Denials

Because an unlawful detainer complaint must be verified (CCP §1166(a)(1)), "general denials" normally are not permitted, and specific paragraphs or parts of the complaint must be denied, either positively or on information and belief. CCP §431.30(d). An exception exists, however, for cases in which the demand or "value of the property in controversy" does not exceed $1000; for these a general denial is permitted even if the complaint has been verified. CCP §431.40(a). In a reported decision on an unlawful detainer action based on nonpayment of rent in a month-to-month tenancy, the quoted phrase was interpreted in dicta as including "at most the unexpired term of the tenant's lease." *Hall v Municipal Court* (1974) 10 C3d 641, 644 n2, 111 CR 721 (dealing with whether written findings were required under former CCP §632). Thus, the "value of the property in controversy" is the unexpired term of the leasehold interest, and not the market value of the premises. Under ¶2(a) of the Judicial Council unlawful detainer answer form (see §10.51), a defendant may deny generally "each statement of the complaint" if the complaint demands less than $1000. If the complaint demands more than $1000, the defendant must make specific denials in ¶2(b).

The answer form includes the most common affirmative defenses (discussed in §§10.53-10.69). Although a general denial puts at issue all allegations in the complaint essential to the landlord's recovery, it is impossible to foresee all possible denials that might be made in order to raise cognizable defenses. The actual scope of the defense will depend on:

- The allegations in the complaint;
- The tenant's view of the facts; and
- Whether the court considers a proffered defense to be within the ambit of a general denial.

There is a question, however, about the scope of defenses allowed under a general denial if no affirmative defenses are raised. The landlord may move for judgment on the pleading in such a case.

PRACTICE TIP: Because the answer form lists the most common affirmative defenses, defense counsel would be taking a risk in attempting to "hide" an affirmative defense under a general denial. Not only would there be little tactical advantage to such an approach in most cases, the attorney also would risk antagonizing the trial judge. This issue is most likely to arise when tenants appear in propria persona; trial courts usually resolve doubts in the unrepresented party's favor or allow a short continuance if the plaintiff resists surprise assertion of a defense.

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§10.53 D. Principal and Affirmative Defenses

Both principal defenses (denying or contesting essential elements of unlawful detainer action) and affirmative defenses are discussed in §§10.54-10.69A. The California Supreme Court held in 1974 that prior dicta barring affirmative defenses (except for "equitable" defenses (see §10.58)) in unlawful detainer actions were "inaccurate." *Green v Superior Court* (1974) 10 C3d 616, 633 n19, 111 CR 704. The *Green* decision asserts that the traditional distinction between legal and equitable defenses is not dispositive; instead, the court held, the primary inquiry should be whether proof of the defense "will preclude the removal of the tenant from the premises." 10 C3d at 633 n19. The court noted that several prior decisions had allowed "legal" defenses based on the issue of possession. See, *e.g., Schweiger v Superior Court* (1970) 3 C3d 507, 90 CR 729 (retaliatory eviction); *Abstract Inv. Co. v Hutchinson* (1962) 204 CA2d 242, 22 CR 309 (discrimination). For further discussion of the *Green* decision and its arguable effect of adding to the affirmative defenses available to a commercial tenant, see California Eviction Defense Manual §§19.11-19.26 (2d ed Cal CEB 1993).

Before the *Green* decision, several courts of appeal also had stated a general rule that affirmative defenses may not be asserted in unlawful detainer actions because of the summary nature of such actions (see §§9.6-9.8). See*, e.g., Union Oil Co. v Chandler* (1970) 4 CA3d 716, 84 CR 756; *D'Amico v Riedel* (1949) 95 CA2d 6, 212 P2d 52.

Although case law provides guidance concerning defenses that are permitted in unlawful detainer actions, trial courts, when faced with a proffered defense of first impression, "may balance the interest in preserving the summary nature of the unlawful detainer action against the public policies furthered by protecting the defendant from eviction," and may refuse the defense if the defendant "has an adequate remedy at law and/or the trial of his alleged defenses would be lengthy and difficult." *Mobil Oil Corp. v Handley* (1978) 76 CA3d 956, 963, 143 CR 321 (antitrust defense disallowed).

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.54 1. Title Dispute, Improper Foreclosure, or Improper Notice Following Foreclosure

§10.54 1. Title Dispute, Improper Foreclosure, or Improper Notice Following Foreclosure

The general rule is that a tenant in possession cannot challenge the landlord's title to the premises (Evid C §624); therefore such a defense is usually unavailable in an unlawful detainer action. See *Tewksbury v Magraff* (1867) 33 C 237 (lessee estopped from asserting title as defense in ejectment action because lessee did not show on appeal sufficient facts to establish lessee's interest in fee, which contradicted lessee's possessory interest). If a landlord first puts title at issue, however, by filing a quiet title action against the tenant, the tenant may raise the landlord's lack of title defensively in an unlawful detainer action. *Greenhut v Wooden* (1982) 129 CA3d 64, 180 CR 786. See *Yuba River Sand Co. v City of Marysville* (1947) 78 CA2d 421, 425, 177 P2d 642 (cross-actions between landlord and tenant to quiet title). See also *Evans v Superior Court* (1977) 67 CA3d 162, 136 CR 596 (tenant having express agreement to purchase property from subsequent purchaser after foreclosure may litigate title defensively in unlawful detainer action).

A holdover trustor's (*i.e.*, borrower's or former owner's) ability to challenge the plaintiff's title in an eviction action brought after foreclosure under CCP §1161a (see §8.68A) is limited. Absent a showing of fraud or lack of compliance with the foreclosure statutes, the trustor may not litigate title to the premises in the unlawful detainer action. See *Cheney v Trauzettel* (1937) 9 C2d 158, 160, 69 P2d 832; *Old Nat'l Fin. Servs., Inc. v Seibert* (1987) 194 CA3d 460, 239 CR 728; *Mehr v Superior Court* (1983) 139 CA3d 1044, 189 CR 138; *Asuncion v Superior Court* (1980) 108 CA3d 141, 166 CR 306; *Abrahamer v Parks* (1956) 141 CA2d 82, 296 P2d 341. See also Banke, *Staying Postforeclosure Eviction Actions Pending Borrower Actions Against Lenders,* 32 CEB Real Prop L Rep 92 (July 2009); California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 2, 7 (4th ed Cal CEB 2009).

PRACTICE TIP: Although the issue appears to be unsettled regarding tenants, arguably, under *Cheney v Trauzettel, supra,* the tenant might be able to defend an eviction following a foreclosure sale by denying in the answer that the sale was conducted properly. If the sale was improper, the purchaser does not have the requisite interest in the property to bring the eviction action. On defense strategies at trial when essential elements have not been proved, see §§12.19, 12.35. One way for a residential tenant to dispute the propriety of a trustee sale (nonjudicial foreclosure) would be to raise the lack of prior notice to the tenant of a trustee sale required by CC §2924.8. See §8.68B.

Because the legislature did not specify a remedy in §2924.8, the courts will have to resolve what remedies a tenant has if that section is violated. Another possible remedy for a violation of §2924.8 would be in the nature of equitable relief; the trial court in the unlawful detainer action could award possession to the plaintiff but stay execution of the judgment for a time equal to the notice period specified in §2924.8.

After a completed foreclosure, CCP §1161b, effective July 8, 2008, alters the notice period for residential tenants in CCP §1161a, which has for many years required a 3-day termination notice to a former owner or a commercial tenant, and a 30-day notice to a tenant or a subtenant in possession of a rental housing unit, after the property is sold in foreclosure. Until January 1, 2013, unless extended, CCP §1161b requires that a tenant or subtenant in possession of a rental housing unit after a foreclosure sale must be given a 60-day written notice to quit under CCP §1162 before the tenant or subtenant may be removed from the property. The 60-day notice does not apply if a party to the note on which foreclosure is based remains a tenant, subtenant, or occupant of the property. (The statute was apparently written with single-family homes in mind; thus, there is an ambiguity when it is applied to multiple-unit buildings. Literally read, the statute states that if a party to the note occupies one unit, no tenant in any unit on the property is entitled to a 60-day notice.) Lack of compliance with this prerequisite is a defense to an unlawful detainer action. See §§10.31, 12.35.

WARNING: In May 2009, the federal government enacted preemptive legislation that temporarily protects residential tenants holding possession under a month-to-month agreement or a lease from immediate eviction after a foreclosure sale by the purchaser or the foreclosing lender. See Protecting Tenants at Foreclosure Act of 2009 (Pub L 111-22, §§701-704, 123 Stat 1660), discussed in §8.68F.

In an eviction action by the purchaser in a foreclosure sale based on "good faith" owner occupancy under a rent control law, the landlord may have to prove a requisite percentage ownership. If the foreclosed unit is subject to a local eviction control law, the lender may not evict unless the local ordinance permits eviction in the event of a foreclosure. *Gross v Superior Court* (1985) 171 CA3d 265, 217 CR 284. For further discussion, see §§7.69, 8.68C.

On the right to resolve title issues in an unlawful detainer action on a cross-complaint, see §10.73.

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§10.55 2. Landlord Fraud

The defense of fraud in the execution of a lease has not been allowed if the tenant was not in possession of the premises when the lease was executed, because the tenant's claim of right to possession would then be based on the lease that he or she claims was fraudulently executed. *Kalmanovitz v Rempp* (1952) 111 CA2d 242, 244 P2d 457; *D'Amico v Riedel* (1949) 95 CA2d 6, 212 P2d 52. The defense has been held available, however, when the tenant had been in lawful possession and was fraudulently induced to enter into the lease. *Knowles v Robinson* (1963) 60 C2d 620, 626, 36 CR 33; *Smith v Whyers* (1923) 64 CA 193, 221 P 387. See discussion of this issue in *Green v Superior Court* (1974) 10 C3d 616, 633 n19, 111 CR 704.

In *Asuncion v Superior Court* (1980) 108 CA3d 141, 166 CR 306, the court held that, when the unlawful detainer action is brought under CCP §1161a after a trustee's sale (see §8.68A), the defendant may assert an affirmative defense that the plaintiff obtained title from the defendant as security for a usurious loan induced by the plaintiff's fraud. But see *Old Nat'l Fin. Servs., Inc. v Seibert* (1987) 194 CA3d 460, 239 CR 728 (fraud in inducement of certain loans was too remote to be allowed as defense).

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§10.56 3. Breach of Covenant of Quiet Enjoyment

Whether the tenant may assert the landlord's breach of the covenant of quiet enjoyment as a defense to an unlawful detainer action is an unsettled question. (For a discussion of the landlord's breach of the covenant of quiet enjoyment in commercial leases, see California Eviction Defense Manual §19.18 (2d ed Cal CEB 1993).) In *Petroleum Collections, Inc. v Swords* (1975) 48 CA3d 841, 122 CR 114, a commercial tenant's attempt to defend an action for unpaid rent by claiming a breach of the implied covenant of quiet enjoyment was rebuffed. The court held that the landlord's improper removal of a sign installed in violation of local codes could serve as a basis for the tenant's claim, but that the tenant could not assert breach of the implied covenant unless and until he or she vacated within a reasonable time (*i.e.,* until a constructive eviction (see §§3.6-3.7, 3.15B, 8.19) had occurred). The court noted that, if the landlord sued for rent accruing before the constructive eviction, the tenant could claim as an offset any damages arising before the eviction or bring an action against the landlord for damages.

In *Guntert v City of Stockton* (1976) 55 CA3d 131, 126 CR 690, the court declined to follow the decision in *Petroleum*, and held that the tenant may elect to keep the lease in effect, remain in possession, and sue for damages. The *Guntert* court also held that the landlord's service of an invalid termination notice (which the court characterized as "arbitrary and unreasonable") constituted a breach of the implied covenant of quiet enjoyment and supported the monetary judgment for the tenant. 55 CA3d at 141. In recognizing the tenant's choice of remedies, one of which is the "option to stand upon the lease and sue for damages" (55 CA3d at 140), the *Guntert* decision arguably supports the assertion of a landlord's breach of the implied covenant as a defense to the landlord's action in unlawful detainer when, *e.g.,* the tenant has withheld rent in response to the breach and the landlord is evicting for nonpayment of rent. *Guntert* was followed in *Marchese v Standard Realty & Dev. Co.* (1977) 74 CA3d 142, 141 CR 370. For further discussion of constructive eviction, affirmative suits on breach of the covenant of quiet enjoyment, and these reported cases, see §§3.5-3.7, 3.15B, 8.19.

PRACTICE TIP: Further support for an argument that the tenant should be able to raise the landlord's breach of the covenant of quiet enjoyment as a defense is found in *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704. In *Green*, the supreme court rejected the doctrine that the covenants of the landlord and tenant are independent, holding that the tenant may assert breach of the implied warranty of habitability as a defense to an unlawful detainer action (see §§3.16, 3.32, 10.64).

For a sample jury instruction based on breach of the covenant of quiet enjoyment, see §12.63A. For further discussion of the covenant of quiet enjoyment pertaining to commercial tenancies and the measure of damages for a breach of the covenant, see California Eviction Defense Manual §19.18 (2d ed Cal CEB 1993).

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§10.57 4. Setoff for Preexisting Debt

Although setoffs for preexisting debts are generally prohibited as defenses in unlawful detainer actions, a tenant who has been overcharged rent might be entitled to what amounts to a setoff in an unlawful detainer action. The rationale is that the tenant has essentially prepaid the rent, so that the notice to pay or quit overstates the amount of rent due. *Nourafchan v Miner* (1985) 169 CA3d 746, 215 CR 450. In *Nourafchan,* the landlord had previously charged the tenant more rent than that allowed by a local rent control law, and the tenant had paid it. In a later eviction action based on nonpayment of rent, the court held that the tenant was "entitled to claim as an affirmative defense the right to offset the excess rent paid during the three-year statutory period" in which the tenant might have sued for the excess. 169 CA3d at 752. This case is authority for the proposition that if the notice to pay or quit is $5.96 too high, it is defective and will not support an unlawful detainer action.

The opinion in *Nourafchan* did not mention CCP §431.70 which ordinarily provides a defendant the right to plead an offset in cross-demands for money, even if the statute of limitations would have barred the defense asserted as an affirmative cause, but the offset cannot exceed the value of the relief awarded to the plaintiff. Nevertheless, it is arguable that CCP §431.70 provides independent authority for a tenant to offset excess rent paid beyond any limitations period against a claim of the landlord for nonpayment of rent.

In *Minelian v Manzella* (1989) 215 CA3d 457, 263 CR 597, the same court that decided *Nourafchan* held that in an unlawful detainer action no statute of limitations applies to an affirmative defense of excess rent paid when the landlord has charged rents in excess of those allowed by a local rent control ordinance. The court noted that the landlord was the "fundamental wrongdoer" in this case, and cited CC §3517 for the maxim, "No one can take advantage of his own wrong." 215 CA3d at 467 n5.

In rent-controlled jurisdictions that establish successor owner liability, if landlord A overcharges the tenant and then sells to landlord B, who files an unlawful detainer based on a 3-day pay or quit notice, the tenant may defend on the basis of excess rent previously paid, including rent paid to landlord A. See *Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 81 CR3d 341.

If the landlord has raised the tenant's rent by more than 10 percent in the 12 months immediately preceding the effective date of a proposed increase on 30 days' notice, rather than the 60 days' notice required by CC §827(b)(3), there is excess rent in the amount of the increase for one month. See §§3.65A, 8.37. Likewise, if the landlord is required to pay interest on the tenant's security deposit under a rent control law in effect in the relevant jurisdiction and has failed to do so, a sum is owed to the tenant. See chap 7. In either event, the tenant may raise as an affirmative defense the amount of the funds owed when the landlord is evicting for nonpayment of rent. See *Minelian v Manzella, supra.*

In *Nork v Pacific Coast Med. Enters.* (1977) 73 CA3d 410, 140 CR 734, the court held that the tenant could not claim an earlier unrelated debt owed by the landlord as a setoff for past-due rent when proving that the debt would be complex and time-consuming. It is unclear whether the same result would apply if the debt were established by prior judgment or judicial admissions in the unlawful detainer litigation, or if the parties intended that the debt satisfy the rent obligation (see discussion of cross-complaints in §10.73).

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§10.58 5. Equitable Defenses

The distinction between "legal" and "equitable" defenses has lost much of its analytical and predictive value, and the courts have largely abandoned it. Nonetheless, defenses to unlawful detainer actions are sometimes characterized as "equitable," and the distinction retains some significance on the question of whether the parties are entitled to have a particular issue tried before a jury (see §11.55).

The application of equitable principles to unlawful detainer actions is generally discussed in *Superior Motels, Inc. v Rinn Motor Hotels, Inc.* (1987) 195 CA3d 1032, 1069, 241 CR 487. See also *Minelian v Manzella* (1989) 215 CA3d 457, 465, 263 CR 597 (defense of equitable setoff permitted); *Nork v Pacific Coast Med. Enters.* (1977) 73 CA3d 410, 414, 140 CR 734 (expands on appropriateness of raising equitable defenses in unlawful detainer actions).

The tenant's attorney may wish to review the following cases that allowed equitable defenses in unlawful detainer actions:

- *Schubert v Lowe* (1924) 193 C 291, 223 P 550: Tenant occupied the premises under an oral lease, not as a month-to-month tenant. An oral lease may not exceed 1 year. CC §1624(a)(3).
- *Manning v Franklin* (1889) 81 C 205, 22 P 550: Parties were not in a landlord-tenant relationship, but were parties to a sale of property.
- *Strom v Union Oil Co.* (1948) 88 CA2d 78, 198 P2d 347: Landlord acted in bad faith by intentionally avoiding payment of rent.
- *Rishwain v Smith* (1947) 77 CA2d 524, 175 P2d 555: Landlord refused to execute lease conforming to a prior written agreement for tenant's purchase of the landlord's business.
- *Knight v Black* (1912) 19 CA 518, 126 P 512: Exact compliance with terms for security for rent provision was impossible, and tenant had offered suitable alternative security.
- *Gray v Maier & Zobelein Brewery* (1906) 2 CA 653, 84 P 280: Landlord acquiesced to subletting, although prohibited by the lease.
- *Pico v Cuyas* (1874) 48 C 639: Relationship of the parties was a partnership rather than one of landlord and tenant. But see *Union Oil Co. v Chandler* (1970) 4 CA3d 716, 725, 84 CR 756 (lessor's alleged antitrust violation scheme could not be raised by petroleum dealer/tenant as equitable defense).
- *Underwood v Corsino* (2005) 133 CA4th 132, 34 CR3d 542: The service of a notice to quit against commercial tenants that prevents them from conducting business is a frustration of purpose.

The doctrine of unclean hands does not block relief to a plaintiff merely because of any past misconduct by plaintiff —the misconduct must be directly related to the matter in which plaintiff seeks relief. *Kendall-Jackson Winery, Ltd. v Superior Court* (1999) 76 CA4th 970, 90 CR2d 743.

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§10.59 6. Violation of Rent Control Ordinance

A local rent control ordinance typically affects an unlawful detainer action by controlling the amount of rent that the landlord may legally charge, and by limiting the grounds on which the landlord may evict a tenant (see §9.13, chap 7). Most rent control ordinances set forth the permissible grounds for eviction as exceptions to their own eviction controls, using phrases such as "The landlord may not evict except…." These ordinances also require that the landlord state the ground for eviction in the termination notice, the complaint, or both.

Some rent control ordinances require that the landlord also plead general compliance with the ordinance (*e.g.,* registration and payment of fees must be pleaded and proved at trial in the landlord's case in chief). See Judicial Council unlawful detainer complaint form (¶14) in §9.31. The allocation of the burden of pleading and proving that an eviction is permitted by an applicable rent control law is the subject of much discussion among attorneys, some of whom opine that a local law cannot reallocate that burden because it is preempted by state law. See §9.16.

If compliance is an essential element of the landlord's case (rather than noncompliance constituting a defense of the tenant's case), the Judicial Council unlawful detainer answer form (see §10.51) adds to the confusion on this issue by listing violation of the local rent control ordinance as an affirmative defense (¶3.g). Because of this, tenant's counsel should be cautious in pleading this issue to avoid an accidental waiver of it.

PRACTICE TIP: If the applicability of a local ordinance is apparent from the face of the complaint (including attached exhibits) or from matters of which the court takes judicial notice, then a lack of allegation of compliance with the ordinance is a demurrable defect (see §§10.29-10.31) or one that subjects the complaint and summons to a motion to quash (see §§10.20-10.21). Otherwise, a lack of compliance should be pleaded as an affirmative defense, including the supporting facts, in order to avoid waiving the issue. Moreover, the judge will appreciate knowing where the defense is going, and the landlord will not be able to object to the tenant's evidence on the basis that it is beyond the scope of the pleadings.

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§10.60 7. Waiver or Estoppel

Courts have allowed tenants to defend against unlawful detainer on the ground that the landlord has waived or is estopped from asserting a breach of the lease or rental agreement. The difference between these related defenses has not always been clear. In *DRG/Beverly Hills, Ltd. v Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 CA4th 54, 35 CR2d 515, the court distinguished waiver from estoppel, noting that waiver by one party does not require any act by the other party, but estoppel requires that such other party rely on the actor's conduct and be injured by it. The court also held that waiver must be proved by clear and convincing evidence, and that estoppel is to be tried by the court, not the jury. For sample jury instructions, see §§12.63B-12.63C.

Acceptance of rent after the tenant's breach of a covenant by a landlord who has full knowledge of all the facts constitutes a waiver of the breach and precludes the landlord from declaring a forfeiture by reason of the breach. *Kern Sunset Oil Co. v Good Roads Oil Co.* (1931) 214 C 435, 440, 6 P2d 71; *Salton Community Servs. Dist. v Southard* (1967) 256 CA2d 526, 533, 64 CR 246; *Julien v Gossner* (1951) 103 CA2d 338, 344, 229 P2d 786. Acceptance of the rent after expiration of a 3-day notice to pay rent or quit constitutes waiver of the breach. *EDC Assocs., Ltd. v Gutierrez* (1984) 153 CA3d 167, 200 CR 333. A tender of the rent by mail raises a rebuttable presumption that the landlord accepted it. *EDC Assocs., Ltd. v Gutierrez, supra*. See *Thriftimart, Inc. v Me & Tex* (1981) 123 CA3d 751, 177 CR 24 (landlord's failure to object, when tenant planted flowers in part of parking lot, waived the right to evict on that basis; no waiver, however, when landlord objected to tenant's construction of new addition to premises in violation of lease, although landlord accepted rent while trying to settle dispute).

Courts have held that the general rules described above do not apply when the lease or rental agreement provides that acceptance of rent does not in itself constitute a waiver. *Salton Community Servs. Dist. v Southard* (1967) 256 CA2d 526, 530, 64 CR 246; *Karbelnig v Brothwell* (1966) 244 CA2d 333, 341, 53 CR 335. (See §1.75 for a form lease provision to this effect.) A commercial lease provision stating that landlord's acceptance of rent would not waive the right to proceed with an unlawful detainer not only prohibited a defense of waiver but also satisfied the statutory requirement of CCP §1161.1(c) that before accepting partial payment, landlord must give actual notice of such nonwaiver to a commercial tenant. *Woodman Partners v Sofa U Love* (2001) 94 CA4th 766, 114 CR2d 566. Even if the rental agreement contains such a provision, the tenant's detrimental reliance, or conduct by the landlord that leads the tenant to believe that strict compliance with a covenant is not required, may estop the landlord from asserting the breach as a basis for the eviction. *Salton Community Servs. Dist. v Southard* (1967) 256 CA2d 526, 531, 64 CR 246. Thus, waiver turns on the landlord's express or implied intent, while estoppel depends on the tenant's detrimental reliance on the landlord's conduct.

When performance of conditions or covenants of the lease is of a continuing nature, waiver of one breach does not preclude the landlord from proceeding against the tenant for subsequent breaches. *Budaeff v Huber* (1961) 194 CA2d 12, 20, 14 CR 729; *Extension Oil Co. v Richfield Oil Corp.* (1942) 52 CA2d 105, 125 P2d 895.

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§10.61 8. Breach of Express Promise to Repair

A landlord's failure to make repairs to the premises, in violation of an express promise to repair, may constitute a defense to an unlawful detainer action based on nonpayment of rent. The promise may either be contained in the lease or be made by the parties in an additional agreement, such as correspondence between the parties. For discussion of agreements to repair, and their enforceability, see §§3.8-3.15. See CC §1698 on the manner in which written contracts may be modified. (On statutory requirements to repair, see CC §§1941, 1942.4, discussed in §§3.10-3.12, 3.15A, 3.41, 13.25. On the implied warranty of habitability, see §§3.16-3.48, 10.64.)

An oral promise that accompanies or follows a written lease (and is not superseded by the lease) is not in conflict with the statute of frauds if the oral promise is to be fulfilled within 1 year of its making. CC §1624. Section 1624 applies to the leasing of real property only if the term of the lease is greater than 1 year. CC §1624(a)(3).

Traditionally, the landlord's duty to repair (even an express duty to repair) was considered to be independent from the tenant's duty to pay rent (*Arnold v Krigbaum* (1915) 169 C 143, 145, 146 P 423), so that the landlord's breach of an express promise to repair could not be raised as a defense to an unlawful detainer action. In recent years, however, the doctrine of independent lease covenants has fallen into disfavor, and the California Supreme Court has held that the tenant may defend an unlawful detainer action based on nonpayment of rent by alleging the landlord's breach of the warranty of habitability. *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704. Even before *Green*, the courts had permitted tenants in constructive eviction to vacate the premises and stop paying rent, holding that the covenants of landlord and tenant were mutually dependent. See *Groh v Kover's Bull Pen, Inc.* (1963) 221 CA2d 611, 34 CR 637. See also *Medico-Dental Bldg. Co. v Horton & Converse* (1942) 21 C2d 411, 132 P2d 457. In *Secretary of HUD v Layfield* (1978) 88 CA3d Supp 28, 152 CR 342, the court indicated that breach of an express warranty may be raised as a defense to an unlawful detainer action. These cases provide analogous authority for a tenant to raise as a defense a landlord's failure to make repairs to the premises in violation of an express promise to repair.

In order to raise this defense, the tenant may be required to have given the landlord notice of the need for repairs. See *Sieber v Blanc* (1888) 76 C 173, 18 P 260; *McNally v Ward* (1961) 192 CA2d 871, 14 CR 260. (On notice requirements for assertion of the implied warranty of habitability, see §3.29.) See, however, *Lopez v Superior Court* (1996) 45 CA4th 705, 52 CR2d 821, in which the court of appeal held that at the time a commercial lease is executed, and on renewal of the lease, the landlord must inspect the premises to make sure they are reasonably safe from dangerous conditions. The same considerations may apply upon renewal of a residential lease.

In the commercial context, it is less clear that breach of an express promise to repair will afford the tenant a defense. In *Schulman v Vera* (1980) 108 CA3d 552, 166 CR 620, the court held that a commercial tenant could not invoke breach of the implied warranty of habitability as a defense because the doctrine of independent covenants remains applicable in unlawful detainer actions based on commercial tenancies. The *Schulman* court's reasoning appears to be inconsistent with that of *Groh v Kover's Bull Pen, Inc., supra,* and *Medico-Dental Bldg. Co. v Horton & Converse, supra*. See §3.18. For further discussion relating to commercial tenancies, see California Eviction Defense Manual §§19.11-19.19 (2d ed Cal CEB 1993).

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§10.62 9. Lack of Certificate of Occupancy

Many local jurisdictions require landlords to obtain a certificate of occupancy indicating that the premises comply with local housing codes, before leasing the premises. In *Gruzen v Henry* (1978) 84 CA3d 515, 148 CR 573, the landlord's failure to obtain a certificate of occupancy from the city before entering into a rental agreement rendered the agreement void and unenforceable as contrary to public policy. Thus, the court of appeal held that the landlord could not recover rent in the unlawful detainer action, but it affirmed that portion of the judgment awarding the landlord possession. The court stated, however, that persons in the position of the tenant defendants could not continue to occupy the premises without compensating the landlord.

The *Gruzen* opinion did not specify whether the unlawful detainer action was based on the tenant's failure to obey a 3-day notice to pay rent or quit or on a 30-day notice. Either way, that portion of the decision permitting the eviction appears to be the result of declaring the lease void. In unlawful detainer actions premised on the failure to pay rent, tenants' attorneys should avoid using the landlord's failure to obtain a certificate of occupancy as a defense if the goal is to keep possession. Instead, counsel might consider using the code violations to establish breach of the implied warranty of habitability as a defense and obtain a reduction in the rent without loss of possession (see §§3.24-3.29, 10.64).

In *Espinoza v Calva* (2008) 169 CA4th 1393, 87 CR3d 492, the trial court awarded judgment for possession in favor of the landlord in an unlawful detainer action and entered a money judgment for reduced rent because of the untenantable condition of the premises. The court of appeal followed the ruling in *Gruzen* and reversed the money judgment, holding that the absence of a certificate of occupancy for the residential unit rendered the lease illegal and void. The appeal on the judgment for possession was moot because before the hearing, the tenants vacated.

PRACTICE TIP: If a tenant has no money to pay even reduced rent under a "pay and stay" order arising from a breach of the warranty of habitability, or if the city has issued an order requiring the building to be vacated, the tenant's lawyer may want to use the landlord's failure to get a certificate of occupancy as a defense to avoid a money judgment against the tenant, but the tenant will have to move if the court declares the lease void. A money judgment is good for 10 years and can be renewed for another 10 years. CCP §§683.020, 683.120(b). Also, the threat of using such a defense may be a strong negotiating point in trying to settle the case with landlord's counsel.

For further discussion of certificate of occupancy violations, see §3.11E.

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§10.63 10. Rental Agreement Not Translated Into Required Language

A non-English-language copy of a lease or rental obligation for a period greater than 1 month, that was negotiated primarily in any of the five enumerated languages (see CC §1632(a)) by a person engaged in a trade or business (*i.e.,* most landlords), must be furnished to the tenant before signing, if the tenant does not provide his or her own interpreter. The copy must be translated into the language used to negotiate the agreement. CC §1632(b)(3). The tenant may rescind the agreement if the landlord fails to comply. CC §1632(k).

PRACTICE TIP: If a landlord who violated CC §1632(b)(3) attempts to evict for nonpayment of rent, the tenant should give notice of rescission of the agreement, creating a tenancy at will, which obligates the tenant to pay a reasonable rent, not the rent provided by the rescinded agreement. Although rescission might invalidate a 3-day notice, such action by the tenant is risky if the reasonable rent is greater than the contract rent.

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§10.64 11. Breach of Implied Warranty of Habitability

Breach of the implied warranty of habitability is a defense to an unlawful detainer action filed to recover possession of residential premises based on nonpayment of rent. *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704. See also *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707; *Hinson v Delis* (1972) 26 CA3d 62, 102 CR 661. (For extensive discussion of the implied warranty and its ramifications in residential unlawful detainer actions, see §§3.16-3.34.) Courts have held that a commercial tenant may not invoke breach of the warranty of habitability (express or implied) as a defense to an unlawful detainer action. *Schulman v Vera* (1980) 108 CA3d 552, 166 CR 620. See discussion of *Schulman* in §3.18. See also *Fish Constr. Co. v Moselle Coach Works, Inc.* (1983) 148 CA3d 654, 658, 196 CR 174. (For extensive discussion of the availability of the defense in a commercial context, see California Eviction Defense Manual §§19.11-19.26 (2d ed Cal CEB 1993).)

Although the defense will not defeat the recovery of possession by the landlord in an unlawful detainer action after the termination of a tenancy (*i.e.,* an unlawful detainer based on a 30-day notice; see §8.69), the defense may still be relevant. A tenant's successful assertion of a breach of the implied warranty of habitability will affect the landlord's ability to recover damages for unlawful detainer.

Assertion of the defense of breach of the implied warranty of habitability raises the following issues about the relief available in an unlawful detainer action and the appropriate procedures:

- Proof of defects (see §§3.11-3.12, 3.28, 3.32-3.33, 12.36-12.37, 12.54-12.55);
- Computation of reasonable rent (see §§3.37-3.39, 12.36-12.37, 12.56-12.59, 13.36-13.38);
- Landlords' protective orders (see §§3.34, 11.49, 11.56-11.61); and
- Procedure after reasonable rent is resolved (see §§13.35-13.39).

For a full summary of procedures when breach of the implied warranty is disputed, see §3.32. See also §3.16 on development of the breach of habitability defense under *Green v Superior Court, supra*. (On the implied warranty of habitability generally, see §§3.16-3.48. On statutory requirements to repair, see CC §§1941, 1942.4, discussed in §§3.10-3.12, 3.15A, 3.41. On attorney fee awards, see §§3.41, 13.25.)

In some rent control jurisdictions, *e.g.,* Berkeley, compliance with building code and habitability standards is an affirmative duty under the ordinance and may be a prerequisite to just cause eviction under the ordinance. Some ordinances also require that compliance with all such duties be stated in the termination notice, or alleged in the complaint, or both, and also provide that a tenant who prevails on the habitability issue defeats the eviction, even if it is otherwise warranted.

If breach of the implied warranty of habitability is alleged as a defense in an unlawful detainer action, failure to provide for a release of it in any settlement may mean that the tenant is still free to allege the breach in a subsequent action for damages. See *Landeros v Pankey* (1995) 39 CA4th 1167, 46 CR2d 165, discussed in §§3.35, 9.18.

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§10.65 12. Retaliatory Eviction

An allegation that the eviction is motivated by the landlord's desire to retaliate for the tenant's exercise of a protected right constitutes a valid defense to an unlawful detainer action. If proved, such an allegation defeats the landlord's right to possession. See comprehensive discussion of the authorities and remedies for retaliatory eviction in §§8.109-8.135. See also §§8.129-8.132, 12.38, 12.61-12.63 for discussion of burden of proof when retaliatory eviction defense is raised in an unlawful detainer action.

The defense of retaliatory eviction is based both on statute (CC §1942.5) and on common law (*Barela v Superior Court* (1981) 30 C3d 244, 178 CR 618). Some retaliation defenses are part of fair housing legislation (see §§8.118-8.123, 10.68).

If the tenant prevails on a retaliation defense in the eviction action, the tenant may bring a subsequent action alleging that the tenant suffered damages from the landlord's retaliatory conduct, but it may be difficult to actually establish damages. See *Gombiner v Swartz* (2008) 167 CA4th 1365, 85 CR3d 83.

A commercial tenant may also defend an unlawful detainer action on the ground that it is retaliatory. *Custom Parking, Inc. v Superior Court* (1982) 138 CA3d 90, 187 CR 674. See California Eviction Defense Manual §19.25 (2d ed Cal CEB 1993).

The defense is not available in an action brought under CCP §1161a after a foreclosure. *California Livestock Prod. Credit Ass'n v Sutfin* (1985) 165 CA3d 136, 211 CR 152. But if the foreclosure was wrongfully obtained, the unlawful detainer action may be stayed pending the resolution of an affirmative suit by the former owner to set aside the foreclosure. See Banke, *Staying Postforeclosure Eviction Actions Pending Borrower Actions Against Lenders,* 32 CEB Real Prop L Rep 92 (July 2009).

In an eviction under the Ellis Act (Govt C §§7060-7060.7), the tenant may raise the defense of retaliatory eviction under CC §1942.5 to controvert the landlord's good faith in going out of the rental housing business. *Drouet v Superior Court* (2003) 31 C4th 583, 3 CR3d 205. In *Drouet,* the supreme court held that the landlord must then establish at a trial or hearing by a preponderance of the evidence the existence of a bona fide intent to withdraw the property from the rental market. If the landlord is able to convince the trier of fact of a bona fide intent to withdraw the property, the landlord may evict the tenants and withdraw the property despite having a retaliatory motive. See McGranahan, Molho, Molloy & Zanger, *The Ellis Act: Easing the Transition for the Evicted Tenant*, 23 CEB Real Prop L Rep 270 (Oct. 2000), for defenses to Ellis Act evictions. See also expanded discussion on the same subject in California Eviction Defense Manual, chap 17 (2d ed Cal CEB 1993).

On whether a landlord may evict a tenant because of a tenant's speech activities, see Greenhalgh & Zucker, *Tenants' Free Expression Rights on California Rental Properties*, 29 Real Est LJ 210 (Winter 2001).

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§10.66 13. Lack of Good Cause to Evict From Government Housing

For housing owned or subsidized by a public agency, good cause or a prior administrative hearing to determine whether good cause exists, or both, may be a prerequisite to an unlawful detainer action, under statutory or regulatory provisions governing the agency's operations, or as a matter of due process. See *Escalera v New York City Hous. Auth.* (2d Cir 1970) 425 F2d 853.

A Section 8 tenant is entitled to a 90-day notice of lease termination when the landlord withdraws from the Section 8 program, regardless of whether the unit is subject to any rent control law. *Wasatch Prop. Mgmt. v Degrate* (2005) 35 C4th 1111, 29 CR3d 262.

For full discussion of the requirements for terminating a tenancy in various types of government-funded housing, see California Eviction Defense Manual, chap 18 (2d ed Cal CEB 1993). In many instances, a landlord of government-sponsored housing must meet additional notice requirements in order to take advantage of state law governing unlawful detainer actions.

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14. Discriminatory Eviction

§10.67 a. Unruh Civil Rights Act

A tenant may raise retaliatory conduct by the landlord that violates the Unruh Civil Rights Act (CC §51) as a defense to an unlawful detainer action. See *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 180 CR 496. The Unruh Act prohibits discrimination in all business establishments based on sex (including pregnancy, childbirth, medical conditions related to pregnancy or childbirth, gender identity, and gender related appearance and behavior), race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation. See §§2.26, 2.57.

The Unruh Act further protects persons who are perceived to have any particular characteristic of the listed categories in the Act or who associate with persons who have, or are perceived to have, any particular characteristic of the listed categories. CC §51(e)(5). The Unruh Act also protects persons the tenant has associated with (or sublet the premises to) if the landlord has a discriminatory motive in evicting that person. See *Winchell v English* (1976) 62 CA3d 125, 129, 133 CR 20.

The Unruh Act prohibits all forms of arbitrary discrimination, not merely discrimination against the categories enumerated in it. See uncodified declarations of the legislature in Stats 2005, ch 420, §2; *Marina Point, Ltd. v Wolfson, supra*; *In re Cox* (1970) 3 C3d 205, 216, 90 CR 24. The California Supreme Court recognized that the Act may protect the rights of unmarried couples and individuals "to equal access to public accommodations under some circumstances," but that distinctions drawn between married and unmarried couples and individuals "that are supported by legitimate business reasons" do not violate the Act. See *Koebke v Bernardo Heights Country Club* (2005) 36 C4th 824, 831, 31 CR3d 565 (Act protects registered domestic partners; case decided before marital status protections added to enumerated categories in CC §51).

The Act forbids discrimination based on sexual orientation. A doctor may not refuse on First Amendment grounds to provide a medical procedure to lesbians that is provided to heterosexual women. *North Coast Women's Care Med. Group, Inc. v Superior Court* (2008) 44 C4th 1145, 81 CR3d 708.

Registered sex offenders are not a "protected class" under the Unruh Act. 89 Ops Cal Atty Gen 85 (2006). See also *Harris v Capital Growth Investors XIV* (1991) 52 C3d 1142, 278 CR 614 (Unruh Act does not proscribe, as economic discrimination, landlord's requirement that prospective tenant have gross monthly income of at least three times the rent); *Schmidt v Superior Court* (1989) 48 C3d 370, 256 CR 750.

Based on the *Marina Point* decision, some tenant advocates argue that the Unruh Act should be interpreted to prohibit any evictions except those for good cause, but no California appellate court has so held. For discussion of the argument that good cause may be required to evict a tenant, see §8.136.

For comprehensive discussion of the Unruh Act, see §§2.21, 2.57-2.59, 8.118-8.121.

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§10.68 b. Other Fair Housing Acts and Protections

The California Fair Employment and Housing Act (Govt C §§12900-12996) generally proscribes discrimination based on several protected characteristics. See §§2.48-2.56, 8.122. The Act expressly prohibits retaliatory eviction. Govt C §12955(f). The Act makes it an unlawful practice to refuse "to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." Govt C §§12927(c)(1), 12955. Refusal to permit a small dog kept by the disabled person in a condominium where dogs are not allowed is a violation of the Act when the dog alleviates depression, and the disabled person is under treatment for depression. *Auburn Woods I Homeowners Ass'n v FEHC* (2004) 121 CA4th 1578, 18 CR3d 669.

Before the passage of the Act, a tenant was permitted to defend an unlawful detainer action on the ground that the eviction was being brought because of the tenant's race, in violation of the federal and state constitutions. *Abstract Inv. Co. v Hutchinson* (1962) 204 CA2d 242, 22 CR 309.

A tenant who is being evicted for a pet in violation of a lease provision prohibiting pets may be entitled to the protections of the federal Fair Housing Amendments Act (42 USC §§3601-3631). Title 24 CFR §100.204 makes it unlawful for any person "to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas." The "Examples" cited in this regulation include accommodation to allow a seeing eye dog in a "no pets" building. In *Bronk v Ineichen* (7th Cir 1995) 54 F3d 425, the court implied that an animal may be considered a service animal, even in the absence of formal training and certification, if it "facilitate[d] a disabled individual's ability to function," a decision to be made based on the facts of each case. See also *Majors v Housing Auth.* (5th Cir 1981) 652 F2d 454 (reversed summary judgment that applied no-pets rule against woman alleging mental disability requiring companionship of pet dog); *Whittier Terrace v Hampshire* (Mass App Ct 1989) 532 NE2d 712 (tenant with psychiatric disability cannot be evicted from subsidized housing for keeping cat in defiance of no-pets rule if evidence shows relationship between her ability to function and companionship of cat). The Act may also require a landlord to permit a financially qualified mother to cosign a lease for her financially ineligible and disabled son as a reasonable accommodation. *Giebeler v M & B Assocs.* (9th Cir 2003) 343 F3d 1143.

A tenant with a disability cannot require under the Unruh Act (CC §51) or the Disabled Persons Act (CC §54) that a landlord make structural modifications unless required by a separate provision of law relating to structural access standards. *Coronado v Cobblestone Village Community Rentals, LP* (2008) 163 CA4th 831, 77 CR3d 883, disapproved on other grounds in *Munson v Del Taco, Inc.* (2009) 46 C4th 661, 94 CR3d 685. The court held that neither state law access standards nor the Americans With Disabilities Act (see chap 2) require structural modifications to portions of rental property not used by the general public.

For more thorough discussion of federal statutes and other protections against housing discrimination, and their impact on evictions, see §§2.29-2.47, 2.67, 8.123-8.128.

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§10.69 15. Notice Served More Than 1 Year After Rent Due

Code of Civil Procedure §1161(2) provides that a 3-day notice to pay rent or quit "may be served at any time within one year after the claimed rent becomes due." This language, although permissive, has been construed to *require* that a 3-day notice be served within 1 year of the due date in order to support an unlawful detainer action. *Bevill v Zoura* (1994) 27 CA4th 694, 697, 32 CR2d 635. In *Bevill,* the court held that a notice is defective if it demands payment of rent more than 1 year overdue. The court also held that this defense does not need to be pleaded as an affirmative defense if the defect appears on the face of a notice attached to the complaint. 27 CA4th at 698. See also *Cal-American Income Prop. Fund IV v Ho* (1984) 161 CA3d 583, 585, 207 CR 532.

Under the reasoning of the *Bevill* case, a landlord could serve a 3-day notice demanding rent due within the year preceding service of the notice, successfully proceed with an unlawful detainer action, and file an ordinary civil action separately to collect the rent that is more than 1 year overdue. Another court of appeal has held, however, that a landlord must sue for all past-due rent in one action. A landlord who does not do so is precluded from obtaining a judgment for rent in a second action because this would constitute splitting the cause of action. *Lekse v Municipal Court* (1982) 138 CA3d 188, 195, 187 CR 698. Although the decision in *Lekse* involved two successive small claims actions, and may be distinguished on that basis, the reasoning was based on the general rule (derived from several authorities cited in *Lekse*) against splitting causes of action when they are based on running accounts or installment payments. 138 CA3d at 193. There are no reported cases as yet establishing that CCP §1161(2) either allows or prohibits a separate action to collect rent delinquent for more than 1 year if an unlawful detainer judgment were to award the other part of the delinquent rent to the landlord.

A different rule applies in a commercial tenancy under CCP §1161.1. The notice may state that the amount of rent due is a "reasonably estimated amount," and the amount given, if not more than 20 percent above the amount ultimately found to be due for the year before service of the notice will not defeat the unlawful detainer action. *Levitz Furniture Co. v Wingtip Communications, Inc.* (2001) 86 CA4th 1035, 103 CR2d 656.

In *Levitz Furniture Co.,* the landlord's notice of estimated rent due under a commercial lease explicitly included rent more than one year overdue. The court held that the landlord could not recover such rent in an unlawful detainer action but that the inclusion did not invalidate the notice. For further discussion of estimated rent in commercial tenancy notices, see California Eviction Defense Manual, chap 19 (2d ed Cal CEB 1993).

PRACTICE TIP: If the defect (that the 3-day notice includes rent more than a year overdue) does not appear on the face of the complaint or in an attached exhibit, the tenant should raise the defense in the answer. Whether or not the rent is a year overdue may be affected by the landlord's bookkeeping procedure. See §8.38. If the tenant states on the face of the check or money order that the payment is to be applied to rent for a particular month, it must be so applied (CC §1479), despite the landlord's bookkeeping methods.

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§10.69A 16. Fair Debt Collection Practices Act

A 3-day notice to pay rent or quit that is signed by someone other than the landlord may be subject to the Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692o) and may thus be defective if it fails to advise that the tenant has 30 days after receipt of the notice to dispute the validity of the back rent sought. *Romea v Heiberger & Assocs.* (2d Cir 1998) 163 F3d 111; *Dearie v Hunter* (1998) 676 NYS2d 896; *Eina Realty v Calixte* (1998) 679 NYS2d 796. For elaboration on this development and Practice Tip, see §8.26A.

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§10.70 E. Verification of Answer

The tenant's answer in an unlawful detainer action must be verified (CCP §446), because the complaint is required to be verified (CCP §1166(a)(1)). The usual exception for answers filed in limited civil cases, under the economic litigation statute that permits a defendant to file an unverified answer even when the complaint is verified (CCP §92(b)), does not apply in unlawful detainer actions (CCP §91(b)). When a tenant appearing in propria persona files an unverified answer, the landlord usually need not move to strike the answer because trial judges routinely ask such defendants to verify their answers in response to the motion.

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§10.71 F. Amendment to Answer

An answer may be amended generally as a matter of right (*i.e.,* without leave of court or notice to other parties) within the time for demurring to an answer (10 days under CCP §430.40(b)), or after a demurrer has been filed but before the hearing on the demurrer (CCP §472; see *Tingley v Times Mirror Co.* (1907) 151 C 1, 10, 89 P 1097). See also California Civil Procedure Before Trial, chap 25 (4th ed Cal CEB 2004). In unlawful detainer actions, however, the effect of CCP §1167.3 is to allow only 5 days to amend the answer after the court rules on a demurrer to the answer or a motion to strike the answer.

Beyond that period, the tenant must, on a showing of good cause, seek court permission before amending the answer. Under CCP §473(a)(1), the court, "in furtherance of justice, and on any terms as may be proper," may allow a party to amend any pleading to correct a mistake or permit an amendment "in other particulars."

Amending the answer might be necessary in an unlawful detainer action if the 5-day period in which to plead is not long enough to permit adequate investigation of the facts. Subsequent investigation may require changing admissions to denials, or vice versa, or may disclose the availability of additional affirmative defenses.

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§10.72 IX. AFFIRMATIVE RELIEF

The "summary nature" of unlawful detainer actions restricts a tenant's right to seek affirmative relief that is usually available in ordinary civil actions. See §§9.6-9.9. In civil actions generally, affirmative relief other than setoff may not be claimed in the answer. CCP §431.30(c). See §10.57. Thus, a defendant must seek affirmative relief in a cross-complaint. As discussed in §§10.73-10.74, however, a tenant defendant's ability to cross-complain is strictly limited.

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§10.73 A. Right to Cross-Complain Limited

In California, cross-complaints are not allowed in unlawful detainer actions because they would subvert the summary nature of the proceedings. *Knowles v Robinson* (1963) 60 C2d 620, 36 CR 33; *Arnold v Krigbaum* (1915) 169 C 143, 146 P 423; *Union Oil Co. v Chandler* (1970) 4 CA3d 716, 721, 84 CR 756. Although tenant advocates have frequently argued the issue, no reported case has established a tenant's right to cross-complain. Accordingly, when a tenant has affirmative claims against a landlord that would not adequately be redressed by a setoff against the damages sought by the landlord in unlawful detainer, a separate action to pursue such claims may be necessary. See, *e.g., Evans v Superior Court* (1977) 67 CA3d 162, 171, 136 CR 596 (pendency of unlawful detainer action does not bar simultaneous prosecution of quiet title action by tenant, and unlawful detainer judgment does not operate as res judicata on quiet title issues affecting title or possession).

An unlawful detainer action may be enjoined by a court in a related action brought by a tenant for affirmative relief against the landlord (see §§11.62-11.64). A court might rule favorably on a motion to consolidate an unlawful detainer action with a cross-action by the tenant if both actions involve the same issues (see §§11.65-11.68). See *Greenhut v Wooden* (1982) 129 CA3d 64, 69, 180 CR 786; *Mobil Oil Corp. v Superior Court* (1978) 79 CA3d 486, 493, 145 CR 17. Also, a tenant may proceed with a filed cross-complaint unless the landlord moves to strike it or objects to the admissibility of evidence presented under it. The landlord's right to challenge the cross-complaint is waived if the landlord does not take some affirmative step in the trial court to object. *Lakeside Park Ass'n v Keithly* (1941) 43 CA2d 418, 422, 110 P2d 1055.

There is authority for an argument that the prohibition on cross-complaints in unlawful detainer suits applies only when the cross-complaint raises new issues that go beyond the tenant's affirmative defenses and therefore would delay the summary proceeding. In *Knowles v Robinson* (1963) 60 C2d 620, 625, 36 CR 33, *e.g.,* the court stated that issues "irrelevant to the right of immediate possession" raised by a cross-complaint defeat the purpose of CCP §1161, which is to restore possession of premises wrongfully withheld from the owner. Similarly, in *Mobil Oil Corp. v Handley* (1978) 76 CA3d 956, 965, 143 CR 321, the court implied that in determining whether to allow a cross-complaint the same rule should be applied as is used for allowing a specific affirmative defense in an unlawful detainer action.

A cross-complaint raising issues similar to those allowable in an affirmative defense would not delay the proceedings and could save court time in the long run. For example, a tenant alleging breach of the warranty of habitability as an affirmative defense must prove both the breach and damages in order for the factfinder to determine the reasonable rental value of the premises (see §§3.32-3.39). The same evidence would also prove all the elements of an affirmative lawsuit for breach of the warranty (see §3.35). Thus, a limited cross-complaint for damages for breach of the warranty arguably would add no new issues to the case and would likely save the court and the parties the time and expense of trying the question of breach again in the tenant's suit against the landlord. Because these damages may be the subject of expert testimony (see §§3.37, 12.29, 12.36), proving them is often time-consuming.

In *Peoria Hous. Auth. v Sanders* (Ill 1973) 298 NE2d 173, the Illinois Supreme Court held that the tenant could cross-complain for damages because the legislature had allowed landlords to expand the issues in an eviction by seeking unpaid rent. To hold otherwise would violate "common sense and accepted rules of statutory interpretation." 298 NE2d at 175. See also *Kaplan v Sanders* (Ga 1976) 227 SE2d 38.

When the landlord seeks "money" in the form of back rent, damages, or both, in addition to possession of the premises, the tenant's attorney may argue that the tenant should be able to assert a "cross-demand" for money by a cross-complaint under CCP §431.70, as long as the tenant's claim relates directly to an affirmative defense, proof of which would preclude restitution of the premises to the landlord. See §10.57.

If the facts warrant such a claim, a tenant may be able to file a cross-complaint against the landlord for forcible entry or forcible detainer. Because such cases are also served with a 5-day summons (see CCP §§428.10, 1159-1160, 1167), one Southern California trial court approved the practice.

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§10.74 B. Exception: If Tenant Has Vacated Premises

If a tenant has vacated the premises before trial, the case becomes an ordinary civil action, and the tenant may seek any affirmative relief by way of a cross-complaint and assert all defenses to which ordinary civil litigants are entitled. CC §1952.3(a); *Fish Constr. Co. v Moselle Coach Works, Inc.* (1983) 148 CA3d 654, 196 CR 174. See §11.51. Failure to assert a cause of action by cross-complaint does not bar the tenant, under CCP §426.30(a), from later asserting that claim unless the tenant files a cross-complaint, an answer, or an amended answer in response to an amended complaint filed by the landlord after the tenant vacates the premises. CC §1952.3(a)(2). Thus, if a tenant who has vacated thereafter files a cross-complaint, any available cause of action not pleaded in the cross-complaint will be barred.

PRACTICE TIP: Litigating a cross-complaint as an ordinary civil action after the tenant vacates possession has several advantages for the tenant over defending a simple unlawful detainer: (1) there is more time to hire necessary experts, locate potential witnesses, do discovery, and prepare for trial (see §§11.5-11.6, 11.42); (2) the monetary relief awarded to the tenant may exceed that which is awarded to the landlord (see §10.57); and (3) the action may proceed on issues not otherwise allowed in unlawful detainer actions (see §§9.6-9.9, 10.73).

A tenant who has vacated the premises may not be required to pay back rent as a condition to filing a cross-complaint. *Medford v Superior Court* (1983) 140 CA3d 236, 189 CR 227. If, after physically surrendering the premises, the tenant continues to assert a legal right to immediate possession, the right to file a cross-complaint may be denied. *Erbe Corp. v W & B Realty Co.* (1967) 255 CA2d 773, 778, 63 CR 462. After *Erbe* was decided, the legislature (in 1977) enacted CC §1952.3, which provides that if the landlord is restored to possession before trial, the case is converted to an ordinary civil action. The statute does not carve out an exception for a tenant who merely *claims a right* to possession.

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§10.75 C. Failure to Object to Cross-Complaint

A landlord who does not move to strike the tenant's cross-complaint, and makes no objection to evidence offered to prove the elements of the cross-complaint, waives the right to challenge the filing of the cross-complaint and cannot raise it on appeal. *Lakeside Park Ass'n v Keithly* (1941) 43 CA2d 418, 422, 110 P2d 1055; see *Servais v Klein* (1931) 112 CA 26, 33, 296 P 123. See also *Garfinkle v Montgomery* (1952) 113 CA2d 149, 155, 248 P2d 52. Accordingly, the tenant's attorney may consider filing a cross-complaint against the landlord when it is desirable to have the tenant's claims adjudicated at the same time as the unlawful detainer. The landlord may decide to waive objection to the cross-complaint and have all issues resolved in one trial or may simply overlook the tenant's filing of the cross-complaint. The tenant's attorney may want to discuss this with the landlord's attorney and negotiate a stipulation allowing for a cross-complaint. If the landlord objects to the filing of the cross-complaint, the tenant's attorney risks possible sanctions under CCP §128.7.

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§10.76 D. Procedure

A cross-complaint may be filed without the court's permission at the same time as the answer (CCP §428.50(a)), or, if against parties other than the plaintiff, at any time before the action is set for trial (CCP §428.50(b)). Leave of court must be obtained for the tenant to file a cross-complaint at any other time; leave may be granted at any time "in the interest of justice." CCP §428.50(c). Other statutes governing cross-complaints include CCP §§428.40 (cross-complaint must be separate document), 428.60 (service of cross-complaint), 428.10 (causes of action assertable in cross-complaint), 428.20 (permitted joinder of cross-complainant or cross-defendant), 428.30 (permitted joinder of causes of action), 425.10 (contents of cross-complaint), 432.10 (time to respond to cross-complaint after service), and 435 (motion to strike cross-complaint).

On the procedure for filing and challenging cross-complaints generally, see California Civil Procedure Before Trial, chap 26 (4th ed Cal CEB 2004).

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Source: Real Property/California Landlord-Tenant Practice/10 Unlawful Detainer: Responsive Pleadings/§10.77 X. CHECKLIST: COMMON DEFECTS IN UNLAWFUL DETAINER COMPLAINTS

§10.77 X. CHECKLIST: COMMON DEFECTS IN UNLAWFUL DETAINER COMPLAINTS

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The following is a checklist of the most common defects encountered in unlawful detainer complaints, with cross-references to allegations or requirements that are discussed in chap 9 and to the method of attacking each defect, as noted in chap 10 or other sources:

___ 1. Service of summons and complaint did not comply with legal requirements (see §§9.45-9.50): Motion to Quash (see §10.19).

___ 2. Complaint fails to state cause of action for unlawful detainer, so that use of 5-day summons is improper (see §9.37): Motion to Quash (see §10.20).

___ 3. Complaint seeks relief not properly the subject of an unlawful detainer action but otherwise states cause of action for unlawful detainer (see §§9.5-9.12, 9.38-9.41): Motion to Strike (see §§10.40-10.41); Motion to Quash (see §10.20).

___ 4. Complaint does not allege that plaintiff has legal capacity to sue (*e.g.,* as owner of premises) (see §§9.34, 9.37): Demurrer under CCP §430.10(b) (see §10.31).

___ 5. Complaint does not allege existence of landlord-tenant or other cognizable relationship (see §§9.4, 9.36-9.37): Demurrer under CCP §430.10(e) for failure to state cause of action (see §§10.29-10.31); Answer (see §10.52); Motion to Quash (see §10.20).

___ 6. Complaint does not state that plaintiff is entitled to possession (see §§9.5, 9.37): Demurrer under CCP §430.10(e) (see §10.31); Answer (see §10.52.); Motion to Quash (see §10.20).

___ 7. Complaint does not allege existence of lease or rental agreement and whether it is written, oral, or implied by conduct (see §§9.3-9.4, 9.36-9.37): Demurrer (see §§10.29-10.31); Answer (see §10.52); Motion to Quash (see §10.20).

___ 8. Failure to attach to complaint written residential lease or rental agreement, as required by CCP §1166(c)(1)(B), unless agreement is oral or eviction is based on rent default (see §9.37): Demurrer (see §§10.29-10.31); Answer (see §10.52); Motion to Quash (see §10.20).

___ 9. Failure to attach to complaint copy of applicable termination notice, as required in residential tenancies by CCP §1166(c)(1)(A) (see §9.37): Demurrer (see §§10.29-10.31); Answer (see §10.52); Motion to Quash (see §10.20).

___ 10. Action was not brought in proper county or judicial district (see §9.33): Motion for Change of Venue; see California Civil Procedure Before Trial, chap 20 (4th ed Cal CEB 2004).

___ 11. Complaint does not (a) allege notice verbatim or according to its legal effect, (b) incorporate notice by reference, or (c) allege fact of service of notice (see §9.37): Demurrer under CCP §430.10(f) for uncertainty or under CCP §430.10(e) (see §§10.29-10.31); Answer (see §10.52); Motion to Quash for defects in notice (see §10.20).

___ 12. Failure either to allege method of service of required termination notice in complaint or to attach to complaint copy of proof of service of notice, as required by CCP §1166(a)(5) (see §9.37): Demurrer under CCP §430.10(f) for uncertainty or under CCP §430.10(e) (see §§10.29-10.31); Answer (see §10.52); Motion to Quash for defects in notice (see §10.20).

___ 13. Notice was legally insufficient (see §§8.22-8.85, 9.37, 9.44): Demurrer under CCP §430.10(e) (see §10.31);

Answer (see §10.52); Motion to Quash (see §10.20).

___ 14. The 3-day notice for nonpayment of rent (a) did not state exact amount due when notice was served (see §8.37), (b) was served before rental due date (see §§8.24, 8.42), (c) did not demand that tenant either pay amount of rent due or vacate premises within 3 days (see §8.36), demanded payment of rent due for more than 1 year preceding notice (see §§8.38, 10.69, 3.18), or (d) lacked name, telephone number, and address of person to whom rent payment shall be made, and either usual days and hours that person will be available to receive it or account number in financial institution into which rent payment may be made and name and street address of institution (which must be within five miles of the rental property) (see §§8.37B, 10.36A): Demurrer under CCP §430.10(e) (see §§10.29-10.31); Answer, denying allegations not appearing on face of complaint (see §§10.52, 10.69); Motion to Quash for defects in notice (see §10.20).

___ 15. Notice of breach of a covenant other than nonpayment of rent did not (a) specify covenant allegedly breached or nature of breach (see §8.51) or (b) demand that tenant either perform breach (if curable) or quit premises within 3 days (see §8.50): Demurrer under CCP §430.10(e) (see §§10.29-10.31); Answer (see §10.52.); Motion to Quash for defects in notice (see §10.20).

___ 16. Complaint does not allege expiration of notice period (see §§8.28-8.29, 9.44): Demurrer under CCP §430.10(e) (see §§10.29-10.31); Answer (see §10.52); Motion to Quash for defects in notice (see §10.20).

___ 17. Complaint does not allege that tenant continues in possession after lapse of notice period (see §§9.5, 9.37): Demurrer under CCP §430.10(e) (see §§10.29-10.31); Answer (see §10.52); Motion to Quash for lack of essential allegations (see §10.20).

___ 18. Tenant was not actually in possession of premises on date complaint filed (see §§9.5, 9.37, 10.74): Demurrer under CCP §430.10(e) (see §§10.29-10.31); Answer (see §10.52); Motion to Quash for lack of essential allegations (see §10.20).

___ 19. Complaint does not base claim for daily damages on reasonable rental value of premises (see §§9.38-9.39, 12.28): Motion to Strike (prayer) (see §10.40); Answer (see §10.52).

___ 20. Complaint does not allege that damages resulted from tenant's unlawful detainer of property (see §§9.37-9.39, 12.27, 12.30): Motion to Strike (see §§10.40-10.41); Answer (see §10.52).

___ 21. Complaint seeks rent due (as opposed to damages) after expiration of notice period (see §§9.38-9.39, 12.27): Demurrer under CCP §430.10(e) (see §§10.29-10.31); Motion to Strike (see §10.40); Answer (see §10.52).

___ 22. Complaint seeks damages other than reasonable daily rental value of premises after expiration of notice period (see §§9.38-9.39, 12.27): Demurrer under CCP §430.10(e) (see §§10.29-10.31); Motion to Strike (see §10.40); Answer (see §10.52); Motion to Quash for joining improper cause of action with an unlawful detainer (see §10.20).

___ 23. Complaint seeks damages for period after entry of judgment (see §§9.38-9.39, 12.27, 12.30): Motion to Strike (see §10.40); Answer (see §10.52).

___ 24. Allegations for rent and damages in body of complaint and prayer do not seek same amounts for same periods (see §§9.37-9.39, 12.30): Demurrer under CCP §430.10(f) for uncertainty (see §§10.29-10.31); Answer (see §10.52).

___ 25. Prayer seeks recovery of sums not supported by allegations in body of complaint (see §§9.37-9.39): Motion to Strike (see §§10.38-10.44); Answer (see §10.52).

___ 26. Complaint alleges rent or damages not requested in prayer (see §§9.37-9.39): Motion to Strike (see §§10.38, 10.44; Answer (see §10.52).

___ 27. No statement in body of complaint supports prayer for $600 statutory damages by specifically alleging that tenant's possession is malicious (see §§9.37-9.40): Motion to Strike (see §§10.38, 10.42); Answer (see

§10.52).

___ 28. Complaint contains irrelevant, false, or improper matter (see §§9.8, 9.37, 9.41): Motion to Strike (see §§10.38, 10.44).

___ 29. Complaint seeks double recovery (*i.e.,* both damages and rent) for same time period (see §§9.38-9.39): Demurrer under CCP §430.10(f) for uncertainty (see §§10.29-10.31); Answer (see §10.52); Motion to Quash (see §§10.22-10.23).

___ 30. Complaint contains allegations that are unclear or internally inconsistent (see §9.37): Demurrer under CCP §430.10(f) for uncertainty (see §§10.29-10.31).

___ 31. Complaint has not been verified (see §9.42): Motion to Strike (see §10.45).

___ 32. Complaint or affidavit does not allege facts showing action was filed in both proper county and proper court location for trial (see §9.33): Motion to Dismiss under CCP §396a(a) (see California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004)); Motion to Transfer under CCP §§396a(b), 396b (see Civ Proc Before Trial, chaps 6, 20).

___ 33. Prayer is outside of jurisdictional limit for limited civil cases (see §9.32): Motion to Transfer under CCP §396 (see Civ Proc Before Trial, chaps 6, 20).

___ 34. Complaint in a limited civil case does not allege that plaintiff agrees to remit to court any recovery over jurisdictional limit (see §§9.32, 9.37): Demurrer under CCP §430.10(a) (see §§10.29-10.31); Motion to Transfer under CCP §396 (see Civ Proc Before Trial, chap 6).

___ 35. Complaint or notice does not allege compliance with applicable rent eviction control ordinance (see §§7.74, 8.22, 9.16, 9.37): Demurrer under CCP §430.10(e) for failure to state cause of action (see §§10.29-10.31); Answer (see §§10.52, 10.59.); Motion to Quash for lack of essential allegations (see §10.20).

___ 36. Prayer seeks attorney fees, but complaint does not allege existence of provision for their recovery in lease or rental agreement (see §§9.37, 13.25): Motion to Strike (see §10.43); Answer (see §10.52).

___ 37. After a foreclosure, failure to allege that plaintiff acquired title by a foreclosure sale that was conducted in compliance with statutory law and the deed of trust, followed by purchase at the sale. See §§8.68B, 10.54.

___ 38. After a foreclosure, failure to allege that plaintiff served the 3-day or 60-day notice on the former owner or tenant required by CCP §1161a or §1161b. See §§8.68A, 8.68C.

NOTE: See also demurrer checklist in §10.31. The Appendixes in California Eviction Defense Manual (2d ed Cal CEB 1993) contain numerous sample motions and supporting memoranda for many situations described in the above checklist.

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11

Unlawful Detainer; Pretrial Proceedings

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I. SCOPE OF CHAPTER §11.1

II. LANDLORD'S DEMURRER TO ANSWER OR MOTION TO STRIKE §11.2

III. DISCOVERY
- A. Tactical Considerations §11.3
- B. Statutory Authority §11.4
- C. Scheduling Unlawful Detainer Discovery and Discovery Motions
  - 1. Shorter Response Periods §11.5
  - 2. Discovery and Trial-Setting Conflicts §11.6
- D. Depositions
  - 1. Legal Basis; Methods §11.7
  - 2. Procedure §11.8
  - 3. Inspecting Documents at Deposition §11.9
  - 4. Taking Deposition Before Action Filed §11.10
- E. Written Interrogatories
  - 1. Nature, Purpose, and Use
    - a. Advantages; Disadvantages §11.11
    - b. Depositions on Written Questions Distinguished §11.12
    - c. Scope and Use Restrictions §11.13
    - d. Number Generally Limited to 35 §11.14
    - e. Considerations When Non-Individual Entities Are Responding §11.15
  - 2. Form: Form Interrogatories—Unlawful Detainer (Judicial Council Form DISC-003/UD-106) §11.16
  - 3. Procedure
    - a. Time for Service and Response §11.17
    - b. Answers and Objections to Interrogatories §11.18
    - c. Protective Orders §11.19
- F. Inspection of Documents or Property
  - 1. Demands Addressed to a Party
    - a. Making the Demand §11.20
    - b. Responding to the Demand §11.21
  - 2. Demands Addressed to a Nonparty §11.22
- G. Requests for Admissions
  - 1. Use and Procedure
    - a. Making the Request §11.23
    - b. Responding to the Request §11.24
    - c. Consequences of Failure to Respond §11.25
    - d. Withdrawing Admission; Relief From Default §11.26
  - 2. Form: Request for Admissions (Judicial Council Form DISC-020) §11.27
- H. Discovery Sanctions and Protective Orders
  - 1. Punishable Conduct §11.28
  - 2. Types of Sanctions §11.29
  - 3. Protective Orders §11.30

IV. MOTION FOR SUMMARY JUDGMENT
- A. Nature and Purpose
  - 1. Granted If No Triable Issue of Material Fact §11.31
  - 2. Burden of Proof
    - a. Plaintiff as Moving Party
      - (1) Statutory Amendment §11.32
      - (2) Amendment Ambiguous §11.33

b. Defendant as Moving Party §11.34
3. Oral Testimony §11.35
B. Hearing Procedures; Deadlines for Filing and Service
1. 5-day Notice of Motion §11.36
2. Filing and Serving Opposition §11.37
C. Supporting Documents §11.38
D. Opposing Documents §11.39

V. MOTION FOR JUDGMENT ON PLEADINGS §11.40

VI. SETTING CASE FOR TRIAL
A. Request for Trial Setting
1. Procedure §11.41
2. Form: Request/Counter-Request to Set Case for Trial—Unlawful Detainer (Judicial Council Form UD-150) §11.41A
B. 20-day Mandatory Trial Setting §11.42
C. Notice of Trial §11.43
D. Extension of Trial Date §11.44
1. Good Cause for Extension §11.45
2. Probability That Landlord Will Prevail §11.46
3. Amount of Landlord's Damages §11.47
4. Potential Offsets to Damages §11.48
5. Order to Deposit Damages §11.49
6. Trial Date Advanced Upon Default §11.50
E. Effect of Tenant's Vacating Before Trial §11.51
F. Case Management and Settlement Conferences §11.52

VII. JURY TRIAL
A. Right to Jury Trial; Procedure §11.53
B. Waiver §11.54
C. No Right to Jury Trial on Equitable Issues §11.55

VIII. MOTIONS TO ESCROW RENT PENDING TRIAL
A. Mandatory Orders (CCP §1170.5) §11.56
B. Discretionary Orders; Habitability Cases
1. Purposes §11.57
2. Legal Basis §11.58
3. Required Showing §11.59
4. Amount of Rent to Be Escrowed §11.60
5. Stipulation for Rent Deposit §11.61

IX. RELATED ACTIONS: PRELIMINARY INJUNCTIONS, CONSOLIDATION, AND COORDINATION
A. Nature of Related Actions §11.62
B. Injunctive Relief
1. Legal Basis; Grounds §11.63
2. The *Newby* Exception: Adequate Remedy at Law §11.63A
3. Overcoming *Newby* Limitations §11.63B
4. Procedure; Bond Required §11.64
C. Consolidation
1. Multiple Actions Pending in Same Court §11.65
2. Multiple Actions Pending in Different Courts §11.66
3. Effect of Consolidation Order §11.67
4. Consolidation for Trial of Related Issues Only §11.68
D. Coordination by Judicial Council §11.69

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§11.1 I. SCOPE OF CHAPTER

This chapter details or summarizes most pretrial activity in an unlawful detainer action, including a plaintiff's motion to strike and demurrer to attack a tenant's answer to the complaint (see §11.2), tactical considerations and procedures for discovery (see §§11.3-11.30), motions for summary judgment or summary adjudication (see §§11.31-11.39), motions for judgment on the pleadings (see §11.40), trial setting and conditions for trial continuance (see §§11.41-11.50), vacating the trial date when a tenant surrenders the premises before trial (see §11.51), case management and settlement conferences (see §11.52), the availability of jury trials in unlawful detainer actions (see §§11.53-11.55), motions for protective orders, stipulations, and other procedures for escrowing rent pending trial (see §§11.56-11.61), enjoining eviction actions (see §§11.63-11.64), and consolidation (see §§11.65-11.68) or coordination (see §11.69) of eviction actions with other lawsuits. Defaults, default judgments, and relief from default are discussed in chap 13. Tenant responsive pleadings are presented in chap 10.

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§11.2 II. LANDLORD'S DEMURRER TO ANSWER OR MOTION TO STRIKE

The landlord may file a demurrer to the tenant's answer within 10 days (plus an additional 5 days under CCP §1013 if service of the answer was by regular mail) after service of the answer. CCP §430.40(b). Except for an objection that the answer does not state facts sufficient to constitute a defense, an objection to an answer is waived unless attacked by demurrer. CCP §430.80(b). A motion to strike all or parts of the answer may be filed within the time to respond (*i.e.,* demur) to the answer (CCP §435(b)) and should be filed together with a demurrer (if any) to the answer (for discussion of grounds see §§10.29, 10.39). Counsel should attempt to have the hearing on shortened notice under CCP §1005, citing among other things CCP §§1179a and 1170.5 (calendar preference and short trial setting for unlawful detainers) and CCP §1170.7 (5-day notice for summary judgment motions).

If service of the answer was by express mail or another method of overnight delivery, the time to file a demurrer is extended by 2 court days. CCP §1013(c). If service was by facsimile transmission, which requires the parties' consent, the time to respond is likewise extended by 2 court days. CCP §1013(e).

A landlord's demurrer or motion to strike is especially appropriate when the tenant employs evasive and conclusory language because it requires the landlord to engage in discovery and suffer resulting delay or proceed to trial without adequate notice of the factual basis for the tenant's defenses. If the tenant's answer is on the Judicial Council's answer form (see §10.51), and the tenant alleges no facts to support the legal conclusions asserted as affirmative defenses, landlord counsel in the demurrer should refer to language in the form that specifically calls for a statement of facts in the blank space near the top of the form's second page. For further discussion of demurrers and motions to strike generally, see chap 10.

Some tenants routinely allege "arbitrary discrimination" in the check-off box of the Judicial Council answer form. Assuming that additional costs and delay are justified, landlord counsel should move aggressively to test such claims by demurrer, motion to strike, or motion for summary judgment or summary adjudication of issues.

PRACTICE TIP: Landlords and their counsel should carefully weigh the advantages of attacking the answer by filing a demurrer or motion to strike with the disadvantages of delaying the unlawful detainer process and incurring additional costs and attorney fees, especially when the answer is filed in pro per.

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III. DISCOVERY

§11.3 A. Tactical Considerations

California's liberal discovery procedures may be very helpful in preparing an unlawful detainer action for trial. Although tenants usually have the greatest need to undertake discovery, landlords may find discovery helpful in certain instances. For example, by uncovering the identities of all occupants of the premises, discovery may enable a landlord to name all necessary parties as defendants and thus to obtain a judgment and writ for eviction of all current occupants. (For discussion of this problem, see §§1.21, 8.67.) The use of the prejudgment claim of right to possession procedure (see §§9.51-9.55) makes formal discovery about other occupants unnecessary if the landlord serves the prescribed forms at the beginning of the action.

For the tenant, affirmative defenses raising code violations or breach of the implied warranty of habitability may be strengthened if pretrial admissions regarding notice and failure to correct defects are obtained during discovery. The defense of retaliatory eviction may require pretrial investigation into the landlord's motivations. Under a rent control ordinance that permits eviction for the purpose of moving in a specified relative of the landlord (see §§7.65-7.68), discovery may confirm or refute the authenticity of the landlord's intentions. Interrogatories and requests for admissions may be used to obtain more facts in disputes over the sufficiency of a 3-day termination notice. Depositions may be useful, but are difficult to take within the time constraints of unlawful detainers. If counsel for defendant wants to take a deposition, he or she should try to get the landlord's counsel to stipulate to the timing of the deposition and scheduling of the trial.

The purpose of discovery is to obtain evidence and evidentiary "leads," and to resolve undisputed issues. The process of discovery tests the pleadings by enabling a party to find out the opponent's contentions and the facts supporting them. *Burke v Superior Court* (1969) 71 C2d 276, 281, 78 CR 481. By eliminating surprise, discovery removes much of the "sporting" element from litigation. *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 376, 15 CR 90. For extensive discussion of discovery rights, theories, and methods, see California Civil Discovery Practice (4th ed Cal CEB 2006).

In unlawful detainer cases, the most commonly used discovery tools are:

- Depositions of witnesses and parties (see §§11.7-11.10);
- Written interrogatories to adverse parties (see §§11.11-11.19);
- Requests for production of documents before or during trial, *e.g.,* statutory notice, subpoena duces tecum (see §§11.20-11.22, 12.16);
- Demands for inspection of real property (see §§11.20-11.22); and
- Requests for admissions (see §§11.23-11.27).

Although this chapter discusses only those five procedures, any other authorized discovery procedure (*e.g.,* motions for physical or mental examinations) may also be used when appropriate.

Once counsel decides that some form of discovery is appropriate, the cost and benefit of each discovery procedure must be analyzed. The following discussion outlines the advantages and disadvantages of each procedure, and suggests ways to accommodate clients of limited means.

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§11.4 B. Statutory Authority

Formal discovery in unlawful detainer actions is governed by the Civil Discovery Act (CCP §§2016.010-2036.050). Effective January 1, 2008, the discovery law was substantially amended to shorten time periods in discovery proceedings and in motions to enforce discovery rights in unlawful detainer actions. See Stats 2007, ch 113. These changes are reflected in this chapter where appropriate.

The discovery statutes clearly apply to unlawful detainer proceedings despite the summary nature of the action. For purposes of the discovery sections, "action" is defined in CCP §2016.020 to include a "special proceeding of a civil nature." Unlawful detainer actions (see CCP §§1159-1179a) are included in Part 3 of the Code of Civil Procedure (CCP §§1063-1822.59), which provides for "special proceedings." Further, several discovery statutes expressly provide shortened notice and response periods in unlawful detainer cases. See, *e.g.,* CCP §2030.260(a) (response to interrogatories due 5 days after service unless court, on propounding party's motion, shortens time, or on responding party's motion, lengthens time).

Legislative provisions on economical litigation (CCP §§90-100) restrict discovery in most limited civil cases, but they do not apply to unlawful detainer cases. CCP §91(b).

NOTE: Operative January 1, 2008, CCP §§1170.8 and 1170.9 were added to address the timing of discovery motions, including the serving of opposition and reply papers, in unlawful detainer proceedings. Further, CCP §§2020.510, 2025.240, 2025.270, 2030.020, 2030.260, 2031.020, 2031.030, 2031.260, 2033.220, and 2033.250 were amended to address consumer and employee record disclosure and the timelines for certain discovery methods in unlawful detainer actions. See §§11.5-11.24.

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C. Scheduling Unlawful Detainer Discovery and Discovery Motions

§11.5 1. Shorter Response Periods

Time requirements for discovery procedures in unlawful detainer suits are substantially different from those in civil actions generally. In many instances, the notice period for and response time to a discovery request are shortened. See, *e.g.,* CCP §§2025.270(b) (oral depositions; see §11.8), 2030.020(c), 2030.260(b) (interrogatories; see §11.17), 2031.020(c), 2031.030(c)(2), 2031.260(b) (document demands; see §11.20), 2033.020(c), 2033.250(b) (requests for admissions; see §11.24). But the parties to unlawful detainer actions may conduct discovery closer to the trial date than is allowed in ordinary civil actions. See CCP §§2024.020(a), 2024.040(b)(1), 2024.050, which, except on leave of court, allows discovery only through the 30th day before trial in civil actions generally, but allows discovery through the 5th day before trial in unlawful detainer actions.

There is no special cutoff before trial in unlawful detainer actions on the hearing of discovery motions. In ordinary civil actions, all discovery motions must be heard on or before the 15th day before the date initially set for trial. CCP §2024.020(a). This provision expressly does not apply to unlawful detainer actions (CCP §2024.040(b)(1)), and CCP §1170.8 provides that a discovery motion in an unlawful detainer action "may be made at any time" on 5 days' notice. Thus, discovery motions will be heard at any time before trial. The Judicial Council adopted Cal Rules of Ct 3.1347, which governs the due dates and methods for opposing a discovery motion in an unlawful detainer action.

NOTE: Under CCP §2016.060, if the pretrial cutoff dates for discovery or discovery motions fall on a Saturday, Sunday, or holiday, "the time limit is extended until the next court day closer to the trial date." This section appears to apply to discovery and discovery motions in unlawful detainer actions, despite the cutoff date specified for unlawful detainer discovery in CCP §2024.040(b)(1).

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§11.6 2. Discovery and Trial-Setting Conflicts

No specific statute prevents the trial date from being set before discovery is complete. Under CCP §1170.5(a), the trial must be held within 20 days after the request to set trial has been filed. See §11.42. If trial is not held within this time, the court must hold a hearing to determine whether the landlord is likely to prevail. If the court so determines, it must order the tenant to pay whatever it determines to be the landlord's damages from the extension as the rent would otherwise become due. CCP §1170.5(b)-(c). See §§11.43-11.50.

PRACTICE TIP: When the landlord wishes to undertake discovery, filing the request to set trial can simply be delayed until after the landlord has completed discovery. Because the tenant's discovery may conflict with the landlord's desire to bring the case to trial, the tenant's attorney should begin discovery immediately. The tenant may begin discovery on being served with the summons and complaint, and even before answering, without the court's permission. See, *e.g.*, CCP §2025.210. The tenant's attorney should contact the landlord's attorney and attempt to work out a discovery and trial schedule by stipulation. Professional courtesy can eliminate expensive pretrial motions. See §11.45.

If served with a request to set trial before discovery has been completed, a tenant may use a motion to strike or set aside the request (under the court's inherent powers in CCP §128) or to extend the trial date (see §11.44), or may file a counter-request. If the court continues the trial date, it is required to hold a hearing under CCP §1170.5(c) to determine whether the landlord is likely to prevail in the action and whether the tenant should be required to pay damages for the delay into court as the rent would otherwise become due. See §§11.44-11.50, 11.56.

If a trial court denies a tenant the opportunity to conduct adequate discovery, the tenant may seek review by petition for writ of mandate. *Burke v Superior Court* (1969) 71 C2d 276, 277 n1, 78 CR 481 (remedy of mandate is ordinarily appropriate for improper denial of discovery, while remedy of prohibition is used to prevent improper discovery).

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D. Depositions

§11.7 1. Legal Basis; Methods

Any party may take the testimony of any person, including a party, by deposition on oral examination or written questions. CCP §§2025.010, 2028.010. The scope of examination is broad, covering any unprivileged matter that is relevant to the subject matter of the action. CCP §2017.010. Examination and cross-examination of deponents is carried out in the same manner as at trial. CCP §2025.330. Generally, the deposition of a nonparty witness may be used at trial only to impeach that witness or if the witness will be unavailable for trial, and his or her testimony is necessary, while a party's deposition may be used by an adverse party for any purpose. CCP §2025.620.

Depositions are expensive. The reporter who records and transcribes the deposition must be paid by the party who requests the deposition; this cost increases if a transcript is ordered. Generally, an expedited transcript will be necessary because of the short time to trial, thereby increasing costs. The court may issue protective orders denying or limiting the examination. CCP §2025.420(b). Deposition costs may be awarded to the prevailing party. CCP §§1032(b), 1033.5(a)(3).

A deposition must be conducted under the supervision of an officer (usually a certified shorthand reporter) who is authorized to administer an oath, who is not a relative or an employee of any attorneys of the parties or of any of the parties, and who is not financially interested in the action. CCP §2025.320. All "services and products" offered by the deposition officer to any party shall be offered to all parties. The deposition officer is also prohibited from offering comments or notations on the demeanor of any witness, party, or attorney. If a party (or a party's attorney) requests, a party is required to enter into the record at the deposition all services and records made available to the party by the deposition officer. CCP §2025.320. Unless the parties agree or the court orders otherwise, the testimony and objections to questions or testimony must be recorded stenographically. CCP §2025.330(b). A deposition may be audiotaped or videotaped or recorded by stenographic method using instant visual display if the notice of deposition stated an intention to record the testimony by those methods, or if all the parties agree. CCP §§2025.220(a)(5), 2025.330(c).

Rules for depositions of nonparty deponents by telephone or other remote electronic means are provided in CCP §2025.310. Any other party may make a simultaneous audio- or videotape of the deposition if the party serves written notice of his or her intention to do so on all parties to the deposition at least 3 calendar days before the deposition date. CCP §2025.330(c). Detailed procedures for audiotaping and videotaping depositions are prescribed by CCP §2025.340. The cost of video recording a deposition is a recoverable court cost. CCP §1033.5(a)(3).

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§11.8 2. Procedure

Depositions may be taken at any time by a defendant after service of the summons and complaint. A plaintiff must obtain leave of court to serve a deposition notice less than 20 days after the earlier of service of summons or appearance of the defendant. CCP §2025.210. A court order must be obtained if either party desires to take a deposition at a place that is neither (CCP §2025.250(a))

- Within 75 miles of the deponent's residence; nor
- Within the county where the action is pending and within 150 miles of the deponent's residence.

A subpoena need not be served on a party if proper notice of the taking of the deposition is given to his or her attorney or to the party (if unrepresented). CCP §2025.280(a). A party scheduling a deposition in an unlawful detainer action must schedule the deposition for a time that is at least 5 days after written notice, but not later than 5 days before trial. CCP §2025.270(b). The court may order a longer or shorter time on a showing of good cause. CCP §2025.270(d). Time is extended if service is made by mail. CCP §1013. The notice must state the following:

- The time and place of the deposition;
- The name, address, and telephone number of each deponent;
- The materials required to be produced by the deponent;
- Any intention to record the deposition by audiotape or videotape; and
- Any intention to use at trial a videotape deposition of a treating physician or expert witness instead of the witness's testimony.

A witness subpoenaed for a deposition is entitled to the same fees and mileage as if compelled to attend a trial, except that the fees that must be paid to a witness who is required to produce business records under Evid C §1560, but who is not required to personally attend a deposition away from the witness's place of business, are those prescribed by Evid C §1563. CCP §1986.5. This amounts to $35 per day plus 20 cents per mile both ways. Govt C §68093. The subpoena must advise the witness of the right to request fees and mileage. CCP §2065. Payment of witness fees is not required when the deponent is a party (or officer, director, or managing agent of a party), whose deposition is properly noticed under the discovery statutes. *Di Napoli v Superior Court* (1967) 252 CA2d 202, 60 CR 394.

On rules for deposition of nonparty deponents by telephone or other remote electronic means, see §10.7.

Examination and cross-examination of deponents proceed as though at trial. CCP §2025.330(d). Thus, when an adverse party's deposition is taken, leading questions are allowed as in cross-examination, and counsel for the deponent may conduct a redirect examination on the matters on which the deponent testifies. Evid C §776(b)(1). Under CCP §2025.610, once a party has taken a person's deposition on due notice to all other parties, subject to specified exceptions, neither that party nor any other party who received notice of the first deposition may take that same person's deposition again, unless the court for good cause grants leave to do so.

See also CCP §2025.320 and §11.7 for rules on goods and services offered by a deposition officer to a party or a party's attorney.

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§11.9 3. Inspecting Documents at Deposition

The deposing party may compel by subpoena duces tecum (under CCP §2020.020) the production by a nonparty witness of books, documents, or other tangible items at the deposition. A party to the action may be compelled to produce such materials by service of a notice on the party's attorney, specifying the materials to be produced (CCP §2025.280); use of a subpoena duces tecum is not required. An affidavit showing good cause for production is not necessary for a deposition subpoena, although it is required for a trial subpoena. CCP §§1985, 2020.510(a)-(b).

A subpoena duces tecum may be used to obtain the consumer or employment records of a party. CCP §§1985.3, 1985.6. The party giving the subpoena must also serve on the "consumer" or "employee" a notice of the deposition, a privacy notification, and a copy of the deposition subpoena. CCP §2025.240(b). A court has an inherent right to quash such a subpoena or may modify or limit its effect. CCP §1987.1. A deposition subpoena with a request for either consumer or employee records must be scheduled for a date that is at least 20 days after the issuance of the subpoena. CCP §2025.270(c). The deposition subpoena is directed to the witness holding the records and must be served with proof of service of the notice to the consumer or employee or a consumer's or employee's written authorization to release personal records. CCP §2020.510(c)-(d). See CCP §§1985.3(c), (e), 1985.6(c), (e).

An attorney of record in California is authorized to issue a subpoena duces tecum without court seal or other assistance of the court clerk, except in cases in which Govt C §§68097.1-68097.10 (special procedure for witnesses who are peace officers or firemen) apply. CCP §1985.

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§11.10 4. Taking Deposition Before Action Filed

Under a procedure rarely used in civil actions generally, a deposition may be taken before an unlawful detainer action is filed, to perpetuate the testimony of a witness or a party. CCP §§2035.010-2035.060. Under CCP §§2035.010-2035.020, a party may use oral and written depositions; inspection of documents, things, and places; and physical and mental examinations to perpetuate the testimony of a witness or party or to preserve evidence before an action is filed. To invoke this procedure, the person taking the deposition must file a verified petition in the superior court of the county of residence of at least one expected adverse party. CCP §2035.030(a). Under CCP §2035.030(b)-(c), the petition must state the following:

- That the petitioner expects to be a party to an action;
- That the petitioner is presently unable to bring the action;
- The subject matter of the expected action, and the petitioner's involvement in it;
- The type of discovery methods the petitioner wishes to use;
- The facts the petitioner wishes to establish;
- The reasons the petitioner wishes to perpetuate, or preserve, the facts;
- The names of the expected adverse parties; and
- The names of the persons from whom discovery is sought, and the substance of the information from each.

Either party might invoke this procedure when the action is not yet ready for filing but there is a need to perpetuate testimony. For example, if an occupant may not be available after the action is filed, the landlord's attorney might wish to examine him or her during the notice period to uncover possible defenses to the action. A tenant who is served with a termination notice, and who intends to remain on the premises and contest the unlawful detainer action, might also wish to undertake discovery without waiting for the notice period to expire. This procedure might be particularly useful for mobilehome tenancies, which have longer notice periods. See §6.74.

Invoking CCP §§2035.010-2035.060, a party could immediately petition the superior court for an order permitting the taking of the expected adverse party's deposition before the unlawful detainer action is filed. The deposing party could inquire about matters expected to be at issue in the case (*e.g.,* the identity of occupants and the nature of their claims to occupancy), facts that later may be difficult to prove, and the existence of possible defenses (*e.g.,* retaliatory motives, racial discrimination). The court will make an order authorizing all or part of the discovery if it determines that it may prevent a failure of or delay in justice. CCP §2035.050(a). Because the unlawful detainer action will be a "summary proceeding" (see §9.6), it is arguable that depositions should be taken as early as possible to prevent a "delay of justice."

PRACTICE TIP: Taking the tenant's deposition before filing the lawsuit may be desirable when the municipal or limited jurisdiction court that hears the action is expected to deny or limit discovery rights because of the "summary nature" of the eviction. By putting the opponent on the defensive, this tactic may result in the disclosure of information that he or she would rather not have revealed. The procedure also might facilitate resolution of the dispute without litigation, by disclosing the strengths and weaknesses of the parties' respective positions.

One possible problem with the procedure in unlawful detainer actions is the requirement under CCP §2035.040 that the petition be served on the adverse party at least 20 days before the date of the hearing on the petition, which may be too long to permit effective use of the procedure in a case based on a 3-day notice. Although the statute does not indicate whether an order shortening time is permitted, CCP §1005 expressly authorizes the court to shorten time for service of a written notice of motion. Because a CCP §§2035.010-2035.060 petition is functionally identical to a written motion, the court arguably has authority to shorten time for service on a showing of good cause.

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E. Written Interrogatories

1. Nature, Purpose, and Use

§11.11 a. Advantages; Disadvantages

Written interrogatories under CCP §§2030.010-2030.410 are often a useful discovery tool in unlawful detainer actions. They are inexpensive and can be used to discover the opponent's factual and legal contentions, the existence and location of potential witnesses and documents, and names for taking depositions if the opponent is a corporation. Despite expedited trial-setting in unlawful detainer cases (see §11.41), interrogatories may be used under the procedures described in §§11.17-11.19. The disadvantages of written interrogatories include a lack of spontaneity, the fact that opposing counsel (and not the party) prepares the answers, and the fact that they cannot be directed to nonparties. On the advantages and disadvantages of depositions and interrogatories, see California Civil Discovery Practice, chaps 6-7 (4th ed Cal CEB 2006).

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§11.12 b. Depositions on Written Questions Distinguished

Written interrogatories to adverse parties should not be confused with depositions on written questions under CCP §§2028.010-2028.080. For these depositions (which are rarely used), a regular deposition hearing is held; the deposition officer reads the questions to the deponent, and records his or her answers. When written interrogatories are propounded under CCP §§2030.010-2030.410, no hearing need be held. Written interrogatories may be propounded only to parties, however, while the procedure for deposition on written questions applies to any witness. See CCP §§2028.040-2028.080. See also California Civil Discovery Practice, chap 6 (4th ed Cal CEB 2006).

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§11.13 c. Scope and Use Restrictions

Under CCP §2030.010(a), interrogatories may be propounded within the scope fixed by CCP §§2017.010-2017.740 and subject to the restrictions of CCP §§2019.010-2019.210. Under CCP §§2017.010-2017.740, discovery may be obtained on any unprivileged matter that is relevant to the subject matter of the pending action or of any motion in the action if the matter is itself admissible or appears reasonably calculated to lead to discovery of admissible evidence. Answers to interrogatories may be used only against the party who answered the interrogatories, as far as admissible under the rules of evidence, at the trial or any other hearing. CCP §2030.410. A party may propound any number of Judicial Council form interrogatories in addition to special interrogatories. CCP §2030.030. Under CCP §§2033.710-2033.740, the Judicial Council has developed optional form interrogatories for use in unlawful detainer actions. These form interrogatories are reproduced in §11.16.

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§11.14 d. Number Generally Limited to 35

Under CCP §2030.030, the number of special interrogatories a party may propound "as a matter of right" to any other party is limited to 35. A supplemental interrogatory may elicit any later acquired information bearing on all answers previously made, twice before the initial trial setting and once again after the initial trial setting, subject to statutory time limits on discovery and discovery motions. CCP §2030.070. An interrogatory may not be made "a continuing one" that imposes a duty on the responding party to supplement an answer with later-acquired information if the earlier answer was correct and complete. CCP §2030.060(g).

Code of Civil Procedure §§2030.040-2030.050 allow a party to exceed the limit of 35 by a prescribed declaration (accompanying the larger number of interrogatories) attesting with specific facts applicable to the lawsuit that the information sought is warranted under the criteria stated in CCP §2030.040 and that none of the interrogatories is being propounded "for any improper purpose … or to cause unnecessary delay or needless increase in the cost of litigation." Bad faith use of this provision may be sanctioned on motion under CCP §§2023.010-2023.040. Code of Civil Procedure §2030.060 expressly outlaws prefaces or instructions and all subparts to interrogatories (except prefaces, instructions, or subparts contained in form sets of interrogatories approved by the Judicial Council; see CCP §§2033.710-2033.740). "Each interrogatory shall be full and complete in and of itself," and a specially prepared interrogatory may not "contain subparts, or a compound, conjunctive, or disjunctive question." CCP §2030.060.

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§11.15 e. Considerations When Non-Individual Entities Are Responding

If the party to whom the interrogatories are directed is a public or private corporation, partnership, association, or government agency, one of its officers or agents must sign the response under oath on behalf of that party. Thus, use of interrogatories is particularly appropriate when information is sought from a party that is not an individual, and the identities or capacities of party witnesses for depositions are unknown or difficult to ascertain.

If the officer or agent signing the response is an attorney, that party waives any lawyer-client privilege and any protection for work product prepared in anticipation of litigation or for trial during any later discovery from the attorney concerning the identity of the sources of the information in the response. CCP §2030.250(b).

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Source: Real Property/California Landlord-Tenant Practice/11 Unlawful Detainer; Pretrial Proceedings/§11.16 2. Form: Form Interrogatories--Unlawful Detainer (Judicial Council Form DISC-003/UD-106)

§11.16 2. Form: Form Interrogatories—Unlawful Detainer (Judicial Council Form DISC-003/UD-106)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	UNLAWFUL DETAINER ASSISTANT *(Check one box)*: An unlawful detainer assistant ☐ did ☐ did not for compensation give advice or assistance with this form. (*If one did, state the following*): ASSISTANT'S NAME: ADDRESS:
ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF:	TEL. NO.: COUNTY OF REGISTRATION: REGISTRATION NO.: EXPIRES *(DATE)*:
SHORT TITLE:	
FORM INTERROGATORIES—UNLAWFUL DETAINER **Asking Party:** **Answering Party:** **Set No.:**	CASE NUMBER:

Sec. 1. Instructions to All Parties

(a) These are general instructions. For time limitations, requirements for service on other parties, and other details, see Code of Civil Procedure sections 2030.010-2030.410 and the cases construing those sections.

(b) These interrogatories do not change existing law relating to interrogatories nor do they affect an answering party's right to assert any privilege or objection.

Sec. 2. Instructions to the Asking Party

(a) These interrogatories are designed for optional use in unlawful detainer proceedings.

(b) There are restrictions that generally limit the number of interrogatories that may be asked and the form and use of the interrogatories. For details, read Code of Civil Procedure sections 2030.030–2030.070.

(c) In determining whether to use these or any interrogatories, you should be aware that abuse can be punished by sanctions, including fines and attorney fees. See Code of Civil Procedure section 128.7.

(d) Check the box next to each interrogatory that you want the answering party to answer. Use care in choosing those interrogatories that are applicable to the case.

(e) Additional interrogatories may be attached.

Sec. 3. Instructions to the Answering Party

(a) An answer or other appropriate response must be given to each interrogatory checked by the asking party. Failure to respond to these interrogatories properly can be punished by sanctions, including contempt proceedings, fine, attorneys fees, and the loss of your case. See Code of Civil Procedure sections 128.7 and 2030.300.

(b) As a general rule, within five days after you are served with these interrogatories, you must serve your responses on the asking party and serve copies of your responses on all other parties to the action who have appeared. See Code of Civil Procedure sections 2030.260–2030.270 for details.

(c) Each answer must be as complete and straightforward as the information reasonably available to you permits. If an interrogatory cannot be answered completely, answer it to the extent possible.

(d) If you do not have enough personal knowledge to fully answer an interrogatory, say so, but make a reasonable and good faith effort to get the information by asking other persons or organizations, unless the information is equally available to the asking party.

(e) Whenever an interrogatory may be answered by referring to a document, the document may be attached as an exhibit to the response and referred to in the response. If the document has more than one page, refer to the page and section where the answer to the interrogatory can be found.

(f) Whenever an address and telephone number for the same person are requested in more than one interrogatory, you are required to furnish them in answering only the first interrogatory asking for that information.

(g) Your answers to these interrogatories must be verified, dated, and signed. You may wish to use the following form *at the end of your answers:*

I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.

(DATE) _____ (SIGNATURE) _____

Sec. 4. Definitions

Words in **BOLDFACE CAPITALS** in these interrogatories are defined as follows:

(a) **PERSON** includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

(b) **PLAINTIFF** includes any **PERSON** who seeks recovery of the **RENTAL UNIT** whether acting as an individual or on someone else's behalf and includes all such **PERSONS** if more than one.

(c) **LANDLORD** includes any **PERSON** who offered the **RENTAL UNIT** for rent and any **PERSON** on whose behalf the **RENTAL UNIT** was offered for rent and their successors in interest. **LANDLORD** includes all **PERSONS** who managed the **PROPERTY** while defendant was in possession.

(d) **RENTAL UNIT** is the premises **PLAINTIFF** seeks to recover.

(e) **PROPERTY** is the building or parcel (including common areas) of which the **RENTAL UNIT** is a part. (For example, if **PLAINTIFF** is seeking to recover possession of apartment number 12 of a 20-unit building, the building is the **PROPERTY** and apartment 12 is the **RENTAL UNIT**. If **PLAINTIFF** seeks possession of cottage number 3 in a five-cottage court or complex, the court or complex is the **PROPERTY** and cottage 3 is the **RENTAL UNIT**.)

(f) **DOCUMENT** means a writing, as defined in Evidence Code section 250, and includes the original or a copy of handwriting, typewriting, printing, photostating, photographing, electronically stored information, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(g) **NOTICE TO QUIT** includes the original or copy of any notice mentioned in Code of Civil Procedure section 1161 or Civil Code section 1946, including a 3-day notice to pay rent and quit the **RENTAL UNIT**, a 3-day notice to perform conditions or covenants or quit, a 3-day notice to quit, and a 30-day notice of termination.

(h) **ADDRESS** means the street address, including the city, state, and zip code.

Sec. 5. Interrogatories

The following interrogatories have been approved by the Judicial Council under section 2033.710 of the Code of Civil Procedure for use in unlawful detainer proceedings:

CONTENTS

70.0 General
71.0 Notice
72.0 Service
73.0 Malicious Holding Over
74.0 Rent Control and Eviction Control
75.0 Breach of Warranty to Provide Habitable Premises
76.0 Waiver, Change, Withdrawal, or Cancellation of Notice to Quit
77.0 Retaliation and Arbitrary Discrimination
78.0 Nonperformance of the Rental Agreement by Landlord
79.0 Offer of Rent by Defendant
80.0 Deduction from Rent for Necessary Repairs
81.0 Fair Market Rental Value

70.0 General

[Either party may ask any applicable question in this section.]

☐ 70.1 State the name, **ADDRESS**, telephone number, and relationship to you of each **PERSON** who prepared or assisted in the preparation of the responses to these interrogatories. (Do not identify anyone who simply typed or reproduced the responses.)

☐ 70.2 Is **PLAINTIFF** an owner of the **RENTAL UNIT**? If so, state:
(a) the nature and percentage of ownership interest;
(b) the date **PLAINTIFF** first acquired this ownership interest.

☐ 70.3 Does **PLAINTIFF** share ownership or lack ownership? If so, state the name, the **ADDRESS**, and the nature and percentage of ownership interest of each owner.

☐ 70.4 Does **PLAINTIFF** claim the right to possession other than as an owner of the **RENTAL UNIT**? If so, state the basis of the claim.

☐ 70.5 Has **PLAINTIFF'S** interest in the **RENTAL UNIT** changed since acquisition? If so, state the nature and dates of each change.

☐ 70.6 Are there other rental units on the **PROPERTY**? If so, state how many.

☐ 70.7 During the 12 months before this proceeding was filed, did **PLAINTIFF** possess a permit or certificate of occupancy for the **RENTAL UNIT**? If so, for each state:
(a) the name and **ADDRESS** of each **PERSON** named on the permit or certificate;
(b) the dates of issuance and expiration;
(c) the permit or certificate number

☐ 70.8 Has a last month's rent, security deposit, cleaning fee, rental agency fee, credit check fee, key deposit, or any other deposit been paid on the **RENTAL UNIT**? If so, for each item state:
(a) the purpose of the payment;
(b) the date paid;
(c) the amount;
(d) the form of payment;
(e) the name of the **PERSON** paying;
(f) the name of the **PERSON** to whom it was paid;
(g) any **DOCUMENT** which evidences payment and the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**;
(h) any adjustments or deductions including facts.

☐ 70.9 State the date defendant first took possession of the **RENTAL UNIT**.

☐ 70.10 State the date and all the terms of any rental agreement between defendant and the **PERSON** who rented to defendant.

☐ 70.11 For each agreement alleged in the pleadings:
(a) identify all **DOCUMENTS** that are part of the agreement and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT;**
(b) state each part of the agreement not in writing, the name, **ADDRESS,** and telephone number of each **PERSON** agreeing to that provision, and the date that part of the agreement was made;
(c) identify all **DOCUMENTS** that evidence each part of the agreement not in writing and for each state the name, **ADDRESS,** and telephone number of each **PERSON** who has the **DOCUMENT**;
(d) identify all **DOCUMENTS** that are part of each modification to the agreement, and for each state

the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT** (see also §71.5);

(e) state each modification not in writing, the date, and the name, **ADDRESS,** and telephone number of the **PERSON** agreeing to the modification, and the date the modification was made (see also §71.5).

(f) identify all **DOCUMENTS** that evidence each modification of the agreement not in writing and for each state the name, **ADDRESS,** and telephone number of each **PERSON** who has the **DOCUMENT** (see also §71.5).

☐ 70.12 Has any **PERSON** acting on the **PLAINTIFF'S** behalf been responsible for any aspect of managing or maintaining the **RENTAL UNIT** or **PROPERTY**? If so, for each **PERSON** state:
(a) the name, **ADDRESS**, and telephone number;
(b) the dates the **PERSON** managed or maintained the **RENTAL UNIT** or **PROPERTY**;
(c) the **PERSON'S** responsibilities.

☐ 70.13 For each **PERSON** who occupies any part of the **RENTAL UNIT** (except occupants named in the complaint and occupants' children under 17) state:
(a) the name, **ADDRESS**, telephone number, and birthdate;
(b) the inclusive dates of occupancy;
(c) a description of the portion of the **RENTAL UNIT** occupied;
(d) the amount paid, the term for which it was paid, and the person to whom it was paid;
(e) the nature of the use of the **RENTAL UNIT**;
(f) the name, **ADDRESS**, and telephone number of the person who authorized occupancy;
(g) how occupancy was authorized, including failure of the **LANDLORD** or **PLAINTIFF** to protest after discovering the occupancy.

☐ 70.14 Have you or anyone acting on your behalf obtained any **DOCUMENT** concerning the tenancy between any occupant of the **RENTAL UNIT** and any **PERSON** with an ownership interest or managerial responsibility for the **RENTAL UNIT**? If so, for each **DOCUMENT** state:
(a) the name, **ADDRESS**, and telephone number of each individual from whom the **DOCUMENT** was obtained;
(b) the name, **ADDRESS**, and telephone number of each individual who obtained the **DOCUMENT**;
(c) the date the **DOCUMENT** was obtained;
(d) the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT** (original or copy).

71.0 Notice

[If a defense is based on allegations that the 3-day notice or 30- day **NOTICE TO QUIT** *is* defective in form or content, *then either party may ask any applicable question in this section.]*

☐ 71.1 Was the **NOTICE TO QUIT** on which **PLAINTIFF** bases this proceeding attached to the complaint? If not, state the contents of this notice.

☐ 71.2 State all reasons that the **NOTICE TO QUIT** was served and for each reason:
(a) state all facts supporting **PLAINTIFF'S** decision to terminate defendant's tenancy;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify all **DOCUMENTS** that support the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

☐ 71.3 List all rent payments and rent credits made or claimed by or on behalf of defendant beginning 12 months before the **NOTICE TO QUIT** was served. For each payment or credit state:
(a) the amount;
(b) the date received;
(c) the form in which any payment was made;
(d) the services performed or other basis for which a credit is claimed;
(e) the period covered;
(f) the name of each **PERSON** making the payment or earning the credit;
(g) the identity of all **DOCUMENTS** evidencing the payment or credit and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**.

☐ 71.4 Did defendant ever fail to pay the rent on time? If so, for each late payment state:
(a) the date;
(b) the amount of any late charge;
(c) the identity of all **DOCUMENTS** recording the payment and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**.

☐ 71.5 Since the beginning of defendant's tenancy, has **PLAINTIFF** ever raised the rent? If so, for each rent increase state:
(a) the date the increase became effective;
(b) the amount;
(c) the reasons for the rent increase;
(d) how and when defendant was notified of the increase;
(e) the identity of all **DOCUMENTS** evidencing the increase and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**.

[See also section 70.11 (d) - (f).]

☐ 71.6 During the 12 months before the **NOTICE TO QUIT** was served was there a period during which there was no permit or certificate of occupancy for the **RENTAL UNIT**? If so, for each period state:
(a) the inclusive dates;
(b) the reasons.

☐ 71.7 Has any **PERSON** ever reported any nuisance or disturbance at or destruction of the **RENTAL UNIT** or **PROPERTY** caused by defendant or other occupant of the **RENTAL UNIT** or their guests? If so, for each report state;
(a) a description of the disturbance or destruction;
(b) the date of the report;
(c) the name of the **PERSON** who reported;
(d) the name of the **PERSON** to whom the report was made;
(e) what action was taken as a result of the report;
(f) the identity of all **DOCUMENTS** evidencing the report and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

☐ 71.8 Does the complaint allege violation of a term of a rental agreement or lease (other than nonpayment of rent)? If so, for each covenant:
(a) identify the covenant breached;
(b) state the facts supporting the allegation of a breach;
(c) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** that support the facts and state the name, **ADDRESS,** and telephone number of each **PERSON** who has each **DOCUMENT.**

☐ 71.9 Does the complaint allege that the defendant has been using the **RENTAL UNIT** for an illegal purpose? If so, for each purpose:
(a) identify the illegal purpose;
(b) state the facts supporting the allegations of illegal use;
(c) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** that support the facts and state the name, **ADDRESS,** and telephone number of each **PERSON** who has each **DOCUMENT.**

[Additional interrogatories on this subject may be found in sections 75.0, 78.0, 79.0, and 80.0.]

72.0 Service

[If a defense is based on allegations that the **NOTICE TO QUIT** *was* defectively served, *then either party may ask any applicable question in this section.]*

☐ 72.1 Does defendant contend (or base a defense or make any allegations) that the **NOTICE TO QUIT** was defectively served? If the answer is "no", do not answer interrogatories 72.2 through 72.3.

☐ 72.2 Does **PLAINTIFF** contend that the **NOTICE TO QUIT** referred to in the complaint was served? If so, state:
(a) the kind of notice;
(b) the date and time of service;
(c) the manner of service;
(d) the name and **ADDRESS** of the person who served it:
(e) a description of any **DOCUMENT** or conversation between defendant and the person who served the notice.

☐ 72.3 Did any person receive the **NOTICE TO QUIT** referred to in the complaint? If so, for each copy of each notice state:
(a) the name of the person who received it;
(b) the kind of notice;
(c) how it was delivered;
(d) the date received;
(e) where it was delivered;
(f) the identity of all **DOCUMENTS** evidencing the notice and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**.

73.0 Malicious Holding Over

[If a defendant denies allegations that defendant's continued possession is malicious, then either party may ask any applicable question in this section. Additional questions in section 75.0 may also be applicable.]

☐ 73.1 If any rent called for by the rental agreement is unpaid, state the reasons and the facts upon which the reasons are based.

☐ 73.2 Has defendant made attempts to secure other premises since the service of the **NOTICE TO QUIT** or since the service of the summons and complaint? If so, for each attempt:
(a) state all facts indicating the attempt to secure other premises;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify all **DOCUMENTS** that support the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

☐ 73.3 State the facts upon which **PLAINTIFF** bases the allegation of malice.

74.0 Rent Control and Eviction Control

☐ 74.1 Is there an ordinance or other local law in this jurisdiction which limits the right to evict tenants? If your answer is no, you need not answer sections 74.2 through 74.6.

☐ 74.2 For the ordinance or other local law limiting the right to evict tenants, state:
(a) the title or number of the law;
(b) the locality.

☐ 74.3 Do you contend that the **RENTAL UNIT** is exempt from the eviction provisions of the ordinance or other local law identified in section 74.2? If so, state the facts upon which you base your contention.

☐ 74.4 Is this proceeding based on allegations of a need to recover the **RENTAL UNIT** for use of the **LANDLORD** or the landlord's relative? If so, for each intended occupant state:
(a) the name;
(b) the residence **ADDRESSES** from three years ago to the present;
(c) the relationship to the **LANDLORD**;
(d) all the intended occupant's reasons for occupancy;
(e) all rental units on the **PROPERTY** that were vacated within 60 days before and after the date the **NOTICE TO QUIT** was served.

☐ 74.5 Is the proceeding based on an allegation that the **LANDLORD** wishes to remove the **RENTAL UNIT** from residential use temporarily or permanently (for example, to rehabilitate, demolish, renovate, or convert)? If so, state:
(a) each reason for removing the **RENTAL UNIT** from residential use;
(b) what physical changes and renovation will be made to the **RENTAL UNIT**;
(c) the date the work is to begin and end;
(d) the number, date, and type of each permit for the change or work;

(e) the identity of each **DOCUMENT** evidencing the intended activity (for example, blueprints, plans, applications for financing, construction contracts) and the name, **ADDRESS**, and telephone number of each PERSON who has each **DOCUMENT**.

☐ 74.6 Is the proceeding based on any ground other than those stated in sections 74.4 and 74.5? If so, for each:
(a) state each fact supporting or opposing the ground;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify all **DOCUMENTS** evidencing the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

75.0 Breach of Warranty to Provide Habitable Premises

[If plaintiff alleges nonpayment of rent and defendant bases his defense on allegations of implied or express breach of warranty to provide habitable residential premises, then either party may ask any applicable question in this section.]

☐ 75.1 Do you know of any conditions in violation of state or local building codes, housing codes, or health codes, conditions of dilapidation, or other conditions in need of repair in the **RENTAL UNIT** or on the **PROPERTY** that affected the **RENTAL UNIT** at any time defendant has been in possession? If so, state:
(a) the type of condition;
(b) the kind of corrections or repairs needed;
(c) how and when you learned of these conditions;
(d) how these conditions were caused;
(e) the name, **ADDRESS**, and telephone number of each **PERSON** who has caused these conditions.

☐ 75.2 Have any corrections, repairs, or improvements been made to the **RENTAL UNIT** since the **RENTAL UNIT** was rented to defendant? If so, for each correction, repair, or improvement state:
(a) a description giving the nature and location;
(b) the date;
(c) the name, **ADDRESS**, and telephone number of each **PERSON** who made the repairs or improvements;
(d) the cost;
(e) the identity of any **DOCUMENT** evidencing the repairs or improvements;
(f) if a building permit was issued, state the issuing agencies and the permit number of your copy.

☐ 75.3 Did defendant or any other **PERSON** during 36 months before the **NOTICE TO QUIT** was served or during defendant's possession of the **RENTAL UNIT** notify the **LANDLORD** or his agent or employee about the condition of the **RENTAL UNIT** or **PROPERTY**? If so, for each written or oral notice state:
(a) the substance;
(b) who made it;
(c) when and how it was made;
(d) the name and **ADDRESS** of each **PERSON** to whom it was made;
(e) the name and **ADDRESS** of each person who knows about it;
(f) the identity of each **DOCUMENT** evidencing the notice and the name, **ADDRESS**, and telephone number of each **PERSON** who has it;
(g) the response made to the notice;
(h) the efforts made to correct the conditions;
(i) whether the **PERSON** who gave notice was an occupant of the **PROPERTY** at the time of the complaint.

☐ 75.4 During the period beginning 36 months before the **NOTICE TO QUIT** was served to the present, was the **RENTAL UNIT** or **PROPERTY** (including other rental units) inspected for dilapidations or defective conditions by a representative of any governmental agency? If so, for each inspection state:
(a) the date;
(b) the reason;
(c) the name of the governmental agency;
(d) the name, **ADDRESS**, and telephone number of each inspector;
(e) the identity of each **DOCUMENT** evidencing each inspection and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 75.5 During the period beginning 36 months before the **NOTICE TO QUIT** was served to the present, did **PLAINTIFF** or **LANDLORD** receive a notice or other communication regarding the condition of the **RENTAL UNIT** or **PROPERTY** (including other rental units) from a governmental agency? If so, for each notice or communication state:
(a) the date received;
(b) the identity of all parties;
(c) the substance of the notice or communication;
(d) the identity of each **DOCUMENT** evidencing the notice or communication and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 75.6 Was there any corrective action taken in response to the inspection or notice or communication identified in sections 75.4 and 75.5? If so, for each:
(a) identify the notice or communication;
(b) identify the condition;
(c) describe the corrective action;
(d) identify each **DOCUMENT** evidencing the corrective action and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 75.7 Has the **PROPERTY** been appraised for sale or loan during the period beginning 36 months before the **NOTICE TO QUIT** was served to the present? If so, for each appraisal state:
(a) the date;
(b) the name, **ADDRESS**, and telephone number of the appraiser;
(c) the purpose of the appraisal;
(d) the identity of each **DOCUMENT** evidencing the appraisal and the name, **ADDRESS,** and telephone number of each **PERSON** who has it.

☐ 75.8 Was any condition requiring repair or correction at the **PROPERTY** or **RENTAL UNIT** caused by defendent or other occupant of the **RENTAL UNIT** or their guests? If so, state:
(a) the type and location of condition;
(b) the kind of corrections or repairs needed;
(c) how and when you learned of these conditions;
(d) how and when these conditions were caused;
(e) the name, **ADDRESS**, and telephone number of each **PERSON** who caused these conditions;

(f) the identity of each **DOCUMENT** evidencing the repair (or correction) and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

[*See also section 71.0 for additional questions.*]

76.0 Waiver, Change, Withdrawal, or Cancellation of Notice to Quit

[If a defense is based on waiver, change, withdrawal, or cancellation of the **NOTICE TO QUIT**, *then either party may ask any applicable question in this section.]*

☐ 76.1 Did the **PLAINTIFF or LANDLORD** or anyone acting on his or her behalf do anything which is alleged to have been a waiver, change, withdrawal, or cancellation of the **NOTICE TO QUIT**? If so:
(a) state the facts supporting this allegation;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of these facts;
(c) identify each **DOCUMENT** that supports the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 76.2 Did the **PLAINTIFF** or **LANDLORD** accept rent **which covered a period after the date for vacating the RENTAL UNIT** as specified in the **NOTICE TO QUIT**? If so:
(a) state the facts;
(b) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify each **DOCUMENT** that supports the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

77.0 Retaliation and Arbitrary Discrimination

[If a defense is based on retaliation or arbitrary discrimination, then either party may ask any applicable question in this section.]

☐ 77.1 State all reasons that the **NOTICE TO QUIT** was served or that defendant's tenancy was not renewed and for each reason:
(a) state all facts supporting **PLAINTIFF'S** decision to terminate or not renew defendant's tenancy;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify all **DOCUMENTS** that support the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

78.0 Nonperformance of the Rental Agreement by Landlord

[If a defense is based on nonperformance of the rental agreement by the **LANDLORD** *or someone acting on the* **LANDLORD'S** *behalf, then either puffy may ask any ap - plicable question in this section.]*

☐ 78.1 Did the **LANDLORD** or anyone acting on the **LANDLORD'S** behalf agree to make repairs, alterations, or improvements at any time or provide services to the **PROPERTY** or **RENTAL UNIT**? If so, for each agreement state:
(a) the substance of the agreement;
(b) when it was made;
(c) whether it was written or oral;
(d) by whom and to whom;
(e) the name and **ADDRESS** of each person who knows about it;
(f) whether all promised repairs, alterations, or improvements were completed or services provided;
(g) the reasons for any failure to perform;
(h) the identity of each **DOCUMENT** evidencing the agreement or promise and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 78.2 Has **PLAINTIFF** or **LANDLORD** or any resident of the **PROPERTY** ever committed disturbances or interfered with the quiet enjoyment of the **RENTAL UNIT** (including, for example, noise, acts which threaten the loss of title to the property or loss of financing, etc.)? If so, for each disturbance or interference, state:
(a) a description of each act;
(b) the date of each act;
(c) the name, **ADDRESS,** and telephone number of each **PERSON** who acted;
(d) the name, **ADDRESS,** and telephone number of each **PERSON** who witnessed each act and any **DOCUMENTS** evidencing the person's knowledge;
(e) what action was taken by the **PLAINTIFF** or **LANDLORD** to end or lessen the disturbance or interference.

79.0 Offer of Rent by Defendant

[If a defense is based on an offer of rent by a defendant which was refused, then either party may ask any applicable question in this section.]

☐ 79.1 Has defendant or anyone acting on the defendant's behalf offered any payments to **PLAINTIFF** which **PLAINTIFF** refused to accept? If so, for each offer state:
(a) the amount;
(b) the date;
(c) purpose of offer;
(d) the manner of the offer;
(e) the identity of the person making the offer;
(f) the identity of the person refusing the offer;
(g) the date of the refusal;
(h) the reasons for the refusal.

80.0 Deduction from Rent for Necessary Repairs

[If a defense to payment of rent or damages is based on claim of retaliatory eviction, then either party may ask any applicable question in this section. Additional questions in section 75.0 may also be applicable.]

☐ 80.1 Does defendant claim to have deducted from rent any amount which was withheld to make repairs after communication to the **LANDLORD** of the need for the repairs? If the answer is "no", do not answer interrogatories 80.2 through 80.6.

☐ 80.2 For each condition in need of repair for which a deduction was made, state:
(a) the nature of the condition;
(b) the location;
(c) the date the condition was discovered by defendant;
(d) the date the condition was first known by **LANDLORD** or **PLAINTIFF**;

(e) the dates and methods of each notice to the **LANDLORD** or **PLAINTIFF** of the condition;
(f) the response or action taken by the **LANDLORD** or **PLAINTIFF** to each notification;
(g) the cost to remedy the condition and how the cost was determined;
(h) the identity of any bids obtained for the repairs and any **DOCUMENTS** evidencing the bids.

☐ 80.3 Did **LANDLORD** or **PLAINTIFF** fail to respond within a reasonable time after receiving a communication of a need for repair? If so, for each communication state:
(a) the date it was made;
(b) how it was made;
(c) the response and date;
(d) why the delay was unreasonable.

☐ 80.4 Was there an insufficient period specified or actually allowed between the time of notification and the time repairs were begun by defendant to allow **LANDLORD** or **PLAINTIFF** to make the repairs? If so, state all facts on which the claim of insufficiency is based.

☐ 80.5 Does **PLAINTIFF** contend that any of the items for which rent deductions were taken were not allowable under law? If so, for each item state all reasons and facts on which you base your contention.

☐ 80.6 Has defendant vacated or does defendant anticipate vacating the **RENTAL UNIT** because repairs were requested and not made within a reasonable time? If so, state all facts on which defendant justifies having vacated the RENTAL UNIT or anticipates vacating the rental unit.

81.0 Fair Market Rental Value

[If defendant denies **PLAINTIFF** *allegation on the fair market rental value of the* **RENTAL UNIT**, *then either party may ask any applicable question in this section. If defendant claims that the fair market rental value is less because of a breach of warranty to provide habitable premises, then either party may also ask any applicable question in section 75.0.]*

☐ 81.1 Do you have an opinion on the fair market rental value of the **RENTAL UNIT**? If so, state:
(a) the substance of your opinion;
(b) the factors upon which the fair market rental value is based;
(c) the method used to calculate the fair market rental value.

☐ 81.2 Has any other **PERSON** ever expressed to you an opinion on the fair market rental value of the **RENTAL UNIT**? If so, for each **PERSON**:
(a) state the name, **ADDRESS**, and telephone number;
(b) state the substance of the **PERSON'S** opinion;
(c) describe the conversation or identify all **DOCUMENTS** in which the **PERSON** expressed an opinion and state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

☐ 81.3 Do you know of any current violations of state or local building codes, housing codes, or health codes, conditions of delapidation or other conditions in need of repair in the **RENTAL UNIT** or common areas that have affected the **RENTAL UNIT** at any time defendant has been in possession? If so, state:
(a) the conditions in need of repair;
(b) the kind of repairs needed;
(c) the name, ADDRESS, and telephone number of each PERSON who caused these conditions.

Comment: The form was revised effective January 1, 2009. The following comments are numbered to correspond to

the above numbered interrogatories:

70.1. The responding party should include an objection that preserves the attorney-client privilege.

70.7, 71.6. These interrogatories are subject to objection because the possession of a permit or certificate of occupancy is a matter of public record. They appear to apply only to actions for nonpayment of rent or other breach of contract, which require an enforceable agreement between the landlord and the tenant, setting forth the rent claimed as due or the contract provision claimed to have been violated. At most, the lack of a valid certificate of occupancy would render any rental agreement provisions concerning the subject building illegal and therefore unenforceable.

75.4-75.5. Objection may be raised to these interrogatories on the ground that the information sought may be obtained from public records.

79.1. With the possible exception of cases in which the landlord's good faith or dominant motive is at issue, inquiry into the landlord's refusal of rent after expiration of a notice to pay rent or quit would not reasonably tend to lead to discoverable evidence. Thus, a relevancy objection could be made to the interrogatory. In all other unlawful detainer situations, the landlord must refuse the offer of rent to avoid waiving the notice (see §10.60). Thus, the answer to the interrogatory could not lead to discoverable evidence.

The Judicial Council's form interrogatories are frequently used for the improper purpose of annoying the opposition. Tenants should avoid checking every box on the form. Section 2 of the instructions on the form warns the litigants that sanctions may be imposed for abusing the use of the form.

Landlords should object to specific interrogatories propounded if they bear no relevance to the defenses asserted by the tenant's answer. The preface to many sections of the form states that the interrogatory may be asked if a particular defense is asserted. If no such defense is asserted (or no answer has yet been filed), an objection by the landlord is appropriate. Counsel for landlords should be aware, however, that some form interrogatories may be relevant under the facts of a particular case, even if the specified defense mentioned in the preface to the form interrogatories has not been asserted. Thus, objections should be used carefully.

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3. Procedure

§11.17 a. Time for Service and Response

Interrogatories may be served by a defendant at any time. CCP §2030.020(a). A plaintiff in an unlawful detainer may propound interrogatories on a party at any time that is 5 days after service of the summons on (or appearance by) that party, whichever is first. CCP §2030.020(c). Responses to interrogatories are due within 5 days of service, unless the court on a motion lengthens or shortens the time period. CCP §2030.260(b). Additional time under CCP §1013(a) applies, however, if the interrogatories are not personally served. The parties may also agree in writing to extend the time. CCP §2030.270.

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§11.18 b. Answers and Objections to Interrogatories

The interrogatories must be answered in writing under oath, and the answers must be signed. CCP §2030.250. The interrogatories should not be filed with the court. The propounding party must retain the originals of both the interrogatories and the response until 6 months after final disposition of the action. CCP §2030.280.

The responding party should answer the interrogatories fully, as required by CCP §§2030.210-2030.310. In an unlawful detainer proceeding, answers are due within 5 days of the service of the interrogatories, unless on motion of either party, the court has shortened or lengthened the response time. CCP §2030.260(b). Failure to provide adequate information in response to discovery requests is a common ground for the trial court to grant a continuance in an unlawful detainer action. See §11.45.

When answers to interrogatories must be derived from business records, a compilation, abstract, audit, or summary may not exist or may not be in the party's possession or control. If so, the party may state this in the answer, specify records from which the answer may be derived, and afford the party serving the interrogatory reasonable opportunity to (CCP §2030.230):

- Examine, audit, or inspect such records; and
- Make copies, compilations, abstracts, or summaries.

Instead of (or in addition to) an answer to an interrogatory, the responding party may state an objection to the particular interrogatory, and the specific ground for the objection must be set forth clearly in the response. CCP §§2030.210-2030.250. The propounding party has up to 45 days (plus 5 calendar days under CCP §1013 if the response was served by mail) from the date of service of the response (see §8.29 for more details), or any additional period agreed on in writing by the parties, to move for an order compelling a further response. CCP §2030.300. A discovery motion may be made in an unlawful detainer action on 5 days' notice. CCP §1170.8. The motion must be accompanied by a declaration under CCP §2016.040, "showing a reasonable and good-faith attempt" to resolve each issue presented by the motion. CCP §2030.300.

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Source: Real Property/California Landlord-Tenant Practice/11 Unlawful Detainer; Pretrial Proceedings/§11.19 c. Protective Orders

§11.19 c. Protective Orders

After receiving interrogatories, the responding party may move "promptly" for a protective order accompanied by a declaration under CCP §2016.040, "showing a reasonable and good faith attempt" at informal resolution of the dispute. The court may issue a protective order under CCP §2030.090 to prevent or minimize the following effects:

- Exposure of trade secrets or confidential business information;
- Unwarranted annoyance;
- Embarrassment;
- Oppression; or
- Undue burden and expense.

Under CCP §1170.8, such a motion may be heard on 5 days' notice.

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F. Inspection of Documents or Property

1. Demands Addressed to a Party

§11.20 a. Making the Demand

Without first obtaining a court order, a party to an action may request any other party to:

- Produce nonprivileged documents, records, papers, and other materials for inspection and copying; and
- Permit entry on designated real property for inspection, measurement, and photography.

CCP §2031.010. This procedure provides only a means of inspecting, copying, or photographing the materials or property. For evidentiary purposes at trial, a proper foundation still must be made through pretrial requests for admissions (regarding the authenticity of the documents), stipulations, or oral testimony. (See §12.17 for discussion of the best evidence rule.) The scope of such an inspection is the same as that of examination on deposition (see §11.9): to discover materials that are relevant to the subject matter of the action or that are reasonably calculated to uncover admissible evidence. CCP §2031.010. Although this procedure is inexpensive, it applies only to parties and not to nonparty witnesses. See CCP §2031.010. For a general discussion of procedures, see California Civil Discovery Practice, chap 8 (4th ed Cal CEB 2006).

A party and his or her expert may inspect premises open to the public without complying with discovery notice requirements. *Pullin v Superior Court* (2000) 81 CA4th 1161, 97 CR2d 447.

Under CCP §2016.020, "document" is defined by reference to Evid C §250, which includes e-mail and facsimile transmissions. To make a written demand for inspection, a plaintiff in an unlawful detainer action must wait at least 5 days (or earlier on court order for good cause shown in a motion with or without notice) after service of the summons on (or after the appearance by) the party to whom the demand is directed, whichever occurs first. CCP §2031.020. The demand must specify a reasonable time for inspection that is at least 5 days after service of the demand (plus 5 calendar days under CCP §1013 if service is by mail) unless the court for good cause shown has allowed specification of an earlier date. CCP §2031.030(c)(2).

A party may propound a supplemental demand to inspect any later acquired or discovered documents, tangible things, or land or other property that are in the possession, custody, or control of the party on whom the demand is made, subject to specific restrictions.

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§11.21 b. Responding to the Demand

The party on whom the demand was made must respond in writing to the request within 5 days (plus 5 calendar days under CCP §1013 if service is by mail) after service of the request (see §8.29 for more details), unless on motion the court has either extended or shortened the response time (CCP §2031.260(b)) or unless the parties have agreed in writing to extend the date for inspection or response time (CCP §2031.270). The responding party must respond separately to each item or category of items under CCP §2031.210 by:

- Stating that the party will comply with the demand by the date set for inspection under CCP §2031.030(c)(2) (see CCP §2031.220);
- Representing that the party cannot comply (see CCP §2031.230); or
- Objecting in whole or in part, specifying grounds for the objection (see CCP §2031.240).

Under CCP §2031.240(b), the objecting party must particularly identify the items subject to the objection and indicate whether they are subject to attorney-client, work product, or other privileges, risking the possibility that the very information sought to be protected will be divulged. In such situations, the respondent should move for a protective order to allow a special master or the court in camera to determine the validity of the objection.

Under CCP §2031.280(a), documents must be produced either "as they are kept in the usual course of business" or "organized and labeled to correspond with the categories in the demand." The responding party must sign the response under oath unless the response contains only objections. The attorney for the responding party must sign any responses that contain an objection. CCP §2031.250.

Failure to timely respond to a demand waives any objection based on the demand. On motion, however, the court may relieve the party from such a waiver on a showing that the party has served a later response that complies substantially with the response requirement and that the failure to respond was due to mistake, inadvertence, or excusable neglect. CCP §2031.300. If the party fails to respond, the propounding party may on 5 days' notice move for an order compelling response and for a monetary sanction. CCP §§1170.8, 2031.300. Sanctions may be awarded unless that party acted with substantial justification or circumstances make the imposition of sanctions unjust. CCP §2031.300(c). If an inadequate response has been served, the propounding party may move for an order compelling further response; the motion must be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of any issue in the motion. CCP §2031.310. The right to compel further response is waived unless filed within 45 days of service of the response (plus 5 calendar days under CCP §1013 if service was made by mail) (see §8.29 for more details), or on any later date to which the parties have agreed in writing. CCP §2031.310(c).

After receiving a demand for inspection, the responding party may move "promptly" for a protective order (in unlawful detainer actions, may give 5 days' notice of motion under CCP §1170.8), accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the disputed issues. The court may make a protective order to prevent exposure of trade secrets, unwarranted annoyance, embarrassment, oppression, or undue burden and expense. CCP §2031.060(a).

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§11.22 2. Demands Addressed to a Nonparty

A subpoena duces tecum must be used if documents are in the possession of a nonparty witness. CCP §§1985, 2020.410, 2020.510(b). The demanding party must offer to pay witness and mileage fees under a subpoena duces tecum. Under CCP §1985.6, a subpoena duces tecum may be used, *e.g.,* to obtain employment records of an employee that are maintained by his current or former employer. Such a request however, must be made in accordance with the provisions of CCP §§2020.510(d), 2025.240(b). This section might be invoked if the acts of a landlord's employee are at issue in an unlawful detainer action. In unlawful detainer actions based on criminal activity on the premises, police reports should be subpoenaed at the earliest possible date because of the length of time it takes to produce police records. See §11.9.

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G. Requests for Admissions

1. Use and Procedure

§11.23 a. Making the Request

A party to a civil action may serve on any other party a written request for admission of the genuineness of specified documents or of the truth of specified matters of fact, opinion relating to fact, or application of law to fact, and such request may relate to a matter that is in controversy between the parties. CCP §2033.010.

EXAMPLE 1: If a tenant in an unlawful detainer case denies proper service of a termination notice, the landlord may ask the tenant to admit having received the notice on a particular date, and to admit the genuineness of an attached copy of the notice. If the tenant admits receipt of the notice, the landlord need not call the process server as a witness.

EXAMPLE 2: When habitability is at issue, the tenant may ask the landlord to admit that the premises were inspected by the health or building inspector, that an inspection report (attached to the request) was received by the landlord in the ordinary course of business, and that the copy attached is genuine. The tenant might also use requests for admissions to establish that the landlord received notice of defective conditions from the tenant, and that specified repairs were not made.

Requests for admissions narrow the issues in the action, and save time and expense in preparation for trial. They are also useful to establish facts necessary to lay the foundation for admitting relevant evidence, such as obtaining admissions of the authenticity of documents to be admitted into evidence. Evid C §1414; see Jefferson's California Evidence Benchbook, chap 30 (3d ed CJA-CEB 1997). A party requesting an admission of the genuineness of any documents must attach copies of the documents to the requests. CCP §2033.060(g).

Under CCP §2033.030, the number of requests for admissions is limited generally to 35, unless the number is increased by stipulation or court order. There is no similar limit, however, on requests to admit the genuineness of documents. Moreover, a party may request more than 35 admissions by serving a declaration that the larger number is necessary and not for an improper purpose. CCP §2033.050. Unless approved by the Judicial Council, a set of requests for admissions may not include a preface or instructions; no request may have subparts; and each request must be "full and complete in and of itself" and may not be "compound, conjunctive, or disjunctive." CCP §2033.060.

Requests for admissions may be made by a defendant at any time. A plaintiff may make requests for admissions without leave of court at any time after 5 days from service of an unlawful detainer summons or appearance by the defendant, whichever is first, unless the court on a showing of good cause shortens that time on motion with or without notice. CCP §2033.020.

The Judicial Council requests for admissions form (DISC-020) is reprinted in §11.27. Under CCP §2033.710, the Judicial Council is directed to develop and approve optional official form requests for admissions in unlawful detainer actions, but has not yet prepared them. On requests for admissions generally, see California Civil Discovery Practice, chap 9 (4th ed Cal CEB 2006).

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§11.24 b. Responding to the Request

The responding party's responses in an unlawful detainer action are due within 5 days after service of the requests, unless on motion the court has extended or shortened the time for response. CCP §2033.250(b). The parties also may informally agree to extend the time for response, which they must confirm in writing. CCP §2033.260.

After receiving requests for admissions, the responding party may move "promptly" for a protective order accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the disputed issues. CCP §2033.080(a). The motion may be made on 5 days' notice. CCP §1170.8. The court may make a protective order to prevent exposure of trade secrets or confidential business information, unwarranted annoyance, embarrassment, oppression, or undue burden and expense. CCP §2033.080(b).

A party must respond in writing under oath to each separate request. See *Steele v Totah* (1986) 180 CA3d 545, 225 CR 635 (a party's attorney may not verify responses to requests for admissions; only a party may do so). The response must either answer or object to each specific request. CCP §2033.210(b). Specific grounds must be stated clearly for each objection. CCP §2033.230(b). Each answer must admit any part of each request that is true, deny any part of each request that is untrue, and specify any matter in each request about which the responding party lacks sufficient information or knowledge to determine its truth. CCP §2033.220.

Code of Civil Procedure §2033.270 directs that requests for admissions and responses not be filed with the court, and that the requesting party retain the originals of both the requests and the responses until 6 months after final disposition of the action. Under CCP §2033.410, an admission made by a party in response to a request may not be used against that party for any other purpose or in any other action.

PRACTICE TIP: Landlord counsel should answer the request for admissions as soon as possible to avoid a continuance of the trial based on lack of response to discovery.

NOTE: Pursuant to CCP §2033.420, if a party denies the genuineness of a document or the truth of an admission and it later is proven that the document is genuine or the admission is true, then the party denying such allegations can be subject to the reasonable expenses, including attorney fees, incurred in proving those facts. If, however, the party did not have to submit proof on the truth of a requested admission at trial (*e.g.,* the parties stipulated to liability pretrial), then reasonable expenses and attorney fees are not recoverable. See *Stull v Sparrow* (2001) 92 CA4th 860, 112 CR2d 239.

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§11.25 c. Consequences of Failure to Respond

Code of Civil Procedure §2033.280(b) provides that if there is no timely response, the requesting party must move for an order to have the unanswered matter deemed admitted. The court must grant the motion unless a proposed response in substantial compliance with CCP §§2033.210-2033.230 is belatedly served on the requesting party before the hearing on the motion. CCP §2033.280(b)-(c). A monetary sanction under CCP §2023.030 must be imposed on the party who failed to serve a timely response, unless that party acted with substantial justification or circumstances make the imposition of sanctions unjust. CCP §§2023.030(a), 2033.280(c).

The requesting party has up to 45 days (plus 5 calendar days under CCP §1013 if the response was served by mail) (see §8.29 for more details), from the date of service of the response, or any additional period agreed on by the parties, to move for an order compelling a further response. The motion must be accompanied by a declaration showing a reasonable and good faith attempt to resolve any issue presented by the motion. CCP §2033.290. The motion may be made on 5 days' notice. CCP §1170.8.

If a party fails to admit the genuineness of any document or the truth of any matter when requested under CCP §§2033.010-2033.420, and if the requesting party later proves the genuineness of the document or the truth of the matter, the requesting party may move for an award of reasonable expenses incurred in making the proof, including attorney fees. The court must make the award under CCP §2033.420 unless it finds that:

- An objection to a request was sustained, or a response was waived;
- The admission sought was of no substantial importance;
- The party failing to make the admission had reasonable grounds to believe the party would prevail on the matter; or
- There was other good reason for failure to admit.

Reasonable expenses are not awardable unless a party actually proves the genuineness of a document or the truth of a matter in the action. See *Stull v Sparrow* (2001) 92 CA4th 860, 112 CR2d 239 (party served with requests for admissions, who at first denied but later stipulated before trial not to contest liability, was not subject to sanctions under discovery statute). Proof at trial is not necessary if a matter is established by summary judgment. *Barnett v Penske Truck Leasing* (2001) 90 CA4th 494, 108 CR2d 821.

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§11.26 d. Withdrawing Admission; Relief From Default

Code of Civil Procedure §2033.410 states that any matter admitted in response to a request for admission is conclusively established in the pending action against the party making the admission, unless the court has permitted withdrawal. Withdrawal or amendment of an admission on noticed motion is permitted if (1) the admission was the result of mistake, inadvertence, or excusable neglect, and (2) the party who obtained the admission will not be substantially prejudiced. CCP §2033.300.

PRACTICE TIP: It is the opinion of some practitioners that CCP §473 provides independent grounds for withdrawal or amendment of an admission, and for relief from admissions made by default under CCP §2033.280, or at least that the cases decided under CCP §473 may be used to interpret and apply the relief for withdrawal of an admission under CCP §2033.300. See §§13.7-13.9.

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Source: Real Property/California Landlord-Tenant Practice/11 Unlawful Detainer; Pretrial Proceedings/§11.27 2. Form: Request for Admissions (Judicial Council Form DISC-020)

§11.27 2. Form: Request for Admissions (Judicial Council Form DISC-020)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
SHORT TITLE:	
REQUESTS FOR ADMISSION ☐ **Truth of Facts** ☐ **Genuineness of Documents** **Requesting Party:** **Answering Party:** **Set No.:**	CASE NUMBER:

INSTRUCTIONS

Requests for admission are written requests by a party to an action requiring that any other party to the action either admit or deny, under oath, the truth of certain facts or the genuineness of certain documents. For information on timing, the number of admissions a party may request from any other party, service of requests and responses, restrictions on the style, format, and scope of requests for admission and responses to requests, and other details, see Code of Civil Procedure sections 94–95, 1013, and 2033.010–2033.420 and the case law relating to those sections.

An answering party should consider carefully whether to admit or deny the truth of facts or the genuineness of documents. With limited exceptions, an answering party will not be allowed to change an answer to a request for admission. There may be penalties if an answering party fails to admit the truth of any fact or the genuineness of any document when requested to do so and the requesting party later proves that the fact is true or that the document is genuine. These penalties may include, among other things, payment of the requesting party's attorney's fees incurred in making that proof.

Unless there is an agreement or a court order providing otherwise, the answering party must respond in writing to requests for admission within 30 days after they are served, or within 5 days after service in an unlawful detainer action. There may be significant penalties if an answering party fails to provide a timely written response to each request for admission. These penalties may include, among other things, an order that the facts in issue are deemed true or that the documents in issue are deemed genuine for purposes of the case.

Answers to *Requests for Admission* must be given under oath. The answering party should use the following language at the end of the responses:

I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.

_____ _____

(DATE) *(SIGNATURE)*

These instructions are only a summary and are not intended to provide complete information about requests for admission. This *Requests for Admission* form does not change existing law relating to requests for admissions, nor does it affect an answering party's right to assert any privilege or to make any objection.

REQUESTS FOR ADMISSION

You are requested to admit within 30 days after service, or within 5 days after service in an unlawful detainer action, of this *Requests for Admission* that:

1. ☐ Each of the following facts is true *(if more than one, number each fact consecutively)*:

   ☐ Continued on Attachment 1

2. ☐ The original of each of the following documents, copies of which are attached, is genuine *(if more than one, number each document consecutively)*:

   ☐ Continued on Attachment 2

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
DISC-020 [Rev. January 1, 2008]

REQUESTS FOR ADMISSION

CEB

Code of Civil Procedure,
§§ 94–95, 2033.010–2033.420, 2033.710

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H. Discovery Sanctions and Protective Orders

§11.28 1. Punishable Conduct

Under CCP §2023.010, abuses of discovery include, but expressly are not limited to:

(1) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.

(2) Using a discovery method in a manner that does not comply with its specified procedures.

(3) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.

(4) Failing to respond or submit to an authorized method of discovery.

(5) Making, without substantial justification, an unmeritorious objection to discovery.

(6) Making an evasive response to discovery.

(7) Disobeying a court order to provide discovery.

(8) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.

(9) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that such an attempt has been made.

Despite the outcome of the discovery motion, the court shall impose a monetary sanction and order any party or attorney who fails to meet and confer to pay the reasonable expenses, including attorney fees, incurred by anyone as a result of that failure. CCP §2023.020.

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§11.29 2. Types of Sanctions

To the extent authorized by any statute governing a particular discovery method, CCP §2023.030 provides that a court (after notice to any affected party, person, or attorney, and after opportunity for a hearing) may impose sanctions against anyone engaging in conduct constituting an abuse of the discovery process. A discovery-related motion for sanctions may be made in an unlawful detainer action on 5 days' notice. CCP §1170.8. The types of sanctions available are:

(a) *Monetary sanctions.* The court may order that anyone engaging in discovery abuse, or any attorney so advising, pay the reasonable expenses, including attorney fees, incurred by another as a result of that conduct. The court may also impose this sanction on one unsuccessfully asserting that another has engaged in a discovery abuse and on any attorney who so advised. If a statute governing a particular method of discovery authorizes a monetary sanction, the court must impose that sanction unless it finds that the person subject to the sanction acted with substantial justification or that other circumstances make the sanction unjust. CCP §2023.030(a). Further, a violation of CCP §2025.320 by any person may result in a civil penalty of up to $5000. CCP §2025.320(f). See §11.7.

(b) *Issue sanctions.* The court may order that designated facts be taken as established in the action in accordance with the claim of the party adversely affected by discovery abuse. The court may also by an order prohibit any party engaging in discovery abuse from supporting or opposing designated claims or defenses. CCP §2023.030(b).

(c) *Evidence sanctions.* The court may prohibit any party engaging in discovery abuse from introducing designated matters in evidence. CCP §2023.030(c).

(d) *Terminating sanctions.* The court may punish the offending party by (CCP §2023.030(d):

- Striking out its pleadings (or parts of them);
- Staying further proceedings initiated by the offending party until it obeys the discovery order;
- Dismissing its action, or any part of its action; or
- Entering a default judgment against it (see *Maldonado v Superior Court* (2002) 94 CA4th 1390, 1398, 115 CR2d 137).

(e) *Contempt sanctions.* The court may treat discovery abuse as a contempt of court and order punishment accordingly. CCP §2023.030(e).

The court also has the power to deny a summary judgment motion if, during a continuance period on the motion, the moving party unreasonably obstructs discovery that the opposing party needs to oppose the motion. See CCP §437c(i), cited in §11.39.

A pro bono attorney is entitled to monetary sanctions on a successful discovery motion, even if the attorney does not charge the client for services in connection with the case. See *Do v Superior Court* (2003) 109 CA4th 1210, 135 CR2d 855. This case is distinguishable from *Trope v Katz* (1995) 11 C4th 274, 45 CR2d 241, and *Argaman v Ratan* (1999) 73 CA4th 1173, 86 CR2d 917, cited in §13.28, in which two courts ruled that attorney fees were not properly awarded to an attorney who represents himself or herself in pro per.

NOTE: Decisional law has limited the imposition of some types of sanctions on due process and other constitutionally based grounds. See California Civil Discovery Practice §§15.101, 15.107, 3.10, 3.154 (4th ed Cal CEB 2006). For further discussion of discovery sanctions generally, including cases interpreting and applying sanction statutes, see Civil Discovery, chap 15.

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§11.30 3. Protective Orders

The discovery laws (CCP §§2016.010-2036.050) provide ample authority for the granting of protective orders against abusive discovery. See, *e.g.,* CCP §2017.020 (general), §2019.030 (general), §2025.420 (depositions), §2030.090 (interrogatories), §2031.060 (inspection of documents), §2033.080 (requests for admissions), and §2034.250 (exchanges of expert witness information). The parties should move for protective orders whenever the need arises. The scope of discovery should be limited because the triable issues in unlawful detainer actions are limited. *Knowles v Robinson* (1963) 60 C2d 620, 36 CR 33; *Union Oil Co. v Chandler* (1970) 4 CA3d 716, 84 CR 756. See §9.8. A court must restrict the frequency or extent of all discovery methods if the selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues being litigated. CCP §2019.030(a)(2). A motion for a protective order affecting discovery may be made in an unlawful detainer action on 5 days' notice. CCP §1170.8.

For motions to compel responses and protective orders that may be made under specific methods of discovery, see California Civil Discovery Practice §§15.30-15.58, 15.59-15.84 (4th ed Cal CEB 2006).

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IV. MOTION FOR SUMMARY JUDGMENT

A. Nature and Purpose

§11.31 1. Granted If No Triable Issue of Material Fact

A tenant or landlord who wishes to end the unlawful detainer action before trial may move for summary judgment, on the respective ground that the action has no merit or that there is no defense to it. CCP §§437c(a), 1170.7. The purpose of the procedure is to determine whether a trial is necessary to resolve the dispute. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841. The motion should be granted if the papers submitted show that the moving party is entitled to judgment as a matter of law because there is no triable issue of material fact. CCP §437c(c). If none exists, summary judgment is granted as a means of expediting litigation and avoiding unnecessary trials. *Martens v Winder* (1961) 191 CA2d 143, 149, 12 CR 413.

Summary judgment in unlawful detainer actions must be granted or denied under CCP §437c on the same basis as for summary judgment motions in other civil actions. CCP §1170.7. Summary judgment cuts off the losing party's right to a trial. The motion should not be granted if there is any doubt whether a triable issue of fact exists. See *Podolsky v First Healthcare Corp.* (1996) 50 CA4th 632, 642, 58 CR2d 89; *Martens v Winder, supra*. "Summary judgment is a severe remedy which is to be granted with caution." *Paper Savers, Inc. v Nacsa* (1996) 51 CA4th 1090, 1094, 59 CR2d 547. When denying a motion for summary judgment, the court must in its order refer specifically to evidence establishing a triable controversy. CCP §437c(g); *Young v Superior Court* (1986) 179 CA3d 28, 224 CR 405.

Summary judgment is also appropriate when there are no disputed facts, and the sole question before the court is one of law. In such cases, it is the duty of the trial court to hear and decide the disputed legal issues. *Varni Bros. Corp. v Wine World, Inc.* (1995) 35 CA4th 880, 887, 41 CR2d 740. Even if the facts are undisputed, but conflicting inferences may be drawn from them, the motion must be denied. *Anderson v Metalclad Insulation Corp.* (1999) 72 CA4th 284, 85 CR2d 331. For further discussion of motions for summary judgment, see California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

In civil actions generally, under CCP §437c(f)(1), a party may also move for summary adjudication of issues (sometimes erroneously called "partial summary judgment"), if granting the motion would completely dispose of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

Code of Civil Procedure §1170.7 does not mention motions for summary adjudication. Rather than a reference to motions "under CCP §437c," it uses the phrase "summary judgment." Because the amount of work to be performed by each side and by the court in evaluating a summary judgment motion is virtually the same as for summary adjudication of issues, judicial economy would favor allowing summary adjudication on one or more issues, at least if made in conjunction with and as an alternative to a motion for summary judgment.

PRACTICE TIP: In making or opposing a motion for summary adjudication of issues, counsel should be prepared to argue whether the policies in creating a 5-day noticed motion for summary judgment, capable of completely ending an action, also justify a motion for summary adjudication, that could eliminate numerous time-consuming issues from trial but would not eliminate the trial. Summary adjudication may be useful to a landlord's attorney if a tenant has pleaded an affirmative defense that is inapplicable or irrelevant to the grounds for the eviction, depending on the benefit to be derived from the cost of such a motion.

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2. Burden of Proof

a. Plaintiff as Moving Party

§11.32 (1) Statutory Amendment

Under 1992 amendments to CCP §437c, the California legislature adopted in part the federal standard for allocating the burden of proof in motions for summary judgment. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841. The result is that in some instances the opposing party rather than the moving party will bear the burden of proof. A plaintiff moving for summary judgment, for example, must prove each element of the cause of action on which summary judgment or summary adjudication is sought. After the plaintiff establishes its prima facie case, the burden shifts to the defendant to show the existence of one or more disputed material facts on that cause of action, or a defense to it. CCP §437c(p)(1). A moving party plaintiff need not negate the defenses raised by the other party's initial pleadings. Compare *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 853, 107 CR2d 841, and *Montrose Chem. Corp. v Superior Court* (1993) 6 C4th 287, 301 n4, 24 CR2d 467, with *Nymark v Heart Fed. Sav. & Loan Ass'n* (1991) 231 CA3d 1089, 1094, 283 CR 53 (decided before 1992 amendments to CCP §437c).

PRACTICE TIP: To avoid the additional time and expense of trial, landlord attorneys may want to consider filing summary judgment motions when frivolous answers are filed by pro per defendants. Failure to respond to the summary judgment motion will likely result in judgment being entered in favor of the plaintiff.

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§11.33 (2) Amendment Ambiguous

The language in CCP §437c(p)(1), which shifts the burden of proof to the defendant after a plaintiff meets the initial burden, is ambiguous. One interpretation is that once the moving-party plaintiff makes a prima facie showing on one or more causes of action, the opposing defendant must show either that a triable issue of one or more material facts exists on each of the subject causes of action, *or that a triable issue of material fact exists on one or more applicable defenses*. (Merely showing that there are disputed facts on defenses raised by the pleadings, however, cannot by itself overcome plaintiff's prima facie case).

Another (more likely) interpretation is that once the plaintiff meets the necessary burden, the opposing defendant must either show that a triable issue of one or more material facts exists on each of the subject causes of action, *or make a prima facie showing on one or more applicable defenses*. In view of the acknowledged intent of the legislature not to require a plaintiff to disprove any defenses in plaintiff's moving papers (see *Montrose Chem. Corp. v Superior Court* (1993) 6 C4th 287, 301 n4, 24 CR2d 467), the second interpretation is logically more consistent with that intent. Implicitly, once the opposing defendant firmly establishes each element of one or more applicable defenses, the motion must be denied, even if the moving-party plaintiff were to controvert the defenses in reply papers (*i.e.,* show that a triable issue exists on those defenses), but this result was not addressed in the amendment.

PRACTICE TIP: The supreme court did not address this aspect of an opposing defendant's burden in *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841, because it was hearing the appeal of a defendant's (rather than a plaintiff's) motion for summary judgment. Until the courts or the legislature clarify this issue, counsel representing a defendant should submit in opposing documents prima facie proof of at least one (but preferably each and every) defense necessary to defeat each cause of action on which the summary judgment motion is based. Also, the defendant should raise all triable issues of material fact on the elements of those causes of action.

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§11.34 b. Defendant as Moving Party

A defendant moving for summary judgment has the initial burden of showing either that a cause of action has no merit or that there is a "complete defense" to it. Once the defendant meets that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists on that cause of action or defense. CCP §437c(p)(2). See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 849, 107 CR2d 841.

A defendant moving for summary judgment or summary adjudication, by attacking a specific cause of action in the complaint, may meet its initial burden by proving that the cause of action has no merit because an element of it cannot be established or because there is a complete defense to it. See *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 107 CR2d 617. See also *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 854, 107 CR2d 841 (defendant may use plaintiff's responses to discovery or other evidence to show plaintiff does not possess, and cannot reasonably obtain, necessary evidence to support claim); *Scheiding v Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 81 CR2d 360 (plaintiff had no duty to volunteer information that was not requested in discovery).

The burden on a defendant moving for summary judgment based on an affirmative defense is heavier than the burden to show that a cause of action has no merit. Instead of submitting evidence "to negate a single element of the plaintiff's cause of action, or offering evidence such as vague or insufficient discovery responses," the defendant must show that undisputed facts support each element of the affirmative defense. *Anderson v Metalclad Insulation Corp.* (1999) 72 CA4th 284, 289, 85 CR2d 331; *Bacon v Southern Cal. Edison Co.* (1997) 53 CA4th 854, 62 CR2d 16.

The manner in which a party's factually insufficient discovery responses may be used against that party in motions for summary judgment is discussed in *Aguilar v Atlantic Richfield Co., supra*. See also California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

EXAMPLE: A tenant moving for summary judgment under the *Aguilar* standard might meet the initial burden by submitting the landlord's answer to an interrogatory, in which the landlord fails to present facts showing that the tenant breached the rental agreement. If the landlord then fails to submit declarations showing that the tenant breached the rental agreement, summary judgment should be entered for the tenant.

Of course, the tenant might instead take the more traditional approach, attaching to the motion a declaration by the tenant showing that he or she did not breach the rental agreement. If the landlord fails to submit declarations showing that the tenant did in fact breach the rental agreement, summary judgment should be entered for the tenant. On the similarities and differences between the burden of proof for a summary judgment motion and that which must be carried at trial, see *Aguilar v Atlantic Richfield Co., supra*.

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§11.35 3. Oral Testimony

The reference in CCP §437c(c) to the motion's being decided on "all the papers submitted" has been interpreted ordinarily to bar oral testimony at summary judgment hearings. *Spencer v Hibernia Bank* (1960) 186 CA2d 702, 717, 9 CR 867. Although Cal Rules of Ct 3.1351(b) (see §11.37) allows opposition to the motion and any reply to opposition to be made orally at the time of the summary judgment hearing in an unlawful detainer action, the rule may not be enough to assure a fair trial for unrepresented defendants who unsuccessfully oppose the motion. Late-entering counsel should file a prompt motion for relief from summary judgment under CCP §473, accompanied by competent declarations raising one or more triable issues of fact on some or all of the moving party's issues. On relief from default generally under CCP §473, see §§13.7-13.14.

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B. Hearing Procedures; Deadlines for Filing and Service

§11.36 1. 5-day Notice of Motion

Under CCP §1170.7, either party may make a motion for summary judgment in an unlawful detainer action, any time after the answer is filed, by giving 5 days' notice to the opposing party. This provision drastically shortens the usual time limits. For most civil actions, CCP §437c(a) provides that the motion must be scheduled with a minimum of 75 days' notice, heard at least 30 days before trial, and filed no earlier than 60 days after the general appearance of the party against whom the motion is directed. Code of Civil Procedure §437c(r), however, makes CCP §437c(a) inapplicable to unlawful detainer actions. On grounds for continuances, see §11.37.

California Rules of Court 3.1350-3.1354 set format and other rules on supporting and opposing papers and objections to evidence specifically in summary judgment motions. In other respects, motions for summary judgment are governed by the uniform rules applicable to law and motion generally. Cal Rules of Ct 3.1100-3.1362. For discussion of the substantive and evidentiary requirements of supporting and opposing papers, see §§11.38-11.39.

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§11.37 2. Filing and Serving Opposition

The usual requirement of CCP §437c(b)(2), that opposition papers to a motion for summary judgment be filed 14 days before the hearing, is made inapplicable to unlawful detainer actions by CCP §437c(r). Instead, Cal Rules of Ct 3.1351 governs the time periods and methods for opposing a summary judgment motion and replying to opposition in an unlawful detainer action.

Opposition to the motion and any reply to opposition may be made orally at the time of the hearing. Cal Rules of Ct 3.1351(b). Alternatively, if a party seeks to have the court consider its opposition before the hearing, written opposition must be filed and served on or before the court day before the hearing. In that event, service must be by personal delivery, facsimile transmission, express mail, or other means consistent with the Code of Civil Procedure and "reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing." Cal Rules of Ct 3.1351(c). In any event, the supreme court has stated that a party opposing a summary judgment motion must have a reasonable opportunity to oppose it. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 854, 107 CR2d 841. Regarding setting aside defaults in summary judgment motions, see Warning in §11.39. See also CCP §1005(c), requiring opposing papers to be promptly served on other counsel.

NOTE: Arguably, under CCP §437c(q), a landlord may assert that the filing of a summary judgment motion in an unlawful detainer action should not be the basis for continuing the trial date.

If the party opposing a motion for summary judgment, however, is unable to contact essential witnesses and obtain their declarations or has a discovery proceeding pending (*e.g.*, has served interrogatories that have not yet been answered or has served a notice of a deposition that has not yet been held), and that party submits an affidavit pursuant to CCP §437c(h) showing that facts essential to justify opposition to summary judgment may exist, the court must reschedule the hearing and grant an extension of time to file an opposition to the motion for summary judgment because the witness or discovery proceeding might reveal a triable issue of fact. See *Frazee v Seely* (2002) 95 CA4th 627, 115 CR2d 780. This is one more reason why defendants to an unlawful detainer action should initiate discovery as soon as possible.

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Source: Real Property/California Landlord-Tenant Practice/11 Unlawful Detainer; Pretrial Proceedings/§11.38 C. Supporting Documents

§11.38 C. Supporting Documents

A party moving for summary judgment must ordinarily file and serve a notice of motion, a supporting memorandum, supporting evidence, and a separate statement of undisputed material facts containing specific citations to the supporting evidence. See CCP §437c(b)(1); Cal Rules of Ct 3.1350(c)-(d). But in 2009, the Judicial Council amended Cal Rules of Ct 3.150(c), which currently states that the supporting documents listed in the Rule are mandatory except as provided in CCP §437c(r) and Cal Rules of Ct 3.151. Although CCP §437c(r) makes CCP §437c(a)-(b) inapplicable to unlawful detainer actions, no other statute or rule of court states what a moving party must file and serve as supporting documents besides the notice of motion required by Cal Rules of Ct 3.1351(a). Code of Civil Procedure §1170.7 (the unlawful detainer action summary judgment statute) simply refers to CCP §437c for the basis on which a summary judgment "shall be granted or denied." This lack of specificity in the governing statutes and court rules may simply be the result of an assumption that a notice of motion and a properly verified complaint will adequately support a summary judgment brought by the plaintiff in most unlawful detainer actions. But if the summary judgment motion is brought by the defendant, the statutes and rules are totally unclear.

NOTE: Despite the 2009 amendment to Rule 3.150(c), uncertainty continues about the scope of the exceptions in CCP §437c(r) for unlawful detainer suits. It seems likely that the legislature intended to make the exceptions in CCP §437c(r) apply only to the motion scheduling and timing provisions of subdivisions (a)-(b) (see §11.36) because subdivisions (c)-(e), which remain applicable to unlawful detainer suits, all assume the requirements of (and directly refer to) the supporting evidence and papers originally described in subdivisions (a)-(b).

PRACTICE TIP: Prudent counsel will act on the probability that CCP §437c(r) is directed only at the scheduling and timing provisions of subdivisions (a)-(b). Counsel should always submit at a minimum declarations of competent witnesses and a separate statement of undisputed facts with a summary judgment motion in any event because it enables the court to review properly the merits of the motion. These papers are particularly crucial if the defendant is the moving party or if verification of the complaint is defective in any way and the plaintiff is the moving party.

A request for judicial notice, if applicable, must be served with the moving papers. Cal Rules of Ct 3.1350(c). All issues sought to be established by a motion for summary adjudication of issues should be listed specifically in the notice of motion and repeated, verbatim, in the separate statement of undisputed material facts. Cal Rules of Ct 3.1350(b), (d). See also *Maryland Cas. Co. v Reeder* (1990) 221 CA3d 961, 974 n4, 270 CR 719; *Homestead Sav. v Superior Court* (1986) 179 CA3d 494, 224 CR 554.

A summary judgment motion usually must be supported by affidavits or declarations containing admissible evidence demonstrating that there is no triable issue of fact. See CCP §437c(b)-(d); Cal Rules of Ct 3.1350(c)(4). Generally, the motion may also be supported by admissions, answers to interrogatories, and judicially noticeable matters. CCP §437c(b)(1). The use of factually insufficient discovery responses by an adverse party in a motion for summary judgment was clarified in *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 855, 107 CR2d 841. See §11.34.

A party seeking to incorporate a portion of the court's file by reference must specify the exact portion of the file to which the party is referring; incorporation of the entire file is not permitted. CCP §437c(b)(7).

The court decides whether a triable issue of fact exists primarily by reviewing supporting declarations and discovery responses, not the pleadings. See *Aguilar v Atlantic Richfield Co., supra*. The facts in the declarations must be evidentiary, and not ultimate facts or conclusions of law. *Estate of Nelson* (1964) 227 CA2d 42, 46, 38 CR 459. A declaration must be based on the declarant's personal knowledge, must show competency to testify to the stated matters, and must set forth admissible evidence. CCP §437c(d); *Estate of Nelson, supra*. The declarant's competence to testify need not be stated expressly, as long as it appears clearly from the foundational facts in the declaration. *University of S. Cal. v Weiss* (1962) 208 CA2d 759, 25 CR 475.

Unless circumstances shift the burden of proof on the opposing party (see §§11.32-11.33), the moving papers must include sufficient facts to establish every element necessary to sustain a judgment in his or her favor. See *Estate of Nelson, supra*. Accordingly, when a single necessary allegation is not supported in the moving papers, the motion

cannot be granted even if the opposing party fails to dispute the allegation. CCP §437c(p)(1)-(2); *Thatcher v Lucky Stores, Inc.* (2000) 79 CA4th 1081, 94 CR2d 575.

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Source: Real Property/California Landlord-Tenant Practice/11 Unlawful Detainer; Pretrial Proceedings/§11.39 D. Opposing Documents

§11.39 D. Opposing Documents

A party opposing a summary judgment must ordinarily file and serve a written memorandum in opposition to the motion, a separate statement (responding to the moving party's statement of undisputed material facts and containing specific citations to controverting evidence), and evidence in the form of written declarations. Cal Rules of Ct 3.1350(e)-(f). A request for judicial notice, if applicable, must be served with the opposing papers. See CCP §437c(b); Cal Rules of Ct 3.1350(e)(4).

In unlawful detainer actions, however, opposition to a summary judgment motion and any reply to opposition may be made orally at the time of the hearing. Cal Rules of Ct 3.1351(b). Alternatively, if a party seeks to have the court consider its opposition before the hearing, written opposition papers must be filed and served on or before the court day before the hearing. Cal Rules of Ct 3.1351(c). On service methods, see §11.37.

When the moving party's evidence is sufficient to support the judgment, summary judgment may be granted unless the opponent submits controverting evidence that raises at least one triable issue of material fact. CCP §437c(c)-(d); *University of S. Cal. v Weiss* (1962) 208 CA2d 759, 767, 25 CR 475. The opponent may use declarations or other evidentiary sources, such as the moving party's responses to discovery, and "matters of which judicial notice shall or may be taken," to defeat a summary judgment motion. CCP §437c(b). The use of factually insufficient discovery responses by adverse parties in summary judgment motions is explained in *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 855, 107 CR2d 841. See also discussion of the shifting of the burden of proof in §§11.32-11.34.

The opponent cannot resort to allegations or denials in that opponent's own verified complaint or answer, in lieu of counterdeclarations. CCP §437c(p)(1)-(2); *Vesely v Sager* (1971) 5 C3d 153, 169, 95 CR 623 (verified complaint); *Coyne v Krempels* (1950) 36 C2d 257, 262, 223 P2d 244 (verified answer). When the moving party's declaration is inadequate, there is no need for the court to consider the sufficiency of the declarations of the opposing party. *Witchell v DeKorne* (1986) 179 CA3d 965, 225 CR 176.

A party wishing to object to evidence in a summary judgment motion must submit objections in writing or arrange to have a court reporter present and make the objections at the hearing. Cal Rules of Ct 3.1352. Any objections not so made will be deemed waived. See CCP §437c(d); Cal Rules of Ct 3.1352. On the format for written objections, see Cal Rules of Ct 3.1354, which requires that written objections be filed at the same time as the objecting party's opposition or reply papers are served and filed unless excused by the court on a showing of good cause.

PRACTICE TIP: Sometimes a trial court will not rule on the evidentiary objections in a tentative ruling or at the hearing. Counsel making the objections should make the record for appeal by asking the trial judge to specifically rule on the objections, or they will be deemed waived. See *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 97 CR2d 140.

When investigation or discovery is incomplete and a motion for summary judgment is pending, the opposing party may request a continuance ex parte under CCP §437c(h) (see §11.37) to obtain additional evidence that may exist to oppose the motion. On obtaining ex parte orders, see Cal Rules of Ct 3.1203(b). The request for a continuance may be denied if the requesting party does not, by affidavit, show that "facts essential to justify opposition may exist but cannot, for reasons stated, then be presented." On the adequacy of an affidavit to support a continuance under §437c(h), see *Bushling v Fremont Med. Ctr.* (2004) 117 CA4th 493, 11 CR3d 653; *Frazee v Seely* (2002) 95 CA4th 627, 115 CR2d 780; *Bahl v Bank of America* (2001) 89 CA4th 389, 107 CR2d 270. If the party moving for summary judgment unreasonably obstructs discovery during the continuance period, the court must grant another continuance to complete the discovery or deny the summary judgment motion. See CCP §437c(i).

The moving party's declarations are strictly construed; the opposing party's declarations are liberally construed. *Podolsky v First Healthcare Corp.* (1996) 50 CA4th 632, 642, 58 CR2d 89; *Armstrong v Optical Radiation Corp.* (1996) 50 CA4th 580, 585 n2, 57 CR2d 763. The facts alleged in the opposing party's declarations, and reasonable inferences drawn from them, must be accepted as true for purposes of deciding the motion. *Armstrong v Optical Radiation Corp., supra*. Such inferences, however, cannot be speculative and must meet the "more likely than not" burden of proof the

opposing party bears at trial. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 851, 107 CR2d 841.

The counterdeclarations must state evidentiary facts within the declarant's personal knowledge, and to which he or she can competently testify. CCP §437c(d).

Counterdeclarations may be based on circumstantial evidence. In *Rich v Schwab* (1984) 162 CA3d 739, 742, 209 CR 417, *e.g.,* a landlord was sued for allegedly raising the rent in retaliation against mobilehome park tenants, who had taken collective action to lobby for a rent moratorium from the city. A summary judgment was awarded to the landlord by the trial court on the basis of the landlord's assertions that the rent increase was motivated by business judgment, supported by appraisers' declarations that the rent was unreasonably low without the increase. The court of appeal reversed, stating that an inference of retaliation could be drawn from the circumstantial evidence presented by the tenants, which included, among other things, facts tending to show a temporal relationship between the landlord's actions and the tenants' organizing activities, and remarks made by the landlord about his intentions to a tenant. 162 CA3d at 744.

A local rule stating that a motion for summary judgment may be granted solely because the opposing party failed to file opposing declarations is inconsistent with CCP §437c and is invalid. The motion may be granted only if the court first finds that the moving party met its initial burden of proof. *Thatcher v Lucky Stores, Inc.* (2000) 79 CA4th 1081, 94 CR2d 575.

WARNING: The rule in CCP §473(b), which requires a court to set aside a default judgment or dismissal on an attorney's affidavit swearing to his or her "mistake, inadvertence, surprise or neglect," does not apply to an attorney's failure to oppose a summary judgment motion. See *English v IKON Bus. Solutions, Inc.* (2001) 94 CA4th 130, 114 CR2d 93. See also *Prieto v Loyola Marymount Univ.* (2005) 132 CA4th 290, 33 CR3d 639.

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§11.40 V. MOTION FOR JUDGMENT ON PLEADINGS

A motion for judgment on the pleadings is allowed in unlawful detainer actions. CCP §438; *Jayasinghe v Lee* (1993) 13 CA4th Supp 33, 17 CR2d 117. Defendant may file such a motion on the ground that the court does not have subject matter jurisdiction or that the complaint fails to state a cause of action. CCP §438(c). The motion may raise any grounds not raised in any prior demurrer, and it may raise the same grounds raised in a prior demurrer if there has been a material change in applicable case law or statute since the ruling on the demurrer. CCP §438(g).

The motion may not be made within 30 days of the date the action is initially set for trial, "unless the court otherwise permits." CCP §438(e). Because it is usually impossible to make a motion for judgment on the pleadings more than 30 days before trial, given the relative quickness of unlawful detainer actions, the court should permit the motion to be made within the 30-day limit. The moving party should argue that, at common law, the motion could be made even during trial and at any time before judgment was entered. See *McNew v Mulcahy* (1938) 24 CA2d 656, 658, 76 P2d 143. Many judges will, in their discretion, permit the motion to be made at the beginning of the trial.

In *Jayasinghe v Lee*, *supra,* decided before enactment of CCP §438, the landlord's complaint and a stipulation signed by the parties showed that the 3-day notice to pay or quit demanded rent higher than that allowed by the lease. On its own motion, the trial court took judicial notice of the stipulation and granted judgment on the pleadings for the tenant, without giving the landlord notice or an opportunity to amend the complaint. The appellate department affirmed, holding that the trial court had not abused its discretion. Note that CCP §438(b)(2), (d) specifically authorizes a court to grant judgment on the pleadings on its own motion, based on matters of which it has taken judicial notice.

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VI. SETTING CASE FOR TRIAL

A. Request for Trial Setting

§11.41 1. Procedure

The Judicial Council adopted a mandatory trial-setting request form for unlawful detainer actions. See Judicial Council Form UD-150, Request/Counter-Request to Set Case for Trial—Unlawful Detainer in §11.41A. Although a few courts will set an unlawful detainer case for trial automatically, others will not set it for trial (or a case management or settlement conference) unless the court deems the case to be at issue or a party files and serves a request to set the case for trial. See, *e.g.,* San Francisco Ct R 6.5 and Alameda Ct R 3.620, which require the filing of a trial setting request.

Among the items required in the request to set the case for trial are statements concerning the nature of the case, whether the case is entitled to legal preference, whether the right to possession is still in issue (*i.e.*, whether the tenant has vacated the premises), whether a jury trial is demanded, and the time estimated for trial. The plaintiff must represent to the court in the request that all parties have been served with process and "have appeared" or have had a default entered against them.

An opposing party may respond to the request to set the case for trial by filing his or her own counter-request within 5 days. Counsel should always check local practices and customs on trial setting. On general procedures for requesting a trial date, see California Civil Procedure Before Trial, chaps 40-42 (4th ed Cal CEB 2004); California Trial Practice: Civil Procedure During Trial, chaps 2, 6 (3d ed Cal CEB 1995).

A motion may be made to advance or reset a trial date (Cal Rules of Ct 3.1335), or for a continuance (Cal Rules of Ct 3.1332). The request must be made by noticed motion (or ex parte application) accompanied by a declaration showing the reason for the continuance under Cal Rules of Ct 3.1332(c)-(d). See Cal Rules of Ct 3.1332(b). On ex parte applications, see also Cal Rules of Ct 3.1203(b). This is so, even if the motion is unopposed or the parties stipulate to the continuance. Extensions of unlawful detainer trial dates are strictly limited by CCP §1170.5(c)-(d), which requires a hearing and possible order requiring the tenant to pay rent into court as a condition to the court's granting an extension. For a discussion of extensions, see §11.44.

Precedence is accorded to unlawful detainer actions over other civil actions "to the end that all such actions shall be quickly heard and determined." CCP §1179a. The landlord is not entitled to precedence in setting the trial date, however, when possession is no longer an issue in the case. CC §1952.3; *Cohen v Superior Court* (1967) 248 CA2d 551, 56 CR 813. See §11.51. See also *Karz v Mecham* (1981) 120 CA3d Supp 1, 4, 174 CR 310.

As a practical matter, some courts require the case to be taken off the priority calendar automatically when possession is no longer at issue. Others require the defendant to make a motion to vacate the trial date. The advantage to the landlord of maintaining the trial date is obtaining a monetary judgment expeditiously, but the court will likely limit the damages to rent, court costs, and, if provided for in the rental agreement, attorney fees. Some plaintiffs, therefore, elect to amend their complaints to include causes of action for damage to the premises or other monetary losses that are unobtainable in an unlawful detainer judgment. See §§9.8, 9.41.

PRACTICE TIP: Landlord attorneys should always consult local court rules, many of which require plaintiffs to notify the court immediately when possession is no longer at issue. See, *e.g.,* Alameda Ct R 3.630.

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Source: Real Property/California Landlord-Tenant Practice/11 Unlawful Detainer; Pretrial Proceedings/§11.41A 2. Form: Request/Counter-Request to Set Case for Trial--Unlawful Detainer (Judicial Council Form UD-150)

§11.41A 2. Form: Request/Counter-Request to Set Case for Trial—Unlawful Detainer (Judicial Council Form UD-150)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX No. *(Optional):* E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	
☐ **REQUEST** ☐ **COUNTER-REQUEST** **TO SET CASE FOR TRIAL—UNLAWFUL DETAINER** ☐ **Plaintiff** ☐ **Defendant**	CASE NUMBER:

1. ☐ **Plaintiff's request.** I represent to the court that all parties have been served with process and have appeared or have had a default or dismissal entered against them. I request that this case be set for trial.
2. **Trial preference.** The premises concerning this case are located at *(street address, apartment number, city, zip code, and county):*
   a. ☐ To the best of my knowledge, the right to possession of the premises is still in issue. This case is entitled to legal preference under Code of Civil Procedure section 1179a.
   b. ☐ To the best of my knowledge, the right to possession of the premises is no longer in issue. No defendant or other person is in possession of the premises.
3. **Jury or nonjury trial.** I request ☐ a jury trial ☐ a nonjury trial.
4. **Estimated length of trial.** I estimate that the trial will take *(check one):*
   a. ☐ days *(specify number):* b. ☐ hours *(specify if estimated trial is less than one day):*
5. **Trial date.** I am not available on the following dates *(specify dates and reasons for unavailability):*

UNLAWFUL DETAINER ASSISTANT (Bus. & Prof. Code, §§ 6400–6415)

6. *(Complete in all cases.)* An unlawful detainer assistant ☐ did **not** ☐ did for compensation give advice or assistance with this form. (*If declarant has received **any** help or advice for pay from an unlawful detainer assistant, complete a–f.)*
   a. Assistant's name:
   b. Street address, city, and zip code:
   c. Telephone no.:
   d. County of registration:
   e. Registration no.:
   f. Expires on *(date):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- An unlawful detainer case must be set for trial on a date not later than **20 days after the first request** to set the case for trial is made (Code Civ. Proc., § 1170.5(a)).
- If a jury is requested, $150 must be deposited with the court 5 days before trial (Code Civ. Proc., § 631).
- Court reporter and interpreter services vary. Check with the court for availability of services and fees charged.
- If you cannot pay the court fees and costs, you may apply for a fee waiver. Ask the court clerk for a fee waiver form.

Form Adopted for Mandatory Use
Judicial Council of California
UD-150 [New January 1, 2005]

REQUEST/COUNTER-REQUEST TO SET CASE FOR TRIAL—UNLAWFUL DETAINER

Code of Civil Procedure, §§ 631, 1170.5(a), 1179a
www.courtinfo.ca.gov

Print

PLAINTIFF:	CASE NUMBER:
DEFENDANT:	

PROOF OF SERVICE BY MAIL

Instructions: *After having the parties served by mail with the* Request/Counter-Request to Set Case for Trial—Unlawful Detainer, *(form UD-150), have the person who mailed the form UD-150 complete this* Proof of Service by Mail. *An* ***unsigned*** *copy of the* Proof of Service by Mail *should be completed and served with form UD-150. Give the* Request/Counter-Request to Set Case for Trial —Unlawful Detainer *(form UD-150) and the completed* Proof of Service by Mail *to the clerk for filing. If you are representing yourself, someone else must mail these papers and sign the* Proof of Service by Mail.

1. I am over the age of 18 and **not a party to this case.** I am a resident of or employed in the county where the mailing took place.
2. My residence or business address is *(specify):*

3. I served the *Request/Counter-Request to Set Case for Trial—Unlawful Detainer* (form UD-150) by enclosing a copy in an envelope addressed to each person whose name and address are shown below AND
   a. ☐ **depositing** the sealed envelope in the United States mail on the date and at the place shown in item 3c with the postage fully prepaid.
   b. ☐ **placing** the envelope for collection and mailing on the date and at the place shown in item 3c following ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
   c. (1) Date mailed:
      (2) Place mailed *(city and state):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct:

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PERSON WHO MAILED *FORM UD-150*)

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED

	Name	Address *(number, street, city, and zip code)*
4.		
5.		
6.		
7.		
8.		
9.		

☐ List of names and addresses continued on a separate attachment or form MC-025, titled Attachment to Proof of Service by Mail.

Copies: Original (to be filed in court with original proof of service); conformed copies (for attorney office files); extra

copies to be served on opposing counsel or unrepresented parties; copy for client.

Comment: The Judicial Council adopted as mandatory Judicial Council Form UD-150, Request/Counter-Request to Set Case for Trial—Unlawful Detainer. The status of the case may require the defendant to file a motion to strike a premature request made by the plaintiff. If the case is not at issue and should not be set for trial, the defendant may submit its Counter-Request.

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§11.42 B. 20-day Mandatory Trial Setting

Priority is given to unlawful detainer trials by CCP §1170.5(a), which requires that trial be held no later than the 20th day after a request for trial setting is made. The language of CCP §1170.5(a) is mandatory; *i.e.,* the clerk must set the trial date within 20 days of the request for setting, even if a jury trial is demanded. For discussion of the legislative policy behind CCP §1170.5, see *Medford v Superior Court* (1983) 140 CA3d 236, 189 CR 227.

Two aspects of §1170.5 may mitigate the strictness of its application. First, CCP §1170.5(i) provides that it must not be construed to interfere with the precedence given to criminal trials. This subsection appears to authorize suspension of the 20-day requirement in order for the court to meet its criminal trial obligations. Second, the 20-day period begins to run when a "request to set the time of the trial is made." CCP §1170.5(a). This should be interpreted to mean that the 20-day period begins to run when a proper request to set trial has been filed. See procedure in §§11.41-11.41A.

Some courts automatically set an unlawful detainer action for trial after the answer is filed. In most courts, the court clerk will set a date within or close to the 20-day requirement in CCP §1170.5(a). Some California trial courts are unable to comply with CCP §1170.5. Most courts do not automatically set unlawful detainers for trial, but instead require that a request to set trial be filed. A landlord seeking to enforce compliance with the 20-day requirement appears to have no remedy other than to initiate a mandamus proceeding in an appellate court or a motion under CCP §1170.5(c) for a rent deposit order. See §§11.45-11.50, 11.56.

In limited civil cases in, *e.g.*, Los Angeles, San Francisco, Alameda, and San Diego counties, courts require a request to set trial, generally meet the statutory time requirement, and give priority to unlawful detainer cases on the day of trial over other civil cases on calendar.

PRACTICE TIP: The landlord could file a request to set trial as soon as the answer is filed, leaving the tenant little time for discovery. The tenant, therefore, should serve discovery with the answer.

It is a good practice for the tenant's attorney to initiate discovery even before serving the answer. If the landlord's attorney files a request to set trial on the date the answer is due, the attorney may later resist an attempt to strike the request on the grounds that it was filed in good faith. Landlord counsel should oppose any motion to strike the request to set trial if the motion is based solely on the need for discovery, because such motions are arguably contrary to the expedited trial-setting procedures and conditions for payment of rent pending a continuance of trial under CCP §1170.5.

The California Judicial Council adopted case disposition time goals for unlawful detainer actions. See Cal Rules of Ct, Standards of J Admin 2.2(i).

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§11.43 C. Notice of Trial

Notice of trial must be served on all parties to an unlawful detainer action at least 5 days before the trial date, or 10 days if service is made by mail. CCP §594(a)-(b). The court clerk is directed to serve notice of trial by mail; any party may serve notice by mail at least 10 days before the trial date if the clerk fails to do so. The provisions of CCP §1013 extending the time for serving notice by mail do not apply to the time limits for notice of trial in unlawful detainer actions. CCP §594(b).

Because CCP §594(a) provides that the adverse party is entitled to only 5 days' notice of trial, apparently a party may obtain approval of a given trial date from the court clerk and then arrange for personal service of notice of trial not less than 5 days before the date set for hearing. See, *e.g.*, *Au-Yang v Barton* (1999) 21 C4th 958, 90 CR2d 227 (strictly construing 15-day notice provision under §594(a)).

PRACTICE TIP: It is a good practice for landlords to give their own notice of trial so that if the clerk fails to give notice, the trial date will be preserved without having to reset or renotice the matter for trial. The notice should contain the date, time, and place of trial. The original notice, along with a proof of service, should be filed with the court before trial.

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Source: Real Property/California Landlord-Tenant Practice/11 Unlawful Detainer; Pretrial Proceedings/§11.44 D. Extension of Trial Date

§11.44 D. Extension of Trial Date

Code of Civil Procedure §1170.5, which requires that the trial date in an unlawful detainer action be set within 20 days of the filing of an appropriate request for setting (see §11.42), also provides procedures for extending the trial date beyond the 20-day period under the following strictly limited circumstances:

- The parties agree to an extension (CCP §1170.5(b)); or
- For another cause, but only if the court finds in a hearing that the landlord is likely to prevail, and conditions the extension on the tenant's payment into court of damages that the plaintiff will suffer from an extension (CCP §1170.5(c)).

The second process is discussed in §§11.45-11.50.

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§11.45 1. Good Cause for Extension

On a request for continuance of trial the court must first determine whether the party has shown good cause for the extension. Cal Rules of Ct 3.1332. If good cause has not been shown, the court will deny the motion. If the party has shown good cause, the court must hold a hearing under CCP §1170.5(c). See §11.46. This situation almost always arises when the tenant seeks an extension. If the landlord seeks an extension, the tenant will probably agree to it because he or she can remain in possession of the premises while the action is pending. In this instance, the extension can be handled by agreement under CCP §1170.5(b).

Although good cause is not mentioned or defined in CCP §1170.5, this issue is governed by the standards for trial continuances in Cal Rules of Ct 3.1332(c)-(d), which cites numerous circumstances indicating good cause, including a party's excused inability to obtain "essential testimony, documents, or other material evidence despite diligent efforts," and places the determination within the trial court's discretion. See also *Cohen v Herbert* (1960) 186 CA2d 488, 493, 8 CR 922. The shortened discovery schedules in unlawful detainer actions provide fertile ground for motions to continue the trial date, especially if the party opposing the continuance has been uncooperative in responding to discovery or if the issues in the case merit discovery procedures which cannot be fully accomplished before the trial date. See §§11.5-11.6.

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§11.46 2. Probability That Landlord Will Prevail

After the court finds good cause for an extension of the trial date, it must then hold a hearing under CCP §1170.5(c) to determine whether there is a reasonable probability that the landlord will prevail at trial. If the court finds that the landlord is not likely to prevail, the extension is ordered and there is no need to go further with the statutory procedure. If there is a reasonable probability that the landlord will prevail, however, the court must condition the extension on payment of damages incurred by the delay. See §11.47.

It is unclear what evidence the court must consider to determine whether the landlord is likely to prevail (*i.e.,* whether the court may rely on declarations and argument, or whether the court must hear live testimony and cross-examination). Under CCP §1170.5(c), the court must determine the amount to be paid into court after a finding of reasonable probability, on the basis of verified statements of the contract rent and objections, and on "oral or demonstrative evidence presented at the hearing." Thus, CCP §1170.5(c) appears to contemplate that all necessary determinations will be made at one hearing.

The most practical approach would be for the court to make all necessary determinations on the basis of verified statements, objections, and oral and demonstrative evidence. On the other hand, it could be argued that the legislature's failure to provide expressly for the means of proof of reasonable probability means that it did not intend that an evidentiary hearing with oral testimony be used in connection with that determination. If oral testimony is allowed, cross-examination must be allowed. Evid C §773(a).

NOTE: In Los Angeles County, trial courts do not generally hold a separate hearing required by CCP §1170.5(b). If the tenant moves for a continuance, and the continuance is granted over objection, the court will often summarily condition the continuance on the tenant's payment of the contract rent for the period of the continuance. The tenant is generally given a short period (24 to 48 hours) to post certified funds with the court. Tenant attorneys, in trying to stipulate to a continuance with landlord's counsel, may want to offer the payment of the rent or rental value to the landlord for the period of the continuance.

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§11.47 3. Amount of Landlord's Damages

If the court finds a reasonable probability that the landlord will prevail at trial, it must determine the amount of damages to be suffered by the landlord due to the delay in the trial date. Damages may be based on the landlord's verified statement of the contract rent, on the tenant's verified objections to it, and on oral and demonstrative evidence. CCP §1170.5(c). Note that the damages must result from the extension and not from the tenant's failure to pay rent, the tenant's holding over, or the lawsuit.

PRACTICE TIP: A landlord sues to evict a tenant for failure to pay monthly rent of $300 in January and February (a total of $600). Trial is set for March 10th. On March 5th, the tenant moves for an extension, claiming the need for an additional 30 days to prepare a defense of breach of the implied warranty of habitability (see chap 3). The court grants the motion and extends the trial date to April 10th. As the extension delays the landlord's ability to charge rent to a new tenant by 30 days, the damages suffered by the landlord as a result of the extension would be $300. If the hearing date had been extended to April 5th, the simplest measure of damages would be to calculate the daily rent ($10), and assess the landlord's potential damages as $250. These damages may be subject to setoff (see §11.48).

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§11.48 4. Potential Offsets to Damages

After determining the potential damages from the extension of the trial date, the court must consider any diminution in the value of the premises or setoff permitted by law. CCP §1170.5(c). For example, the tenant may present the same evidence of the reduced value of the premises under CCP §1170.5(c) as would be given to support the defense of the landlord's breach of the implied warranty of habitability at trial (see §§3.36-3.38). Thus, under the decision in *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, although the contract rent may be $300, breach of the warranty may reduce the reasonable rental value of the premises to some other figure, such as $200 (see §3.37). If the action is for nonpayment of rent, and the tenant has strong evidence of breach of the warranty, the proceedings may not reach this stage because the court will not have found a reasonable probability that the landlord will prevail on the issue of possession.

Diminution in value is an issue independent of the effect of the implied warranty of habitability in setting the amount to be escrowed (*e.g.,* when the lawsuit is based on expiration of a fixed-term lease, or on a 30-day or 60-day termination notice, and market conditions have reduced the rental value).

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§11.49 5. Order to Deposit Damages

The final step in a motion to continue the trial date (see §§11.44-11.48) is that the court must order the tenant to pay the landlord's potential damages into court or into an escrow account. CCP §1170.5(c). The order cannot require the tenant to deposit the damages immediately, but only as the rent otherwise becomes due and payable. See *Medford v Superior Court* (1983) 140 CA3d 236, 241, 189 CR 227. Thus, for example, if the court extends the trial date from March 10th to April 10th and finds that the landlord is likely to prevail and to lose one month's rent (*e.g.,* $1300) from the extension, the tenant would be required to pay $1300 into court on the date that the rent next comes due—probably April 1st.

The court may order the tenant to make payments into a designated escrow account (CCP §1170.5(c)); any costs of administering the account are recoverable by the prevailing party (CCP §1170.5(e)). Under CCP §1170.5(g), the court may order that the payments be invested in an insured, interest-bearing account, with interest to be allocated as the distributions are allocated. Courts that frequently hear unlawful detainer actions may have one interest-bearing account for all tenant payments. After trial, the court determines distribution of the amounts paid into court by the tenant. CCP §1170.5(f). Presumably, the prevailing party will be awarded this amount. If the tenant prevails in a breach of implied warranty of habitability defense, the tenant should recover a fraction of the payments held by the court, representing the amount by which the contract rent was reduced to "reasonable rent" by the breach (see §3.37).

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§11.50 6. Trial Date Advanced Upon Default

If the tenant fails to pay the landlord's potential damages into court as ordered by the court (see §11.49), trial of the action must be held within 15 days of the date the payment was due. CCP §1170.5(d). The statute does not specify whether the landlord must make a motion to advance the trial date, or whether the court may simply advance the date on its own motion. Advancing the trial date is the only sanction provided for the tenant's failure to make the ordered payment. There is no provision in CCP §1170.5(d) permitting a court to impose other sanctions such as striking the answer, entering a default judgment, or holding the tenant in contempt of court. The effectiveness of CCP §1170.5(d) depends on the extended trial date set by the court. If trial was originally set for March 10th, and extended to April 10th in an order conditioned on the tenant's payment of $1300 into court on April 1st, the landlord would gain nothing from the tenant's failure to pay on April 1st. If the trial date had been extended to some date beyond April 15th, however, then CCP §1170.5(d) might be useful in advancing the trial to an earlier date.

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Source: Real Property/California Landlord-Tenant Practice/11 Unlawful Detainer; Pretrial Proceedings/§11.51 E. Effect of Tenant's Vacating Before Trial

§11.51 E. Effect of Tenant's Vacating Before Trial

A properly filed unlawful detainer action becomes an "ordinary civil action" if possession of the premises is no longer at issue at the time of trial or judgment because the plaintiff has been restored to possession. CC §1952.3(a). Accordingly, the action is no longer entitled to precedence on the trial calendar and is not subject to the shortened time limits provided in CCP §§1159-1179a. The landlord may then seek damages not otherwise recoverable in unlawful detainer (CC §1952.3(a)(1)), but must amend the complaint. Defenses to the proper service of notices preceding the unlawful detainer action in accordance with CCP §§1161-1162 arguably would no longer apply because service is only a required element for a prima facie case in unlawful detainer actions. The tenant may seek "any affirmative relief," and assert all defenses, whether the landlord amends the complaint or not. CC §1952.3(a)(2); *Heller v Melliday* (1943) 60 CA2d 689, 696, 141 P2d 447.

Whether the defendant is entitled to a continuance for purposes of moving for leave to file a cross-complaint is not within the trial court's discretion. In *Fish Constr. Co. v Moselle Coach Works, Inc.* (1983) 148 CA3d 654, 196 CR 174, *e.g.,* the tenant's attorney delivered the keys to the premises to the landlord's attorney on the day before trial, along with a letter stating that the tenant no longer claimed possession of the commercial premises. Before trial began, the tenant moved to take the case off the calendar and reset it as an ordinary civil matter, so that he could amend the answer to assert the defense that the landlord had breached the lease by not maintaining the premises. The court of appeal held that the trial court should have granted the tenant's motion.

Allowing a tenant a reasonable period of time to plead all cognizable issues in one case is preferable to forcing the parties to proceed with two lawsuits. Other courts have held that, whenever feasible, all issues should be tried between the parties together even in unlawful detainer actions. See *Greenhut v Wooden* (1982) 129 CA3d 64, 180 CR 786; *Mobil Oil Corp. v Superior Court* (1978) 79 CA3d 486, 145 CR 17. A tenant who vacates before trial cannot be required to pay the back rent claimed as a condition to filing a cross-complaint. *Medford v Superior Court* (1983) 140 CA3d 236, 189 CR 227. In *Medford,* the court held that such a requirement would have the same effect as a prejudgment attachment, which is prohibited in a residential unlawful detainer action.

The compulsory cross-complaint rule (CCP §426.30) does not apply to the tenant's response unless the tenant files either a cross-complaint or an answer or amended answer in response to the landlord's amended complaint filed under CC §1952.3(a)(1). If the landlord files an amended complaint, the tenant has 30 days to respond, as in an ordinary civil action. CC §1952.3(b). If the landlord elects to proceed on the existing complaint, however, the tenant's time to respond is not enlarged. CC §1952.3(b). If the court has entered the default of a tenant who has vacated, and the complaint has not been opened by amendment or otherwise set aside, the matter may nevertheless proceed as an unlawful detainer action. CC §1952.3(c).

PRACTICE TIP: Landlords may have a difficult time determining whether or not the tenant has vacated. Without strong evidence of abandonment, landlords are well advised to continue with the trial for unlawful detainer and receive a judgment and writ of possession to avoid an allegation of bad faith in retaking possession.

It is not uncommon for a tenant to vacate immediately before the scheduled trial date. If this occurs, the landlord must inform the trial or calendar court judge. Such an obligation is imposed by written court rule, *e.g.,* in some districts of the Los Angeles Courts. The case is then transferred to the master calendar department for further proceedings. Many courts, however, proceed with trial on the date originally set to allow the landlord to prove damages if the tenant has defaulted in the action. See CC §1952.3(c). See §11.41.

PRACTICE TIP: A tenant may gain significant strategic advantages in a case by surrendering possession before trial, such as more time to investigate the potential for affirmative relief. Surrender also gives the landlord that which he or she mainly seeks in the action: possession of the premises. A tenant who vacates before trial, and who wishes to raise additional defenses or a cross-complaint, should file a motion for an order removing the case from the trial calendar and resetting it as an ordinary civil case.

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§11.52 F. Case Management and Settlement Conferences

The California Rules of Court govern case management and settlement conferences in general civil cases. See Cal Rules of Ct 3.720-3.735, which deal with initial case management reviews, case management conferences, meet and confer requirements, and case management statements. These rules do not apply to unlawful detainer actions because such actions are excluded from the definition of "general civil cases," they will be designated as short-cause cases for trial, or they will be resolved in any event within 180 days. See Cal Rules of Ct 1.6(4), 3.10, 3.721, 3.735. If possession is no longer at issue in an unlawful detainer action, many courts now transfer the matter to the "general civil" calendar. If such a transfer occurs, counsel will need to be cognizant of the requirements of Cal Rules of Ct 3.720-3.735.

California Rules of Court 3.735(b) allows the trial court to exempt a short cause case from the requirements of case management review. This can be accomplished by order of the court or stipulation of all parties. A short cause case is a civil case in which the time estimated for trial by all parties or the court is 5 hours or less. Cal Rules of Ct 3.735(a).

California Rules of Court 3.1380(a) allows the court to set one or more mandatory settlement conferences on the court's own motion or the request of any party. Rule 3.1380(b) specifies that trial counsel, parties, and persons with full authority to settle the case must personally attend the conference unless excused by the court for good cause. Further, Cal Rules of Ct 3.1380(c) requires the submission of a mandatory settlement conference statement 5 court days before the settlement conference date.

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VII. JURY TRIAL

§11.53 A. Right to Jury Trial; Procedure

When an issue of fact is presented in an unlawful detainer action, the parties are entitled to have the case tried by a jury, unless that right is waived. CCP §1171. (On waiver, see §11.54.) In determining whether to demand a jury trial, a party and his or her attorney must consider the relative likelihood of success in trial before a jury or the court, and the expense and delay of a jury trial. Jury trials tend to benefit tenants who have persuasive proof of retaliatory eviction, waiver, and "bad-faith" eviction under local eviction controls. Breach of the implied warranty of habitability, however, has often been successfully tried before judges, and a jury trial on that defense may be unnecessary. In general, when the case turns on credibility, tenants appear to fare better with juries than with bench trials. However, on a technical legal issue, a court trial may be preferred for the tenant because a judge is more likely to understand the legal technicality.

Merely demanding a jury trial (in a request to set trial (see §11.41), counter-request, or separate pleading that simply recites the requesting party's demand) is not sufficient to secure the right to a jury trial. The party demanding a jury also must post advance jury fees for the first day of trial, no later than 5 days before the date set for an unlawful detainer trial. CCP §631(b). Because only 10 days' notice of trial is required in unlawful detainer actions, most court clerks will accept the required deposit if it is made by the tenant immediately after receiving the notice of trial date by mail (see CCP §594). A tenant who waits until receiving notice of the trial date, however, risks waiving the right to a jury trial.

PRACTICE TIP: The safest course for a tenant who wishes a jury trial appears to be:

- To file and serve a separate notice demanding a jury trial at the same time that the answer is filed and served, or to file a Counter-Request to Set Case for Trial (Judicial Council of California Form UD-150) within 5 days of the mailing of the landlord's Request to Set Case for Trial (see §11.41A); and
- To deposit the required advance fees as soon as practicable after receipt of the plaintiff's request to set trial, which deposit should ensure posting more than 14 days before trial.

Jury fees range from $120 to $300 per day, but a court may not require an advance deposit of more than $150. CCP §631(b). Jury expenses are recoverable as costs for the prevailing party. CCP §1033.5(a)(1). If a party is proceeding in forma pauperis, the jury fees may be waived. See §10.11. On procedures for obtaining a jury trial generally, see California Civil Procedure Before Trial, chap 41 (4th ed Cal CEB 2004).

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§11.54 B. Waiver

Under CCP §631(d), a party waives the right to a jury trial by any of the following ways:

- Failure to appear at the trial;
- Written consent, filed with the court clerk or judge;
- Oral consent, in open court, entered in the minutes;
- Failure to announce that a jury is required at the time the cause is first set for trial, if it is set on notice or stipulation, or within 5 days after setting if set without notice or stipulation;
- Failure to deposit with the clerk or court before trial advance jury fees, in accordance with CCP §631(b); or
- Failure to deposit with the clerk or court after trial begins daily jury fees and transportation fees, in accordance with CCP §631(c).

To avoid risk of waiver, counsel should use the procedure discussed in §11.53.

In 2005, the supreme court ruled that contractual predispute jury trial waivers are invalid. See *Grafton Partners LP v Superior Court* (2005) 36 C4th 944, 32 CR3d 5. The court cited the California Constitution (Cal Const art I, §16), which states that in a civil action, the litigants may waive their right to a jury trial only as prescribed by statute, and CCP §631, which prescribes only six means for waiving a jury trial. Because an agreement made before any dispute arises between the contracting parties is not one of the means authorized by CCP §631, the court concluded that a predispute agreement to waive a jury trial is unenforceable. The court specifically disapproved the ruling in *Trizec Props., Inc. v Superior Court* (1991) 229 CA3d 1616, 280 CR 885, which had upheld a jury trial waiver in a commercial lease.

The court in *Grafton* distinguished predispute arbitration and judicial reference agreements, which are generally enforceable because they "are specifically authorized by statute" and "represent an agreement to avoid the judicial forum altogether." 36 C4th at 955. However, many courts will scrutinize these types of agreements in any event. See, *e.g., Treo @ Kettner Homeowners Ass'n v Superior Court* (2008) 166 CA4th 1055, 83 CR3d 318, in which the court of appeal refused to enforce an ADR provision in CC&Rs that required submission of disputes to judicial reference, because it did not meet constitutional standards for a jury trial waiver.

PRACTICE TIP: Some courts insist that the party demanding a jury have all proposed jury instructions ready and will treat failure to meet this requirement as a waiver. This practice appears to be aimed at lawyers who demand a jury solely for the purpose of obtaining bargaining leverage over an opponent; *i.e.,* lawyers who expect the case to settle but have no intention of proceeding with a jury trial. This court practice appears questionable under the holding in *Grafton Partners LP v Superior Court, supra*.

A state court rule, which was repealed, did provide that if the party demanding a jury later waives that demand, all other parties have 5 days after receipt of a notice of waiver mailed by the clerk to demand a jury trial and to deposit the advance jury fees. See former Cal Rules of Ct 222.1. No statute or court rule is known that governs this situation currently. In that event, or if the party demanding the jury waives the demand at the time or after the case is assigned to a specific court department, or if that party fails to deposit the advance jury fees, then the other party should promptly act to request a jury and deposit the fees to avoid a waiver. The safest practice is for each party wanting a jury trial to make the minimum advance deposit required by CCP §631(b), which is a small amount. See §11.53.

The trial court has discretion to allow a jury trial, on such terms as may be just, even though a party has waived the right to a jury. CCP §631(e). Because of the constitutional guarantee of a jury trial (see CCP §631(a)), doubt about whether to relieve a party of a waiver should be resolved in favor of granting a jury trial. *Cowlin v Pringle* (1941) 46 CA2d 472, 116 P2d 109. A party who wishes to be relieved of a waiver must request relief by motion. See *Taylor v Union Pac. R.R. Corp.* (1976) 16 C3d 893, 130 CR 23. See also California Civil Procedure Before Trial, chap 41 (4th ed Cal CEB 2004). The motion, which should be noticed if time permits, should state why a jury trial was initially waived and why the interests of justice would be served by a jury trial. See CCP §631(e).

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§11.55 C. No Right to Jury Trial on Equitable Issues

A party has no right to a jury trial on equitable issues. See *Richard v Degen & Brody, Inc.* (1960) 181 CA2d 289, 295, 5 CR 263, disapproved on other grounds in *Kendall v Ernest Pestana, Inc.* (1985) 40 C3d 488, 498, 220 CR 818. If both legal and equitable issues are involved in an unlawful detainer action, the court will try the equitable issues first, because this may obviate the need for a jury trial on the legal issues. In *Richard*, the trial court ruled that it first would try the equitable defense of estoppel. The defendant's attorney then agreed to allow the court to determine damages without the aid of a jury. The court found against the tenant and concluded that, aside from damages (which were to be fixed by the court), there were no factual issues left for the jury. The appellate court held that it was not error to deny the tenant a jury trial. See also *Union Oil Co. v Chandler* (1970) 4 CA3d 716, 728, 84 CR 756.

In *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 12 CR2d 741, plaintiff brought a conversion claim, on which the trial court submitted an equitable defense of unclean hands to a jury. The court of appeal held that this submission to the jury was proper, for two reasons:

- The gist of the plaintiff's action was legal, not equitable, and the assertion of an equitable defense in a law action will not change it into an action in equity requiring trial by the court.
- Even if the action were viewed as equitable in nature, the trial court has discretion to submit an equitable defense to a jury.

In this case, because the unclean hands defense was intertwined with legal issues and raised questions of fact and credibility properly submitted to a jury, it was "particularly prudent" for the judge to exercise his discretion to submit that issue to the jury. 10 CA4th at 623.

A tenant should have the right to a jury trial on the issue of retaliatory eviction. In *Department of Transp. v Kerrigan* (1984) 153 CA3d Supp 41, 200 CR 865, the court held that a claim of retaliatory eviction under CC §1942.5 is a legal, rather than an equitable, defense. See also *Barela v Superior Court* (1981) 30 C3d 244, 178 CR 618, and *Schweiger v Superior Court* (1970) 3 C3d 507, 90 CR 729, on the common law defense of retaliatory eviction.

PRACTICE TIP: A landlord's attorney is often forced to litigate a jury trial that has numerous inapplicable defenses, inappropriate requests for damages, or numerous procedural flaws. A motion in limine, pretrial, to exclude affirmative defenses not applicable in an unlawful detainer action, strike inappropriate requests for damages, or sever equitable defenses, is a good technique to narrow issues and save court time.

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VIII. MOTIONS TO ESCROW RENT PENDING TRIAL

§11.56 A. Mandatory Orders (CCP §1170.5)

If the trial of an unlawful detainer action is extended beyond 20 days after the filing of a request for setting the trial date (see §11.42), the court must hold a hearing to determine whether there is a reasonable probability that the landlord will prevail; if there is such a probability, the court must order that the landlord's potential damages from the delay be paid into court or into an escrow account as the rent would otherwise become due. CCP §1170.5(b)-(c).

This provision appears to make a hearing mandatory whenever the trial is extended (even if the landlord unilaterally requests the continuance or the court extends the date on its own motion), and to make an order for payment into court mandatory if the court finds a "reasonable probability" that the landlord will prevail at trial. This provision also appears to make a hearing on a rent deposit order mandatory if a trial court simply fails to follow the time prescription of CCP §1170.5(a) when the case is first set for trial. See CCP §1170.5(b). (For extensive discussion of procedures for escrowing rents under CCP §1170.5(c)-(d), see §§11.45-11.50.)

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B. Discretionary Orders; Habitability Cases

§11.57 1. Purposes

On request of a landlord, trial courts occasionally order a tenant to deposit rent payments into court or into an escrow account at the contract rate, or in some lesser amount, as they become due and for as long as the tenant remains in possession of the premises while the unlawful detainer action is pending. This procedure protects the landlord's interest by continuing rent payments during trial. It is used less frequently since the enactment of CCP §1170.5, which (1) requires that the trial date be set within 20 days after a request to set trial is filed (see §11.42), and (2) provides a statutory procedure for escrowing rents if the trial will not occur on the 20-day schedule (see §§11.44-11.50, 11.56). Note, however, that CCP §1170.5 provides for escrowing rents only after a noticed motion has been filed and only for rent due after the 20-day period for setting the case for trial. Thus, a nonstatutory, discretionary escrow procedure may be used to require payment of rent falling due before the 20-day period expires, especially when filing the request to set trial is delayed (*e.g.,* to allow extensive discovery or writ proceedings).

This nonstatutory procedure might be available to a landlord when the court finds, under the mandatory CCP §1170.5 procedure, that the landlord is unlikely to prevail in an unlawful detainer action. See §11.46. For example, the landlord is not likely to prevail on the issue of possession when the tenant raises a warranty of habitability defense and introduces persuasive evidence to support it at the CCP §1170.5 hearing. Even though this defense prevents the landlord from repossessing the premises, the court may ultimately adjudge that the landlord is entitled to a reasonable monthly rent for the premises (see §3.37). In such a case, the court might enter a nonstatutory protective order directing that all or a portion of the amount of monthly rent be placed in escrow pending trial. On stipulations for rent deposits, see §11.61.

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§11.58 2. Legal Basis

California courts have recognized the potential role of protective orders when the tenant withholds rent as a response to uninhabitable conditions (see §§3.16-3.48) and may look favorably on motions for escrowing rents when the tenant remains in possession of the premises during extended litigation. See *Green v Superior Court* (1974) 10 C3d 616, 636, 111 CR 704; *Hinson v Delis* (1972) 26 CA3d 62, 71, 102 CR 661. Both *Green* and *Hinson* discuss only the possibility of protective orders to secure the landlord's financial interest, but there are no reported California cases that indicate an appellate court has actually reviewed such an order.

A nonstatutory protective order is limited to rental payments "as they become due." See *Green v Superior Court* (1974) 10 C3d 616, 637, 111 CR 704; *Hinson v Delis, supra*. See also *Medford v Superior Court* (1983) 140 CA3d 236, 240, 189 CR 227. The financial interest protected by the order extends only to possible rental loss caused directly by the tenant's assertion of the implied warranty of habitability defense. Tenant attorneys should argue that because the landlord does not risk loss of past rent in allowing the tenant to litigate this defense, unpaid rent accrued before the action was filed should not be included in the protective order. (See cases discussed in §3.34.)

PRACTICE TIP: Protective orders are rarely used by landlord attorneys in low-rent residential leases because there are few practical remedies available to landlords if defendants fail to comply with the order. A motion for contempt, *e.g.,* might fail if the defendants are insolvent, and the benefit must always be balanced with the expense of a contempt motion.

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§11.59 3. Required Showing

No reported California case has discussed the showing necessary for the landlord to obtain an order escrowing rent payments. (For discussion of cases on protective orders from other jurisdictions, see §3.34.) A leading case on the issue of protective orders imposing rent escrow is *Bell v Tsintolas Realty Co.* (DC Cir 1970) 430 F2d 474, 483, in which the court held that protective orders are proper only "when the tenant has either asked for a jury trial or asserted a defense based on violations of the housing code."

Balancing the landlord's need for security against the apparent merits of the tenant's defense, the court listed the following factors to be considered in determining whether to grant or deny a protective order (430 F2d at 484):

- The amount of rent allegedly due;
- The number of months that the landlord has not received even partial payment;
- The landlord's obligations for the premises, *e.g.,* mortgage, taxes;
- The "reasonableness" of rent for the premises;
- Whether the landlord faces a substantial threat of foreclosure; and
- Whether the tenant proceeds in forma pauperis.

The court noted that requiring an indigent tenant to deposit rent in order to maintain a meritorious defense creates a "monetary barrier" to participation in the judicial system. 430 F2d at 480.

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§11.60 4. Amount of Rent to Be Escrowed

After granting a motion for an escrow order, the court must determine the amount of rent that must be paid into the account. When the tenant raises the warranty of habitability defense (see §§3.16-3.48), the court might find that the amount to be escrowed should be less than the contract rent. In *Bell v Tsintolas Realty Co.* (DC Cir 1970) 430 F2d 474, 484, the court noted that a trial court should "consider imposition of a lesser amount … when the tenant makes a very strong showing that the condition of the dwelling is in violation of Housing Regulations norms."

PRACTICE TIP: Although the affirmative defense of uninhabitability has not been fully litigated when the court considers a motion for an escrow order, a strong showing of housing code violations may demonstrate that the value of the premises is less than the contract rent. If the landlord had attempted to raise the rent before filing the unlawful detainer action, the tenant's attorney could argue that only the original contract rent should be placed in escrow. (See §3.37 for further discussion of determination of the amount of rent to be escrowed.)

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§11.61 5. Stipulation for Rent Deposit

To show good faith, while contesting a landlord's right to the rent, the tenant might offer a stipulation for a protective order. This maneuver gives the tenant the ability to negotiate the amount of monthly rent deposits, particularly if the tenant has a persuasive habitability defense. Alternatively, the tenant's attorney should consider having the tenant deposit all unpaid rent into a trust account and pay future rent into the account as it becomes due. This would obviate the need for a protective order and show the court that the tenant is not attempting to concoct a defense after failing to pay rent. Even if the tenant ultimately prevails on the issue of possession, the contract rent (or a lesser sum) may be payable immediately as a condition of the tenant's continued possession. If so, a trust account will greatly assist the tenant. The availability of such funds also may be useful in settlement negotiations with the landlord, *e.g.,* the rent deposits can be traded off for repairs.

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IX. RELATED ACTIONS: PRELIMINARY INJUNCTIONS, CONSOLIDATION, AND COORDINATION

§11.62 A. Nature of Related Actions

While an unlawful detainer action is pending, either the landlord or the tenant might file other actions raising similar issues and arising out of the same facts. Because the issues are limited (see §§9.8, 10.72-10.73), an unlawful detainer judgment usually has no res judicata effect on issues not cognizable in unlawful detainer. *Vella v Hudgins* (1977) 20 C3d 251, 142 CR 414; *Gonzales v Gem Props.* (1974) 37 CA3d 1029, 112 CR 884. But unlawful detainer judgments have collateral estoppel or res judicata effect when an issue could have been raised (or actually was adjudicated), in the unlawful detainer action. See *Vella v Hudgins, supra,* and discussion in §13.39.

Bringing an unlawful detainer action does not preclude the landlord from bringing a separate action for breach of a lease or rental agreement. CC §1952. Filing an unlawful detainer action does not bar the simultaneous prosecution of a quiet title action brought by either landlord or tenant. *Evans v Superior Court* (1977) 67 CA3d 162, 171, 136 CR 596.

The need for some mechanism for coordinating the prosecution of related actions is demonstrated in a number of reported cases. As a summary proceeding entitled to preference in trial setting (see §§9.7, 11.42), an unlawful detainer action may not be stayed solely because the tenant filed an action against the landlord earlier in the same court. *Mobil Oil Corp. v Superior Court* (1978) 79 CA3d 486, 145 CR 17; *Childs v Eltinge* (1973) 29 CA3d 843, 105 CR 864. In *Mobil Oil*, a gas station lessee sued for declaratory and injunctive relief based on the landlord's alleged practice of terminating franchises without good cause and filing unlawful detainer actions to enforce such terminations. While the tenant's action was pending, the landlord filed an unlawful detainer action against the tenant in the same court. The court of appeal held that the trial court should have denied the tenant's motion to stay the unlawful detainer action because the tenant's causes of action were not entitled to trial precedence over the unlawful detainer action. 79 CA3d at 494. The court noted that:

- The two actions "probably" should be consolidated for trial (79 CA3d at 493); and
- The stay might have been proper if the lessee had sought a preliminary injunction, which does have precedence over unlawful detainer actions (79 CA3d at 495).

In *Greenhut v Wooden* (1982) 129 CA3d 64, 69, 180 CR 786, the landlord filed both a quiet title action and an unlawful detainer action against the tenant, based on the claim that the lease had expired. The appellate court noted that the trial court could have consolidated these two cases with the tenant's declaratory relief action, or the tenant could have sought an injunction against the unlawful detainer action. Also, in *Asuncion v Superior Court* (1980) 108 CA3d 141, 146, 166 CR 306, when the landlord filed an unlawful detainer action under CCP §1161a, the tenant moved to transfer the case to the superior court, and filed an affirmative suit for damages and to quiet title. The appellate court indicated that, on a proper factual showing, the trial court could either enter a preliminary injunction staying the unlawful detainer action or consolidate the two actions. The court distinguished the decision in *Mobil Oil Corp. v Superior Court, supra,* on the grounds that it involved commercial property and the stay was not supported by adequate facts.

PRACTICE TIP: The credit crisis of 2007-2010 precipitated an increase in civil filings in the superior courts arising from foreclosures, particularly eviction cases and related civil actions by borrowers against lenders. This increased the awareness of the need for coordinating the actions. For example, if a foreclosure was wrongfully obtained, the eviction case may be stayed pending the resolution of an affirmative suit by the borrower to set aside the foreclosure sale. See Banke, *Staying Postforeclosure Eviction Actions Pending Borrower Actions Against Lenders,* 32 CEB Real Prop L Rep 92 (July 2009).

In multiparty actions that are related, similar coordination issues arise. *Mobil Oil, Greenhut*, and *Asuncion* all involved competing claims over the parties' interests in a single premises. If, however, a number of tenants in a building are facing separate unlawful detainer actions after withholding rent because of the landlord's breach of the implied warranty

of habitability, they may consider consolidating the actions into a single action or seeking to enjoin the individual unlawful detainer actions as part of an affirmative suit based on breach of the implied warranty of habitability. See *Hernandez v Stabach* (1983) 145 CA3d 309, 193 CR 350. A tenants' association may file an action on behalf of affected tenants to enjoin evictions pending an action to enforce relocation benefits required by development agreements with a local entity. See *Lincoln Place Tenants Ass'n v City of Los Angeles* (2007) 155 CA4th 425, 66 CR3d 120. On injunctions, see §§11.63-11.64.

When the landlord has filed an unlawful detainer action against a rent-withholding tenant who files a separate action against the landlord (either before or after commencement of the landlord's action, in either the same or a higher court) for damages or an injunction based on breach of the implied warranty of habitability, the pretrial remedy of coordination (see §11.69) or the remedy of consolidation (see §§11.65-11.68) may be available.

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B. Injunctive Relief

§11.63 1. Legal Basis; Grounds

In order to protect the tenant against the summary remedy of unlawful detainer before any related actions have been resolved, the tenant's attorney may wish to enjoin further prosecution of the unlawful detainer action while the related actions are pending. See *Greenhut v Wooden* (1982) 129 CA3d 64, 69 n3, 180 CR 786; *Asuncion v Superior Court* (1980) 108 CA3d 141, 146, 166 CR 306. But see *Old Nat'l Fin. Servs., Inc. v Seibert* (1987) 194 CA3d 460, 239 CR 728 (court of appeal upheld trial court's refusal to stay unlawful detainer action pending homeowner's fraud action because it determined that issues in fraud action were only remotely related to unlawful detainer defense). See also §8.134. Or the tenant's attorney may use an injunction to address housing rights violations before the unlawful detainer actions are actually filed. See, *e.g., Price v City of Stockton* (9th Cir 2004) 390 F3d 1105.

A preliminary injunction may be issued to preserve the status quo if the unlawful detainer action would result in irreparable injury, a multiplicity of actions, or injury for which there is no adequate remedy at law. See CCP §526(a); *Asuncion v Superior Court, supra*. See also Banke, *Staying Postforeclosure Eviction Actions Pending Borrower Actions Against Lenders,* 32 CEB Real Prop L Rep 92 (July 2009); *Guntert v City of Stockton* (1974) 43 CA3d 203, 117 CR 601 (injunction restraining landlord from filing eviction action affirmed when landlord had no ground for terminating lease). Whether injunctive relief will be granted in a particular case depends primarily on the factual showing made, and not on mere recitation of authority. See §11.64.

California courts have considered the propriety of enjoining unlawful detainer under the following circumstances:

- The landlord's title was at issue in a related action to quiet title to the premises (*Greenhut v Wooden, supra*; *Asuncion v Superior Court, supra*);
- The eviction was motivated by retaliatory intent (*Mobil Oil Corp. v Superior Court* (1978) 79 CA3d 486, 495, 145 CR 17; *Aweeka v Bonds* (1971) 20 CA3d 278, 97 CR 650; see §8.134) or unlawful racial discrimination (see *Prendergast v Snyder* (1966) 64 C2d 877, 878, 50 CR 903); and
- A commercial landlord breached the implied covenant of quiet enjoyment (*Guntert v City of Stockton, supra*; *Petroleum Collections, Inc. v Swords* (1975) 48 CA3d 841, 847, 122 CR 114).

PRACTICE TIP: A request for a preliminary injunction will more likely succeed if the underlying theory of the tenant's action against the landlord is based on a statute that expressly authorizes or has been interpreted to permit temporary or permanent injunctive relief independently of the general, equitable grounds enumerated in CCP §526(a). See, *e.g.,* the remedies designated in the chart in §2.28. See also authorities prohibiting housing discrimination cited throughout chap 2.

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§11.63A 2. The *Newby* Exception: Adequate Remedy at Law

In *Newby v Alto Riviera Apartments* (1976) 60 CA3d 288, 131 CR 547, the tenant filed an action for damages and injunctive and declaratory relief, stemming from the landlord's service of a 30-day termination notice and allegedly abusive conduct in retaliation for the tenant's organizing activities. The landlord had not yet filed an unlawful detainer action. The appellate court held that the trial court properly denied an injunction against the proposed eviction (60 CA3d at 302) because:

- The tenant's claims were also cognizable affirmative defenses to an unlawful detainer action; and
- The tenant therefore failed to show lack of an adequate remedy at law.

Interpreted broadly, *Newby* suggests that injunctive relief is not available when the gravamen of the tenant's complaint (*e.g.,* breach of the implied warranty of habitability, retaliatory eviction) can be raised as a defense to possession in an unlawful detainer action. The rationale of *Newby* may also bar a tenant from enjoining an eviction while proceeding in an affirmative suit to obtain repairs to the premises based on a breach of the warranty of habitability. Code of Civil Procedure §1174.2(a), enacted after the decision in *Newby,* allows the trial court in an unlawful detainer action to order the landlord "to make repairs and correct the conditions" that constitute the breach.

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§11.63B 3. Overcoming *Newby* Limitations

Although the application of the "adequate remedy at law" standard in *Newby v Alto Riviera Apartments* (1976) 60 CA3d 288, 131 CR 547, might be appropriate in "routine" unlawful detainer cases (see §11.63A), the tenant's legal remedy of defending the eviction may not be adequate, and a preliminary injunction may be granted in certain situations, such as the following:

- A foreclosure is imminent or has occurred (see *Asuncion v Superior Court* (1980) 108 CA3d 141, 146, 166 CR 306; *Weingand v Atlantic Sav. & Loan* (1970) 1 C3d 806, 83 CR 650; see also Banke, *Staying Postforeclosure Eviction Actions Pending Borrower Actions Against Lenders,* 32 CEB Real Prop L Rep 92 (July 2009));
- The landlord's breach of the covenant of quiet enjoyment is continuous, substantial, and materially harmful to the tenant's business or healthy enjoyment of the premises;
- Another party is necessary to a related court proceeding, but is not an appropriate party to the unlawful detainer action (see *Lincoln Place Tenants Ass'n v City of Los Angeles* (2007) 155 CA4th 425, 66 CR3d 120);
- The eviction is in response to a tenant's withholding of rent for an extreme case of breach of the warranty of habitability tantamount to a constructive eviction (see, *e.g., Stoiber v Honeychuck* (1980) 101 CA3d 903, 928, 162 CR 194);
- A landlord violates tenants' rights under good cause eviction standards in local ordinances (see, *e.g., Barrientos v 1801-1825 Morton LLC* (9th Cir 2009) 583 F3d 1197, holding that federal rules that allow property owners to opt out of Section 8 program and rents to exceed rent control levels do not preempt local eviction controls; see §7.19);
- A city violates the tenants' federal housing rights while exercising its redevelopment rights (see, *e.g., Price v City of Stockton* (9th Cir 2004) 390 F3d 1105, in which plaintiffs proved substantial likelihood of success in showing that they were denied relocation benefits required by federal law; court enjoined city from vacating, demolishing, or converting SRO hotels until it adopted and implemented antidisplacement and relocation assistance plan);
- A group of tenants in substandard housing seek in an affirmative suit to effectuate needed repairs to an entire building and to enjoin unfair business practices, when only some of the units are the subject of eviction actions (see *Hernandez v Stabach* (1983) 145 CA3d 309, 193 CR 350; but see *Daro v Superior Court* (2007) 151 CA4th 1079, 61 CR3d 716, ruling that tenants were not among class of persons Subdivided Lands Act was intended to protect; therefore, had no standing to sue); or
- The landlord has engaged in a pattern of serving termination notices and unlawful detainer complaints, followed by voluntary dismissal.

PRACTICE TIP: The decision in *Newby* was based on the tenant's presumed adequate remedy at law. When a defense allowable in an unlawful detainer action, *e.g.,* retaliatory eviction or uninhabitability, is also the basis of the tenant's affirmative suit against the landlord, the tenant should emphasize that a separate and independent basis for the injunction is to prevent a multiplicity of judicial proceedings, *i.e.,* multiple lawsuits. See CCP §526(a)(6), (b)(1). This argument is most effective when the facts show that the defense, if successful, would not only defeat the landlord's claim for possession but also result in (a) affirmative relief for the tenant beyond a mere setoff against the delinquent rent (see *Stoiber v Honeychuck* (1980) 101 CA3d 903, 911, 162 CR 194) because such relief is not permitted in unlawful detainer suits (*Landeros v Pankey* (1995) 39 CA4th 1167, 1174, 46 CR2d 165), or (b) affirmative relief for a class of persons beyond those actually being evicted (see *Hernandez v Stabach, supra*. See §§9.8, 10.73. See also cases cited in §11.63.

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§11.64 4. Procedure; Bond Required

The procedure for obtaining a preliminary injunction is set forth in CCP §§525-534 and Cal Rules of Court 3.1150-3.1153, and discussed comprehensively in California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004). Grounds for a preliminary injunction are listed in CCP §526(a). If trial of the unlawful detainer is imminent, counsel may first request a temporary restraining order. CCP §527.

In order to obtain a preliminary injunction, the tenant must demonstrate, on motion, through a verified complaint or declarations, that "sufficient grounds exist" for the injunction. CCP §527(a). A court will not grant a preliminary injunction unless there is a "reasonable probability" that the plaintiff will succeed on the merits of the complaint. *Continental Baking Co. v Katz* (1968) 68 C2d 512, 528, 67 CR 761.

A preliminary injunction may be modified or dissolved on a showing under CCP §533 that:

- The underlying facts have materially changed;
- The law on which the injunction was granted has changed; or
- "[T]he ends of justice would be served."

A bond or undertaking is generally required as a condition to the issuance of a preliminary injunction. CCP §529(a). The most practical approach to determine the amount of the bond is to apply the same formulae used for rent deposit orders (see §§11.47-11.48, 11.56-11.61), but courts have inherent power to waive the bond requirement for an indigent litigant. *Conover v Hall* (1974) 11 C3d 842, 851, 114 CR 642; *Asuncion v Superior Court* (1980) 108 CA3d 141, 147, 166 CR 306. The landlord's obvious response to a proposed issuance of an injunction without bond based on the tenant's indigence is to point out that, without income, the landlord may lose the building. This argument is especially effective when a number of tenants are participating in a rent strike.

PRACTICE TIP: If a rent deposit order has already been entered in the pending unlawful detainer action, the tenant has a strong argument that no bond or undertaking should be required to enjoin the progress of the eviction and that compliance with the rent deposit order while both actions are pending is sufficient to protect the interest of the landlord under CCP §529(a).

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C. Consolidation

§11.65 1. Multiple Actions Pending in Same Court

A court may consolidate separate actions pending before it when they involve "a common question of law or fact." CCP §1048(a). See California Civil Procedure Before Trial, chap 43 (4th ed Cal CEB 2004). The primary requirement is a showing that all the pending actions sought to be consolidated involve a common question of law or fact. CCP §1048. The more similar that the questions of law or fact appear to be, both in quality and quantity, the stronger the argument for consolidation will be. This situation may arise when the landlord's unlawful detainer action is a limited civil case and either party has filed in the same superior court an affirmative action arising out of the landlord-tenant relationship.

The argument for consolidation is strengthened if a joint trial will prevent unnecessary cost and delay and will not prejudice the rights of the opposing party. See, *e.g., Greenhut v Wooden* (1982) 129 CA3d 64, 180 CR 786; *Mobil Oil Corp. v Superior Court* (1978) 79 CA3d 486, 145 CR 17. "The purpose of consolidation is merely to promote trial convenience and economy by avoiding duplication of procedure, particularly in the proof of issues common to both actions." *Wouldridge v Burns* (1968) 265 CA2d 82, 86, 71 CR 394. Thus, when a number of tenants in a building are facing eviction after withholding rent, the argument for consolidation is stronger if the rent was withheld in response to defects in the common areas of the building, as well as to defects in the individual units.

Before CCP §1048 was amended in 1971, it authorized consolidation only "whenever it can be done without prejudice to a substantial right." Although the present version omits this reference to prejudice, it nevertheless may be advisable to show that the opposing party will not be prejudiced if the motion is granted. Grounds on which the motion might be denied for prejudice include the following:

- Evidence that is relevant in one action might prejudice the claim or defense of another party against whom such evidence is inadmissible;
- A joint trial would result in denial of a jury trial in one or more of the actions; or
- Consolidation would complicate the issues, thereby confusing the jurors.

The court has discretion to issue an order to consolidate, and such a decision will not be reversed unless that discretion has been abused. The circumstances of a particular case may show that the court could not refuse to consolidate without clearly abusing its discretion, in which case mandamus would lie to compel the trial court to grant the order. *Realty Constr. & Mortgage Co. v Superior Court* (1913) 165 C 543, 547, 132 P 1048; *Cicinelli v Iwasaki* (1959) 170 CA2d 58, 71, 338 P2d 1005. See *Clore v Fredman* (Ill 1974) 319 NE2d 18 (error to deny request for consolidation of class action for declaratory and injunctive relief with forcible detainer action).

The manner for obtaining an order of consolidation is not specified in CCP §1048, but the commonly accepted method is by noticed motion. Consolidation may also be effected by stipulation or on the court's own motion. See *McClure v Donovan* (1949) 33 C2d 717, 722, 205 P2d 17. For forms for a notice of motion to consolidate actions, a declaration in support of a motion to consolidate, and an order for consolidation, see Civ Proc Before Trial, chap 43.

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§11.66 2. Multiple Actions Pending in Different Courts

When actions sharing a common question of law or fact are pending in more than one county, the superior court in one county may transfer any action from another to its own court for coordination and consolidation for trial. CCP §403. See also Cal Rules of Ct 3.500. Transfer and coordination provide an alternative to the more unwieldy procedure of coordination, which is authorized by CCP §404. See §11.69.

The superior court may issue a coordination order on a motion showing that the standards of CCP §404.1 are met, that the action is not "complex" as defined by the Judicial Council, and that the moving party made a good faith effort to obtain a stipulation for coordination from all parties to each action. CCP §403. For forms for a notice of motion, supporting declaration, and order (adaptable for coordination under CCP §403), see California Civil Procedure Before Trial, chaps 43-44 (4th ed Cal CEB 2004).

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§11.67 3. Effect of Consolidation Order

An order of consolidation unites the separate actions so that they become a single action with the case number of the earlier action. The court treats separate pleadings as one set, and renders a single verdict or judgment. *Bank of Cal. v Connolly* (1973) 36 CA3d 350, 363, 111 CR 468. See California Civil Procedure Before Trial, chap 43 (4th ed Cal CEB 2004). Different procedures with respect to the statement of decision (CCP §632) and entry of judgment may be followed if only specified issues in the actions were consolidated (see §11.68). Even complete consolidation, however, does not eradicate the trial court's power to distinguish the rights and liabilities of the individual parties. For example, if the landlord fails to prove his or her case as to one tenant, the court may dismiss the case as to that tenant, while continuing to hear the action against the remaining tenants.

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§11.68 4. Consolidation for Trial of Related Issues Only

When only a single common question of law or fact exists (or a few), consolidation may still be a viable tool for adjudicating the related issue or issues even though separate statements of decision and judgments ultimately will be made. Code of Civil Procedure §1048(a) provides for a "joint hearing or trial of any or all the matters in issue," thus expressly authorizing consolidation for the limited purpose of trying related issues while the actions themselves remain discrete.

When actions are consolidated only for specified issues, the cases maintain separate identities and case numbers; evidence particular to each case is restricted to that case; the pleadings are considered separately; and verdicts, statements of decision, and judgments are separate. See 4 Witkin, California Procedure, *Pleading* §341 (5th ed 2008). In *McClure v Donovan* (1949) 33 C2d 717, 722, 205 P2d 17, the court remarked that, when such limited consolidation is ordered, relevant evidence presented in one case applies in the other, "but separate findings and judgments must be made in each case in disposition of the particular issues as independently submitted." (Note that findings of fact have been replaced by a statement of decision. See §§12.64-12.66.)

Counsel should consider carefully the possible benefits of seeking limited consolidation as an alternative to complete consolidation. For consolidated tenant actions, for example, separate judgments may be desirable due to the disparate nature of the tenants' cases or personalities.

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§11.69 D. Coordination by Judicial Council

Coordination by the chair of the Judicial Council is available when the landlord has an unlawful detainer case pending in one county, and the tenant has a case (*e.g.,* for damages and injunctive relief) pending in another. CCP §§404-404.8; Cal Rules of Ct 3.500-3.550. The cases must share common issues of fact or law, as in consolidation procedures. For extensive discussion of coordination, see California Civil Procedure Before Trial, chap 44 (4th ed Cal CEB 2004).

As with consolidation (see §§11.65-11.68), coordination results in multiple actions being tried together, but the procedure for obtaining coordination may be quite different from that for consolidation, depending on the nature of the case. The precise procedure to be used for coordination is dictated by whether the case is "complex" (*e.g.,* multiple related cases, extended trial periods, class actions, difficult or novel issues, substantial postjudgment judicial supervision; see Cal Rules of Ct 3.400) requiring judicial management under Cal Rules of Ct 3.400-3.403, 3.714-3.715, 3.750-3.751. See also Cal Rules of Ct, Standards of J Admin 3.10.

Coordination is initiated in a "complex" case by petitioning the chairperson of the California Judicial Council for assignment of a judge to determine whether the actions are complex and whether coordination is appropriate. CCP §404. See also Cal Rules of Ct 3.400, 3.521. Because the petitioning procedure is very time consuming, the petition should be filed even before the answer for it to have any chance of success in an unlawful detainer action.

In an action which does not meet the Judicial Council standards for "complex" cases, any party to one action may file a noticed motion to obtain an order to transfer another action, from another court, to the court in which the motion is heard, for coordination of the actions if there are one or more common questions of fact or law. CCP §403. The actions may then be consolidated for trial. See §11.66.

It is unlikely that the more cumbersome coordination procedures will be used successfully in complex unlawful detainer actions, particularly in view of the accelerated, mandatory trial-setting provisions (see §11.42). However, the enactment of CCP §403 enables a noncomplex case to be transferred from one county to another as easily as consolidation is ordered of cases within the same county.

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12

Unlawful Detainer: Trial

Sonya Bekoff Molho
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I. SCOPE OF CHAPTER §12.1

II. DISQUALIFYING THE JUDGE
- A. Challenge for Cause §12.2
  - 1. Procedures for Challenging for Cause §12.3
  - 2. Standard for Disqualification in Contested Challenge for Cause §12.4
- B. Peremptory Challenge §12.5
  - 1. Procedures for a Peremptory Challenge §12.6
  - 2. Deadline for Making Peremptory Challenge
    - a. Before Trial Commences; After Appeal on Remand §12.7
    - b. Before Other Proceedings §12.7A
    - c. Effect of Intervening Decisions §12.7B
  - 3. Effect of Exercise of Peremptory Challenge §12.8
- C. Appealing the Challenge Motion §12.8A
- D. Tactical Considerations in Deciding Whether to Challenge Judge §12.9

III. COMPELLING PARTY AND NONPARTY ATTENDANCE AT TRIAL
- A. Nonparty Witness
  - 1. Subpoena Required §12.10
  - 2. Service of Subpoena §12.11
- B. Parties
  - 1. Notice to Appear or Subpoena §12.12
  - 2. Service of Notice to Appear §12.13
- C. Statutory Witness and Mileage Fees §12.14

IV. COMPELLING PRODUCTION OF DOCUMENTS AND OTHER MATERIALS
- A. Nonparty Witnesses: Subpoena Duces Tecum §12.15
- B. Parties: Notice to Produce or Subpoena Duces Tecum §12.16
- C. Production of Original Document; Stipulations Regarding Duplicates or Photocopies §12.17

V. PENALTIES FOR DISOBEYING SUBPOENA §12.18

VI. PLAINTIFF'S CASE
- A. Elements of Unlawful Detainer §12.19
  - 1. Proving Service of Notice; Statutory Presumptions Regarding Return of Service §12.20
  - 2. Proving Case When Tenant Fails to Appear at Trial §12.21
- B. Elements to Be Proved for Unlawful Detainer Based on Nonpayment of Rent
  - 1. Proof of Rent Due
    - a. Landlord Has Burden of Proof §12.22
    - b. Use of Books and Records to Prove Amount or Receipt of Rent §12.23
      - (1) To Refresh Witness's Memory §12.24
      - (2) Introduction as a Past Recollection Recorded §12.25
      - (3) Admissible Under Business Records Exception to Hearsay Rule §12.26
  - 2. Proof of Damages
    - a. Damages Limited to Period From Termination of Tenancy Through Judgment §12.27
    - b. Damages Based on Reasonable Rental Value §12.28
      - (1) Determination of Reasonable Rental Value; Opinions of Landlord or Expert §12.29
      - (2) Damage Award in Absence of Request for Such Relief §12.30
    - c. Special Damages §12.31
      - (1) Pleading Statutory Damages
        - (a) Proof of Statutory Damages for Defendant's Malice §12.32

(b) Establishing Malice §12.33
(2) Difficulty in Obtaining Award of Statutory Damages §12.34

VII. PRINCIPAL DEFENSES
A. That Elements of Unlawful Detainer Not Proved §12.35
B. Breach of Implied Warranty of Habitability in Nonpayment of Rent Cases
1. General Elements of Defense §12.36
2. Adjudication of Reasonable Rent §12.37
C. Retaliatory Eviction for Tenant's Exercise of Legal Rights §12.38

VIII. AMENDMENTS TO CONFORM TO PROOF
A. Liberality in Granting Amendments §12.39
B. Scope of Amendment Under CCP §1173; Supplemental Versus Amended Complaint §12.40

IX. JURY INSTRUCTIONS
A. General Sources of Jury Instructions §12.41
B. Specific Instructions for Unlawful Detainer Cases §12.42
C. Procedure for Filing Proposed Instructions;
Filing Deadlines §12.43
D. Format §12.44
E. Sample Jury Instructions §12.45
1. Form: Sample Instruction on Burden of Proof, Preponderance of Evidence §12.46
2. Form: Sample Instruction on Facts Plaintiff Must Establish §12.47
3. Form: Sample Instruction on Service of Notices; Computation of Time §12.48
4. Rent and Damages
a. Form: Sample Instruction on Calculation of Rent and Damages §12.49
b. Form: Sample Instruction on Definition of "Fair Rental Value" for Assessing Damages §12.50
c. Form: Sample Instruction on Witnesses' Opinions Concerning Fair Rental Value §12.51
d. Form: Sample Instruction on Statutory Damages; Definition of Malice §12.52
5. Habitability of Premises §12.53
a. Sample Instruction on Definition of "Habitability"
(1) Form: Landlord's Instruction §12.54
(2) Form: Tenant's Instruction §12.54A
b. Form: Sample Instruction on Breach of Warranty—Factors to Consider; Notice of Defects §12.55
c. Drafting Instructions on Computing "Reasonable Rent" Owed When Warranty Breached §12.56
(1) Form: Sample Instruction on Calculation of Reasonable Rent — Percentage-Reduction-in-Use Method §12.57
(2) Form: Sample Instruction on Calculation of Reasonable Rent — Difference-in-Value Method §12.58
(3) Form: Sample Instruction on Calculation of Reasonable Rent — Factoring in Tenant's Discomfort and Annoyance §12.59
6. Retaliatory Eviction §12.60
a. Form: Sample Instruction on Elements of Retaliatory Eviction (Month-to-Month Tenancy) §12.61
b. Burden of Proof
(1) Form: Sample Instruction When Tenant Bears Entire Burden of Proof on Defense §12.62
(2) Form: Sample Instruction When Landlord Bears Burden of Disproving Intent §12.63
7. Miscellaneous Defenses
a. Form: Sample Instruction on Breach of Implied Covenant of Quiet Enjoyment §12.63A
b. Form: Sample Instruction on Waiver §12.63B
c. Form: Sample Instruction on Estoppel §12.63C
d. Form: Sample Instruction on Landlord's Refusal of Rent §12.63D

X. COURT TRIAL: STATEMENT OF DECISION
A. Party Must Request Statement of Decision §12.64
B. Deadlines for Request; Determining Whether Statement Must Be Written or Oral §12.65
C. Counsel's Role Regarding Ambiguous or Inadequate Statement of Decision §12.66

XI. JURY TRIAL
A. Jury Verdict; General and Special Verdicts §12.67
B. Judgment Based on Jury Verdict §12.68

XII. DEFAULTS AT TRIAL §12.69

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§12.1 I. SCOPE OF CHAPTER

This chapter discusses unlawful detainer trials. Methods and deadlines for challenging the judge are discussed (see §§12.2-12.9). Required procedures for compelling witnesses' attendance (see §§12.10-12.13) and production of documents (see §§12.15-12.17) are detailed. Additionally, the chapter outlines the elements and burden of proof for both the plaintiff/landlord's case (see §§12.19-12.34) and the defendant/tenant's affirmative defenses (see §§12.35-12.38). Sample jury instructions also are included (see §§12.41-12.63). The chapter ends with a discussion of the trial's outcome in court trials (see §§12.64-12.66) and jury trials (see §§12.67-12.68).

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II. DISQUALIFYING THE JUDGE

§12.2 A. Challenge for Cause

A judge has a legally imposed duty to decide any proceeding in which he or she is not disqualified. CCP §170. A judge who determines himself or herself to be disqualified must notify the presiding judge and refrain from further participation in the proceeding. CCP §170.3(a)(1). Grounds for a judge's disqualification include (CCP §170.1):

- Personal knowledge of disputed facts in the case;
- Prior service as a lawyer in the case;
- Financial interest in the subject matter;
- Status as a party to the proceeding;
- Familial relationship to a party;
- Any reason casting doubt on the judge's ability to be impartial, including bias or prejudice toward an attorney in the proceeding;
- Inability to properly conduct the proceeding because of permanent or temporary physical impairment; and
- Current arrangement for prospective employment as a dispute resolution neutral or, within previous two years, participation in discussions on such employment if:
- Arrangement or discussions occurred with a party; or
- The proceeding before the judge requires a decision on whether to submit a dispute to alternative dispute resolution or appoint a dispute resolution neutral.

Grounds for disqualification do not include (CCP §170.2):

- Membership in a racial, ethnic, religious, sexual, or similar group when the proceedings involve the rights of such a group; or
- Expression of an opinion on a factual or legal issue in the proceeding, except as a lawyer in the proceeding or as a judge in prior trial proceedings in the case in question.

The fact that a judge is a landlord or a tenant, or has a financial interest in the rental housing or commercial market, is probably not sufficient to warrant disqualification. As emphasized in *People ex rel Dep't of Pub. Works v McCullough* (1950) 100 CA2d 101, 110, 223 P2d 37, bias or prejudice disqualifies a judge only if it is directed against the party moving for disqualification.

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§12.3 1. Procedures for Challenging for Cause

A party who believes that a judge should be disqualified may file a written statement with the clerk, objecting to the hearing or trial before that judge, and setting forth the grounds for disqualification. CCP §170.3(c)(1). The statement must be presented at the earliest possible opportunity after discovery of the facts constituting grounds for disqualification. CCP §170.3(c)(1). Copies of the statement must be served on each party and the judge. CCP §170.3(c)(1). Within 10 days after filing or service, whichever is later, the judge may file either a consent to the disqualification or a written, verified answer concerning the allegations made and any additional relevant facts. CCP §170.3(c)(3).

If the judge contests the request for disqualification, the question must be heard and determined by another judge agreed on by the parties or, if no agreement is possible, by a judge assigned by the chairperson of the California Judicial Council. CCP §170.3(c)(5). A challenged judge who fails to file a response within 10 days is considered to have consented to the disqualification. CCP §170.3(c)(4). In *North Beverly Park Homeowner's Ass'n v Bisno* (2007) 147 CA4th 762, 54 CR3d 644, however, the court ruled that a judge's failure to respond to a CCP §170.1(a)(7) challenge, after the issuance of a permanent injunction on a judgment which had become final, did not amount to a "consent" to the disqualification. The court also found that, even if a CCP §170.1 challenge did apply to a final judgment, the defendant did not make a showing of "impairment" within the meaning of CCP §170.1(a)(7).

For further discussion of procedures for a challenge for cause, see California Trial Practice: Civil Procedure During Trial §§6.26-6.56 (3d ed Cal CEB 1995).

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§12.4 2. Standard for Disqualification in Contested Challenge for Cause

The code provisions on disqualification for cause (CCP §§170-170.5), enacted in 1984, replaced former CCP §§170-170.1. Although the new sections are more detailed, particularly with respect to grounds for disqualification, cases interpreting the former sections probably still represent good law on the issues presented. Under such cases, if the disqualification statement is sufficient and the request is contested, the issue at the hearing is whether the facts presented raise a probability that a fair and impartial trial cannot be held. *Rohr v Johnson* (1944) 65 CA2d 208, 212, 150 P2d 5. The standard against which a judge's possible bias is measured is high. See *Johnston v Dakan* (1908) 9 CA 522, 526, 99 P 729 (trial judge presumed to be "honest and solvent").

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§12.5 B. Peremptory Challenge

Under CCP §170.6, a judge may be disqualified merely on the basis of a motion, supported by a conclusory declaration that the judge is prejudiced against a party or attorney in the action. The constitutionality of CCP §170.6 has been upheld in *Solberg v Superior Court* (1977) 19 C3d 182, 137 CR 460, and *Johnson v Superior Court* (1958) 50 C2d 693, 329 P2d 5. No further act or proof is necessary. CCP §170.6(a)(3); *Johnson v Superior Court, supra*. Other than following reversal on appeal of a trial judge's decision or final judgment, a challenge under CCP §170.6 may be exercised only once in any action by a given attorney, party, or side. CCP §170.6(a)(3).

Code of Civil Procedure §170.6(a)(2) authorizes a motion to establish prejudice after a trial court's decision is reversed on appeal if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. A "new trial" includes proceedings on remand that require the case to be reopened with, presumably, a trial on the merits. *People v Superior Court (Maloy)* (2001) 91 CA4th 391, 109 CR2d 897. If the appellate court remands the decision to the trial judge for a ministerial purpose, however, the judge is not subject to a challenge for prejudice. *Stubblefield Constr. Co. v Superior Court* (2000) 81 CA4th 762, 97 CR2d 121. The procedure is essentially the same as for peremptory challenges made before trial.

While a challenge under CCP §170.6 may be exercised only once in any action, there is one limited exception. A party may exercise a post-appeal challenge if the matter is assigned, on remand, to the trial judge who originally heard the case. CCP §170.6(a)(2). However, on remand, a party may only exercise one post-appeal peremptory challenge even if that party did not make a pre-appeal challenge. *Casden v Superior Court* (2006) 140 CA4th 417, 44 CR3d 474.

A trial judge's decision on a pretrial motion to resolve a conflict of laws issue is not a trial under §170.6(a)(2); consequently the moving party has no right to disqualify the judge after the decision is affirmed by the court of appeal. *State Farm Mut. Auto. Ins. Co. v Superior Court* (2004) 121 CA4th 490, 17 CR3d 146. See also *Peracchi v Superior Court* (2003) 30 C4th 1245, 135 CR2d 639 (trial judge not subject to peremptory challenge following remand if sole task remaining for judge is resentencing defendant). See also *Geddes v Superior Court* (2005) 126 CA4th 417, 23 CR3d 857 (judge who determined summary judgment motion not subject to peremptory challenge following remand for court to explain its reasoning in accordance with CCP §437c(g)).

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§12.6 1. Procedures for a Peremptory Challenge

A party or attorney may exercise a peremptory challenge by making an oral or written motion without notice, supported by an affidavit or declaration that the judge is so prejudiced against the party or attorney that he or she cannot conduct a fair and impartial trial. CCP §170.6(a)(2). The declaration must be in substantially the form set forth in CCP §170.6(a)(5). Many courts provide declaration forms. The form may be available online; *e.g.,* the Los Angeles Superior Court has its own fillable form for the declaration at http://www.lasuperiorcourt.org/forms/, and clerks in Los Angeles Superior Court may require this form. The declaration need state only that the judge before whom the proceeding is pending is prejudiced. It need not state any facts supporting the charge of prejudice, and no judicial determination on the existence of any supporting facts need be made. *Johnson v Superior Court* (1958) 50 C2d 693, 329 P2d 5; *Autoland, Inc. v Superior Court* (1988) 205 CA3d 857, 252 CR 662. Another party cannot contest the motion by offering facts to prove the challenged judge's lack of prejudice. On the timing of a peremptory challenge and who may be challenged, see *Pedus Servs., Inc. v Superior Court* (1999) 72 CA4th 140, 84 CR2d 771.

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2. Deadline for Making Peremptory Challenge

§12.7 a. Before Trial Commences; After Appeal on Remand

Because different courts use different calendaring methods, and some will assign a case to a single judge for all purposes at various times after the case is filed, it can be very difficult to ascertain when a CCP §170.6 challenge must be made. The general rule under CCP §170.6(a)(2) is that the challenging motion must be made at least 5 days before the date set for trial if the judge assigned to try the case is known at least 10 days before that date. In a jurisdiction with a master calendar, the motion should be directed to the supervising judge no later than the time that the case is assigned for trial. The motion will not be granted if it is made after:

- The drawing of the first juror's name in a jury trial; or
- The plaintiff's opening statement or, when no such statement is made, after the first witness has been sworn, any evidence has been given, or trial of the case has otherwise commenced in a court trial.

If the case is assigned to a judge for all purposes, the motion must be made to the assigned judge or to the presiding judge within 10 days after notice of the assignment, or if a party has not yet appeared in the action, within 10 days after its appearance. See CCP §170.6(a)(2).

Because the prejudice must be directed against a party or an attorney appearing in the action, the motion may not be made after a default has been entered against the moving party unless the default is first set aside. *Mackie v Mackie* (1960) 186 CA2d 825, 830, 9 CR 173; see CCP §170.6(a)(1).

A peremptory challenge to the original trial judge (if that judge is reassigned to conduct a new trial after a remand) must be brought within 60 days of the reassignment. CCP §170.6(a)(2); *Stubblefield Constr. Co. v Superior Court* (2000) 81 CA4th 762, 97 CR2d 121. Such a challenge may be made only by the party who filed the appeal resulting in the remand and may be made even if that party exercised a peremptory challenge against another judge earlier in the action. However, no peremptory challenge is permitted to a judge who determined a summary judgment motion if the case is remanded for the court to explain its reasoning in accordance with CCP §437c(g). *Geddes v Superior Court* (2005) 126 CA4th 417, 23 CR3d 857.

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§12.7A b. Before Other Proceedings

Except in cases assigned to a judge for all purposes, which require a challenge early in the action (see §12.7), a party may challenge a judge assigned to hear a matter other than the trial no later than the commencement of the hearing. CCP §170.6(a)(2). But the right may be exercised only if a hearing involving a contested issue of law or fact is actually pending. *Grant v Superior Court* (2001) 90 CA4th 518, 108 CR2d 825. Because judges presiding over settlement and case management conferences do not decide the merits of the action, the peremptory challenge procedure does not apply to those proceedings. *Grant v Superior Court, supra*. A party may therefore challenge a judge who presided over such proceedings if the judge is later appointed for a trial or hearing on the merits of the case. CCP §170.6(a)(2).

In *Swift v Superior Court* (2009) 172 CA4th 878, 91 CR3d 504, the court found that a judge's rulings on discovery motions were only factual in nature and did not relate to the merits of the case. The court then ordered the trial court to accept the peremptory challenge filed by plaintiff. The court distinguished the ruling in *Autoland, Inc. v Superior Court* (1988) 205 CA3d 857, 252 CR 662, by holding that *Autoland* did not discuss whether discovery disputes constituted contested issues of fact and law.

When judges are assigned in proceedings not specifically covered by §170.6(a)(2), a peremptory challenge may be made using the procedures in §170.6(a)(2) "as nearly as may be."

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§12.7B c. Effect of Intervening Decisions

Other than following reversal on appeal of a trial judge's decision or final judgment, a peremptory challenge may not be made after a contested issue of fact "relating to the merits" of the case has been decided or submitted for decision to the challenged judge. CCP §170.6(a)(2); *Briggs v Superior Court* (2001) 87 CA4th 312, 104 CR2d 445; *La Seigneurie U.S. Holdings v Superior Court* (1994) 29 CA4th 1500, 35 CR2d 175. One court allowed a peremptory challenge to be made after the judge decided a summary judgment motion that involved only contested *legal* matters. *Bambula v Superior Court* (1985) 174 CA3d 653, 220 CR 223. See also *Fight for the Rams v Superior Court* (1996) 41 CA4th 953, 48 CR2d 851 (ruling on demurrer not decision on contested fact issue). But see *California Fed. Sav. & Loan Ass'n v Superior Court* (1987) 189 CA3d 267, 234 CR 413 (challenge denied after trial court decided class certification issues and several complex questions of *law* on summary adjudication).

A discovery referee may be disqualified for future proceedings on a peremptory challenge after the referee's decisions on earlier motions in the case are accepted by the trial court. *Pedus Servs., Inc. v Superior Court* (1999) 72 CA4th 140, 84 CR2d 771. But see *Autoland, Inc. v Superior Court* (1988) 205 CA3d 857, 252 CR 662 (challenge to discovery referee must be made immediately after notice of appointment).

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.8 3. Effect of Exercise of Peremptory Challenge

§12.8 3. Effect of Exercise of Peremptory Challenge

A judge who fails to disqualify himself or herself on the filing of a timely motion under CCP §170.6 is without jurisdiction to take any further action in connection with the case; any subsequent acts are void, including all orders and the judgment. See *Ball v City Council* (1967) 252 CA2d 136, 145, 60 CR 139.

The fact that a party has exercised a peremptory challenge under CCP §170.6 does not bar that party from challenging another judge under §170.6, following reversal on appeal of that judge's decision or final judgment, or for cause under CCP §§170.1-170.5 (see §§12.2-12.4). CCP §170.6(a)(2), (a)(7).

For further discussion of procedures for making a peremptory challenge under CCP §170.6, see California Trial Practice: Civil Procedure During Trial §§6.57-6.77 (3d ed Cal CEB 1995).

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§12.8A C. Appealing the Challenge Motion

Under CCP §170.3(d), an order granting or denying a motion to challenge a judge is not appealable, but it may be reviewed by a writ of mandate. Only the parties to the underlying proceeding may pursue writ relief under §170.3(d); the judge is not such a party. See *Curle v Superior Court* (2001) 24 C4th 1057, 103 CR2d 751.

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§12.9 D. Tactical Considerations in Deciding Whether to Challenge Judge

Because the consequences may be significant, a motion to disqualify a judge, whether for cause or peremptorily, should never be made lightly. A party who loses a challenge for cause under CCP §170.3 may face a judge who is more alienated and hostile than originally anticipated. When this occurs, the party should consider using a peremptory challenge under CCP §170.6, if one is still available. If the challenge for cause is made diplomatically and on narrow grounds, the judge may be more receptive to the challenging party.

Although a peremptory challenge eliminates the risk of having to proceed before the challenged judge, it may alienate the judge against the attorney for future cases. Making the challenge before the supervising judge at the master calendar stage may lessen the chance that the challenged judge will be antagonized by the motion.

Before moving to disqualify a judge, the attorney should determine who might be assigned as a replacement judge. If the new judge is not likely to be more sympathetic, a challenge may only cause unnecessary delay. When there is no judge in the court who is not disqualified, the chairperson of the California Judicial Council will assign a judge from another county or judicial district to try the case. See CCP §§170.6(a)(3), 170.8. The outside judge may be from a less busy, rural district. The attorney should consider whether a judge from such a district would benefit the case.

PRACTICE TIP: Landlord or tenant attorneys will occasionally need to challenge a judge who they believe has misinterpreted the law in prior decisions and is therefore likely to be consistent in that interpretation for future cases. Whenever a motion to disqualify a judge is made, it may be wise to request a visit with the judge or notify the court clerk in advance to informally explain the reasons for the motion. Judges generally appreciate the effort to give them further explanation for the challenge.

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III. COMPELLING PARTY AND NONPARTY ATTENDANCE AT TRIAL

A. Nonparty Witness

§12.10 1. Subpoena Required

A witness's attendance at trial may be compelled by service of a writ (or order), known as a subpoena. CCP §1985. See also CCP §2064 (subpoenaed witness must attend trial and testify). The subpoena specifies the time and place that the witness must appear. CCP §1985(a). The subpoenaing party and the witness may change the time and place specified in the subpoena by mutual agreement. CCP §1985.1.

Court clerks' offices provide blank form subpoenas, presigned and stamped with the clerk's seal, to attorneys who request them. CCP §1985(c). An ordinary subpoena compelling attendance is issued as a matter of course; good cause for attendance need not be shown. CCP §1986. An attorney of record in a proceeding may issue subpoenas without seal, which have the same force and effect as subpoenas issued with the court clerk's seal. CCP §1985(c).

On compelling attendance by subpoena generally, see California Trial Practice: Civil Procedure During Trial §§4.1-4.18 (3d ed Cal CEB 1995).

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§12.11 2. Service of Subpoena

Any person may serve the subpoena by personally delivering a copy "or a ticket containing its substance" to the witness. CCP §1987(a). The subpoena must advise the witness of his or her right to request fees and mileage. CCP §2065; §12.14. The witness must be given the witness and mileage fees, if demanded, at the time of service. CCP §1987(a).

A trial subpoena must be served so as to allow the witness "a reasonable time for preparation and travel" to the courthouse. CCP §1987(a). On service generally, see California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

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B. Parties

§12.12 1. Notice to Appear or Subpoena

If written notice requesting the adverse party or the party's agent to appear at trial is served on an opponent's attorney of record, no subpoena is necessary; the notice operates in lieu of a subpoena. CCP §1987(b).

If the time to serve a notice to appear has expired (see §12.13), counsel may still subpoena the opposing party (see §12.10). Subpoenaing counsel may want to call opposing counsel to ascertain if counsel will accept service of the subpoena or will stipulate to produce the party at trial. Any such stipulation should be confirmed in writing.

See §12.16 for discussion of use of the notice procedure in lieu of a subpoena duces tecum to compel production of certain documents at trial.

On compelling attendance by notice to appear, see California Trial Practice: Civil Procedure During Trial §§4.36-4.39 (3d ed Cal CEB 1995).

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§12.13 2. Service of Notice to Appear

A notice to appear (see §12.12) must be served on the party's attorney of record at least 10 days before the time required for attendance, unless the court fixes a shorter time. Such a notice has the same effect as a subpoena. CCP §1987(b). If the notice is mailed both from and to an address in California, 5 calendar days must be added to the time. CCP §1013. For service of a subpoena, see §12.11.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.14 C. Statutory Witness and Mileage Fees

§12.14 C. Statutory Witness and Mileage Fees

A subpoena must include written notice that the witness is entitled to request statutory witness and mileage fees. CCP §2065. A witness who is a party in the action whose attendance is compelled by a notice to appear (see §12.12) may also be entitled to demand witness and transportation fees. CCP §1987(b). For attendance at all levels of trial courts, witness fees are currently $35 per day plus 20 cents per mile both ways (Govt C §68093; see also Govt C §68097). Counsel should check for amendments to these sections.

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IV. COMPELLING PRODUCTION OF DOCUMENTS AND OTHER MATERIALS

§12.15 A. Nonparty Witnesses: Subpoena Duces Tecum

A subpoena duces tecum is used to compel the production of books, records, or documents for possible introduction at trial. See generally California Trial Practice: Civil Procedure During Trial §§4.21-4.28 (3d ed Cal CEB 1995). As of January 1, 2000, a separate Judicial Council form is used for a Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration. The Judicial Council form declaration may be used or a separate declaration may be attached.

Service of a subpoena duces tecum is made personally in the same manner as an ordinary subpoena, except that a "copy of an affidavit shall be served with a subpoena duces tecum issued before trial." CCP §1985(b). The affidavit must describe exactly the documents or other matters and set forth facts showing both the existence of good cause for their production and their materiality to the issues in the case. CCP §1985(b). The affidavit must further state that "the witness has the desired matters or things in his or her possession or under his or her control." CCP §1985(b). A declaration under penalty of perjury may be used in place of an affidavit, and often is. See CCP §2015.5.

Under CCP §1985.6, a subpoena duces tecum may be used to obtain employment records of an employee that are maintained by his current or former employer. This section might be invoked if the acts of a landlord's employee are at issue in an unlawful detainer action.

A subpoena duces tecum is invalid unless a copy of the underlying affidavit or declaration is served along with it. CCP §1987.5.

A witness served with a subpoena duces tecum is entitled to demand witness fees and mileage, as with service of a subpoena or a notice to appear (see §12.14). CCP §1987(a).

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§12.16 B. Parties: Notice to Produce or Subpoena Duces Tecum

Code of Civil Procedure §1987(c) allows a party to compel another party, a person for whose immediate benefit an action is being prosecuted or defended, or an agent of such a party to bring "books, documents or other things" to the trial on at least 20 days' notice (or a shorter time if the court, on proper application, allows). If the notice is mailed from a California address to a California address, add 5 calendar days. CCP §1013. The notice must "state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control." CCP §1987(c). If the adverse party serves and files objections, the requesting party must make a noticed motion supported by a showing of both good cause and materiality in order to have a court order production of the evidence. CCP §1987(c). See generally California Trial Practice: Civil Procedure During Trial §§4.36-4.39 (3d ed Cal CEB 1995).

Although the statutory notice to produce at trial has significant advantages, the 20-day service requirement may be impossible to satisfy in light of the expedited trial-setting and shortened period for notification of trial unique to unlawful detainer cases (see §§11.41-11.43).

Code of Civil Procedure §1987(c) provides alternatives for obtaining the production at trial of documentary evidence under the adverse party's control:

- The subpoena duces tecum, which must be served only a "reasonable" time before the scheduled appearance (see §12.11); or
- A court order, obtained by appropriate application, shortening time for service of the CCP §1987(c) notice.

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§12.17 C. Production of Original Document; Stipulations Regarding Duplicates or Photocopies

It is not uncommon for the adverse party to have possession of the original of an important document, the contents of which must be proved at trial (*e.g.,* notices of rent increases, letters of complaints regarding habitability). If the original of a writing is otherwise admissible, it may be introduced into evidence to prove its contents. Evid C §1520. Under Evid C §1521, a duplicate of a writing is admissible to the same extent as an original, unless a genuine dispute exists about the material terms of the writing or its authenticity, or if under the circumstances it would be unfair to admit the duplicate instead of the original. Duplicates include those made by standard photocopying techniques. See Evid C §260.

It is common for counsel to stipulate to the use of photocopies at trial. However, the original should be made available for inspection.

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§12.18 V. PENALTIES FOR DISOBEYING SUBPOENA

A witness who disobeys a subpoena or a court order to appear may be found in contempt of court, ordered to pay a $500 penalty, and held liable for all damages suffered by the party requiring that witness's attendance. CCP §§1991-1992. In addition, a warrant for the arrest of the witness may be issued. CCP §§1993-1994. See California Trial Practice: Civil Procedure During Trial §§4.52-4.54 (3d ed Cal CEB 1995).

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VI. PLAINTIFF'S CASE

§12.19 A. Elements of Unlawful Detainer

In the usual unlawful detainer action, the landlord establishes a prima facie case by offering evidence of all of the following:

- The landlord-tenant relationship (see chaps 1, 9);
- Proper termination of the relationship, usually through proof of service of a 3-day, 30-day, or 60-day notice (see §§5.24A, 8.26, 8.69, 12.20); and
- The tenant's withholding possession of the premises.

Knowles v Murphy (1895) 107 C 107, 112, 40 P 111. The plaintiff must prove the existence of a relationship other than landlord-tenant if the defendant is an employee, agent, or licensee of the plaintiff (CCP §1161(1)), or if the plaintiff acquired the property by foreclosure (CCP §1161a(b)(2)). See §§8.68A-8.68E, 10.54. Failure to prove any of the above matters, if disputed, will result in a dismissal. *Ahlers v Barrett* (1906) 4 CA 158, 87 P 232 (landlord-tenant relationship not shown).

Proof that the tenant retained the key and left personal property on the premises is sufficient to show that the tenant is withholding possession. *Levy v Henderson* (1916) 31 CA 789, 791, 161 P 1004. See also *Cohen v Superior Court* (1967) 248 CA2d 551, 554, 56 CR 813 (equipment on premises may constitute holdover, even if keys returned). See §§12.39-12.40 on amendments to conform to proof.

In proving up damages after obtaining a default judgment, the plaintiff need only establish a prima facie case to obtain judgment. *Johnson v Stanhiser* (1999) 72 CA4th 357, 85 CR2d 82.

Local rent control laws impose on a landlord additional proof requirements on the issues of just cause for eviction and general compliance with the local ordinance. See §§7.73-7.75, 9.16-9.16D.

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§12.20 1. Proving Service of Notice; Statutory Presumptions Regarding Return of Service

If proper service of the requisite notice is denied in the answer, or put at issue by a general denial, the plaintiff must introduce sufficient proof on the issue. *Liebovich v Shahrokhkhany* (1997) 56 CA4th 511, 65 CR2d 457. In *Lacrabere v Wise* (1904) 141 C 554, 75 P 185, the defendants denied the plaintiff's allegation of service of a 3-day notice to terminate the tenancy. At trial, the plaintiff offered in evidence the purported notice and affidavits of several persons to show service of the notice on the defendants. The court ruled that the affidavits were comparable to hearsay and that the plaintiffs must offer the testimony of a witness with personal knowledge of service. 141 C at 556. Even though CCP §2009 allows use of affidavits to prove service of a summons or other paper in an action or other proceeding, the court refused to apply that statute to service of notices essential to sustain the action itself. 141 C at 556. In *Liebovich v Shahrokhkhany, supra,* the court stated that the affidavit of service alone was insufficient to prove at trial that the service of a 3-day notice met the requirements of CCP §1162; the testimony of the person who made the service is required. Note that Evid C §647 only creates a presumption, affecting the burden of producing evidence, that the facts stated in the return of service filed by a licensed process server are true. Also, a sheriff's or marshal's return of service of process or notice is only prima facie evidence of the facts stated in the return. Govt C §§26662, 71265.

PRACTICE TIP: When the action is for nonpayment of rent, the court itself may raise a hearsay objection to the landlord's attempt to introduce a declaration of service (of a notice to pay rent or quit) by someone other than a licensed process server or sheriff's or marshal's deputy. If the landlord's attorney has reason to expect that a particular judge will raise such an objection or that a tenant will deny service of the notice, the attorney should produce in court the actual person who accomplished the service or an eyewitness to the event.

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§12.21 2. Proving Case When Tenant Fails to Appear at Trial

Tenants in unlawful detainer actions frequently fail to appear at the trial after having filed an answer. In this situation, the landlord must still prove the basic elements of the case, and in addition must prove that the tenant was properly served with notice of the time and place of trial. CCP §594(a); *Marriage of Goddard* (2004) 33 C4th 49, 14 CR3d 50. If the tenant is not present to controvert evidence, the landlord may prove notice of trial by introducing into evidence an affidavit or certificate or other competent evidence. CCP §594(b). The standard of proof should be a prima facie case rather than proof by a preponderance of the evidence. See *Johnson v Stanhiser* (1999) 72 CA4th 357, 85 CR2d 82.

Code of Civil Procedure §594(a) prohibits a trial from being held in the absence of a party unless the absent party had 15 days' notice of the trial date, or 5 days' notice in an unlawful detainer. (Notice of trial must be served on all parties to an unlawful detainer action at least 5 days before the trial date, or 10 days if service is made by mail. CCP §594. See trial setting procedures in §§11.41-11.43.) In *Au-Yang v Barton* (1999) 21 C4th 958, 90 CR2d 227, the California Supreme Court held that when a case was set with 15 days' notice to all parties, but the trial court then advanced the trial date, §594(a) prohibits the court from holding the trial in the absence of a party who has not received notice of the new trial date. Section 594(a) does not require 15 days' notice of a continuance of a trial to a later date if the party received proper notice of the initial trial date. On trial setting procedures, see chap 11.

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B. Elements to Be Proved for Unlawful Detainer Based on Nonpayment of Rent

1. Proof of Rent Due

§12.22 a. Landlord Has Burden of Proof

When an unlawful detainer action is based on nonpayment of rent, failure to pay rent is an essential element of the landlord's case. Therefore, the landlord has the burden of proof on this issue. Evid C §500. Under Evid C §636, "payment of earlier rent or installments is presumed from a receipt for later rent or installments." This presumption requires the landlord to carry the burden of producing evidence to the contrary. Evid C §604.

If the tenant contends that a rent payment allegedly not made was in fact made by mail, he or she may rely on Evid C §641, which provides that a "letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." This presumption, however, does not prevail over uncontradicted testimony that the letter was not received. *Carl v Thomas* (1931) 116 CA 294, 300,2 P2d 872. See also 1 Witkin, California Evidence, *Burden of Proof and Presumptions* §78 (4th ed 2000). The lease may also provide for the method of payment, *i.e.*, payment in person at the rental office.

NOTE: Code of Civil Procedure §1161(2) provides that if a notice to pay rent or quit does not provide an address for the personal payment of rent, and the tenant can show that the rent was mailed to the landlord at the address provided in the notice, then the landlord is *conclusively* presumed to have received the rent payment.

If the tenant proves that there is no certificate of occupancy for the dwelling unit, then no rent is due, although the court will order the eviction because it is illegal for the tenant to continue living there, and the lease may be declared void. *Espinoza v Calva* (2008) 169 CA4th 1393, 87 CR3d 492; *Gruzen v Henry* (1978) 84 CA3d 515, 148 CR 573. See §§3.11E, 10.62.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.23 b. Use of Books and Records to Prove Amount or Receipt of Rent

§12.23 b. Use of Books and Records to Prove Amount or Receipt of Rent

When there is no written lease or rental agreement, the landlord must prove the amount of agreed-on rent. Oral testimony is sufficient if the point is not controverted by the tenant.

Past rent receipts, account books, and other written records may be invaluable to the landlord in proving the contract rent. These items also serve as evidence of whether disputed rent payments were or were not made.

PRACTICE TIP: Careful examination and questioning of a landlord whose books are very disorganized might allow a successful defense under CCP §1161(2) that the landlord is claiming rent that is more than 1 year overdue. This assertion might require a late request from defense counsel to amend the pleadings to conform to the proof (see §§12.39-12.40).

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§12.24 (1) To Refresh Witness's Memory

Although Evid C §771(a) is very liberal in allowing the use (but not necessarily the admission into evidence) of any type of writing to refresh recollection, it gives the adverse party the right to inspect the writing at the trial or hearing, and to cross-examine the witness concerning it. The right to inspect the writing is protected even when the witness used it before trial to refresh his or her memory. Evid C §771(a). In addition, the adverse party may introduce pertinent portions of the writing into evidence on cross-examination. Evid C §771(b). See also 3 Witkin, California Evidence, *Presentation at Trial* §§177-181 (4th ed 2000). If the writing is not produced, the testimony of the witness concerning the matter must be stricken from the record (Evid C §771(a)), unless the writing is impossible to procure (Evid C §771(c)). Thus, while Evid C §771 may help the landlord prepare for trial and substantiate testimony concerning the amount and receipt of rent, it may require that the landlord produce the books or records in question and be cross-examined concerning them.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.25 (2) Introduction as a Past Recollection Recorded

§12.25 (2) Introduction as a Past Recollection Recorded

When a witness's memory is not refreshed by reference to a writing, the writing may be read into evidence as a past recollection recorded (Evid C §1237) if a proper foundation is laid by establishing all of the following:

- The writing must have been made "at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory."
- The writing must have been made by the witness, under the witness's direction, or "by some other person for the purpose of recording the witness' statement at the time it was made."
- The witness must testify that the writing was a true statement of the facts.
- The writing must be "authenticated as an accurate record of the statement."

The adverse party has the right to inspect the writing and cross-examine the witness on it. Evid C §768(b). Although the writing may be read into evidence if it qualifies as past recollection recorded, only the adverse party may offer the document itself into evidence. Evid C §1237(b). See Jefferson's California Evidence Benchbook, chap 11 (3d ed CJA-CEB 1997).

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.26 (3) Admissible Under Business Records Exception to Hearsay Rule

§12.26 (3) Admissible Under Business Records Exception to Hearsay Rule

A writing may be admissible under the business records exception to the hearsay rule (Evid C §1271) if a proper foundation is laid by establishing all of the following:

- The writing was made in the regular course of business.
- The writing was made at or near the time of the act, condition, or event.
- The custodian or other qualified witness testifies to its identity and the mode of its preparation.
- The sources of information and method and time of preparation indicate its trustworthiness.

If these foundational requirements cannot be met, the writing may still be used to refresh the witness's memory.

PRACTICE TIP: Landlord attorneys should urge on-site managers to keep daily incident logs or records as a regular course of business.

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2. Proof of Damages

§12.27 a. Damages Limited to Period From Termination of Tenancy Through Judgment

A plaintiff's failure to prove that the tenant is guilty of an unlawful detainer (CCP §1161) precludes an award of damages. *Roberts v Redlich* (1952) 111 CA2d 566, 244 P2d 933. When the unlawful detainer is established, however, the landlord may recover damages for the period of unlawful detainer (see §13.19).

Because CCP §1174(b) authorizes only those damages resulting from the unlawful detainer, the landlord may not recover damages (other than back rent in an action based on nonpayment of rent) for breaches of a lease or rental agreement. *Vasey v California Dance Co.* (1977) 70 CA3d 742, 139 CR 72; *Harris v Bissell* (1921) 54 CA 307, 313, 202 P 453; *Chase v Peters* (1918) 37 CA 358, 360, 174 P 116. See §13.18. Therefore, the court should not award a judgment for unpaid rent that accrued during the 30-day notice period, if the unlawful detainer was based solely on the 30-day notice. See *Saberi v Bakhtiari* (1985) 169 CA3d 509, 215 CR 359; *Castle Park No. 5 v Katherine* (1979) 91 CA3d Supp 6, 154 CR 498. The court, too, lacks jurisdiction to enter judgment for the tenant on the condition that the tenant immediately pay pendente lite rents. *Balassy v Superior Court* (1986) 181 CA3d 1148, 226 CR 817.

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§12.28 b. Damages Based on Reasonable Rental Value

The measure of damages is the reasonable rental value of the premises during the time the tenant unlawfully withheld possession. *Stockton Morris Plan Co. v Carpenter* (1936) 18 CA2d 205, 210, 63 P2d 859; *Flournoy v Everett* (1921) 51 CA 406, 196 P 916.

Although the contractual rent may be considered as evidence of the reasonable rental value of the premises (*Lehr v Crosby* (1981) 123 CA3d Supp 1, 9, 177 CR 96), the court may find the reasonable rental value to be a greater or lesser amount (*Harris v Bissell* (1921) 54 CA 307, 313, 202 P 453). Thus, for termination of a month-to-month tenancy, if the tenant introduces evidence of the landlord's breach of the warranty of habitability, the trier of fact may consider the nature and extent of the landlord's breach in assessing and awarding either back rent or damages for the period between termination and judgment. *Four Seas Inv. Corp. v International Hotel Tenants' Ass'n* (1978) 81 CA3d 604, 146 CR 531.

Assuming that the tenant has properly raised a defense of breach of the warranty of habitability, the trial court must permit the tenant to introduce evidence of the breach and may not limit the tenant to an offer of proof. *Espinoza v Calva* (2008) 169 CA4th 1393, 1398, 87 CR3d 492. If the court finds a breach of the warranty of habitability, the court is required to perform its duties under CCP §1174.2. 169 CA4th at 1399. See §§12.37, 13.36, 13.40.

Although a court may abate rent if a residential landlord breaches the implied warranty of habitability, there is no statutory authority to permit abatement of rent for a commercial tenant who successfully defends an unlawful detainer. *Underwood v Corsino* (2005) 133 CA4th 132, 34 CR3d 542.

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§12.29 (1) Determination of Reasonable Rental Value; Opinions of Landlord or Expert

An owner of property is competent to testify concerning its value, without showing any special qualifications (Evid C §813; *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 114 CR 622), but is bound by the same rules of admissibility as any other witness (*Sacramento & San Joaquin Drainage Dist. v Goehring* (1970) 13 CA3d 58, 91 CR 375). Any other evidence of the value of real property must be given by someone familiar with property and rental values in the area. Evid C §813(a)(1); *San Bernardino County Flood Control Dist. v Sweet* (1967) 255 CA2d 889, 63 CR 640. Depending on the landlord's experience, it may be possible to qualify him or her as an expert based on familiarity with the rental market. Technical skill, training, or ability is not necessary; knowledge of comparable rental values may be sufficient. See *San Bernardino County Flood Control Dist. v Sweet, supra*; *City of Stockton v Ellingwood* (1929) 96 CA 708, 716, 275 P 228. Both of those cases concern market value rather than rental value, but the same principles should apply to both.

PRACTICE TIP: Landlord attorneys should consider calling an expert witness, *i.e.,* a property manager or broker, to testify if the reasonable rental value is higher than the contract rent.

When there is no testimony establishing reasonable rental value, damages for unlawful detainer should be denied. See *Stockton Morris Plan Co. v Carpenter* (1936) 18 CA2d 205, 214, 63 P2d 859; *Lehr v Crosby* (1981) 123 CA3d Supp 1, 9, 177 CR 96.

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§12.30 (2) Damage Award in Absence of Request for Such Relief

It has been held proper for the court to award damages for reasonable rental value even though the complaint does not pray for such relief (see *Flournoy v Everett* (1921) 51 CA 406, 408, 196 P 916; *Holland v Eastern Outfitting Co.* (1911) 16 CA 441, 117 P 562); however, this result is questionable if the tenant is unprepared to meet the landlord's proffered evidence because he or she has not been notified that damages would be sought at trial. Just as recovery cannot be awarded for damages accruing before the unlawful detainer, the judgment cannot award future damages (*i.e.,* accruing after the date of the judgment) for continued possession, such as "$3 per day until defendant gives up possession." *Cavanaugh v High* (1960) 182 CA2d 714, 722, 6 CR 525. See *Lehr v Crosby* (1981) 123 CA3d Supp 1, 9, 177 CR 96; *Pfitzer v Candeias* (1921) 53 CA 737, 200 P 839.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.31 c. Special Damages

§12.31 c. Special Damages

Code of Civil Procedure §1174 does not preclude an award of damages beyond that in the nature of rent; *i.e.,* the "reasonable rental value" or "fair rental value" of the premises need not be the only measure of damages. If malice is shown, the plaintiff may be awarded statutory damages of up to $600. CCP §1174(b); see §§12.32-12.33, 12.52. See also CCP §1166(b), which permits the plaintiff to recover any damages resulting from "fraud, force or violence" that accompanied the forcible entry or forcible or unlawful detainer.

EXAMPLE: Special damages might be assessed when a tenant's malicious refusal to vacate has caused any of the following:

- Damages suffered by a landlord who promised possession to a new tenant because of the failure of defendant to vacate;
- Delay in closing of an escrow when gaining possession is a condition of sale;
- Delay in planned construction, and thus increased costs; or
- Mental distress for an extended period to a peculiarly susceptible landlord, *e.g.,* an elderly owner-occupier.

No authority other than CCP §§1166 and 1174(b) exists for this list of special damages in unlawful detainer actions; if those statutory prescriptions are not met, tenants may oppose them on that basis. See discussion on limited issues and damages in §9.8.

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(1) Pleading Statutory Damages

§12.32 (a) Proof of Statutory Damages for Defendant's Malice

Under CCP §1174(b), when a defendant is found guilty of unlawful detainer and malice is shown, the plaintiff may be awarded statutory damages of up to $600, in addition to actual damages (including rent found due). Until 1994, §1174(b) provided for treble damages. Because the requirement of "malice" remains the same, however, cases addressing malice under the former treble-damages version of the statute should continue to apply under the current statutory-damages version.

The trier of fact is directed by CCP §1174(b) to determine whether statutory damages should be awarded. Thus, a landlord who wishes to recover statutory damages should allege the tenant's malice in the complaint (see §9.40) and prove this allegation at trial. The landlord may be able to recover statutory damages that are not specifically included in the prayer, if the complaint otherwise pleads facts that justify statutory damages. See *Rogers v Kabakoff* (1947) 81 CA2d 487, 184 P2d 312. Counsel should be sure, however, to pray for statutory damages if the landlord wishes to recover them. See *Hall v Berkell* (1955) 130 CA2d 800, 279 P2d 832 (punitive damages not recoverable when there was neither a prayer for them, nor a pleading of malice, although sufficient evidence at trial to establish malice). If the tenant fails to answer or otherwise appear in the action, the landlord cannot recover statutory damages unless the complaint specifically requested them. See CCP §580; *Gudarov v Hadjieff* (1952) 38 C2d 412, 240 P2d 621.

PRACTICE TIP: If the landlord learns of new facts after filing the complaint that support a finding of malice, a motion to amend the complaint at the time of trial to recover damages based on malice should be made. However, an amendment to the complaint to add a new theory will not be allowed if the amendment is not based on the same general facts. *North 7th St. Assocs. v Constante* (2001) 92 CA4th Supp 7, 111 CR2d 815.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.33 (b) Establishing Malice

§12.33 (b) Establishing Malice

"Malice" is not defined in CCP §1174(b). For a jury instruction specifically approved for unlawful detainer actions by the Judicial Council that defines "malice" when §1174(b) applies, see CACI 4341, quoted in §12.52.

"Malice" is defined in BAJI 7.34 (more specifically than in CACI 4341) as "a wish to vex, annoy, or injure another person." The jury instruction goes on to describe malice as

> that attitude or state of mind which actuates the doing of an act for some improper or wrongful motive or purpose. It does not necessarily require that the defendant be angry or vindictive or bear any actual hostility or ill will toward the plaintiff.

Malice is also defined in CACI 3940, under a general Punitive Damage Instruction, as follows:

> "Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

For a sample jury instruction on statutory damages and the requisite showing of malice, see §12.52.

Malice is proved when the evidence shows that the tenant willfully, deliberately, and obstinately withheld possession of the premises against the landlord's will, with knowledge that the tenancy had terminated legally. *Erbe Corp. v W & B Realty Co.* (1967) 255 CA2d 773, 63 CR 462. In *Erbe,* the court upheld an award of treble damages under CCP §1174 when the tenant, in addition to holding over after termination of the lease, kept the new tenant out by putting armed guards and locked chains on the premises.

Under BAJI 7.34, even though actual malice is an intangible state of mind, "[m]alice, like any other fact, may be proved by direct or circumstantial evidence." To prove the tenant's malice, the landlord usually is forced to rely on circumstantial evidence, rather than direct evidence of statements or actions by the tenant. See, *e.g., Sasson v Katash* (1983) 146 CA3d 119, 194 CR 46 (treble damages upheld because evidence indicated that tenant had no reasonable belief that landlord was obligated to renew lease); *Fifth & Broadway Partnership v Kimny, Inc.* (1980) 102 CA3d 195, 204, 162 CR 271 (treble damages upheld because tenant's statements to landlord indicated "that he might as well stay because he had nothing to lose by leaving, and he might as well try to fight the [unlawful detainer action] so he could at least get something out of the space"); *Buck v Morrossis* (1952) 114 CA2d 461, 467, 250 P2d 270 (treble damages upheld because tenant "made no claim of right to the premises," failed to file answer, and filed demurrer after discharging attorney, for purpose of remaining in premises through Christmas season).

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§12.34 (2) Difficulty in Obtaining Award of Statutory Damages

In seeking statutory damages, counsel should note that CCP §1174(b) "is penal in its nature and should receive a strict construction." *Gwinn v Goldman* (1943) 57 CA2d 393, 399, 134 P2d 915. Thus, the court will not award statutory damages if the tenant's holding over of the premises is "characterized by good faith and a reasonable belief in his right to remain." *Board of Pub. Serv. Comm'rs v Spear* (1924) 65 CA 214, 218, 223 P 423. Whether to award statutory damages is within the trial court's discretion even if the tenant's holding over is found to be willful. *Richard v Degen & Brody, Inc.* (1960) 181 CA2d 289, 294, 5 CR 263, disapproved on other grounds in *Kendall v Ernest Pestana, Inc.* (1985) 40 C3d 488, 498, 220 CR 818. If the cause of action for unlawful detainer fails because the tenant surrenders possession before the action is filed, there can be no award of statutory damages under CCP §1174(b). *Briggs v Electronic Memories & Magnetics Corp.* (1975) 53 CA3d 900, 126 CR 34. Note that there are no reported cases awarding statutory damages against a residential tenant. This fact indicates the difficulty of proving the requisite malice, and it may also reflect the penal nature of CCP §1174 and the resultant strict construction of its terms.

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VII. PRINCIPAL DEFENSES

§12.35 A. That Elements of Unlawful Detainer Not Proved

If the landlord fails to introduce sufficient evidence on each element of the unlawful detainer cause of action to support a verdict or judgment (see §§12.19-12.30), the tenant may move for nonsuit under CCP §581c (jury trial) or for judgment under CCP §631.8 (court trial) at the close of the landlord's case.

EXAMPLE: If the landlord's 3-day notice fails to specify the name, telephone number, and address of the person to whom the rent payment shall be made, the usual days and hours that person is available, and additional information required under CCP §1161(2), the notice is defective and nonsuit should be granted.

PRACTICE TIP: If the defect cannot be corrected (*e.g.,* a defective notice) and comes out during the landlord's case-in-chief, the tenant may move for judgment at the close of plaintiff's case. However, if the defect can be corrected (*e.g.,* putting on testimony of the tenant's neighbors as to alleged acts of nuisance), the landlord may reopen the case-in-chief. In this circumstance, it is better to wait until the evidence phase has concluded and then argue the defect during closing argument. At this point, many judges will not permit the landlord to reopen.

If the tenant submits evidence to refute any of the elements of the cause of action, the trier of fact must weigh the conflicting evidence and determine whether each disputed element has been established. The tenant may also present evidence to support an affirmative defense alleged in the answer (*e.g.,* breach of warranty of habitability; see §12.36) and argue for judgment on the grounds that even if the landlord has established a prima facie case, the affirmative defense has been proved by a preponderance of the evidence.

In an unlawful detainer action based on nonpayment of rent, if the tenant has ever paid excess rent under a rent control ordinance, all excess rent previously paid acts as a credit against future months' rent. There is no statute of limitations. *Minelian v Manzella* (1989) 215 CA3d 457, 263 CR 597. Excess rent paid to a previous landlord may be offset against a new landlord seeking to evict for nonpayment of rent. *Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 81 CR3d 341. If the notice seeks as little as $5.96 more than the rent owed, it is defective. *Nourafchan v Miner* (1985) 169 CA3d 746, 215 CR 450. *Nourafchan* was disapproved in *Minelian* as to whether a statute of limitations operates when an offset of excess rent is applied to future months' rent, but is still good law as to the notice asking for only the rent actually due. If the notice seeks rent for specific named months, and the tenant can show that those specific months have been paid by checks or money orders designating that the funds must be applied to the specific months, the notice may be defective. CC §1479. This is so, even if rent is owed for other, earlier months. Landlord attorneys should argue that the law does not require that a 3-day notice identify the months for which the rent is outstanding; therefore, any reference to specific dates is superfluous and, if the amount demanded is correct, the notice should be declared valid. See CCP §1161(2).

A problem of proof may arise when the tenant pays rent in cash, but the landlord refuses to give receipts. Civil Code §1499 provides that a debtor may require a written receipt for cash paid to the creditor.

NOTE: Under CCP §1161(2), if a landlord does not supply a tenant with an address where rent can be delivered personally by the tenant, then it will be *conclusively* presumed that the landlord received the rent if a tenant can show proof of mailing. It is therefore essential that a landlord have a place where rent can be personally delivered by the tenant to avoid this presumption.

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B. Breach of Warranty of Habitability in Nonpayment of Rent Cases

§12.36 1. General Elements of Defense

If a residential unlawful detainer action is based on nonpayment of rent, the tenant may defend by alleging that the landlord has breached the implied warranty of habitability. The tenant has the burden of proof (see §§12.53-12.54A). The defense is based on the theory that the covenants of the lease are interdependent, *i.e.,* if the landlord breaches the implied warranty of habitability, the tenant is relieved of the obligation to pay rent. *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704. See §3.35. Breach of the implied warranty is an affirmative defense; compliance with the warranty is not an element of the landlord's case. *De La Vara v Municipal Court* (1979) 98 CA3d 638, 159 CR 648. If the tenant proves a breach of the warranty of habitability, however, the tenant is entitled to possession and a conditional judgment (including a rent reduction) in his/her favor. *Hyatt v Tedesco* (2002) 96 CA4th Supp 62, 117 CR2d 921. The court in *Hyatt* ruled that whether such a breach is "substantial" is a matter of law and can be determined by an appellate court. For discussion of proving the elements of a breach of the implied warranty defense, see §§3.24-3.31. On procedures for invoking and rebutting breach of the implied warranty in an unlawful detainer action, see §§3.22-3.23. On orders that the rent be paid into court while the defense is being litigated, see §§3.34, 11.56-11.60. If the tenant proves a defense of breach of the warranty of habitability, the court is required to make the findings required by CCP §1174.2 and to give the tenant 5 days from the date of judgment to pay the back rent at the rate set by the court. *Espinoza v Calva* (2008) 169 CA4th 1393, 87 CR3d 492.

Under CC §1942.3, in any unlawful detainer action, the tenant may establish a presumption of breach of the statutory habitability requirements (see CC §§1941-1941.1) if there has been no abatement of conditions for 60 days after a notice to abate nuisance or repair substandard conditions has been issued to the landlord by a public official. On the interaction between the statutory habitability requirements and the implied warranty of habitability, see §§3.24-3.25. On the differences in remedies, see §§3.15A, 3.32-3.41.

If breach of the implied warranty of habitability is alleged as a defense in an unlawful detainer action, failure to provide for it specifically in any settlement may mean that the tenant is still free to allege the breach in a subsequent action for damages. See *Landeros v Pankey* (1995) 39 CA4th 1167, 46 CR2d 165, discussed in §3.35.

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§12.37 2. Adjudication of Reasonable Rent

If the tenant fails to prove the landlord's breach of the implied warranty of habitability (see §12.36), judgment is entered for the landlord for possession and damages. If the tenant proves that the landlord breached the warranty, the trier of fact must determine a "reasonable rent" for the premises (*i.e.,* contract rent minus damages from the breach; see §§3.36-3.41), and must allow the tenant a reasonable time to pay this rent as a condition to retaining possession of the premises. See *Espinoza v Calva* (2008) 169 CA4th 1393, 87 CR3d 492; *Lee v Vignoli* (1979) 98 CA3d Supp 24, 160 CR 79. See also *Golden Gateway Ctr. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1999) 73 CA4th 1204, 87 CR2d 332 (discomfort during repairs to unit does not entitle tenant to reduction under rent control law). If the tenant fails to pay the determined "reasonable rent," the landlord may obtain a writ of possession and evict the tenant. If the tenant proves the breach, the court may retain jurisdiction and order the landlord to correct the breaches of the warranty of habitability. CCP §1174.2(a)(3).

See §§13.36, 13.40 for discussion of CCP §1174.2, which directs that the landlord is the prevailing party when a tenant who successfully establishes the defense of breach of any warranty of habitability fails to pay the reasonable rental value, as determined by the court, within a 5-day period.

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§12.38 C. Retaliatory Eviction for Tenant's Exercise of Legal Rights

The tenant may defend against an unlawful detainer action by alleging that the landlord's motive in bringing the action is to retaliate against the tenant for some legally protected conduct. (For extensive discussion of the retaliatory eviction defense, see §§8.109-8.136.)

The basic retaliatory eviction statute (CC §1942.5(a)) provides that a landlord who retaliates against a tenant for complaining about the tenantability of the premises may not recover possession within 180 days after the date of the oral complaint if the tenant is not in default on rent payments. Under CC §1942.5(a), the tenant's attorney must prove as three facts the following:

(1) The tenant complained to an appropriate agency regarding the tenantability of the premises, or otherwise exercised tenants' rights under CC §§1940-1954.1;

(2) The tenant is not in default in rent payments; and

(3) The landlord retaliated against the tenant within 180 days of the tenant's complaint by attempting to recover possession of the subject property.

If the tenant proves those basic facts, it appears that the tenant has shown the eviction to be retaliatory. For an extensive discussion of CC §1942.5, see §§8.110-8.117.

Under CC §1942.5(c), the tenant generally bears the burden of producing evidence that the landlord's conduct was in retaliation for the tenant's participation in a tenants' association. See §8.130. In *Western Land Office, Inc. v Cervantes* (1985) 175 CA3d 724, 741, 220 CR 784, the court rejected a tenant's contention that CC §1942.5 creates a rebuttable presumption of retaliation and formulated the following procedure for retaliation cases (175 CA3d at 742):

- The tenant must prove the "landlord's retaliatory motive by a preponderance of the evidence."
- "If the landlord takes action for a valid reason not listed in the unlawful detainer statutes, he must give notice to the tenant of the ground upon which he proceeds." This requirement is taken from CC §1942.5(e), but the court failed to clarify if and when the notice must specify a reason. The apparent meaning of the phrase, "not listed in the unlawful detainer statutes" is that when the eviction is by means of a 30-day notice under CC §1946, no reason for giving notice or for filing an unlawful detainer action, other than the intent to terminate the tenancy, is required. Code of Civil Procedure §1161(1)-(5) lists a series of eviction grounds. Included is the landlord's right to evict a tenant whose tenancy has been terminated under CC §1946 but who has failed to move out. CCP §1161(5).
- If the tenant controverts the reason given in the notice, the landlord must prove the truth of the stated reason by a preponderance of the evidence.

Proof of the existence of a valid reason to evict, however, does not necessarily prove good faith, *i.e.,* that the landlord is seeking to evict because of the valid reason rather than to punish the tenant for his or her exercise of some right. Therefore, even if the landlord proves the existence of a valid reason, the tenant may prove retaliation by showing that the landlord does not seek to evict in good faith. In an eviction under the Ellis Act (Govt C §§7060-7060.7) (see §7.64G), the rule is somewhat different. See *Drouet v Superior Court* (2003) 31 C4th 583, 3 CR3d 205. In *Drouet,* the supreme court held that if the tenant contends under CC §1942.5 that the landlord's intent to take the unit off the rental housing market is retaliatory, the landlord must establish by a preponderance of the evidence the existence of a bona fide intent to withdraw the property from the rental market. If the landlord is able to convince the trier of fact of a bona fide intent to withdraw the property, the landlord may evict the tenants and withdraw the property despite having a retaliatory motive. For a discussion of the application of the common law doctrine of retaliatory eviction to commercial tenancies, see California Eviction Defense Manual §19.25 (2d ed Cal CEB 1993).

PRACTICE TIP: If the landlord has a history of tenant complaints about habitability issues and is attempting to terminate the tenancy of a complaining tenant, or if the tenant has formed a tenant association or "asserted any other right" within 180 days of the serving of a termination notice, it is advisable that the landlord include the

reason for eviction in the notice. Although this changes the initial burden of proof in the action, it avoids the confusion of CCP §1942.5(e).

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VIII. AMENDMENTS TO CONFORM TO PROOF

§12.39 A. Liberality in Granting Amendments

When evidence produced at trial to support a claim or defense is inconsistent with allegations in the party's pleading, the inconsistency may be regarded as a material variance (CCP §469), an immaterial variance (CCP §470), or a failure of proof (CCP §471). For material or immaterial variances, the court may order the pleading amended to conform to the proof. CCP §§469-470. A complaint or answer may be amended in this manner at any stage of trial. Normally, the courts are liberal in granting such amendments, but if an amendment considered to be a material variance prejudices the other party, the amendment may be granted on "such terms as may be just." CCP §469. See, *e.g., Glaser v Meyers* (1982) 137 CA3d 770, 777, 187 CR 242 (even amendment that adds new and separate cause of action is allowed if based on same general set of facts and does not prejudice party against whom it is offered). But an amendment to a complaint may be denied when it adds a new cause of action not based on the same general facts, and the tenant will be prejudiced. *North 7th St. Assocs. v Constante* (2001) 92 CA4th Supp 7, 111 CR2d 815. See also *Garcia v Roberts* (2009) 173 CA4th 900, 93 CR3d 286 (amendment proposed during trial by original plaintiff's successor to allege written lease option contract in action originally brought on oral contract unfairly prejudiced defendants because original plaintiff had denied existence of written lease in deposition and could not testify at trial); *Babcock v Antis* (1979) 94 CA3d 823, 156 CR 673 (failure of complaint to allege that amounts prayed for were within municipal court's jurisdiction, correctable by amendment to conform to proof); *Feigin v Kutchor* (1951) 105 CA2d 744, 234 P2d 264 (when issue fully litigated at trial, trial court had power and duty to permit amendment to answer denying plaintiff's right to possession). See generally California Trial Practice: Civil Procedure During Trial §§18.103-18.123 (3d ed Cal CEB 1995).

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.40 B. Scope of Amendment Under CCP §1173; Supplemental Versus Amended Complaint

§12.40 B. Scope of Amendment Under CCP §1173; Supplemental Versus Amended Complaint

Counsel should be aware of CCP §1173, which provides:

> When it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs ….

One court ruled that §1173 does not apply to motions to amend made before an unlawful detainer trial commences. In *North 7th St. Assocs. v Constante* (2001) 92 CA4th Supp 7, 111 CR2d 815, for example, the Los Angeles Superior Court, Appellate Department, held that the trial court abused its discretion in permitting a landlord to orally amend an unlawful detainer action immediately before trial to add a 3-day notice to pay rent or quit when the original case was based on a 30-day notice to terminate tenancy. In allowing the landlord to state a new and different cause of action, the trial court had failed to give the tenant the opportunity to investigate the new allegation or call rebuttal witnesses. Additional defenses were available to the tenant under the new allegation of nonpayment of rent. The appellate court held that §1173 only affects the discretion of the judge to deny amendment or grant a continuance after evidence is admitted. At the time that the motion to amend the complaint was made and granted, there was no evidence before the court, as trial had not yet commenced.

In motions made under §1173, the requirement that the court allow the landlord to amend its complaint is softened by the tenant's right to a continuance if the tenant shows good cause. Few cases have interpreted §1173, and it is unclear just how far it extends in permitting the plaintiff to amend the complaint to conform to the proof.

From a tenant perspective, the section permits minor amendments, such as an amendment to change the date of service of a 3-day notice to pay rent or quit, provided that the amended date is not fatal to the cause of action by showing that the court action was filed prematurely (*i.e.*, before the 3-day period expired). Beyond that, it is unclear what types of amendments §1173 authorizes. Arguably, a plaintiff should not be able to allege an entirely different cause of action, *e.g.*, one based on a 30-day notice, after the tenant successfully proved defenses to an action based on a 3-day notice if the tenant can show that at least one defense to the amended cause of action would have been entirely different (see authorities discussed in §§8.28, 8.78, 9.44). Under *Glaser v Meyers* (1982) 137 CA3d 770, 187 CR 242 (see §12.39), a cause of action based on a different notice would not be based on the same facts and could prejudice the tenant.

From the landlord perspective, it is arguable that by expressly providing for actions "other than the offense charged" the statute should allow for alternative causes of action and theories based on the facts that have been proven, or can be proven at trial. Merely stating the general rule regarding amendments (see §12.39) does not answer the threshold question of whether varying theories of unlawful detainer are separate causes of action or, instead, just alternative means of pleading the same cause of action for unlawful detainer. Even if each separately accruing basis for unlawful detainer is deemed a separate cause of action, §1173 arguably was intended to supersede general "amendment to conform to proof" procedures and differs from "general" law.

Matters occurring after the complaint has been filed may generally be raised only by a supplemental complaint, filed after a noticed motion, and not by an amendment to the original complaint to conform to proof. *Earp v Nobmann* (1981) 122 CA3d 270, 175 CR 767. Although a supplemental complaint adds additional matters to the original complaint, it cannot be used to add causes of action that have not accrued at the time the original complaint was filed. 5 Witkin, California Procedure, *Pleading* §1250 (5th ed 2005). Evidence of a notice not alleged in the complaint should be subject to exclusion under the objection that it would be irrelevant, subject of course to the above discussion of what can properly be raised by way of amendment to a complaint.

Counsel for the landlord might urge the court to allow amendment to state a new cause of action under CCP §1173 based on an offer of proof of the service of the notice. The tenant can counter by attempting to show prejudice. If the service date indicates that the tenant was not given the full 3-day period to pay rent, that fact is a defense to the action. See §§8.43-8.45, 9.44. If the notice was not received, the failure of service can be raised as a substantive defense. See §§8.24, 9.6.

From a tenant perspective, new causes of action should not be added to the case at the time of trial. "Amendments" to a complaint are made to allege facts that existed when the original complaint was filed. CCP §473. A landlord may "supplement" the complaint with leave of court to allege relevant facts that occurred after the original complaint was filed, but the supplemental complaint cannot be used to allege facts constituting an entirely new cause of action. CCP §464(a). If the landlord acquires a new cause of action after filing the first unlawful detainer, neither an amendment to the complaint nor a supplemental complaint is applicable. Instead, the landlord must serve the new notice, wait until the time expires, then file a new unlawful detainer case. The landlord may, of course, move to consolidate the two cases for trial.

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IX. JURY INSTRUCTIONS

§12.41 A. General Sources of Jury Instructions

Jury instructions are designed to inform the jurors of the law applicable to the case, and to assist them in the deliberation process. Various general instructions provide guidance to the jury on the nature of direct and circumstantial proof, the distinction between formal proof and counsels' argument, the credibility of witnesses, and the like. Because these subjects are commonly considered to be noncontroversial, the pattern instructions in California Civil Jury Instructions are routinely used. These instructions are usually referred to as CACI from the Judicial Council's California Civil Jury Instructions; or as BAJI, the acronym from the earlier title (Book of Approved Jury Instructions). On jury instructions generally, see California Trial Practice: Civil Procedure During Trial, chap 20 (3d ed Cal CEB 1995). On CACI and BAJI instructions and how to request them, see Civ Proc During Trial §§20.12-20.19.

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§12.42 B. Specific Instructions for Unlawful Detainer Cases

California Civil Jury Instructions 4300-4341 specifically apply to unlawful detainer actions. In December 2007, CACI VF-4300-VF-4302 were added as general and specific verdict forms for use in unlawful detainer actions. The CACI do not cover all unlawful detainer situations. The Judicial Council did not mandate the use of CACI to the exclusion of other jury instructions in any event. The CACI are designated the "official instructions for use" in California state courts and are recommended for use unless a judge "finds that a different instruction would more accurately state the law and be understood by jurors." Cal Rules of Ct 2.1050(a), (e).

The Book of Approved Jury Instructions (BAJI) is not geared to the specific facts of unlawful detainer cases or to the law applicable to those facts. Because each party has the right to have the jury instructed on all theories of the party's case that are supported by the pleadings, and all evidence or any inferences that may properly be drawn from the evidence (see California Trial Practice: Civil Procedure During Trial §§20.7-20.8 (3d ed Cal CEB 1995)), the parties to an unlawful detainer action must prepare special instructions on their respective legal theories, unless the trial judge rules that one or more of the CACI instructions will be given.

Required instructions normally cover the burden of proof (based on BAJI 2.60, CACI 200), the required elements of the landlord's case (see §§12.19-12.34, 12.46-12.52), and the tenant's defenses (see §§12.35-12.38, 12.53-12.63C). Because of their frequent use and complexity, sample instructions on the defenses of breach of the implied warranty of habitability (see §§3.24-3.48) and retaliatory eviction (see §§8.109-8.136) are presented in §§12.53-12.59 and 12.60-12.63, respectively. Counsel may need to draft specific instructions to cover other potential defenses.

For additional instructions applicable to unlawful detainer actions, see California Eviction Defense Manual, App II (2d ed Cal CEB 1993).

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§12.43 C. Procedure for Filing Proposed Instructions; Filing Deadlines

In civil cases, the right to have the jury instructed on appropriate factual and legal theories is conditioned on the parties' filing proposed instructions before the first witness is sworn. CCP §607a; see *Agarwal v Johnson* (1979) 25 C3d 932, 950, 160 CR 141. (On procedural requirements generally, see California Trial Practice: Civil Procedure During Trial §§20.12-20.36 (3d ed Cal CEB 1995).) A party who fails to submit specific proposed instructions may not argue on appeal that the trial court's failure to instruct on that issue was error. *Willden v Washington Nat'l Ins. Co.* (1976) 18 C3d 631, 135 CR 69. Although the court's complete failure to instruct on a crucial issue may be reversible error (see *Agarwal v Johnson, supra*), counsel should file proposed special instructions to support all factual and legal theories. In addition, although trial courts have the power to modify or correct proposed instructions that they consider to be deficient, they generally are under no duty to do so. See Civ Proc During Trial §§20.37-20.41.

Counsel should be thoroughly familiar with filing deadlines in the court in which they are scheduled to appear. Local rules or customs may require that the parties file or exchange proposed instructions before trial begins, or may postpone the filing of instructions until some later time, *e.g.,* when the plaintiff rests his or her case. See Civ Proc During Trial §20.34. Because unanticipated issues may arise at trial, the parties have the right to present additional instructions as warranted by the evidence. CCP §607a. The opportunity to file additional instructions, however, is no excuse for not filing the initial set of proposed instructions at the appropriate time.

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§12.44 D. Format

California Rules of Court 2.1055 requires that each set of proposed jury instructions have a cover page containing the caption of the case and stating the name of the party proposing the instructions, and an index listing all proposed instructions. In the index, approved jury instructions (*i.e.,* Judicial Council's California Civil Jury Instructions—CACI) must be identified by their reference numbers, and special instructions must be numbered consecutively. The index must contain a checklist that the court may use to indicate whether the instruction was given as proposed, given as modified, refused, or withdrawn. Each proposed instruction must be on a separate page or pages, contain the instruction number and title of the instruction at the top of the first page of the instruction, and be prepared without any blank lines or unused bracketed portions. The instruction must be in a form suitable to allow it to be read directly to the jury. Special instructions require a citation of authorities at the bottom of the page that support the specific instruction; approved instructions do not require any citation. No local court form or rule may depart from the requirements of Rule 2.1055.

Although the form and format of preparing jury instructions for submission to the court are governed exclusively by Cal Rules of Ct 2.1055, local rules or the trial court may determine the form and format of jury instructions that are "presented to the jury." Cal Rules of Ct 2.1055(a)(2), (e). All proposed instructions must be printed on recycled paper. Cal Rules of Ct 2.101. The instructions must be in the form and format for court papers specified in Cal Rules of Ct 2.100-2.119. See Cal Rules of Ct 2.1055(b). See generally California Trial Practice: Civil Procedure During Trial, chap 20 (3d ed Cal CEB 1995).

PRACTICE TIP: Always review Cal Rules of Ct 2.1050 and 2.1055 before preparing proposed jury instructions; the rules are frequently amended. The Judicial Council instruction forms have a special box for designating a case as a limited civil case. On attorney-drafted pleadings, the logical place would be underneath the title of the court. Because the case numbers used in limited civil cases may differ from those in unlimited civil cases, no confusion, to the knowledge of this author, has resulted nor has any of her pleadings been refused for failure to include the words "Limited Civil Case."

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.45 E. Sample Jury Instructions

§12.45 E. Sample Jury Instructions

Sections 12.46-12.63C contain sample jury instructions covering allocation of the burden of proof, elements of a cause of action for unlawful detainer, and principal affirmative defenses.

WARNING: Because the facts of the particular case play the primary role in determining the actual content of jury instructions, these sample instructions are printed here to illustrate possible approaches, and are not intended as forms that may be used in every case. Using these samples as a guide, counsel should draft proposed instructions tailored to the facts of the case.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.46 1. Form: Sample Instruction on Burden of Proof, Preponderance of Evidence

§12.46 1. Form: Sample Instruction on Burden of Proof, Preponderance of Evidence

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§12.46-12.48.

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BURDEN OF PROOF; PREPONDERANCE OF EVIDENCE

In this action, Landlord (who is the plaintiff in this action) has the burden of establishing by a preponderance of the evidence all facts necessary to prove the following issues:

1. That a landlord-tenant relationship was created between the Landlord and the Tenant (who is the defendant in this action);

2. That the landlord-tenant relationship was legally terminated by Landlord;

3. That Tenant remains in possession of the premises;

4. The amount of rent owed by Tenant up to and through the date that the relationship was terminated; and

5. The amount of damages suffered by Landlord because of Tenant's unlawful remaining in possession. These damages are calculated from the date that the unlawful detainer of the premises began, *i.e.,* the day following the date that the notice terminated the tenancy, through the date of trial.

[*Add If breach of warranty of habitability defense is raised*]

In this action, Tenant has the burden of establishing by a preponderance of the evidence all facts necessary to prove the following issues:

A. That Landlord breached the implied warranty of habitability;

B. That Tenant was injured because of that breach; and

C. The amount of damages suffered by Tenant as a result of the breach.

[*Continue*]

A preponderance of the evidence is evidence that has more convincing force and greater probability of truth, when weighed against the evidence opposed to it. If the evidence is evenly balanced, so that the evidence on neither side of an issue preponderates, then your finding on that issue must be against the party who has the burden of proving it.

In determining whether an issue has been proved by a preponderance of the evidence, you must consider all the evidence bearing on that issue, regardless of who produced it.

Comment: See format requirements in §12.44. This sample is based on BAJI 2.60 (CACI 200), but is substantially modified for use in unlawful detainer actions. Further modification may be required under CC §1942.3 if the defense is based on breach of statutory habitability requirements (see CC §§1941-1942.4) in addition to, or instead of, the implied warranty of habitability. For discussion see California Eviction Defense Manual §§14.26, 15.26 (2d ed Cal CEB 1993).

This instruction is intended to apply to the usual case in which the parties are landlord and tenant. If the defendant is an employee, agent, or licensee of the plaintiff (see CCP §1161(1)), or the plaintiff claims to have acquired the property by foreclosure (see CCP §§1161a, 1161b), the first two numbered paragraphs on the landlord's burden of proof would have to be changed. See *Cheney v Trauzettel* (1937) 9 C2d 158, 160, 69 P2d 832 (plaintiff-purchaser must

prove foreclosure sale complied with statutory law and deed of trust, followed by purchase at sale), discussed in §§8.68-8.68E, 10.54.

For an introductory jury instruction approved by the Judicial Council, see CACI 4300. On the elements of the landlord's case, see §12.19. On the implied warranty of habitability defense, see §§3.24-3.48. For further instructions on habitability, see §§12.53, 12.59. For sample instructions on the burden of proof when the landlord's retaliatory motive is raised as a defense, see §§12.62-12.63.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.47 2. Form: Sample Instruction on Facts Plaintiff Must Establish

§12.47 2. Form: Sample Instruction on Facts Plaintiff Must Establish

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§12.46-12.48.

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FACTS PLAINTIFF MUST ESTABLISH

In this action for unlawful detainer, by which Landlord seeks to recover possession of the premises together with rent and damages, Landlord must establish the following facts by a preponderance of the evidence introduced at trial:

1. Landlord is the _ _[*e.g., owner, manager, lessee*]**_ _ of the premises;**

2. Landlord and Tenant entered into the relationship of _ _[*e.g., landlord and tenant, sublessor and sublessee*]**_ _ by _ _**[*executing/signing*]**_ _ _ _**[*an oral/a written*]**_ _ _ _**[*lease/rental agreement*]**_ _ concerning the premises owned by Landlord;**

3. Tenant took possession of the premises under the _ _[*lease/rental agreement*]**_ _;**

[*Add if action is based on nonpayment of rent*]

4. Under the _ _[*lease/rental agreement*]**_ _ the agreed-on monthly rent for the premises was $_ _**[*amount*]**_ _.**

5. Tenant is in possession of the premises at the present time.

[*Continue*]

[*Add if 30-day/60 day notice was served*]

[6.] Landlord served or caused to be served on Tenant, in a legally sufficient manner, a properly worded _ _[*30-day/60-day*]**_ _ notice terminating the landlord-tenant relationship;**

[7.] After expiration of the term of the _ _[*30-day/60-day*]**_ _ notice, Tenant refused to vacate the premises; and**

[*Add if 3-day notice was served*]

[8.] After Tenant's failure to pay the agreed-on rent on its due date, Landlord served or caused to be served on Tenant, in a legally sufficient manner, a properly worded 3-day notice to pay rent or quit the premises;

[9.] On expiration of the 3-day period, Tenant neither paid the amount of rent demanded in the notice nor vacated the premises; and

[*Continue*]

A tenant of real property is guilty of unlawful detainer when:

A. The Tenant continues in possession of the premises after the landlord-tenant relationship has been legally terminated _ _[*e.g., after 30 days from valid service of a 30-day notice/after 60 days from valid service of a 60-day notice)*]**_ _; or**

B. The Tenant has been properly served with a valid 3-day notice to pay rent or quit, but continues in possession of the premises after failing to pay the rent within the specified 3-day period.

Comment: See format requirements in §12.44. See CCP §1161(1)-(2). This instruction provides alternative language

for unlawful detainer actions based on termination of a month-to-month tenancy (see §8.69), or termination for nonpayment of rent (see §8.26). This instruction must be adapted to fit the facts of the particular case, because it must include all disputed elements of the cause of action. This sample instruction is intended to apply to the usual case in which the parties are landlord and tenant. If the defendant is an employee, agent, or licensee of the plaintiff (see CCP §1161(1)), or the plaintiff claims to have acquired the property by foreclosure (see CCP §§1161a, 1161b), the first two to four numbered paragraphs on the landlord's burden of proof would have to be modified. See *Cheney v Trauzettel* (1937) 9 C2d 158, 160, 69 P2d 832. For similar jury instructions approved by the Judicial Council, see CACI 4302, 4306.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.48 3. Form: Sample Instruction on Service of Notices; Computation of Time

§12.48 3. Form: Sample Instruction on Service of Notices; Computation of Time

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§12.46-12.48.

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SERVICE OF NOTICES; COMPUTATION OF TIME

For a _ _[*30-day termination notice/60-day termination notice/3-day notice to pay rent or quit*]_ _ to terminate the landlord-tenant relationship effectively, it must be served in a legally sufficient manner, *i.e.,* by one of the following methods:

1. Notice server delivers the notice to Tenant personally;

2. If Tenant cannot be found at his or her residence or usual place of business, notice server leaves a copy with a person of suitable age and discretion at either place, and mails a copy to Tenant at his or her residence; or

3. If Tenant's place of residence or business cannot be ascertained, or a person of suitable age and discretion cannot be found there, notice server posts a copy in a conspicuous place on the premises, delivers a copy to a person residing on the premises (if such a person can be found), and mails a copy to Tenant at the premises.

[*Add only if 30-day or 60-day notice*]

[4.] By sending the notice by certified or registered mail addressed to the Tenant.

Comment: If proper service of notice is in dispute, it may be necessary to tailor the instruction to the facts in dispute (*e.g.,* the requisites of personal service or whether the landlord attempted personal service before using substituted or conspicuous service). On requisites of service of the notice, see §§8.62-8.67, 8.74, 8.76. Note that actual receipt of an improperly served notice may cure any defects in its service. See §8.66.

[*Continue*]

[*Add one of the following alternatives on when the 3-day notice period begins to run*]

[*Alternative 1: Time runs from tenant's receipt of notice*]

When a 3-day notice to pay rent or quit is served by either method 2 or 3 above, the 3-day period in which Tenant may pay the rent demanded, and remain in possession of the premises, begins to run on the date that Tenant actually receives the mailed copy of the notice.

[*Alternative 2: Time runs from date notice mailed*]

When a 3-day notice to pay rent or quit is served by either method 2 or 3 above, the 3-day period in which Tenant may pay the rent demanded, and remain in possession of the premises, begins to run on the date that the notice is left or posted and mailed.

Comment: There is a split of decisional law among the appellate districts, and uncertainty in the statutes, on the issue of when the time begins to run on a 3-day notice not personally served. Under a strict application of CCP §1013(a), which was rejected in *Losornio v Motta* (1998) 67 CA4th 110, 78 CR2d 799, the 3-day period in which tenant may pay the rent demanded and remain in possession of the premises begins to run 5 days after the mailing of the 3-day notice, for a total of 8 days. Compare *Davidson v Quinn* (1982) 138 CA3d Supp 9, 188 CR 421 (time begins to run when tenant actually receives notice), with *Losornio v Motta, supra,* and *Walters v Meyers* (1990) 226 CA3d

Supp 15, 277 CR 316 (time begins to run on date notice posted and mailed). See discussion in §§8.29, 8.65. The above options must be modified if the action is based on a 30-day notice. See §§8.69, 8.74, 8.77.

[*Continue*]

Service of a notice on one of two or more Cotenants also constitutes service of the same notice on the other Cotenants, if it is addressed to them.

Comment: See §§8.67, 8.76. When two or more tenants hold their interest in the premises jointly or in common, service of a notice to quit on one terminates the tenancy of all cotenants. *University of S. Cal. v Weiss* (1962) 208 CA2d 759, 25 CR 475. See also *Four Seas Inv. Corp. v International Hotel Tenants' Ass'n* (1978) 81 CA3d 604, 146 CR 531.

In determining the date on which a landlord-tenant relationship was terminated, you must exclude the date on which the notice was served on Tenant and begin counting on the day after service of the notice. If the last day of the notice period falls on a holiday, Tenant's time to comply with the notice is extended to include the next day that is not a holiday. The term "holiday" includes Saturdays and Sundays as well as all other days officially designated as holidays.

Comment: See CCP §§10, 12-13. See also §§8.28-8.29, 8.42, 8.65, 8.77. See jury instruction format requirements in §12.44. For similar instructions approved by the Judicial Council, see CACI 4303, 4305, 4307.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/ 4. Rent and Damages/§12.49 a. Form: Sample Instruction on Calculation of Rent and Damages

4. Rent and Damages

§12.49 a. Form: Sample Instruction on Calculation of Rent and Damages

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§12.49-12.52.

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CALCULATION OF RENT AND DAMAGES

Landlord claims to be entitled to recover both unpaid rent and damages. The amounts of rent and damages, if any, to which Landlord is entitled are computed _ _[*before setoff, if there has been a breach of the implied warranty of habitability*]_ _ in accordance with the following instructions:

The landlord-tenant relationship terminates under the law on the date of expiration of a _ _[*3-day notice to pay rent or quit/30-day termination notice/60-day notice*]_ _.

"Rent" is the sum due to Landlord under the terms of the lease or rental agreement before termination of the landlord-tenant relationship and as long as the relationship remains in existence. Rent is the consideration that Tenant has agreed to pay to Landlord for occupancy and use of the premises, plus the amount of any increase to which Tenant has acquiesced by remaining on the premises after the effective date of a notice of a rent increase.

The amount of rent to which Landlord is entitled, which must be awarded if you find in Landlord's favor under these instructions, is the sum that has accrued as of the date on which a valid 3-day notice to pay rent or quit expired.

When Tenant fails to pay rent on the due date, Landlord may serve on Tenant a 3-day notice to pay rent or quit. If Tenant fails both to pay the rent and to leave the premises, Landlord may recover in an unlawful detainer action both the amount of rent accrued as of the date on which a valid notice to pay rent or quit expired, and damages.

"Damages" is the amount that Tenant is obligated to pay to Landlord after the landlord-tenant relationship has been terminated, *i.e.,* after expiration of a _ _[*3-day notice to pay rent or quit/30-day termination notice/60-day termination notice*]_ _. As used in these instructions, damages means the reasonable or fair rental value of the premises, *i.e.,* the reasonable value for occupancy and use of the premises for the period commencing on the first day on which termination of the relationship is effective, and ending on the date of the jury's verdict.

Landlord must establish, by a preponderance of the evidence, (1) the rate of rent that Tenant was obligated to pay by the terms of the lease or rental agreement, including any valid modifications of that agreement; and (2) the fair rental value of the premises during the period for which Landlord claims damages.

"Fair rental value" for purposes of computing damages is not necessarily the same as the rent on which the parties agreed in the lease or rental agreement, but may be a greater or lesser amount.

In determining the fair rental value of the premises, you may consider the opinion of value given by their owner. You may also consider the opinion of any other witness who has testified to the value of the premises, and who has knowledge of the rental value of similar rental units in the area in which the premises are located.

Comment: On the burden of proof, see *Haig v Hogan* (1947) 82 CA2d 876, 187 P2d 426. The portion of this instruction relating to proof of rent must be modified or deleted if the unlawful detainer action is based on anything other than a rent default by the tenant. See CCP §1174(b). On the distinction between fair rental value and the contract rent, see *Harris v Bissell* (1921) 54 CA 307, 202 P 453; *Glouberman v Coffey* (1955) 138 CA2d Supp 906, 292 P2d 681.

See also the discussion in §12.28. On the ability of a property owner to testify about the fair rental value, see Evid C §813. For further instructions on this point, see §12.51. See also the discussion in §13.19. See jury instruction format requirements in §12.44. For a similar instruction approved by the Judicial Council, see CACI 4340. See also BAJI 11.74, which deals with the evaluation of fair market value of a property based on "highest and best use." For a specific jury instruction on establishing a setoff from the rent for the tenant's cost of repairs made under the CC §1942 repair and deduct remedy (see §3.12) before service of the 3-day notice to pay rent or quit, see CACI 4326.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.50 b. Form: Sample Instruction on Definition of 'Fair Rental Value' for Assessing Damages

§12.50 b. Form: Sample Instruction on Definition of "Fair Rental Value" for Assessing Damages

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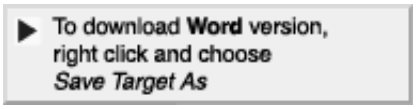

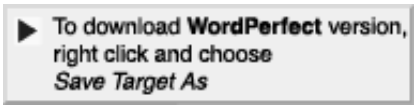

DAMAGES: DEFINITION OF "FAIR RENTAL VALUE"

The "fair rental value" of the premises is the highest price on the date of valuation that would be agreed on (1) by a landlord who is willing to rent, but under no necessity or obligation to do so; and (2) by a prospective tenant who is ready, willing, and able to rent, but under no necessity to do so—each having full knowledge of the uses and purposes for which the property is reasonably adaptable and available.

The fair rental value of the premises does not relate to their potential worth to Landlord for speculation or possible use.

Comment: This instruction is adapted from BAJI 11.73, 11.75. See §§12.27-12.30. See jury instruction format requirements in §12.30. For a similar instruction approved by the Judicial Council, see CACI 4340. See also BAJI 11.74, which addresses the evaluation of fair market value of a property based on "highest and best use."

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.51 c. Form: Sample Instruction on Witnesses' Opinions Concerning Fair Rental Value

§12.51 c. Form: Sample Instruction on Witnesses' Opinions Concerning Fair Rental Value

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WITNESSES' OPINIONS CONCERNING FAIR RENTAL VALUE

You must determine the fair rental value of the premises only from the opinions of witnesses who have been permitted by the Court to express their opinions on the rental value. Thus, in assessing damages, you may not find that the rental value of the premises is either less or more than that to which such witnesses have testified.

The owner of the property, and any witness who has knowledge of rental values in the area in which the premises are located, may state an opinion of the rental value and the reasons for his or her opinion. You must consider evidence that has been received from such witnesses regarding the reasons for their respective opinions of rental value, and all other evidence concerning the premises and other similar property, for the limited purpose of enabling you to understand and weigh the testimony of the witnesses.

You should consider each witness's opinion by weighing his or her qualifications and reasons for the opinion. Give each opinion the weight to which you consider it to be entitled. You must resolve any conflict in the testimony of the witnesses by weighing each opinion against the others, taking into consideration the reasons given for the opinion; the facts relied on in forming it; and the witness's relative credibility, expertise, skill, knowledge, experience, training, and education.

Comment: See *San Bernardino County Flood Control Dist. v Sweet* (1967) 255 CA2d 889, 63 CR 640; *City of Stockton v Ellingwood* (1929) 96 CA 708, 275 P 228; Jefferson's California Evidence Benchbook §29.1 (3d ed CJA-CEB 1997). For discussion, see §§12.27-12.30. See jury instruction format requirements in §12.44.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.52 d. Form: Sample Instruction on Statutory Damages; Definition of Malice

§12.52 d. Form: Sample Instruction on Statutory Damages; Definition of Malice

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STATUTORY DAMAGES; "MALICE"

If Tenant is found guilty of unlawful detainer, and actual malice is shown in Tenant's holding over of the premises, Landlord may be awarded statutory damages of up to $600 in addition to actual damages.

Landlord has the burden of proving by a preponderance of the evidence that Tenant held over the premises with malice. "Malice" means a willingness to vex, harass, annoy, or injure another person. To be malicious, the conduct must be willful, intentional, deliberate, and obstinate. Malice may be shown by direct evidence of declarations of hatred or ill will, or by indirect inferences from acts and conduct (*e.g.,* by a showing that Tenant's conduct was willful and intentional, and undertaken in reckless disregard of the possible results).

Comment: On recovery of statutory damages authorized by CCP §1174(b), see §§12.32-12.33. Malice is not defined in §1174(b). For a definition of "malice," see *Brewer v Second Baptist Church* (1948) 32 C2d 791, 197 P2d 713; *Dietrich v Litton Indus., Inc.* (1970) 12 CA3d 704, 90 CR 856. See also authorities cited in §§12.32-12.33.

For an instruction specifically approved for unlawful detainer actions by the Judicial Council that defines "malice" when §1174(b) applies, see CACI 4341, which has a different definition of "malice" from the above quoted instruction. It states: "A tenant acts with malice if he or she willfully continues to occupy the property with knowledge that he or she no longer has the right to do so." The Judicial Council did not mandate the use of CACI to the exclusion of other jury instructions. The CACI are designated the "official instructions for use" in California state courts and are recommended for use unless a judge "finds that a different instruction would more accurately state the law and be understood by jurors." Cal Rules of Ct 2.1050(a), (e).

For another definition of "malice" arising from the general punitive damages statute, see CACI 3940, which also has a different definition of "malice" from the above quoted instruction and states: "Malice" means that [name of defendant] acted with intent to cause injury or that [name of defendant]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

If the conduct on which the landlord relies in seeking statutory damages falls under constitutional guaranties (*e.g.,* freedom of speech and association), the landlord might be held to a heavier burden of proof, *i.e.,* "clear and convincing evidence." See *People v Thomas* (1977) 19 C3d 630, 637, 139 CR 594; Jefferson's California Evidence Benchbook §45.1 (3d ed CJA-CEB 1997). See jury instruction format requirements in §12.44.

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§12.53 5. Habitability of Premises

For detailed discussion of substantive issues raised by the defense of breach of the implied warranty of habitability, see §§3.24-3.48. For discussion of evidentiary presumptions and allocation of the burden of proof, see §§12.36, 12.54, 12.54A. See also California Eviction Defense Manual §§19.11-19.17 (2d ed Cal CEB 1993) for a discussion of the implied warranty of habitability and its potential effects on an unlawful detainer action in a commercial lease.

The tenant generally has the burden of proving breach of the implied warranty by a preponderance of the evidence. If the evidence warrants, the court must instruct the jury on the defense. In some rent-controlled jurisdictions, a landlord is required to plead and prove compliance with the warranty of habitability as an essential element of an unlawful detainer case. See §§9.16, 10.64. See also §7.75. Although tenant advocates have argued that compliance with the warranty of habitability should be an element of the landlord's burden in every case, no reported case supports this position. In *De La Vara v Municipal Court* (1979) 98 CA3d 638, 159 CR 648, the court held that the landlord need not allege compliance with the warranty in the complaint. In light of this decision, and in the absence of a local ordinance prescribing otherwise, a court is unlikely to deviate from the traditional view of a breach of the warranty as an affirmative defense that the tenant must prove in order to prevail.

In *Smith v David* (1981) 120 CA3d 101, 110, 176 CR 112, an affirmative suit by the tenant for damages for breach of the implied warranty, the court approved the following instruction as "a correct statement of the law" and "necessary to the jury's understanding of the doctrine": The "fact that plaintiffs remained in premises which they claim were uninhabitable does not mean, under the law, that the premises were therefore habitable." The court also held that the trial court should have instructed the jury on the legislature's finding of a housing crisis (see former Health & S C §33250, repealed by Stats 1996, ch 799, §15) to explain (1) why a tenant might remain in a dwelling with habitability problems, and (2) why the landlord's failure to comply with relevant building and housing code provisions materially affecting the tenant's health and safety would constitute a breach. 120 CA3d at 111. An instruction may also restate the standards set forth in CC §1941.1, if applicable to the facts, regardless of whether the tenant utilized the repair-and-deduct remedy. *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707. (See §§3.12-3.15 on the repair-and-deduct remedy.) On circumstances that constitute a substantial breach of the implied warranty of habitability, see *Hyatt v Tedesco* (2002) 96 CA4th Supp 62, 117 CR2d 921 (conditions affecting tenant's health and safety, including leaky roof, wall cracks, water damage, and inadequate plumbing).

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a. Sample Instruction on Definition of "Habitability"

§12.54 (1) Form: Landlord's Instruction

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DEFINITION OF "HABITABILITY"

One of the defenses asserted by Tenant is that Landlord breached the implied warranty of habitability. The landlord must maintain the premises in a habitable condition during the term of the landlord-tenant relationship. This implied warranty does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that "bare living requirements" must be maintained. The terms "habitable" and "habitability" relate to conditions of the premises that affect the health and safety of the occupants and visitors. Minor housing code violations standing alone that do not affect habitability must be considered *de minimis* and will not entitle the tenant to reduction in rent.

Tenant has the burden of establishing by a preponderance of the evidence all facts necessary to prove that Landlord breached the warranty, that Tenant suffered damages as a result of the breach, and the nature and extent of the damages. Additional instruction on this burden of proof will be given in another jury instruction.

Comment: See CCP §1174.2; *Green v Superior Court* (1974) 10 C3d 616, 635, 111 CR 704; *Hinson v Delis* (1972) 26 CA3d 62, 70, 102 CR 661. Modification may be required under CC §1942.3 if the defense is based on breach of statutory habitability requirements (see CC §§1941-1942.4) in addition to, or instead of, the implied warranty of habitability. For discussion of evidentiary presumptions and burden of proof, see §§12.36, 12.53. See jury instruction format requirements in §12.44. For a habitability jury instruction approved by the Judicial Council, see CACI 4320.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.54A (2) Form: Tenant's Instruction

§12.54A (2) Form: Tenant's Instruction

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DEFINITION OF "HABITABILITY"

One of the defenses asserted by Tenant is that Landlord breached the implied warranty of habitability during the term of the landlord-tenant relationship.

Every residential lease or rental agreement in California contains an implied warranty of habitability, which guarantees that the premises are habitable when the landlord-tenant relationship begins, and that the landlord will maintain the premises in a habitable condition during the term of the landlord-tenant relationship. This implied warranty does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that "bare living requirements" must be maintained. In deciding whether the premises are habitable in this case, you may consider, but are not limited to, the following statements:

(1) In most cases substantial compliance with those applicable building and housing code standards that materially affect health and safety will suffice to meet the Landlord's obligations under the common-law implied warranty of habitability.

(2) The fact that Tenant remained in the premises while claiming it was uninhabitable does not mean, under the law, that the premises therefore were, in fact, habitable.

(3) Minor housing code violations standing alone that do not affect habitability must be considered *de minimis* and will not entitle the tenant to reduction in rent.

Tenant has the burden of establishing by a preponderance of the evidence all facts necessary to prove that Landlord breached the warranty, that Tenant suffered damages as a result of the breach, and the nature and extent of the damages. Additional instruction on this burden of proof will be given in another jury instruction.

Comment: See *Green v Superior Court* (1974) 10 C3d 616, 637, 111 CR 704; *Hinson v Delis* (1972) 26 CA3d 62, 70, 102 CR 661. See also *Smith v David* (1981) 120 CA3d 101, 176 CR 112; *Hyatt v Tedesco* (2002) 96 CA4th Supp 62, 117 CR2d 921. The difference between the landlord's and tenant's instruction mainly stems from whether CCP §1174.2 was intended by the legislature to limit the decision in *Green v Superior Court, supra,* and narrow the scope of the implied warranty of habitability to cover only defects that affect health and safety. (This a point of disagreement among landlord-tenant counsel.) Note that, in a reported rent board appeal, the court of appeal held that inconvenience resulting from repairs and maintenance done by the landlord that does not substantially interfere with the tenant's right to live in the premises does not entitle the tenant to a rent decrease. *Golden Gateway Ctr. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1999) 73 CA4th 1204, 87 CR2d 332. If the tenant is not entitled to a rent decrease from the particular rent control board, probably no decrease is warranted in a court trial for breach of the warranty of habitability.

Modification of this instruction may be required under CC §1942.3 if the defense is based on breach of statutory habitability requirements (see CC §§1941-1942.4) in addition to, or instead of, the implied warranty of habitability. For discussion of evidentiary presumptions and burden of proof, see §§12.36, 12.53. See jury instruction format requirements in §12.44. For a habitability jury instruction approved by the Judicial Council, see CACI 4320.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.55 b. Form: Sample Instruction on Breach of Warranty--Factors to Consider; Notice of Defects

§12.55 b. Form: Sample Instruction on Breach of Warranty—Factors to Consider; Notice of Defects

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§12.54-12.59.

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BREACH OF WARRANTY OF HABITABILITY—FACTORS TO CONSIDER; NOTICE OF DEFECTS

You may consider the following factors in deciding whether Landlord has breached the implied warranty of habitability:

The warranty does not require that the rented premises be in a perfect, or aesthetically pleasing, condition. The law requires substantial compliance with applicable building, housing, and health code standards that materially affect the health and safety of human occupants. The law also requires that other conditions within and around the premises may not materially affect the normal use and enjoyment of the premises. Landlord must substantially comply with these requirements as they apply to the interior of the rental unit and to the common areas. On the other hand, minor housing code violations that do not affect habitability do not constitute breach of the warranty.

More specifically, you may consider the following:

1. Adequacy of waterproofing and weather protection of the roof and exterior walls (including windows and doors);

2. Condition of exterior and interior walls and ceilings;

3. Operation of doors and windows;

4. Adequacy of ventilation;

5. Adequacy of plumbing, heating, and electrical equipment;

6. Maintenance of bath and toilet facilities;

7. Adequacy of water supply (*i.e.,* volume and pressure);

8. Presence of rodents, vermin, and insects;

9. Presence of odors and gases;

10. Cleanliness of common areas under Landlord's control;

11. Maintenance of floors, carpets, and stairways;

12. Whether buildings, grounds, and other areas under Landlord's control are clean, sanitary, and free of debris, filth, rubbish, garbage, rodents, vermin, and insects;

13. Whether Landlord has supplied an adequate number of containers for garbage and rubbish, in clean condition and good repair;

14. Whether Landlord has installed locks on doors, security or locking devices on windows, and locks on doors to common areas (for breaches on or after July 1, 1998); and

15. Presence of lead hazards as described in Health & S C §§17920.3 or 17920.10, including deteriorated

lead-based paint, lead-contaminated dust, lead-contaminated soil, or disturbing lead-based paint without containment, if the amount of lead exceeds the permissible levels established by law and is likely to endanger the health of the public or the tenant.

To prove breach of the warranty, Tenant must also prove:

1. That Tenant gave _ _[*Landlord/Landlord's agent*]_ _ notice of the defective conditions within a reasonable time after Tenant discovered or should have discovered the defects or that _ _[*Landlord/Landlord's agent*]_ _ had actual or constructive knowledge of the defects; and

2. That the defects were not caused by Tenant's wrongful action or abnormal use of the premises.

Comment: The tenant need not prove that he or she had no knowledge of the defects when the tenancy began (see §3.21) or that the landlord had a reasonable time to repair the defects (see §3.30). *Knight v Hallsthammar* (1981) 29 C3d 46, 171 CR 707; see *Smith v David* (1981) 120 CA3d 101, 176 CR 112. It appears that notice to the landlord of the defects, or the landlord's actual or constructive knowledge of the defects, is still a required element of the defense (see §3.29). See *Knight v Hallsthammar, supra*.

The list of conditions in this instruction is illustrative only, not exhaustive. See §§3.11-3.12. The attorney should draft the instruction to include all conditions that apply to the specific case, according to the facts at issue. See *Barker v Lull Eng'g Co.* (1978) 20 C3d 413, 418, 143 CR 225. In defining the warranty, and specifying factors to guide the jury in determining whether there has been a breach, counsel should consider the opinions in *Green v Superior Court* (1974) 10 C3d 616, 637, 111 CR 704, and *Hinson v Delis* (1972) 26 CA3d 62, 70, 102 CR 661.

If the facts of the case warrant, the instruction may refer to the standards for "tenantability" in CC §1941.1. *Knight v Hallsthammar, supra*; *Smith v David, supra*. If the tenant's defense is based on the repair-and-deduct remedy (see §§3.12-3.15), as opposed to breach of the warranty of habitability, CC §1941.1 would provide an appropriate basis for instructions. Modification may be required under CC §1942.3 if the defense is based on breach of statutory habitability requirements (see CC §§1941-1942.4) in addition to, or instead of, the implied warranty of habitability. See jury instruction format requirements in §12.44. For a habitability jury instruction approved by the Judicial Council, see CACI 4320.

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§12.56 c. Drafting Instructions on Computing "Reasonable Rent" Owed When Warranty Breached

The California courts have not adopted a uniform method of computing the "reasonable rent" owed the landlord when the tenant proves a breach of the warranty of habitability, although several ways have been suggested (see *Green v Superior Court* (1974) 10 C3d 616, 638, 111 CR 704); see discussion in §§3.16-3.48). As a general proposition, reasonable rent is determined by (1) using some measure to determine the extent to which the tenant has been damaged by the landlord's breach of the implied warranty, and (2) using that figure to reduce the contract rent and arrive at the reasonable rent.

The sample instructions in §§12.57-12.58 contain two methods of calculation supported by case law: the percentage-reduction-in-use method (see *Cazares v Ortiz* (1980) 109 CA3d Supp 23, 168 CR 108), and the difference-in-value method (see *Quevedo v Braga* (1977) 72 CA3d Supp 1, 140 CR 143). (For discussion of these methods, see §3.37.) Another method, indirectly supported by case law, is for the jury to award the tenant general damages for discomfort and annoyance (see, *e.g., Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194). A sample instruction for this method of calculation is set forth in §12.59. (For discussion of this method, see §3.38) Which of these instructions is used depends on the court's ruling regarding the measure of damages to be applied in the particular case.

Note that, under each of these instructions, damages are awardable only for the period for which the tenant failed to pay rent. Thus, the instructions do not take into account the theory advanced by tenant advocates that damages may be assessed for periods during which the tenant did not withhold rent, and that such prior damages may offset the rent demanded in the 3-day notice to pay rent or quit. (For discussion of this theory, see §§13.36-13.38.) If this theory is adopted by the court in a particular case, counsel should draft an instruction providing for such an offset to arrive at the reasonable rent.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.57 (1) Form: Sample Instruction on Calculation of Reasonable Rent--Percentage-Reduction-in-Use Method

§12.57 (1) Form: Sample Instruction on Calculation of Reasonable Rent—Percentage-Reduction-in-Use Method

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§12.54-12.59.

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CALCULATION OF REASONABLE RENT:
PERCENTAGE-REDUCTION-IN-USE METHOD

If you find that Landlord breached the implied warranty of habitability during a period for which Tenant failed to pay rent, Tenant owes Landlord only a reasonable rent for that period. You may determine the amount of reasonable rent by deciding by what percentage Tenant's use of the premises was reduced as a result of the breach, and by reducing the agreed-on rent by that percentage. If you determine that the damages were equal to or greater than the agreed-on rent, Tenant would owe no rent at all.

Comment: This instruction is based on the percentage-reduction-in use method of calculating "reasonable rent," approved by the court in *Cazares v Ortiz* (1980) 109 CA3d Supp 23, 168 CR 108, and apparently approved in *Green v Superior Court* (1974) 10 C3d 616, 639 n24, 111 CR 704. For discussion of the various methods of calculation, see §§3.37-3.38. For discussion of the proposition that the tenant's rent may be reduced to zero by this method, see *Green v Superior Court, supra*. See also *Smith v David* (1981) 120 CA3d 101, 112, 176 CR 112. See jury instruction format requirements in §12.44. The habitability and damages jury instructions approved by the Judicial Council (see CACI 4320, 4340) do not address this issue.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.58 (2) Form: Sample Instruction on Calculation of Reasonable Rent--Difference-in-Value Method

§12.58 (2) Form: Sample Instruction on Calculation of Reasonable Rent—Difference-in-Value Method

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CALCULATION OF REASONABLE RENT:
DIFFERENCE-IN-VALUE METHOD

If you find that Landlord breached the implied warranty of habitability during a period for which Tenant failed to pay rent, Tenant owes Landlord only a "reasonable rent" for that period. You may determine the reasonable rent by the following method:

1. Determine the fair rental value of the premises as if the defects constituting the breach had not existed; and

2. Subtract from that amount the fair rental value of the premises in their actual condition during occupancy by Tenant (taking into account the defects constituting the breach).

To arrive at the reasonable rent, subtract the result of your subtraction from the rent in the lease or rental agreement. If you determine that the difference between the warranted value and the actual fair rental value is equal to the rent in the lease or rental agreement, Tenant would owe no rent at all.

Comment: This instruction uses the difference-in-value method of calculating "reasonable rent," adopted by the court in *Quevedo v Braga* (1977) 72 CA3d Supp 1, 140 CR 143, and noted with apparent approval in *Green v Superior Court* (1974) 10 C3d 616, 638, 111 CR 704. For discussion of the various methods of calculation, see §§3.37-3.38. For discussion of the proposition that the tenant's rent may be reduced to zero by this method, see *Green v Superior Court* (1974) 10 C3d 616, 639, 111 CR 704. See also *Smith v David* (1981) 120 CA3d 101, 112, 176 CR 112. See jury instruction format requirements in §12.44. The habitability and damages jury instructions approved by the Judicial Council (see CACI 4320, 4340) do not address this issue.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.59 (3) Form: Sample Instruction on Calculation of Reasonable Rent--Factoring in Tenant's Discomfort and Annoyance

§12.59 (3) Form: Sample Instruction on Calculation of Reasonable Rent—Factoring in Tenant's Discomfort and Annoyance

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CALCULATION OF REASONABLE RENT:
FACTORING IN TENANT'S DISCOMFORT AND ANNOYANCE

If you find that Landlord breached the implied warranty of habitability during a period for which Tenant failed to pay rent, Tenant owes Landlord only a "reasonable rent" for the period. In determining the amount of reasonable rent, you first must find the amount of general damages that Tenant suffered because of the breach. No definite standard or method of calculation is prescribed by law for determining the amount of general damages, or for determining compensation for discomfort and annoyance, and no witness's opinion is required to fix the amount of reasonable compensation. General damages may include compensation for discomfort and annoyance suffered by Tenant and his or her family as a result of Landlord's breach of the implied warranty of habitability.

In determining the amount of damages, you must calmly and reasonably exercise your duties by fixing damages that are just and reasonable in light of the evidence. You may consider any evidence of the severity of the defects, including the length of time that they persisted, their effect on Tenant's mental and physical health and safety, and the percentage of the premises that became uninhabitable. Having determined the amount of general damages for discomfort and annoyance, you should subtract that amount from the rent in the lease or rental agreement, to arrive at the reasonable rent.

Comment: This method of calculating "reasonable rent" has not been utilized in any reported California unlawful detainer case. But see *Stoiber v Honeychuck* (1980) 101 CA3d 903, 162 CR 194, in which the court approved this measure of damages in an affirmative suit by a tenant. For discussion of out-of-state authority for this method, and the rationale behind it, see §3.38. But see *Cazares v Ortiz* (1980) 109 CA3d Supp 23, 168 CR 108, in which the court criticized this method of measuring the tenant's damages for the landlord's breach of the implied warranty. See jury instruction format requirements in §12.44. The habitability and damages jury instructions approved by the Judicial Council (see CACI 4320, 4340) do not address this issue.

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§12.60 6. Retaliatory Eviction

The tenant generally bears the burden of proving the defense of retaliatory eviction by a preponderance of the evidence, but the burden of proving the landlord's intent is shifted to the landlord when the termination notice states a reason not listed in the unlawful detainer statutes and the tenant controverts it. *Western Land Office, Inc. v Cervantes* (1985) 175 CA3d 724, 742, 220 CR 784. See §8.130. See instructions in §§12.62-12.63. In an eviction under the Ellis Act (Govt C §§7060-7060.7) (see §§7.64-7.64G), if the tenant puts on evidence that the landlord's attempt to take the unit off the rental housing market is retaliatory, the landlord must establish by a preponderance of the evidence the existence of a bona fide intent to withdraw the property from the rental market. If the landlord does so, the landlord may evict the tenants and withdraw the property despite having a retaliatory motive. *Drouet v Superior Court* (2003) 31 C4th 583, 3 CR3d 205.

The elements of retaliatory eviction are set out in the sample instruction in §12.61. A similar instruction, tailored to the facts of the case, should always be used when retaliatory eviction is an issue for the jury. A tenant may rely on multiple theories of retaliation. See §§8.110, 8.117. See discussion regarding the common law doctrine of retaliatory eviction in a commercial context at California Eviction Defense Manual §19.25 (2d ed Cal CEB 1993).

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.61 a. Form: Sample Instruction on Elements of Retaliatory Eviction (Month-to-Month Tenancy)

§12.61 a. Form: Sample Instruction on Elements of Retaliatory Eviction (Month-to-Month Tenancy)

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ELEMENTS OF RETALIATORY EVICTION

Tenant raises the defense that Landlord, in seeking to evict Tenant by serving a _ _[*30-day/60-day*]**_ _ notice terminating the landlord-tenant relationship and by initiating this unlawful detainer action, is retaliating against Tenant because Tenant _ _**[*specify conduct, e.g., complained about condition of the premises to an appropriate government agency, participated in the formation or activities of a tenants' association, associated with persons against whom Landlord held discriminatory attitudes, or engaged in other legally protected conduct*]**_ _.**

The type of landlord-tenant relationship involved in this litigation is a month-to-month agreement. Although a month-to-month agreement may be terminated by a landlord for any legitimate reason, or for no reason at all, it may not be terminated for an improper reason. Despite the fact that a month-to-month agreement may be terminated without cause, California law prohibits a landlord from retaliating against a tenant because the tenant _ _[*e.g., complained about tenantability of the premises, exercised other protected rights*]**_ _. If Landlord or Landlord's agent had no knowledge of Tenant's _ _**[*e.g., complaints, conduct*]**_ _ you may not find that Landlord's purpose in evicting Tenant is retaliatory.**

If you find, in accordance with these instructions, that the _ _[*30-day/60-day*]**_ _ termination notice is retaliatory, then that notice is legally ineffective. If it is legally ineffective, (1) Tenant was entitled under the law to ignore it, and (2) Landlord is not entitled to recover possession of the premises or damages of any kind.**

[*Add*, *if applicable*]

An "appropriate government agency" is a public agency with jurisdiction over complaints relating to habitability, including _ _[*e.g., county health departments, city building inspection departments, city fire departments, environmental agencies*]**_ _.**

Comment: This instruction is based on *Barela v Superior Court* (1981) 30 C3d 244, 178 CR 618; *S. P. Growers Ass'n v Rodriguez* (1976) 17 C3d 719, 131 CR 761; and *Schweiger v Superior Court* (1970) 3 C3d 507, 90 CR 729. For discussion of the retaliatory eviction defense generally, see §§8.109-8.135. Note that the defense may be alleged under CC §1942.5, common law, other statutes or constitutional provisions, or a combination of legal theories. The instructions must be tailored to fit the facts and legal theories of each particular case. Because the defense of retaliatory eviction may apply to tenancies other than month-to-month, this sample should be modified accordingly. See jury instruction format requirements in §12.44. For retaliatory eviction jury instructions approved by the Judicial Council, see CACI 4321-4322.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/ b. Burden of Proof/§12.62 (1) Form: Sample Instruction When Tenant Bears Entire Burden of Proof on Defense

b. Burden of Proof

§12.62 (1) Form: Sample Instruction When Tenant Bears Entire Burden of Proof on Defense

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RETALIATORY EVICTION: BURDEN OF PROOF
WHEN TENANT BEARS BURDEN ON DEFENSE

[*Insert instruction on plaintiff's burden of proof; see sample in §12.46*]

Tenant has the burden of establishing by a preponderance of the evidence all facts necessary to prove the following issues:

1. That Tenant took the following action(s):

[*Include one or more of the following, if applicable; see §8.110*]

a. Tenant complained to _ _[*an appropriate government agency/ Landlord/Landlord's agent*]**_ _ concerning the tenantability of the rental unit or the common areas of the premises;**

[b.] Tenant exercised _ _[*his/her*]**_ _ rights under Civil Code sections 1940-1954.1 by _ _**[*allege conduct on which Landlord's retaliation was based*]**_ _;**

[c.] Tenant participated in the formation or activities of a tenants' association;

[d.] Tenant exercised rights protected under _ _[*common law/state or federal law/the state or federal constitution*]**_ _;**

[*Add if complaint concerning tenantability or exercise of rights under Civil Code sections 1940-1954.1 (a. or b., above) is applicable*]

[2.] That Tenant is not in default in payment of rent; and

[3.] That Landlord retaliated against Tenant within 180 days of Tenant's complaint by attempting to recover possession of the subject property.

[*In all cases, continue*]

[4.] That Landlord had knowledge or notice of Tenant's _ _[*e.g., complaint, exercise of rights*]**_ _, and commenced this unlawful detainer action in retaliation against Tenant because of Tenant's conduct.**

A preponderance of the evidence is evidence that has more convincing force and greater probability of truth, when weighed against the evidence opposed to it. If the evidence is evenly balanced, so that the evidence on neither side of an issue preponderates, then your finding on that issue must be against the party who has the burden of proving it.

In determining whether an issue has been proved by a preponderance of the evidence, you must consider all the evidence bearing on that issue, regardless of who produced it.

Comment: This instruction, adapted from BAJI 2.60 (also see CACI 200), should be used when the circumstances of the case cause the entire burden of proof to be allocated to the tenant. For discussion of allocation of the burden of proof on retaliatory intent, see §§8.130, 12.60. On retaliatory eviction generally, see §§8.109-8.135. For an instruction

allocating the burden of disproving intent to the landlord, see §12.63. Note that the 180-day limit under CC §1942.5(a) applies to the tenant's complaints concerning tenantability or exercise of rights under CC §§1940-1954.1, but not to defenses grounded on CC §1942.5(c) or on common law retaliation arising out of the tenant's complaints about conditions constituting breach of the implied warranty of habitability. See jury instruction format requirements in §12.44. For retaliatory eviction jury instructions approved by the Judicial Council, see CACI 4321-4322.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.63 (2) Form: Sample Instruction When Landlord Bears Burden of Disproving Intent

§12.63 (2) Form: Sample Instruction When Landlord Bears Burden of Disproving Intent

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RETALIATORY EVICTION: BURDEN OF PROOF WHEN LANDLORD BEARS BURDEN OF DISPROVING INTENT

In this action, Landlord (who is the plaintiff in this action) has the burden of establishing by a preponderance of the evidence all facts necessary to prove the following issues:

1. That a landlord-tenant relationship was created between the Landlord and the Tenant (who is the defendant in this action);

2. That the landlord-tenant relationship was legally terminated by Landlord;

3. That Tenant remains in possession of the premises;

4. The amount of rent owed by Tenant up to the date that the relationship was terminated; and

5. The amount of damages suffered by Landlord because of Tenant's unlawful remaining in possession. These damages are calculated from the date that the unlawful detainer of the premises began, *i.e.,* the date that the relationship was terminated, through the date of trial.

6. That Landlord's conduct in terminating the landlord-tenant relationship and attempting to evict Tenant was not undertaken in retaliation against Tenant for engaging in conduct protected by state or federal laws or constitutions.

Tenant has the burden of establishing by a preponderance of the evidence all facts necessary to prove the following Issues:

1. That Tenant took the following action(s):

[*Include one or more of the following, if applicable; see §8.110*]

a. Tenant complained to _ _[*an appropriate government agency/ Landlord/Landlord's agent*]**_ _ concerning the tenantability of the rental unit or the common areas of the premises;**

[b.] Tenant exercised _ _[*his/her*]**_ _ rights under Civil Code sections 1940-1954.1 by _ _**[*allege conduct on which Landlord's retaliation was based*]**_ _;**

[c.] Tenant participated in the formation or activities of a tenants' association;

[d.] Tenant exercised rights protected under _ _[*common law/state or federal law/the state or federal constitution*]**_ _;**

[*Add if complaint concerning tenantability or exercise of rights under Civil Code sections 1940-1954.1 (a. or b., above) is applicable*]

[2.] That Tenant is not in default in payment of rent; and

[3.] That landlord retaliated against Tenant within 180 days after Tenant's complaint by attempting to recover possession of the subject property.

[*Continue*]

A preponderance of the evidence is evidence that has more convincing force and greater probability of truth, when weighed against the evidence opposed to it. If the evidence is evenly balanced, so that the evidence on neither side of an issue preponderates, then your finding on that issue must be against the party who has the burden of proving it.

In determining whether an issue has been proved by a preponderance of the evidence, you must consider all the evidence bearing on that Issue, regardless of who produced it.

Comment: This instruction, adapted from BAJI 2.60 (see CACI 200), should be proposed by tenant's counsel when the circumstances of the case cause the burden of disproving intent to be allocated to the landlord, or if the tenant's attorney wishes to preserve the issue for appeal. For discussion of allocation of the burden of proof on retaliatory intent, see §§8.130, 12.60. Note that the 180-day limit under CC §1942.5(a) applies to the tenant's complaints concerning tenantability or exercise of rights under CC §§1940-1954.1, but not to defenses grounded on CC §1942.5(c) or on common law retaliation arising out of the tenant's complaints about conditions constituting breach of the implied warranty of habitability. See jury instruction format requirements in §12.44. For retaliatory eviction jury instructions approved by the Judicial Council, see CACI 4321-4322.

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7. Miscellaneous Defenses

§12.63A a. Form: Sample Instruction on Breach of Implied Covenant of Quiet Enjoyment

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DEFENSE: LANDLORD'S BREACH OF IMPLIED COVENANT OF QUIET ENJOYMENT

In every lease and rental agreement, there is an implied covenant of quiet enjoyment. This means that Landlord promises not to interfere, either directly or indirectly, with the Tenant's peaceful enjoyment of the premises while the Tenant is in possession.

In this action the Tenant has asserted that the Landlord interfered with the Tenant's enjoyment of the premises by the following conduct:

[*Describe all testimony and documents admitted into evidence showing conduct of Landlord which directly or indirectly interfered with Tenant's enjoyment of premises.*]

If you find that the Landlord substantially breached the implied covenant of quiet enjoyment during the period for which rent is demanded in this case, then the Tenant owes the Landlord only a reasonable rent for that period.

Comment: See §§3.5-3.7, 10.56. This instruction should be given only when the unlawful detainer complaint is based on an allegation of nonpayment of rent or other breach of the lease or rental agreement. See instructions in §§12.57-12.59 for methods of determining "reasonable rent," which may be used with modifications in cases in which the landlord has breached the implied covenant of quiet enjoyment during the period for which rent is demanded. See jury instruction format requirements in §12.44.

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§12.63B b. Form: Sample Instruction on Waiver

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DEFENSE: LANDLORD'S WAIVER OF RIGHT TO TERMINATE TENANCY

A Landlord may waive the right to terminate a tenancy for an alleged breach of a provision of the lease or rental agreement. A waiver occurs when the Landlord, with knowledge of his or her rights, communicates to the Tenant that he or she will not assert those rights. A waiver may be express or implied. It is express when the Landlord states that he or she will not assert those rights under that provision or will not assert any rights as a result of the Tenant's breach of that provision. A waiver is implied when the Landlord commits acts that are inconsistent with an assertion of that provision or of a breach of that provision.

In this action the Tenant has asserted that any alleged breach of the lease or rental agreement has been waived by the Landlord because of the following:

[*Summarize all testimony and documents admitted into evidence showing conduct of Landlord that expressly or impliedly waived Tenant's breach, e.g., acceptance of rent with knowledge of breach.*]

If you find that a waiver has occurred, then you should render a verdict for the defendant.

Comment: See *DRG/Beverly Hills, Ltd. v Chopstix Dim Sum Cafe & Takeout III, Ltd*. (1994) 30 CA4th 54, 59, 35 CR2d 515, for a distinction between waiver and estoppel. See cases discussed in §§8.49 and 10.60 for examples of the application of the principles of waiver and estoppel in landlord-tenant disputes. For a specific jury instruction on establishing the landlord's waiver of the tenant's breach by acceptance of rent after expiration of the 3-day notice, see CACI 4324. See jury instruction format requirements in §12.44.

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Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.63C c. Form: Sample Instruction on Estoppel

§12.63C c. Form: Sample Instruction on Estoppel

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DEFENSE: ESTOPPEL OF LANDLORD'S RIGHT TO TERMINATE TENANCY

A Landlord may be estopped from terminating a tenancy for a breach of a provision of the lease or rental agreement. This occurs when the Landlord, by words or actions, leads the Tenant to reasonably believe that the Landlord will not take action against the Tenant for breach of that provision, and the Tenant relies on this belief to his or her substantial detriment.

In this action the Tenant contends that the Landlord should be estopped from terminating the tenancy for the alleged breach of the lease or rental agreement because of the following:

[*Summarize all testimony and documents admitted into evidence showing conduct of Landlord and reliance by Tenant, e.g., Landlord accepting rent or amending lease with knowledge of breach and Tenant making improvements, incurring other expenses, or foregoing good opportunity to relocate.*]

If you find that an estoppel has occurred, then you should render a verdict for the defendant.

Comment: See *DRG/Beverly Hills, Ltd. v Chopstix Dim Sum Cafe & Takeout III, Ltd*. (1994) 30 CA4th 54, 59, 35 CR2d 515, for a distinction between waiver and estoppel. Because estoppel is an equitable defense, the court in *DRG/Beverly Hills, Ltd.* did not permit the issue to be decided by a jury. 30 CA4th at 61. But see *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 12 CR2d 741, discussed in §11.55. See also cases in §§8.49 and 10.60 on the application of principles of waiver and estoppel in landlord-tenant disputes. See jury instruction format requirements in §12.44.

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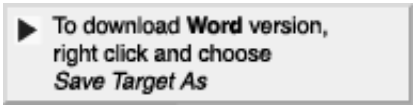
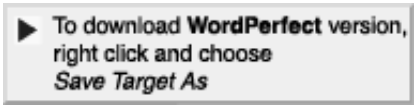
Source: Real Property/California Landlord-Tenant Practice/12 Unlawful Detainer: Trial/§12.63D d. Form: Sample Instruction on Landlord's Refusal of Rent

§12.63D d. Form: Sample Instruction on Landlord's Refusal of Rent





DEFENSE: LANDLORD'S WRONGFUL REFUSAL OF RENT

A landlord may not evict a tenant if the tenant tendered the rent demanded within the 3-day notice period but the landlord wrongfully refused to accept it. The tenant claims that the landlord is not entitled to evict _ _[*him/her/it*]_ _, because the landlord refused to accept the tenant's payment of the rent. To succeed on this defense, the tenant must prove that after service of the 3-day notice but before the end of the notice period, the tenant presented the full amount of rent that was due to the landlord and that the landlord refused to accept the payment.

If the landlord's practice was to accept payment by check and the tenant presented a check, the check constitutes payment of the rent. If the landlord notified the tenant by the notice itself or prior to service of the notice that the rent could not be paid by check, then payment by the tenant by check was not sufficient.

If you find that the tenant tendered the rent demanded within the 3-day notice period and that the landlord wrongfully refused to accept the payment, then you should render a verdict for the defendant.

Comment: See CACI 4327.

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X. COURT TRIAL: STATEMENT OF DECISION

§12.64 A. Party Must Request Statement of Decision

In court trials, the court must provide a formal written decision (known as a statement of decision) if a party requests one. CCP §632; *Espinoza v Calva* (2008) 169 CA4th 1393, 87 CR3d 492. The statement must explain the trial court's factual and legal basis for its decision on each of the principal controverted issues. CCP §632. See Cal Rules of Ct 3.1590. The requirement that a statement of decision be provided when requested applies with equal effect in both unlimited and limited civil cases. CCP §632. For discussion of statements of decision generally, see California Trial Practice: Civil Procedure During Trial §§24.34-24.50 (3d ed Cal CEB 1995).

The requesting party must "specify those controverted issues as to which the party is requesting a statement of decision." CCP §632. The opponent then may request a statement of decision on controverted issues not mentioned by the initial requesting party. CCP §632.

If a statement of decision is not requested, a minute order constitutes the decision of the court. See *Perry v Perry* (1969) 270 CA2d 769, 771, 76 CR 212.

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§12.65 B. Deadlines for Request; Determining Whether Statement Must Be Written or Oral

A statement of decision is required only if a party appearing at trial requests it within 10 days after the court announces its intended decision. CCP §632. The statement must be in writing unless the parties stipulate otherwise. CCP §632. Note, however, that for trials concluded within 1 day (or in less than 8 hours over more than 1 day), which would include most unlawful detainer actions, a party desiring a statement of decision must request it before the matter is submitted for decision, *i.e.,* no later than the close of argument. CCP §632. In this instance, the statement must be in writing, unless (CCP §632):

- The parties stipulate otherwise; or
- The trial is completed in less than 1 day, or in less than 8 hours over more than 1 day, in which case it may be made orally on the record.

A trial will be deemed to commence at the beginning of the opening statement of any party or counsel or, if there is no opening statement, at the administering of the oath to the first witness or instruction of any witness, or the introduction of any evidence. CCP §581(a)(6). Failure to provide a statement of decision when properly requested is reversible error. *Miramar Hotel Corp. v Frank B. Hall & Co.* (1985) 163 CA3d 1126, 210 CR 114. See also *Auer v Frank* (1964) 227 CA2d 396, 38 CR 684. See also *Espinoza v Calva* (2008) 169 CA4th 1393, 1397, 87 CR3d 492 (trial court's failure to provide properly requested statement of decision normally results in remand requiring trial court to issue statement of decision).

The statement of decision is the functional equivalent of, and serves the same purpose as, findings and conclusions. In some situations, the trial court's findings may be implied from the judgment and facts in the record. For example, in *Lee v Vignoli* (1979) 98 CA3d Supp 24, 160 CR 79, the record on appeal showed that even though the trial court had awarded possession of the premises to the landlord, it had allowed admission of the tenant's evidence of uninhabitability and had determined that the rent owed was $135 per month less than the contract rate. Despite the absence of express findings in the record, the appellate court construed the rent reduction as an implied finding that the landlord had breached the warranty of habitability, and reversed the judgment. It may be unwise, however, for counsel to rely on the record to supply the trial court's findings. Instead, counsel should request a statement of decision under CCP §632 whenever the judgment might be challenged.

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§12.66 C. Counsel's Role Regarding Ambiguous or Inadequate Statement of Decision

The trial court's statement of decision (*i.e.,* finding) on an issue is considered an implied negation of all contrary assertions. *Kanner v Globe Bottling Co.* (1969) 273 CA2d 559, 566, 78 CR 25. If a finding is made on a controverted fact, the court need not make a further finding with respect to the probative facts, or a statement of decision regarding evidentiary matters. *Kanner v Globe Bottling Co., supra*.

When a statement of decision does not resolve a controverted issue (or a specific finding is ambiguous), but the record demonstrates a party's attempt to bring the omission or ambiguity to the court's attention either before entry of judgment, or in conjunction with a motion for new trial (CCP §657) or a motion for vacation of judgment (CCP §663), another court may not infer that the trial court decided in favor of the prevailing party with respect to the controverted fact or issue. CCP §634. Thus, if the requesting party fails to bring the omission or ambiguity to the trial court's attention, the new trial court (following a motion for new trial or a motion for vacation of judgment) or the court of appeal may assume that the original trial court decided in favor of the prevailing party on those controverted facts or issues, as long as that determination is consistent with the judgment and results by necessary implication from any express findings or statements that are made. See *Branche v Hetzel* (1966) 241 CA2d 801, 810, 51 CR 188; *Auer v Frank* (1964) 227 CA2d 396, 406, 38 CR 684. Therefore, the party requesting a statement of decision must bring any omission or ambiguity in the statement to the trial court's attention.

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XI. JURY TRIAL

§12.67 A. Jury Verdict; General and Special Verdicts

In a jury trial, the verdict performs the function performed by the statement of decision (see §§12.64-12.66) in a court trial. The verdict is the jury's means of delivering and formally recording its resolution of the disputed issues in a case. See CCP §§613, 618. The jury may return either a general or a special verdict. CCP §624. When rendering a general verdict, the jury simply resolves all issues in favor of the plaintiff or the defendant. CCP §624.

The court has two different methods available to further refine the jury's fact-finding process:

(1) The court may instruct the jury to return a general verdict, and—to test the general verdict further—instruct the jury to make special findings of fact in response to specific, written questions. CCP §625. When a special finding and the general verdict are inconsistent, the special finding controls and the court must enter judgment on it. CCP §625. If the special verdict is inconsistent, the trial court may direct the jury to deliberate further. See CCP §619; *Mizel v City of Santa Monica* (2001) 93 CA4th 1059, 113 CR2d 649.

(2) The court may instruct the jury to return a special verdict in which the jury makes findings only on the facts and leaves resolution of the legal consequences of those facts to the court. CCP §624.

Many trial judges use one of these procedures to sharpen the jury's verdict in unlawful detainer jury trials because of the complexity of the causes of action and defenses. California Civil Jury Instructions VF-4300-VF-4302 are the general and specific verdict forms for use in unlawful detainer actions.

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§12.68 B. Judgment Based on Jury Verdict

A verdict is not the same as a judgment; pronouncing judgment is a judicial act that must be performed by a judge. CCP §664. After a verdict has been rendered, judgment is entered on the basis of the verdict unless the court has stayed proceedings or reserved judgment pending posttrial motions. CCP §664. On motions after trial, see §§13.43-13.63.

For extensive discussion of general and special verdicts and entry of judgment following rendition of the verdict, see California Trial Practice: Civil Procedure During Trial, chaps 22-23 (3d ed Cal CEB 1995).

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§12.69 XII. DEFAULTS AT TRIAL

Occasionally, one party or another does not appear for trial after having appeared in the action. A judgment entered after a contested trial may be set aside if the party's failure to appear is the fault of counsel. See *Marriage of Hock* (2000) 80 CA4th 1438, 96 CR2d 546. But see *Vandermoon v Sanwong* (2006) 142 CA4th 315, 47 CR3d 772, in which the court ruled that mandatory set-aside provisions of CCP §473(b) did not apply to a trial conducted in a party's absence since this was not a "default," "default judgment," or "dismissal" within the meaning of §473(b). See also *Hossain v Hossain* (2007) 157 CA4th 454, 69 CR3d 356, in which the court ruled that §473(b) applied only to a default or default judgment entered by the court clerk. On setting aside entries of default and default judgments, see §§13.7-13.16.

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13

Unlawful Detainer: Judgment and Posttrial Proceedings

Sonya Bekoff Molho

I. SCOPE OF CHAPTER §13.1

II. DEFAULT
- A. When Defendant Is in Default §13.2
- B. Procedure for Obtaining Default Judgment
  - 1. Entry of Default §13.3
  - 2. Immediate Judgment for Possession §13.4
  - 3. Judgment for Monetary Relief §13.5
- C. Form: Request for Entry of Default (Judicial Council Form CIV-100) §13.6
- D. Relief From Default
  - 1. Grounds Under CCP §473(b)
    - a. Fault of Defendant Party; Discretionary Relief §13.7
    - b. Fault of Attorney; Mandatory Relief §13.8
    - c. Default Obtained by Fraud §13.9
  - 2. Procedure Under CCP §473(b)
    - a. Noticed Motion §13.10
    - b. Time Limits for Motion
      - (1) Usually 6 Months §13.11
      - (2) 90-Day Exception §13.12
      - (3) Fraud and Other Exceptions §13.13
  - 3. Conditions for Relief Under CCP §473(b) §13.14
  - 4. Other Grounds and Procedures for Relief From Default
    - a. Lack of Actual Notice of Suit §13.15
    - b. Limited Civil Case Omnibus Rule §13.16

III. JUDGMENT
- A. When Plaintiff Prevails
  - 1. Forfeiture of Possession and Leasehold Rights §13.17
  - 2. Back Rent §13.18
  - 3. Damages Caused by Unlawful Detainer §13.19
  - 4. Prejudgment Interest §13.20
  - 5. Costs
    - a. Awarded to Prevailing Party §13.21
    - b. Allowable Costs and Expenses §13.22
    - c. Procedure for Claiming Costs §13.23
    - d. Limitations on Costs §13.24
  - 6. Attorney Fees
    - a. Basis for Recovery §13.25
    - b. Determining Who Is Prevailing Party
      - (1) Party Recovering "Greater Relief" §13.26
      - (2) Effect of Dismissal §13.27
    - c. Limits on Recovery by Prevailing Party
      - (1) Attorney Representing Self §13.28
      - (2) In-House or Pro Bono Representation §13.28A
      - (3) Effect of Tenant Tendering Full Amount of Rent Owing §13.28B
      - (4) If Attorney Files Action in Wrong Court §13.28C
      - (5) Actions Not Arising From Lease §13.28D
    - d. Determining Amount of Fees §13.29
    - e. Fees for Services Before Complaint Filed §13.30
    - f. Award of Fees Against Successors in Interest §13.31
    - g. Attorney Fees on Appeal §13.32
    - h. Procedure for Claiming Fees §13.33

(1) Basis of Award Governs Procedure
(a) Contractual Attorney Fees §13.33A
(b) Statutory Attorney Fees §13.33B
(2) Time Limits for Claiming Attorney Fees §13.33C
7. Landlord Posttrial Inspections §13.33D
8. Form: Judgment for Plaintiff (Attorney-Drafted) §13.34
B. When Defendant Prevails
1. Tenant's Retention of Possession §13.35
2. Warranty of Habitability Damages §13.36
a. Assessing Only Against Delinquent Rent §13.37
b. Assessing Against All Rent Due After Notice §13.38
3. Res Judicata Effect §13.39
4. Attorney Fees and Costs
a. Under Contract §13.40
b. Under Anti-SLAPP Statute §13.40A
5. Form: Judgment—Unlawful Detainer (Judicial Council Form UD-110) §13.40B
6. Form: Judgment—Unlawful Detainer Attachment (Judicial Council Form UD-110S) §13.40C
7. Form: Order for Judgment for Defendant—Warranty of Habitability (Attorney-Drafted) §13.41
C. Successive Actions Not Barred by Appeal §13.42

IV. POSTTRIAL PROCEEDINGS
A. Posttrial Motions Generally §13.43
1. Motion for New Trial §13.44
2. Judgment Notwithstanding Verdict §13.45
3. Motion to Vacate and Enter Different Judgment §13.46
4. Motion to Correct Clerical Error §13.47
B. Stay of Execution §13.48
1. 5-day Stay; Restoring Possession on Unexpired Lease (CCP §1174(c)) §13.49
a. Mandatory Stay §13.50
b. Discretionary Stay §13.51
2. Court's Inherent Power (CCP §918)
a. Grounds §13.52
b. Length and Conditions of Stay §13.53
3. Form: Ex Parte Application for Stay of Execution §13.54
4. Form: Tenant's Declaration of Hardship §13.55
C. Relief From Forfeiture (CCP §1179)
1. Statutory Requirements §13.56
2. Form: Application for Relief From Forfeiture §13.57
D. Appeal
1. Governing Statutes and Rules of Court §13.58
2. Procedure and Time Limits §13.59
3. Stay Pending Appeal (CCP §1176) §13.60
4. Effect of Tenant's Vacating Pending Appeal §13.61
5. Form: Notice of Motion for Stay of Execution Pending Appeal §13.62
E. Extraordinary Writs §13.63

V. ENFORCING THE JUDGMENT
A. For Possession
1. Writ of Possession; Procedure §13.64
a. Contents of Writ §13.65
b. Service of Writ §13.66
c. Eviction Under the Writ §13.67
d. Effect of Bankruptcy; CCP §715.050 §13.68
2. Form: Writ of Execution (Judicial Council Form EJ-130) §13.69
3. Postjudgment Claim of Right to Possession
a. Notice Procedure and Limitations on Use §13.70
b. Filing of Postjudgment Claim §13.71
c. Hearing on Postjudgment Claim §13.72
4. Form: Claim of Right to Possession and Notice of Hearing (Judicial Council Form CP10) §13.73
B. For Rent and Damages §13.74
C. Credit Reporting Issues §13.75
D. Fair Debt Collection Practices Act §13.76

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§13.1 I. SCOPE OF CHAPTER

This chapter focuses on preparing judgments and posttrial motions. Whether or not the trier of fact is a judge or a jury, counsel for the prevailing party must prepare a judgment for the judge presiding over the trial to sign, so that judgment can be entered. Judgment forms and discussion of their contents are presented in §§13.17-13.34 for plaintiff as the prevailing party, and in §§13.35-13.41 for a prevailing defendant. Judgment by default and relief therefrom are explained in §§13.2-13.16.

Grounds and procedures for universally applicable posttrial motions such as for a new trial, for judgment notwithstanding the verdict, to vacate judgment and enter a different judgment, and to correct clerical error are found in §§13.43-13.47. Posttrial procedures peculiar to unlawful detainer actions are detailed with attorney-drafted or Judicial Council forms as follows:

- Stay of execution of judgment (see §§13.48-13.55);
- Relief from forfeiture (see §§13.56-13.57);
- Appeals, stay pending appellate review, and extraordinary writs (see §§13.58-13.63);
- Enforcing a judgment by writ of possession (see §§13.64-13.69);
- Postjudgment claim of right to possession (see §§13.70-13.73); and
- Enforcing a judgment for monetary relief (see §13.74).

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II. DEFAULT

§13.2 A. When Defendant Is in Default

If a tenant fails to appear and defend an unlawful detainer action within 5 days after service of the summons and complaint (CCP §1167), the clerk, on the landlord's application, must enter the tenant's default (CCP §1169). See §13.3. The constitutionality of statutes providing an even shorter time to respond in unlawful detainer actions than that provided in California actions was upheld in *Lindsey v Normet* (1972) 405 US 56, 31 L Ed 2d 36, 92 S Ct 862. See also *Deal v Municipal Court* (1984) 157 CA3d 991, 996, 204 CR 79, in which the court cited *Lindsey* as dispositive in its upholding of the 5-days-to-answer requirement of CCP §1167.

The clerk must also, on request of the landlord, immediately enter a judgment for restitution of the premises and issue a writ of possession. CCP §1169. See §13.4. The landlord may then seek any further relief, such as a monetary award of rent or damages, which must be obtained from the court, not the clerk. CCP §1169. See §13.5. In some cases in which the designation of the street of the subject premises is incorrect, *i.e.,* "street" instead of "avenue," the marshal or sheriff may refuse to execute the writ of possession. In such cases, landlord attorneys may request the judge to sign an order to amend the judgment under CCP §§470 and 473(d) and have a new or amended writ of possession issue with the correct address.

If the tenant is served by "substituted service" or "constructive service," service is not complete until 10 days after a copy of the summons and complaint is mailed (CCP §§415.20(b), 415.45(c); see §§9.48-9.49), and the tenant's 5 days to answer only begin to run at that point (CCP §1167). If the fifth day after service becomes effective falls on a weekend or holiday, the tenant's time to appear and defend is extended to "the next day which is not a holiday." CCP §12a. Weekend days are included, but judicial holidays other than weekends are excluded, in calculating the 5-day response period. CCP §1167. While trial courts are closed on the third Wednesday of each month due to budget issues, the Wednesdays on which the courts are closed are treated as holidays and should not be counted as part of the 5-day period. See Govt C §68106.

A tenant may file a responsive pleading, even if the time to plead has elapsed, as long as the clerk has not yet entered the tenant's default. *Goddard v Pollock* (1974) 37 CA3d 137, 112 CR 215. See California Civil Procedure Before Trial, chap 38 (4th ed Cal CEB 2004). After a default is entered by the clerk, the tenant may not file an answer or any other pleading until the default is set aside. *Brooks v Nelson* (1928) 95 CA 144, 147, 272 P 610. See §§13.7-13.16.

PRACTICE TIP: If a default has just been entered at the time the defendant attempts to file an answer, the defendant may ask to file an answer "on demand." In that event, if the request for default is rejected for any reason, the defendant has an answer on file. If the default is not rejected, the defendant must, of course, still act to set aside the default and resulting default judgment.

If the landlord's attorney refuses to agree to an extension of time to respond to the complaint, tenant's counsel may make an ex parte application to the court for an extension order. CCP §§473(a)(1), 1054. See discussion and sample form in §§10.48-10.49. This request is likely to be granted in the absence of unusual circumstances.

PRACTICE TIP: Counsel for the landlord should be wary of unnecessary requests for extensions in simple cases. Delay costs the client money, and the right to an expedited trial is set forth by statute. See §11.42. Since the answer is generally filed on a preprinted form, 1 or 2 days' extension, if any, should be sufficient without monetary compensation. See §11.6.

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B. Procedure for Obtaining Default Judgment

§13.3 1. Entry of Default

Code of Civil Procedure §1169 provides that, on written application by the landlord and proof of service of the summons and complaint, the clerk must enter the tenant's default. The default form prescribed by the Judicial Council (see §13.6) must be used. See CCP §585.5 and Cal Rules of Ct 3.1800 on required documents. The default form provides a box to be checked when the landlord's attorney also wishes to apply for immediate entry of judgment for restitution and issuance of a writ of possession, as authorized by CCP §1169. The form also includes the declaration of mailing required by CCP §587. When filed with the clerk, it must be accompanied by the original unlawful detainer summons and a separate proof of service of summons. CCP §1169. There are mandatory forms for proving service of summons; the landlord must file with the court either Proof of Service of Summons (Judicial Council Form POS-010) or Notice And Acknowledgment of Receipt (Judicial Council Form POS-015) with the original summons. See CCP §417.10(a).

Paragraph 8 of the Request for Entry of Default (Judicial Council Form CIV-100) (see §13.6) requires the landlord's attorney to attest that no defendants are "in the military service so as to be entitled to the benefits of the Servicemembers Civil Relief Act." If the tenant is in fact in the military, the attorney needs to check with the local court as to how to proceed. Some courts allow client declarations to prove that the tenant's military service does not materially affect the tenant's ability to pay rent and some courts require an oral prove-up hearing. (See Servicemembers Civil Relief Act (SCRA) (Pub L 108-189, 117 Stat 2835) 50 USC App §§501-596, cited in §1.73.)

PRACTICE TIP: Many courts (*e.g.,* Los Angeles) have their own printed forms for default judgment, which include a decree for immediate possession. Such forms should be used whenever possible. Because the clerks are familiar with them, using the forms expedites entry of judgment and issuance of the writ of possession. Fillable forms for Default Judgment—Unlawful Detainer and for Application for Issuance of Writ of Possession are available online at http://www.lasuperiorcourt.org/forms.

A party requesting entry of default and claiming costs must itemize them on the request for entry of default form (see §13.6) at the time of applying for the judgment. Cal Rules of Ct 3.1700(a)(2). As attorney fees authorized by contract are an item of costs (CCP §1033.5(a)(10)(A)), they should be requested at that time as well. CCP §1033.5(c)(5). See §§13.21, 13.24 for a discussion of allowable costs in unlawful detainer actions.

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§13.4 2. Immediate Judgment for Possession

In addition to entering a default, the clerk must enter judgment for restitution of the premises and issue a writ of execution, on the landlord's request. CCP §1169. Under this procedure, the clerk may enter judgment only for restitution but not for monetary relief such as back rent, damages, or attorney fees. The method of entry of judgment prescribed by CCP §1169 constitutes a departure from the usual procedure in civil actions. See CCP §585(a)-(b). See generally California Civil Procedure Before Trial, chap 38 (4th ed Cal CEB 2004).

PRACTICE TIP: Local procedures should be investigated before submitting default papers. Some courts have instructed their clerks not to issue clerk's judgments under CCP §1169 unless the landlord submits not only the materials necessary to enter default (request form, summons, and proof of service), but also the materials most important to show that a judgment for all relief requested by the complaint may also be obtained (written contract, if any, and termination notice). Although there is no authority for this practice, it is far easier to accede to these special requirements than to fight them. Moreover, if on assembling the necessary papers counsel discovers a fatal defect (*e.g.,* notice demanding more rent than was due), this additional review of the case may prevent later delays or liability for wrongful eviction.

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§13.5 3. Judgment for Monetary Relief

A landlord who wants a default judgment on issues other than possession (*e.g.,* damages, attorney fees, costs) must provide proof of these claims in the usual default hearing under CCP §585(b). Unless the landlord gives prior notice to the tenant, the default judgment may not award greater damages than those pleaded in the complaint. *Janssen v Luu* (1997) 57 CA4th 272, 66 CR2d 838. In proving up damages, the plaintiff need only establish a prima facie case to obtain judgment. *Johnson v Stanhiser* (1999) 72 CA4th 357, 85 CR2d 82. For discussion of default hearings generally, see California Civil Procedure Before Trial, chap 38 (4th ed Cal CEB 2004).

The court may permit the use of affidavits (or declarations; see CCP §2015.5) in lieu of personal testimony for proving the default and damages. CCP §585(d). See also Cal Rules of Ct 3.1800 on required documents. The following information, if applicable, should be incorporated into the landlord's declaration:

- Location of premises (*i.e.,* street address and apartment number);
- Date on which notice to quit was served, with a copy attached as exhibit;
- Date on which unlawful detainer action was filed;
- Date on which complaint was served on tenant;
- Fact that 5 days have elapsed since complaint was served;
- Amount of unpaid rent to date tenancy was terminated;
- Fair rental value of premises and per diem damages after termination;
- Costs incurred in bringing unlawful detainer action;
- Amount of reasonable attorney fees, if authorized by agreement, including paragraph number of attorney fee provision; and
- Amount of security or cleaning deposit, if any, being withheld. (Many courts do not require deposit information, because the landlord normally has up to 21 days after recovering possession of the property for the use of the security deposit, and the condition of the property is unknown at the time of trial. See CC §1950.5.)

PRACTICE TIP: The use of affidavits in lieu of personal testimony will nearly always shorten the time to obtain a default judgment for rent and damages. In Los Angeles County Superior Court, for example, it may take 8 weeks to schedule a default hearing for personal testimony to be heard and for judgment to be entered. In contrast, the use of affidavits may shorten this time to only 5 court days. Many courts urge the use of affidavits in all but exceptional cases (*e.g.,* when the landlord requests statutory damages). Trial courts' practices vary considerably, and counsel should call a court clerk to find out the local practice.

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Source: Real Property/California Landlord-Tenant Practice/13 Unlawful Detainer: Judgment and Posttrial Proceedings/ §13.6 C. Form: Request for Entry of Default (Judicial Council Form CIV-100)

§13.6 C. Form: Request for Entry of Default (Judicial Council Form CIV-100)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
REQUEST FOR (Application) ☐ **Entry of Default** ☐ **Clerk's Judgment** ☐ **Court Judgment**	CASE NUMBER:

1. TO THE CLERK: On the complaint or cross-complaint filed
   a. on *(date)*:
   b. by *(name)*:
   c. ☐ Enter default of defendant *(names)*:
   d. ☐ I request a court judgment under Code of Civil Procedure sections 585(b), 585(c), 989, etc., against defendant *(names)*:

   (Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under Code Civ. Proc., § 585(d).)
   e. ☐ Enter clerk's judgment
      (1) ☐ for restitution of the premises only and issue a writ of execution on the judgment. Code of Civil Procedure section 1174(c) does not apply. (Code Civ. Proc., § 1169.)
         ☐ Include in the judgment all tenants, subtenants, named claimants, and other occupants of the premises. The *Prejudgment Claim of Right to Possession* was served in compliance with Code of Civil Procedure section 415.46.
      (2) ☐ under Code of Civil Procedure section 585(a). *(Complete the declaration under Code Civ. Proc., § 585.5 on the reverse (item 5).)*
      (3) ☐ for default previously entered on *(date)*:

2. **Judgment to be entered.**

	Amount	Credits acknowledged	Balance
a. Demand of complaint	$	$	$
b. Statement of damages *			
(1) Special	$	$	$
(2) General	$	$	$
c. Interest	$	$	$
d. Costs *(see reverse)*	$	$	$
e. Attorney fees	$	$	$
f. **TOTALS**	$	$	$

   g. **Daily damages** were demanded in complaint at the rate of: $ per day beginning *(date)*:
   (Personal injury or wrongful death actions; Code Civ. Proc., § 425.11.)*

3. ☐ *(Check if filed in an unlawful detainer case)* **Legal document assistant or unlawful detainer assistant** information is on the reverse *(complete item 4)*.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

FOR COURT USE ONLY

(1) ☐ Default entered as requested on *(date)*:
(2) ☐ Default NOT entered as requested *(state reason)*:

Clerk, by _____, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
CIV-100 [Rev. January 1, 2007]

REQUEST FOR ENTRY OF DEFAULT
(Application to Enter Default)

Code of Civil Procedure, §§ 585–587, 1169
www.courtinfo.ca.gov

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

4. **Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.).** A legal document assistant or unlawful detainer assistant ☐ did ☐ did **not** for compensation give advice or assistance with this form. *(If declarant has received **any** help or advice for pay from a legal document assistant or unlawful detainer assistant, state):*
   a. Assistant's name:
   b. Street address, city, and zip code:
   c. Telephone no.:
   d. County of registration:
   e. Registration no.:
   f. Expires on *(date):*

5. ☐ **Declaration under Code of Civil Procedure Section 585.5** *(required for entry of default under Code Civ. Proc., § 585(a)).* This action
   a. ☐ is ☐ is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).
   b. ☐ is ☐ is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).
   c. ☐ is ☐ is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).

6. **Declaration of mailing (Code Civ. Proc., § 587).** A copy of this *Request for Entry of Default* was
   a. ☐ **not mailed** to the following defendants, whose addresses are **unknown** to plaintiff or plaintiff's attorney *(names):*
   b. ☐ **mailed** first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:
      (1) Mailed on *(date):*
      (2) To *(specify names and addresses shown on the envelopes):*

I declare under penalty of perjury under the laws of the State of California that the foregoing items 4, 5, and 6 are true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

7. **Memorandum of costs** *(required if money judgment requested).* Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):
   a. Clerk's filing fees ..... $
   b. Process server's fees ..... $
   c. Other *(specify):* ..... $
   d. ..... $
   e. **TOTAL** ..... $ _____
   f. ☐ Costs and disbursements are waived.
   g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

8. ☐ **Declaration of nonmilitary status** *(required for a judgment).* No defendant named in item 1c of the application is in the military service so as to be entitled to the benefits of the Servicemembers Civil Relief Act (50 U.S.C. App. § 501 et seq.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

Copies: Original (filed with court clerk); one copy for each attorney of record and unrepresented party; office copies.

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D. Relief From Default

1. Grounds Under CCP §473(b)

§13.7 a. Fault of Defendant Party; Discretionary Relief

Grounds for setting aside a default and vacating a default judgment are provided by statute. The most commonly used is CCP §473(b), which gives a court the discretionary power to relieve a party from a judgment, order, or other proceeding taken through his or her "mistake, inadvertence, surprise or excusable neglect." Although CCP §473(b) also *requires* that a court set aside a default entered because of an attorney's mistake or neglect, even if inexcusable (see §13.8), it does not allow the court to set aside a default entered because of a client's inexcusable mistake or neglect. *Cisneros v Vueve* (1995) 37 CA4th 906, 44 CR2d 682. A default will be set aside under CCP §473(b) if it is caused by error committed by both the attorney and the client as long as there is no intentional misconduct. *Benedict v Danner Press* (2001) 87 CA4th 923, 104 CR2d 896.

If the affidavit of mailing that accompanies the request for entry of default (see §13.3) has an inaccurate address, that defect is not jurisdictional. Consequently, a motion to set aside the default and the resulting judgment on that basis will not lie under CCP §473. *Rodriguez v Henard* (2009) 174 CA4th 529, 94 CR3d 313.

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§13.8 b. Fault of Attorney; Mandatory Relief

Code of Civil Procedure §473(b) requires a court to vacate a default or default judgment on grounds of attorney mistake, inadvertence, surprise, or neglect whenever an application for relief is made no more than 6 months after entry of judgment, in proper form, and is accompanied by an attorney's sworn affidavit, unless the court finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. See *Marriage of Hock* (2000) 80 CA4th 1438, 96 CR2d 546 (set aside judgment after uncontested trial). The purpose of an attorney's declaration admitting fault is to relieve the innocent client of the burden of the attorney's fault and avoid causing more litigation in the form of malpractice suits. 80 CA4th at 1446. See also *Solv-All v Superior Court* (2005) 131 CA4th 1003, 32 CR3d 202 (party whose attorney, without knowing participation of party, failed to file timely answer because settlement discussions were in progress is entitled to mandatory relief from default judgment); *Matera v McLeod* (2006) 145 CA4th 44, 51 CR3d 331 (§473(b) required reversal of default judgment after court struck answer as discovery sanction and entered default and default judgment).

The courts have limited the application of CCP §473(b). See, *e.g.*, *Jerry's Shell v Equilon Enters., LLC* (2005) 134 CA4th 1058, 36 CR3d 637 (§473(b) does not provide relief from sanctions imposed for deliberate failure to respond to discovery or oppose discovery motions); *English v IKON Bus. Solutions, Inc.* (2001) 94 CA4th 130, 114 CR2d 93 (§473(b) does not apply to judgment resulting from attorney's failure to oppose summary judgment motion); *Prieto v Loyola Marymount Univ.* (2005) 132 CA4th 290, 33 CR3d 639 (§473(b) does not permit the court to set aside a summary judgment if losing party's counsel filed no opposition). See also *Ambrose v Michelin N. Am., Inc.* (2005) 134 CA4th 1350, 37 CR3d 1 (§473(b) does not permit court to set aside summary judgment if losing party's counsel did file opposition, but failed to file affidavit seeking continuance to allow expert witness more time to examine evidence; request for continuance at hearing on summary judgment was insufficient). See also *Hossain v Hossain* (2007) 157 CA4th 454, 69 CR3d 356, holding that CCP §473(b) does not apply to an attorney's failure to timely file opposition and a cross-motion to a motion to enforce a settlement. Mandatory relief was not available because there was neither a default nor a default judgment within the meaning of §473(b). The court explained that a default judgment within the meaning of CCP §473(b) is a judgment after a defendant has failed to answer the complaint and the defendant's default has been entered. On applying §473(b) to defaults in discovery proceedings, compare *Matera v McLeod, supra,* with *Jerry's Shell v Equilon Enters., LLC, supra*. On whether CCP §473 allows for relief from dismissal resulting from an attorney's failure to amend the complaint on time, compare *Harlan v Department of Transp.* (2005) 132 CA4th 868, 33 CR3d 912, with *Leader v Health Indus. of Am.* (2001) 89 CA4th 603, 107 CR2d 489.

If the default is caused by the combined error of the attorney and the client, it will be set aside as long as there is no intentional misconduct. *Benedict v Danner Press* (2001) 87 CA4th 923, 104 CR2d 896. In *Benedict*, the court found the mandatory relief provision of §473(b) is applicable to a default even if the actions of the party are an additional cause in fact of the default. In *Benedict*, the attorney in part relied on the client's agent's erroneous description of service of process in failing to timely file an answer.

PRACTICE TIP: In appropriate situations, counsel might consider seeking alternative relief under both discretionary and mandatory provisions of CCP §473. See, *e.g., Solv-All v Superior Court, supra,* which suggests a broader definition of mistake, inadvertence, surprise, and neglect than is found in most cases interpreting CCP §473.

The motion to set aside the default and default judgment must be correctly addressed to the opposing party or attorney. In *Moghaddam v Bone* (2006) 142 CA4th 283, 47 CR3d 602, the attorney filing the motion sent it to the correct P.O. Box but the wrong zip code for the opposing attorney. The intended recipient failed to receive the motion and failed to oppose it. The reviewing court ultimately held that the ruling setting aside the default judgment was void.

In seeking relief under CCP §473(b), an affidavit setting forth the attorney's "mistake, inadvertence, surprise, or neglect" must be signed by the attorney who represented the client and caused the mistake even if that attorney is not the attorney of record in the unlawful detainer case. See *SJP, LP v City of Los Angeles* (2006) 136 CA4th 511, 39 CR3d 55 (affidavit of bankruptcy counsel who both represented client and caused mistake was competent).

If the court grants relief based on an attorney's affidavit of fault, it *must* order the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. CCP §473(b). Further, when relief from a default or default judgment is granted under CCP §473(b), the court *may* (CCP §473(c)(1)):

- Impose a penalty of up to $1000 on an offending attorney;
- Direct the offending attorney to pay up to $1000 to the State Bar Client Security Fund; or
- Grant other relief, as appropriate.

Relief under CCP §473(b), however, may not be made conditional on the attorney's payment of such fees, costs, or monetary penalties imposed by the court, or on compliance with other sanctions. CCP §473(c)(2).

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§13.9 c. Default Obtained by Fraud

Although not specifically referred to in the statute, proceedings under CCP §473 can also be used to set aside defaults obtained through intrinsic or extrinsic fraud. *Batchelor v Finn* (1959) 169 CA2d 410, 341 P2d 803; *Guardianship of Levy* (1955) 137 CA2d 237, 244, 290 P2d 320. For additional discussion, see California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

If the defendant was never served with process, but a fraudulent declaration asserting service was filed and used as the basis for a default judgment, the default and default judgment may be set aside, but not under CCP §473. See, *e.g.,* CCP §86(b)(3). A motion should, however, be brought promptly after the defendant discovers the judgment. See §13.13. For additional discussion, see Civ Proc Before Trial, chaps 19, 42.

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2. Procedure Under CCP §473(b)

§13.10 a. Noticed Motion

Once the clerk has entered the tenant's default, the tenant may not file an answer or other pleading, or appear at trial or in any other manner in the action until the default is set aside. *Heathman v Vant* (1959) 172 CA2d 639, 343 P2d 104. See also CCP §1010. To set aside the default and vacate a judgment entered under it, the tenant must submit (CCP §§473(b), 1003):

- Written notice of motion, stating the grounds on which the motion is made; and
- Proposed answer or other pleading.

Because entry of the default by the clerk and entry of default judgment by the clerk or the court are two distinct acts (see §§13.3-13.5), the motion must request relief from both to be effective. See *Heathman v Vant, supra*. If only the judgment is vacated, the default may remain as a bar to the tenant's appearing in the action. See *Heathman v Vant, supra*.

The notice of motion must be accompanied by a supporting memorandum. See CCP §§473(b), 1005; Cal Rules of Ct 3.1113. If the motion is made within 6 months after entry of judgment and is accompanied by an affidavit by the defendant's attorney admitting the attorney's mistake, inadvertence, surprise, or neglect, then the court must vacate the entry of default unless it finds the default was not a result of the attorney's neglect. CCP §473(b).

For forms for a notice of motion, points and authorities, and a court order, see California Eviction Defense Manual, Apps VV-WW (2d ed Cal CEB 1993).

When moving to set aside a default under CCP §473(b), the tenant must show a satisfactory excuse for the default, as well as diligence in making the motion. See generally California Civil Procedure Before Trial, chap 38 (4th ed Cal CEB 2004). The motion must be accompanied by the answer, or other pleading that the moving party proposes to file, if the default is vacated. CCP §473(b).

PRACTICE TIP: If a writ of execution has been issued under a default judgment, the tenant should include (in the notice of motion to set aside the default and vacate the judgment) a request that the court quash the writ. Under CCP §473(b), the court may relieve a party from a judgment, order, or other proceeding. An order quashing the writ will not take effect automatically. If the motion succeeds, counsel should immediately serve the order on the levying officer to ensure that the writ will not be executed despite issuance of the order.

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b. Time Limits for Motion

§13.11 (1) Usually 6 Months

The motion for relief from default caused by a party or that party's attorney must be made within a "reasonable time," but not more than 6 months from entry of default or default judgment. CCP §473(b). For a discussion of the "reasonable time" issue, see *Lee v Wells Fargo Bank* (2001) 88 CA4th 1187, 106 CR2d 726. Note that entry of the default by the clerk, and not entry of the default judgment, fixes the beginning of the 6-month period. *Title Ins. & Trust Co. v King Land & Improvement Co.* (1912) 162 C 44, 120 P 1066; *Castagnoli v Castagnoli* (1954) 124 CA2d 39, 268 P2d 37.

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§13.12 (2) 90-Day Exception

In unlawful detainer actions, if written notice of the default judgment or entry of default is personally served within the state on the tenant and tenant's attorney, if any, stating that any application for relief must be made within 90 days, then the defendant has only 90 days after service of the notice in which to move to set aside the default. CCP §473(b).

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§13.13 (3) Fraud and Other Exceptions

Despite the 6-month and 90-day limits of CCP §473(b), trial courts have inherent power to entertain a motion to set aside a default entered through extrinsic fraud or mistake *more than* 6 months after entry. *Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620. The 6-month and 90-day limits also *do not* apply to a motion to vacate a judgment that is void on its face, or a motion to correct clerical errors in a judgment. See CCP §473(d).

PRACTICE TIP: Counsel should determine whether or not the merits and economics of the case favor the parties stipulating to have the default judgment set aside to try the case on the damage issues, because in most cases possession will have already been restored to the landlord and there may be other causes of action available to both the landlord and the tenant.

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§13.14 3. Conditions for Relief Under CCP §473(b)

Code of Civil Procedure §473(b) allows a court to relieve a party from a judgment, order, or other proceeding "upon any terms as may be just." Thus, attention should be paid to specific conditions that the court, in granting relief, should impose to render a "just" decision for all parties. The landlord's attorney should request that:

- The setting aside of a default be conditioned on payment of contract rent into court, for the period from when eviction could have been obtained on the default judgment through trial; and
- The default be reinstated on the tenant's failure to pay.

See *Goodson v The Bogerts, Inc.* (1967) 252 CA2d 32, 42, 60 CR 146 (trial court has power to impose condition of protective deposit in granting motion to vacate default judgment).

Counsel may also seek reimbursement for attorney fees attributable to obtaining the default and default judgment and costs attributable to the eviction (writ of execution and sheriff's fees). See, *e.g., Reeves v Hutson* (1956) 144 CA2d 445, 301 P2d 264. Counsel could argue that the tenant should be required to post cash or an equivalent bond to cover the increased costs of litigation attributable to setting aside the default (*e.g.,* deposition costs and attorney fees, including a trial attorney's fees if the tenant will not waive the right to jury trial as a condition to setting aside the default).

On awarding mandatory costs, fees, and penalties on the granting of a motion to set aside a default, see §13.8.

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4. Other Grounds and Procedures for Relief From Default

§13.15 a. Lack of Actual Notice of Suit

Under CCP §473.5, a party may move for relief from a default when service of the summons did not result in actual notice to that party. The general noticed motion format (see §13.10) must be used, and the notice of motion must contain all relief requested by the motion. Under CCP §473.5, however, the motion must be filed within a reasonable time, but no more than 2 years after entry of the default or 180 days after service of written notice of entry of default. CCP §473.5(a). The CCP §473.5 motion must be accompanied by an affidavit that the tenant's lack of actual notice was not caused by his or her avoidance or inexcusable neglect. CCP §473.5(b). It must also include a copy of the answer or other proposed pleading. CCP §473.5(b).

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§13.16 b. Limited Civil Case Omnibus Rule

California has unified trial courts, consisting of superior courts that hear both unlimited civil cases and limited civil cases. See §9.32. Consult the local court policies on unlawful detainer actions for practice guidelines. In limited civil cases, a defendant may file a motion to vacate a judgment obtained through extrinsic fraud, mistake, inadvertence, or excusable neglect. See CCP §86(b)(3). Although no time period is specified in §86(b)(3), a default may be set aside more than 6 months after entry only if the basis for the challenge is extrinsic fraud or mistake. *Marianos v Tutunjian* (1977) 70 CA3d 61, 138 CR 529.

Under some circumstances, a default improperly obtained against the tenant will precipitate sanctions against the landlord and landlord's counsel. See, *e.g., Magnolia v Fields* (1987) 191 CA3d Supp 1, 236 CR 900. In *Magnolia,* the landlord's attorney served by mail a notice that the tenant's demurrer had been overruled, allowing the tenant 10 days to file an answer. However, on the same day on which he mailed the notice, the attorney had the tenant's default entered. Ruling that this was a frivolous action, the appellate court held that the trial court's denial of sanctions under CCP §128.5 was an abuse of discretion and that attorney fees for obtaining a writ of mandate to set aside the default should be paid by the landlord's attorney.

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III. JUDGMENT

A. When Plaintiff Prevails

§13.17 1. Forfeiture of Possession and Leasehold Rights

Under CCP §1174(a), if the verdict or judgment is "in favor of the plaintiff and against the defendant, judgment shall be entered for the possession of the premises." The judgment is not self-executing, however; it must be enforced through a writ of possession issued under CCP §§715.010-715.040; see §§13.64-13.69. The landlord may, for tactical reasons, wish to limit the unlawful detainer judgment to possession and seek rent and damages in a separate action. This procedure is permissible under CCP §1174(b) and CC §1952(b). *Northrop Corp. v Chaparral Energy, Inc.* (1985) 168 CA3d 725, 214 CR 173.

The effect of the judgment with respect to forfeiture of the tenant's rights under a lease is more complex. Although the word "forfeiture" is specifically mentioned only in CCP §1161(3), it has been held that CCP §1161 generally gives a landlord the statutory right to elect a forfeiture whether or not there is a forfeiture clause in the lease or rental agreement. *Sexton v Nelson* (1964) 228 CA2d 248, 256, 39 CR 407.

A court has no power to declare a forfeiture, however, unless the landlord has elected to declare it expressly in the required termination notice. CCP §1174(a). See §8.34. Thus, mere default in the payment of rent, or breach of a covenant in the lease or rental agreement, does not create a forfeiture; an affirmative act of election must be included in the 3-day or 30-day notice. See, *e.g., Igauye v Howard* (1952) 114 CA2d 122, 126, 249 P2d 558; *Bank of America v Moore* (1937) 18 CA2d 522, 526, 64 P2d 460. A 3-day notice that simply recites the rent due and demands possession is insufficient as a basis for forfeiture. *Neuhaus v Norgard* (1934) 140 CA 735, 739, 35 P2d 1039. But language such as "or the said lessors will institute legal proceedings against you to recover possession of said premises with treble rent" would indicate sufficient intention to elect a forfeiture. 140 CA at 740.

If the landlord did not elect a forfeiture in the 3-day notice to pay rent or quit, and the lease or rental agreement has not by its terms expired, the court may allow the tenant 5 days following entry of an unlawful detainer judgment to pay all back rent (with interest), damages, and costs, thereby restoring the tenancy. CCP §1174(c). If the lease is in writing and for a term of more than 1 year, the court must allow the tenant to avoid forfeiture. CCP §1174(c) (see §§13.48-13.51). Otherwise, if the landlord elects forfeiture and judgment is entered accordingly, the tenant may be able to avoid forfeiture only on a showing of "hardship." CCP §1179 (see §13.56).

A previous judgment for rent, damages, and forfeiture of the lease may not bar a landlord from recovering prospective damages for unpaid rent for the balance of the lease term in a subsequent action brought under CC §1951.2. See *Danner v Jarrett* (1983) 144 CA3d 164, 192 CR 535; see §§8.14-8.16.

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§13.18 2. Back Rent

Rent as a form of actual damages may be recoverable along with possession in an unlawful detainer judgment. See §§10.40-10.41, 12.22. Back rent (delinquent rent through the expiration of the tenancy) is recoverable only when the action is based on nonpayment of rent. CCP §1174(b); *Saberi v Bakhtiari* (1985) 169 CA3d 509, 215 CR 359; *Castle Park No. 5 v Katherine* (1979) 91 CA3d Supp 6, 154 CR 498. See also *Harris v Bissell* (1921) 54 CA 307, 202 P 453. See also §§9.38-9.41. The amount found due, if any, is determined by the contract or the agreed-on rent and is recoverable only for the period of delinquency through expiration of the 3-day notice to pay rent or quit. See CCP §1174. A landlord is not permitted, however, to recover rent due for more than 1 year preceding service of the notice. See §§10.41, 10.69. In commercial tenancies, a landlord may seek rent more than 1 year old if the sum prayed for is listed as an estimate and is no more than 20 percent above the amount due within the 1-year period before service of the notice. *Levitz Furniture Co. v Wingtip Communications, Inc.* (2001) 86 CA4th 1035, 103 CR2d 656. See §§8.37A, 10.69. The landlord may consider suing for all past-due rent in another action, separately from the unlawful detainer. Otherwise, the landlord may be precluded from obtaining a judgment for rent in a second action because that would constitute splitting a cause of action. See *Lekse v Municipal Court* (1982) 138 CA3d 188, 193, 187 CR 698, discussed in §10.69.

Unless the lease is terminated through the landlord's fault (*e.g.,* when there is a constructive eviction (see §8.19)), rent paid by the tenant in advance will not be apportioned in the absence of a qualifying provision in the lease, even though the tenant lawfully surrenders the premises during the prepaid period. *Friedman v Isenbruck* (1952) 111 CA2d 326, 335, 244 P2d 718.

See §§12.22-12.26 regarding proof at trial of rent owed by the tenant.

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§13.19 3. Damages Caused by Unlawful Detainer

Code of Civil Procedure §1174(b) allows the court to award only those damages occasioned to the plaintiff by the unlawful detainer. Unless the tenant used fraud, force, or violence to remain in possession, the court may award only those damages resulting from the detainer itself, *i.e.,* reasonable rental value, calculated daily from the date of expiration of the termination notice up through the date of judgment. See *Roberts v Redlich* (1952) 111 CA2d 566, 244 P2d 933. See also *Hudec v Robertson* (1989) 210 CA3d 1156, 258 CR 868 (trial court lacked jurisdiction to award landlord back rent in unlawful detainer based on alleged expiration of a lease, an issue on which tenant prevailed). See also §§9.38-9.41, 10.40, 12.27-12.30.

Code of Civil Procedure §1174(b) also authorizes an award of additional "statutory" damages of up to $600 for a malicious holding over, in place of the former provision for treble damages. For discussion of statutory damages, see §§9.40, 10.42, 12.31-12.34.

Any sums claimed by the landlord for the tenant's breaches before the unlawful detainer are characterized as back rent (for which the landlord must have served a 3-day notice to *pay rent* or quit; see CCP §1174(b)) or as "non-allowable" damages. See *Vasey v California Dance Co.* (1977) 70 CA3d 742, 139 CR 72 (separate action required for damages from tenant's unauthorized alteration of premises).

Damages are measured by the premises' reasonable rental value, usually at a per diem rate, during the period of unlawful detainer. See *Flournoy v Everett* (1921) 51 CA 406, 196 P 916. Although the agreed-on rent is evidence of the rental value (*Lehr v Crosby* (1981) 123 CA3d Supp 1, 9, 177 CR 96; *Harris v Bissell* (1921) 54 CA 307, 312, 202 P 453), the reasonable rental value may be found to be higher or lower (*Harris v Bissell, supra*).

The measure of rental value for assessing unlawful detainer damages is not simply "all rents, issues and profits" of a leasehold. *Superior Motels, Inc. v Rinn Motor Hotels, Inc.* (1987) 195 CA3d 1032, 1069, 241 CR 487. Damages for wrongful possession are not limited to the rent set by a local rent control ordinance. See *Adler v Elphick* (1986) 184 CA3d 642, 229 CR 254.

PRACTICE TIP: Following the full impact of the Costa-Hawkins Rental Housing Act (CC §§1954.50-1954.535), on January 1, 1999, rent-controlled cities that had either no vacancy decontrol or limited vacancy decontrol (*e.g.,* Santa Monica, Berkeley, West Hollywood) have seen a dramatic escalation in rents. As a result, the damages for unlawful detention may far exceed the rent-controlled rent. Counsel for tenants need to consider this fact when taking a weak unlawful detainer case to trial.

It has been held proper for the trial court to award damages in the absence of a prayer for them in the complaint. *Flournoy v Everett* (1921) 51 CA 406, 408, 196 P 916; *Holland v Eastern Outfitting Co.* (1911) 16 CA 441, 117 P 562. Such an award appears questionable in light of CCP §1174(b), which authorizes the trier of fact to assess damages alleged in the complaint and proved at trial. However, a lack of allegations or prayer could be cured by seeking leave to amend under CCP §1173. The court may not award future damages, *i.e.,* a specified sum for each day of the tenant's continued possession after entry of judgment. *Lehr v Crosby* (1981) 123 CA3d Supp 1, 10, 177 CR 96; *Cavanaugh v High* (1960) 182 CA2d 714, 722, 6 CR 525.

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§13.20 4. Prejudgment Interest

Code of Civil Procedure §1174(c) authorizes interest on the rent found due if a tenant is awarded possession on curing the default because the landlord did not elect a forfeiture (see §13.49). When the unlawful detainer action is based on nonpayment of rent, and rent is found due, interest on the rent from the date each installment was due may be awarded also under CC §3287(a). *Chambers v Security Commercial & Sav. Bank* (1920) 46 CA 32, 188 P 818.

In *Tripp v Swoap* (1976) 17 C3d 671, 682, 131 CR 789, overruled on other grounds in *Frink v Prod* (1982) 31 C3d 166, 180, 181 CR 893, the court listed the following three conditions for an award of prejudgment interest under CC §3287(a):

- An underlying monetary obligation must exist;
- Recovery must be certain or capable of being made certain by calculation; and
- Right to recovery must vest on a particular day.

See also CC §1951.2(b) (discussed in §8.14) regarding interest on the "worth at the time of award" in a breach-of-lease case.

Interest is not recoverable, however, on damages occasioned by an unlawful detainer. Such damages, as distinguished from rent, are not a liquidated sum, capable of being made certain by calculation. *Stockton Morris Plan Co. v Carpenter* (1936) 18 CA2d 205, 213, 63 P2d 859; *Samuels v Singer* (1934) 1 CA2d 545, 555, 36 P2d 1098. See also *Superior Motels, Inc. v Rinn Motor Hotels, Inc.* (1987) 195 CA3d 1032, 1072, 241 CR 487. The tenant's tender of the rent due during the 3-day notice period precludes an award of interest on the amount tendered (see CC §1504), although interest would be allowable for the period up to the date of tender. *Webb v Jones* (1927) 88 CA 20, 30, 263 P 538.

A trial court may award prejudgment interest when it is otherwise allowable, even though it was not requested in the complaint. *Chambers v Security Commercial & Sav. Bank, supra*. The trial court's failure to award interest cannot be claimed as error on appeal when interest was not requested in the complaint or at trial. *Garfinkle v Montgomery* (1952) 113 CA2d 149, 159, 248 P2d 52.

If allowable, prejudgment interest on back rent would be awarded at the legal rate, which is 7 percent per year under Cal Const art XV, §1, unless the parties agree in the lease or rental agreement for a higher rate, in which case the prejudgment interest may not exceed 10 percent per year under Cal Const art XV, §1(1). See also CC §3289(b). The landlord is also entitled to recover interest at the rate of 10 percent per year on the principal amount of the money judgment remaining unsatisfied, as distinct from the prejudgment interest discussed above. CCP §685.010(a). See California Trial Practice: Civil Procedure During Trial §27.114 (3d ed Cal CEB 1995).

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5. Costs

§13.21 a. Awarded to Prevailing Party

The party in whose favor judgment is ordered is entitled to claim his or her costs in the action. CCP §1032(b). Although this proposition is straightforward enough, it may not always be clear in an unlawful detainer action who is the prevailing party for purposes of recovering costs. Confusion formerly arose when a tenant succeeded on an implied warranty of habitability defense, because the landlord might still obtain a conditional judgment for possession of the premises if the tenant did not pay the amount of "reasonable rent" (see forms in §§13.40B-13.41). Currently, under CCP §1174.2, the landlord is the prevailing party when a tenant who successfully establishes the defense of breach of any warranty of habitability fails to pay the reasonable rental value, as determined by the court in a conditional judgment, within a 5-day period. For further discussion, see §§13.36-13.40.

When a party recovers relief other than a monetary judgment, the court has discretion to award costs. CCP §1032(a)(4). An award of purely equitable relief (*e.g.,* possession or an injunction) or a plaintiff's dismissal of monetary damage claims on the eve of trial, therefore, may result in a court awarding no costs to either party. See *United States Golf Ass'n v Arroyo Software Corp.* (1999) 69 CA4th 607, 615, 81 CR2d 708. See also *Fries v Rite Aid Corp.* (2009) 173 CA4th 182, 92 CR3d 523 (allowed defendant to file cost memorandum after plaintiff voluntarily dismissed action). This discretionary standard differs from the standards applied in attorney fee disputes (see §§13.26-13.27).

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§13.22 b. Allowable Costs and Expenses

Allowable costs are governed by CCP §§1032-1034.5. They include:

- Filing (appearance), motion, and jury fees and jury expenses (CCP §1033.5(a)(1)-(2));
- Actual cost of service of process (CCP §1033.5(a)(4));
- Deposition costs, including travel expenses (CCP §1033.5(a)(3));
- Court reporter fees (CCP §1033.5(a)(11); Govt C §69953);
- Transcripts of court proceedings ordered by the court (CCP §1033.5(a)(9));
- Models, blowups, and photocopies of exhibits, if reasonably helpful to the trier of fact (CCP §1033.5(a)(12));
- Costs on appeal (CCP §1034(b)); and
- Costs advanced to the sheriff or marshal for an eviction (CCP §1034.5).

Ordinary witness fees are recoverable. CCP §1033.5(a)(7); Govt C §§68093, 68097; see *Fay v Fay* (1913) 165 C 469, 132 P 1040. Expert witness fees, however, are not recoverable as costs, unless the use of the expert is ordered by the court or is authorized by law. CCP §1033.5(a)(8), (b)(1); *Sanchez v Bay Shores Med. Group* (1999) 75 CA4th 946, 89 CR2d 634. See *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442 (parties to contract cannot change meaning of statutory law excluding award of expert witness fees). Fees for an interpreter, if appointed by the court, may also be recoverable. Evid C §752.

On recovery of costs generally, see California Trial Practice: Civil Procedure During Trial, chap 27 (3d ed Cal CEB 1995). For discussion of attorney fees as an item of costs, see §§13.23, 13.33.

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§13.23 c. Procedure for Claiming Costs

If a judgment includes an award of costs, or if costs are claimed after a dismissal, the party claiming costs must file and serve an appropriate memorandum of costs within 15 days after the mailing date of the notice of entry of judgment or dismissal or within 180 days after entry of judgment, whichever is earlier. Cal Rules of Ct 3.1700(a)(1). The party claiming costs and the party contesting costs may extend the time for serving and filing the cost memorandum and a motion to strike or tax costs by filing written confirmation of such an agreement with the court. In the absence of an agreement, the court may extend the time for serving and filing the memorandum of costs for a maximum of 30 days. Cal Rules of Ct 3.1700(b)(3).

The time provisions relating to the filing of a memorandum of costs, while not jurisdictional, are mandatory. *Sanabria v Embrey* (2001) 92 CA4th 422, 426, 111 CR2d 837. If the cost claim arises from a dismissal of the action, whether voluntary or involuntary, the memorandum of costs may be filed without an entry of judgment. *Fries v Rite Aid Corp.* (2009) 173 CA4th 182, 92 CR3d 523.

The party against whom costs are sought may challenge the costs by filing a motion to strike the cost bill or a motion to tax costs, no later than 15 days after service of the cost memorandum (response time is extended if memorandum served by mail). See Cal Rules of Ct 3.1700(b)(1); California Trial Practice: Civil Procedure During Trial §§27.103-27.105 (3d ed Cal CEB 1995).

Under Cal Rules of Ct 3.2000, a plaintiff in an unlawful detainer proceeding who has complied with CCP §1034.5 may file a supplemental cost memorandum for costs of eviction by a sheriff or marshal within 10 days after being advised by the sheriff or marshal of the exact amount of the costs. The defendant may move to tax those costs within 10 days after service of the supplemental cost memorandum.

Because the costs of eviction (serving a writ of possession or for posting and serving a copy of the writ) are generally limited to the statutory eviction fee (currently $75 plus (if needed) $50 "for removing an occupant or occupants from the premises and putting a person in possession of the premises; see Govt C §26733.5) plus the statutory writ of execution fee, such supplemental cost bills are often more expensive to prepare than their recovery amount. A landlord who waits, however, to include such costs in a later postjudgment filing (*e.g.,* for accrued postjudgment interest or for wage garnishment expenses) may not be allowed eviction expenses on the ground that they were not claimed within 10 days of having been ascertained.

Attorney fees are defined by statute as a cost item (CCP §1033.5(a)(10)) but are claimed in the memorandum of costs (without a noticed motion after judgment) only if the party claiming them is awarded either statutory or contractual attorney fees that are fixed without the necessity of a court hearing. CCP §1033.5(c)(5); Cal Rules of Ct 3.1702(e). Examples of this are fees fixed in a certain amount by contract or statute, schedules in local rules that prescribe a fixed amount of attorney fees on default, or a stipulation by the parties to accept the amount set by local jurisdictions for contested actions (usually based on the principal amount claimed as damages or the nature of the action). Otherwise, if attorney fees are awarded to the prevailing party by the trial court, the amount is generally determined on a motion filed after judgment (CCP §1033.5(c)(5); Cal Rules of Ct 3.1702). See §§13.33-13.33C.

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§13.24 d. Limitations on Costs

Unlawful detainer actions are not within the jurisdiction of small claims court. See CCP §116.220. Consequently, under CCP §1033(b)(2), because a prevailing landlord could not have brought the unlawful detainer action in small claims court, if the recovery in a superior court, limited civil case is less than the small claims court's jurisdictional maximum, the landlord's costs are limited to the actual filing fee for the action, the actual costs for service of process, and, if applicable, reasonable attorney fees. These may be awarded only if the plaintiff advised the defendant in writing before the action was brought that legal action was contemplated and that such action could result in the award of these costs against the defendant.

Code of Civil Procedure §1033(b)(2) may prove to be troublesome to landlords. Small recoveries are common in unlawful detainer actions, particularly when the judgment is recovered quickly and the monthly rent is low. In such cases, the amount of rent or damages awarded could easily be less than the small claims court's jurisdictional limit ($7500 if the plaintiff is a natural person; see CCP §§116.220(a)(1), 116.221). On the other hand, the recovery of "possession" is a recovery in excess of the jurisdiction of the small claims court. The small claims court no longer has jurisdiction to award possession. Arguably, CCP §1033(b) should not apply in cases where possession has been awarded to the landlord.

PRACTICE TIP: Notices to quit or to terminate tenancies should include the warning prescribed in CCP §1033(b)(2) when the monetary relief (back rent and damages) is expected to be less than $7500. Furthermore, the notices should closely follow the wording of the statute to avoid claims of intimidation and harassment, and may state that the warning is given without a waiver of the right to argue the inapplicability of CCP §1033(b) altogether.

In superior court, when a prevailing plaintiff recovers a judgment that could have been recovered in a court of lesser jurisdiction, an award of costs is within the court's discretion as governed by CCP §1034. CCP §1033(a).

There is no statutory language limiting the amount of the costs that a prevailing defendant may claim.

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6. Attorney Fees

§13.25 a. Basis for Recovery

Except as expressly provided by statute, the "measure and mode" of compensating attorneys are left to the agreement of the parties. CCP §1021. The parties may, and often do, provide in the lease or rental agreement for recovery of attorney fees incurred in enforcing the provisions of that agreement (see §1.74). A party may recover attorney fees under a contractual provision even if neither party has *pleaded* entitlement to the fees as an item of damages, because such fees are recovered as costs. *Allstate Ins. Co. v Loo* (1996) 46 CA4th 1794, 54 CR2d 541. The better practice is to plead for attorney fees at least in the prayer of the complaint.

Some leases are one-sided and provide only for recovery of attorney fees when the landlord enforces its terms. Under California law, however, such a provision is interpreted to provide for recovery of attorney fees by the prevailing party, regardless of language limiting the right to one party. CC §1717(a). In other words, a unilateral contractual provision for attorney fees is transformed into a reciprocal provision by authorizing an award of fees to the prevailing party, "whether he or she is the party specified in the contract or not." CC §1717(a). Thus, if the lease provides for attorney fees at all, the party prevailing at trial in an unlawful detainer action may recover attorney fees. Moreover, if the contract provides for attorney fees, the prevailing party is entitled to fees regardless of which party initiated the action. *Pacific Custom Pools, Inc. v Turner Constr. Co.* (2000) 79 CA4th 1254, 94 CR2d 756.

A commercial lease provision that allowed the lessor to recover attorney fees in an enforcement action that "determined" that the tenant was in default entitled the landlord to attorney fees after accepting the tenant's CCP §998 offer. *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 264, 118 CR2d 276. The Court of Appeal held that a party that accepts a §998 offer may recover attorney fees under CC §1717 when the compromise agreement was silent as to costs and fees.

In *Cruz v Ayromloo* (2007) 155 CA4th 1270, 1277, 66 CR3d 725, the court of appeal allowed attorney fees for both contract and tort causes of action under a lease that provided that the prevailing party would be awarded fees "for all claims in any civil action *in connection with* the lease." (Emphasis in original.)

When there is no contractual provision for attorney fees, there is no general statutory authorization for attorney fees in unlawful detainer proceedings except for CCP §1174.21, which provides that a landlord who brings an unlawful detainer action based on nonpayment of rent, and who violates the habitability standards in CC §1942.4, must pay the tenant's reasonable attorney fees and costs (see §§3.15A, 3.41), and CC §798.85, which entitles the prevailing party in an action regarding a tenancy under the Mobilehome Residency Law (CC §§798-799.10) to an award of reasonable attorney fees and costs (see chap 6). A city or county ordinance may serve as authority for an award of attorney fees. *City of Santa Paula v Narula* (2003) 114 CA4th 485, 8 CR3d 75. Other statutes that authorize an award of attorney fees in related contexts include the following:

- CC §52(a) (enforcement of Unruh Act (CC §51));
- CC §789.3(d) (unlawful termination of utility services);
- CC §1940.1(b) (violation of residential hotel tenancy rights);
- CC §1942.4(b) (affirmative suit for breach of statutory habitability requirements);
- CC §1942.5(g) (action for damages for retaliatory eviction);
- CCP §527.6(i) (action to enjoin harassment);
- CCP §1021.5 (private attorney general); and
- CCP §1021.8 (court's discretion when Attorney General is prevailing party and enforcing important public rights).

For a complete listing of statutes authorizing awards of attorney fees, see California Attorney Fee Awards, chaps 3, 9, 12-13 (2d ed Cal CEB 1994).

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b. Determining Who Is Prevailing Party

§13.26 (1) Party Recovering "Greater Relief"

Attorney fees in routine unlawful detainer actions usually turn on the presence or absence of an attorney fee provision in the lease. See §13.25. Civil Code §1717(a) authorizes an award of attorney fees to the prevailing party, who is defined in CC §1717(b)(1) as the party who recovered a greater relief in the action on the contract. Civil Code §1717 was amended (in piecemeal fashion) several times between 1980 and 1988. In its current version a court has the authority to decide that neither party is the prevailing party for purposes of awarding attorney fees under CC §1717(b)(1) even though it may make an award of costs to one of the parties. See *Nasser v Superior Court* (1984) 156 CA3d 52, 202 CR 552. If the tenant defeats the plaintiff's claim for possession in the unlawful detainer action, the tenant is the party prevailing on the contract as a matter of law and may not be denied reasonable attorney fees under CC §1717. See *Hsu v Abbara* (1995) 9 C4th 863, 39 CR2d 824. Because the primary objective of an unlawful detainer action is recovery of possession of the premises (see *Gray v Whitmore* (1971) 17 CA3d 1, 17, 94 CR 904), the tenant must be considered to have prevailed in the action if the landlord for any reason is denied recovery of the premises. If a tenant successfully defeats the claim for possession by proving at trial the defense of breach of warranty of habitability, however, and thereafter fails to pay the reasonable rental value as determined by the court within a 5-day period, and if a statute or a contract (*i.e.,* rental agreement, lease) provides for attorney fees to the prevailing party, then the landlord will be awarded costs and attorney fees. CCP §1174.2. For further discussion, see §§13.36, 13.40-13.40A.

In *Public Employees' Retirement Sys. v Winston* (1989) 209 CA3d 205, 258 CR 612, the court held that the tenant, who was entitled to return of the security deposit, which exceeded the amount of unpaid rent, was the prevailing party. A tenant was held to be the prevailing party in *Haire v Stevenson* (1987) 196 CA3d 1249, 242 CR 433, although the landlord prevailed in the unlawful detainer action. Because the tenant's judgment for damages in his action for breach of the lease exceeded the landlord's judgment in the unlawful detainer action, the tenant was the prevailing party. Both of these cases are consistent with the current version of CC §1717(b)(1), which provides that the prevailing party is the one who recovered greater relief.

A party may actually be the prevailing party under the terms of the lease, but may be denied attorney fees. In a commercial lease that defined the prevailing party as the party "who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other [p]arty… of its claims or defenses," a tenant received a voluntary dismissal while its summary judgment motion was pending and filed a motion for attorney fees. The court of appeal agreed that the language of the lease qualified the tenant as the prevailing party, but denied attorney fees because CC §1717 governs the award of attorney fees in "any action on a contract" and does not permit attorney fees in the event of a voluntary dismissal. *Mitchell Land & Improvement Co. v Ristorante Ferrantelli, Inc.* (2007) 158 CA4th 479, 70 CR3d 9.

A commercial landlord recovered attorney fees in *North Assocs. v Bell* (1986) 184 CA3d 860, 229 CR 305. The landlord filed an unlawful detainer action based on a 30-day notice terminating a month-to-month tenancy. The tenant defended the action on the ground that he had exercised an option to extend the expired lease, which contained an attorney fees provision. The trial court ruled in the landlord's favor. The court of appeal affirmed the trial court's award of attorney fees under CC §1717, even though the trial court found that the lease containing the attorney fee provision had expired and had not been extended. Had the tenant prevailed in his defense, he would have been allowed to recover attorney fees based on the lease. The court thus found that it would be inequitable to deny attorney fees to the landlord.

Similarly, in *Real Prop. Servs. Corp. v City of Pasadena* (1994) 25 CA4th 375, 30 CR2d 536, the court held that the prevailing signatory defendant was entitled to fees against the losing nonsignatory plaintiff because the plaintiff would have been entitled to an attorney fees award had it prevailed. But see *Whiteside v Tenet Healthcare Corp.* (2002) 101 CA4th 693, 708, 124 CR2d 580, as to when there is a sufficient nexus between a signatory landlord and a

nonsignatory sublessee so that the sublessee may enforce an attorney fee provision in the lease as a third party beneficiary.

WARNING: There are many other appellate court decisions on whether attorney fees may be awarded to or against persons who were not signatories to the agreement in dispute. See, *e.g.,* §§13.31, 13.40. For further discussion, see California Attorney Fee Awards §§6.10-6.12 (2d ed Cal CEB 1994). Many of the opinions on this issue appear to be in conflict because they were decided on factually driven analyses, or because the court applied equitable principles that appear to be inconsistent with the language of CC §1717. Because of the apparent conflicts among the appellate districts, counsel should review carefully the facts of the reported cases and check to see which cases are binding in his or her district, or be prepared to argue the view most favorable to one's client for an action pending in a district where there is no published opinion on this issue.

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§13.27 (2) Effect of Dismissal

If the plaintiff dismisses the contract action voluntarily, or the action is dismissed as part of a settlement, effectively there is no party prevailing on the contract. CC §1717(b)(2). Consequently, the defendant may not recover attorney fees incurred in defending a contract action that is voluntarily dismissed before trial, even if the contract expressly authorizes recovery of those fees. *Santisas v Goodin* (1998) 17 C4th 599, 617, 71 CR2d 830 (real estate purchase contract); *Mitchell Land & Improvement Co. v Ristorante Ferrantelli, Inc.* (2007) 158 CA4th 479, 70 CR3d 9; *Exxess Electronixx v Heger Realty Corp.* (1998) 64 CA4th 698, 75 CR2d 376 (commercial lease). See also *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 76 CR3d 325 (commercial lease; analysis by court of value of studying exact language of fee provision in contract).

For example, in *Honey Baked Hams, Inc. v Dickens* (1995) 37 CA4th 421, 424, 43 CR2d 595, disapproved on other grounds in *Santisas v Goodin* (1998) 17 C4th 599, 614 n8, 71 CR2d 830, a commercial lease required that "the losing party" in any action for possession pay "the successful party" a reasonable attorney fee, "whether or not such action is prosecuted to judgment." The landlord sued to evict for nonpayment of rent, but voluntarily dismissed the action when it learned of a weakness in its evidence. The trial court granted the tenant's motion for attorney fees, and the court of appeal affirmed. The ruling in *Honey Baked Hams* was expressly disapproved in *Santisas,* because §1717(b), not CCP §1021, governs the award of fees after a voluntary dismissal of a contract action.

In an action on a contract that is ultimately settled, however, the parties may in their settlement agreement waive rights under §1717(b)(2). See, *e.g., Jackson v Homeowners Ass'n Monte Vista Estates-East* (2001) 93 CA4th 773, 113 CR2d 363, in which the parties entered into a pretrial settlement agreement and inserted a clause providing that the trial court would determine the prevailing party and the amount of the attorney fee award. The court of appeal held the agreement to be valid and enforceable because the parties contemplated that that the case would not be dismissed until the trial court had decided the attorney fee issue.

Note also that the *Santisas* decision arose from a contract that contained an attorney fee clause awarding fees to the prevailing party and does not apply to attorney fee awards authorized by statute. See, *e.g., Del Cerro Mobile Estates v Proffer* (2001) 87 CA4th 943, 105 CR2d 5 (mobilehome tenant in whose favor dismissal was entered was entitled to recover attorney fees under Mobilehome Residency Law, CC §798.85, a statute independent of the cost statutes and wholly separate from CC §1717); *Galan v Wolfriver Holding Corp.* (2000) 80 CA4th 1124, 96 CR2d 112 (trial court had discretion to rule that defendant was not prevailing party for purposes of recovering attorney fees under CC §1942.4 after plaintiff voluntarily dismissed suit for untenantable unit). See also *Parrott v Mooring Townhomes Ass'n* (2003) 112 CA4th 873, 6 CR3d 116 (CC §1717 not applicable in suit against condominium association for injunctive and declaratory relief; attorney fees governed by statute); *Damian v Tamondong* (1998) 65 CA4th 1115, 77 CR2d 262 (§1717 does not bar statutory attorney fee award for defendant in whose favor dismissal was entered in action under automobile sales financing law).

A defendant is not entitled to fees under CC §1717 even if the plaintiff dismisses voluntarily after trial, judgment for the plaintiff, and reversal on appeal. *Investors Capital Mgmt. v Reiff* (1979) 96 CA3d Supp 26, 158 CR 272. But see *Wells v Marina City Props.* (1981) 29 C3d 781, 176 CR 104 (plaintiff lost right to dismiss voluntarily when demurrer sustained and plaintiff failed to amend complaint), and *Groth Bros. Oldsmobile, Inc. v Gallagher* (2002) 97 CA4th 60, 118 CR2d 405 (absolute right to voluntarily dismiss case before trial did not apply when previous court order (by tentative ruling) sustained defendant's demurrer without leave to amend; defendant allowed to seek reasonable attorney fees under §1717).

A voluntary dismissal does not always exculpate a plaintiff from liability for attorney fees. See, *e.g., Santisas v Goodin, supra*; *Del Cerro Mobile Estates v Proffer, supra* (when plaintiff joins noncontract claim with contract action and dismisses entire action, defendant might recover attorney fees if contract or statute permits fee award in noncontract claim); *Drybread v Chipain Chiropractic Corp.* (2007) 151 CA4th 1063, 60 CR3d 580 (after landlord dismissed unlawful detainer suit that claimed tenant was holding over after lease expired, court ruled that §1717 did not apply and defendant, as prevailing party under CCP §1032(a)(4), was entitled to fees); *Kelley v Bredelis* (1996) 45 CA4th 1819,

53 CR2d 536 (when voluntary dismissal is set aside, defendant may be awarded attorney fees).

Also, under CCP §581(i), a plaintiff may not dismiss the entire *action* voluntarily if a defendant has sought relief in a cross-complaint, but a plaintiff may dismiss the *complaint* or any part of it under CCP §581(c), despite a cross-complaint.

PRACTICE TIP: Before voluntarily dismissing an action prior to trial, a landlord's attorney should scrutinize the complaint to make sure all causes of action pleaded arise from the contract. For a list of potential attorney fee entitlements, see §13.24.

On effect of dismissal on claims for costs, see §§13.21, 13.23.

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c. Limits on Recovery by Prevailing Party

§13.28 (1) Attorney Representing Self

An attorney who represents himself or herself in propria persona may not recover attorney fees under CC §1717. *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241. Nor may a pro per attorney recover attorney fees as discovery sanctions. *Argaman v Ratan* (1999) 73 CA4th 1173, 86 CR2d 917. A pro se litigant, including an attorney, may recover as a discovery sanction reasonable expenses incurred, even though he or she may not recover attorney fees. *Kravitz v Superior Court* (2001) 91 CA4th 1015, 111 CR2d 385.

The supreme court held that under CCP §128.7, a self-representing attorney may not be awarded attorney fees incurred in the defense of meritless claims. *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475 (applied *Trope v Katz, supra,* and reversed order awarding $25,050 in attorney fees). Although court of appeal decisions have allowed pro per attorneys to recover attorney fees under a companion statute (CCP §128.5) if the opposing party is guilty of bad faith tactics (see, *e.g., Abandonato v Coldren* (1995) 41 CA4th 264, 48 CR2d 429), the supreme court disapproved those rulings in *Musaelian v Adams, supra*.

For further discussion of attorney fees under CC §1717, see cases cited in §13.40 and California Attorney Fee Awards, chap 6 (2d ed Cal CEB 1994).

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§13.28A (2) In-House or Pro Bono Representation

An entity that is represented by in-house counsel may recover attorneys fees under CC §1717. *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198. Similarly, a pro bono attorney may be awarded attorney fees on a successful motion to redress discovery abuses under the discovery laws, even if the attorney was not charging for services rendered in the case. See *Do v Superior Court* (2003) 109 CA4th 1210, 135 CR2d 855.

When applicable, CCP §1021.8 gives the court discretion when the Attorney General is the prevailing party and is enforcing important public rights.

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§13.28B (3) Effect of Tenant Tendering Full Amount of Rent Owing

Under CC §1717(b)(2), a tenant may argue that the landlord cannot be the prevailing party for purposes of CC §1717 if:

- The court finds that the tenant truthfully alleged in the answer that the tenant tendered to the landlord the full amount to which the landlord was entitled; and
- The tenant deposits that amount into court for the landlord.

The landlord may argue in response that the failure to tender the rent during the 3-day notice period terminates the tenancy irrespective of CC §1717(b)(2). See §8.45. If the court accepts the tenant's view of CC §1717 and finds the allegation to be true, the tenant would be the prevailing party and thus would be entitled to recover attorney fees under CC §1717. If the tenant tendered the rent due before or during the 3-day notice period, of course, he or she should prevail and would not need the benefit of this provision. See §§8.43-8.44.

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§13.28C (4) If Attorney Files Action in Wrong Court

Attorney fees may be denied or reduced if a landlord who is otherwise the prevailing party sues in the wrong jurisdictional level of the courts. CCP §1033. In *Dorman v DWLC Corp.* (1995) 35 CA4th 1808, 42 CR2d 459, a landlord sued his tenant in superior court for $50,000 for damage to the leased commercial premises, but the court awarded the landlord only $22,910. Because this amount was within the jurisdiction of the municipal court, the court exercised its discretion under §1033 to deny the landlord an award of attorney fees and costs, although the lease provided for attorney fees and costs to the prevailing party, and the landlord had prevailed. On appeal, the landlord argued that CC §1717 requires the trial court to award attorneys fees to the prevailing party if the lease so provides. The court of appeal held that CCP §1033 controlled, but that the trial court had abused its discretion by failing to award any fees. After trial court unification, the rule in §1033 that was the basis of the *Dorman* decision was preserved, but it distinguishes between unlimited and limited civil cases.

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§13.28D (5) Actions Not Arising From Lease

In *Artesia Med. Dev. Co. v Regency Assocs.* (1989) 214 CA3d 957, 266 CR 657, the court held that a subtenant could not be the prevailing party, although it was awarded relief from forfeiture of the lease in an unlawful detainer action. Although the lease provided for attorney fees, there was no privity of contract between the landlord and the subtenant. Therefore, CC §1717 did not authorize an award of attorney fees for *either* party. In any event, the subtenant could not be the prevailing party under CC §1717, because it actually lost the unlawful detainer action and was allowed relief from forfeiture only as "an act of grace."

In *McCulloch v M & C Beauty Colleges, Inc.* (1987) 194 CA3d 1338, 1347, 240 CR 189, the tenant argued that attorney fees should not be awarded under the lease because the issues actually litigated in the suit were "entirely outside of the lease." In defense to an unlawful detainer action, the tenant raised complicated questions of title in an effort to prove that he had exercised a right of first refusal. The court rejected this argument on the ground that the tenant, and not the landlord, was responsible for introducing those issues into the case. Thus, the case essentially remained an unlawful detainer action. But see (the current) CC §1717(c) (allows for setoff in a case between contract and noncontract awards to ascertain prevailing party).

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Source: Real Property/California Landlord-Tenant Practice/13 Unlawful Detainer: Judgment and Posttrial Proceedings/ §13.29 d. Determining Amount of Fees

§13.29 d. Determining Amount of Fees

Attorney fees actually awarded to the prevailing party are often based on the amount in controversy, and they may not accurately reflect the actual amount of time expended by counsel on the case. This problem may arise especially in unlawful detainer actions, in which counsel for both parties may expend much time litigating complicated issues such as habitability and retaliation, but in which the actual dollar amounts in dispute (basically back rent and damages; see §§13.18-13.19) may be small.

The court in *Stokus v Marsh* (1990) 217 CA3d 647, 266 CR 90, however, upheld an award of $75,000 in attorney fees to a landlord because of the extremely vigorous, but unsuccessful, defense attempted by counsel for the tenants. Similarly, in *Honey Baked Hams, Inc. v Dickens* (1995) 37 CA4th 421, 43 CR2d 595, disapproved on other grounds in *Santisas v Goodin* (1998) 17 C4th 599, 614 n8, 71 CR2d 830, a court of appeal allowed an attorney fee award of over $5000 to the tenant's attorney, citing the facts that the landlord served the 3-day notice on the Friday of the 3-day New Year's weekend (although it had prepared the notice a month earlier), the tenant had submitted detailed billings to support the award, and a 5-year tenancy was at stake.

To assess attorney fees, trial courts frequently refer to local fee schedule tables. See *Bakkebo v Municipal Court* (1981) 124 CA3d 229, 236, 177 CR 239. On procedures see §§13.33-13.33C. For further discussion of fixing the amount of attorney fees, see California Attorney Fee Awards, chaps 11-13 (2d ed Cal CEB 1994).

An attorney fee award may be immunized from appellate review under the well-established rule that the trial court's decision "cannot be reversed in the absence of an abuse of discretion." *Melnyk v Robledo* (1976) 64 CA3d 618, 623, 134 CR 602. In *Hadley v Krepel* (1985) 167 CA3d 677, 214 CR 461, however, the court held that the trial court had abused its discretion in awarding the prevailing party only 20 percent of the attorney fees requested. Particularly in cases of unusual complexity or duration, the trial court should consider many factors in determining the amount of the award, "including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure," and other circumstances. *Melnyk v Robledo, supra.*

The trial court may consider, but need not follow, the fee arrangement between the prevailing party and his or her counsel. *Vella v Hudgins* (1984) 151 CA3d 515, 198 CR 725. A court may consider the attorney's "age and experience in the particular type of work demanded." *La Mesa-Spring Valley Sch. Dist. v Otsuka* (1962) 57 C2d 309, 316, 19 CR 479. The determination should focus on reasonably necessary services and not on the mere total of hours expended. *Cirimele v Shinazy* (1955) 134 CA2d 50, 52, 285 P2d 311. The trial court may also need to decide who gets the fees awarded—the attorney or the party. In *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809, *e.g.*, the supreme court held that attorney fees awarded under Govt C §12965 (exceeding the fees already paid) belong to the attorney and not the client, unless their agreement provides otherwise.

PRACTICE TIP: When attorney fees might be awarded in a case, counsel should document the need for each expenditure of time as the case proceeds and be prepared to submit a detailed declaration stating (1) the hours worked and a justification for them, (2) material concerning his or her background and experience, (3) the complexity and importance of the case, and (4) any other facts that might support an award of fees in the amount requested. See California Attorney Fee Awards, chap 12, Apps A-L (2d ed Cal CEB 1994); California Eviction Defense Manual §26.24 (2d ed Cal CEB 1993).

A $500 limit on attorney fees in a rental agreement does not preclude an award of a higher amount under CCP §128.5, which authorizes sanctions for frivolous litigation tactics). *Park Magnolia v Fields* (1987) 191 CA3d Supp 1, 236 CR 900. Sanctions for frivolous litigation actions are currently governed by CCP §128.7.

In awarding attorney fees, a court hearing a limited civil case is not restricted by its $25,000 jurisdictional limit, as long as the fees are reasonable and bear a rational relationship to the substantive recovery. *Stokus v Marsh* (1990) 217 CA3d 647, 266 CR 90. Upholding a $75,000 fee award in an unlawful detainer action in which actual damages were $6166, the court in *Stokus* rejected dicta in *Bakkebo v Municipal Court, supra,* which suggested that a fee award could not exceed a court's jurisdictional limit.

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§13.30 e. Fees for Services Before Complaint Filed

If counsel for the prevailing party can establish that significant services were performed before the action was filed, and that such services were necessary to prosecute or defend the action successfully, fees for such services may be awarded within the court's discretion. In *La Mesa-Spring Valley Sch. Dist. v Otsuka* (1962) 57 C2d 309, 316, 19 CR 479, the supreme court held that the fees must proximately and directly result from the action, but not be disallowed merely because the services were rendered before the action was filed. Thus, counsel might be able to recover for time spent preparing and serving the termination notice, investigating the facts of the case, or even attempting to persuade the parties to resolve their dispute.

Upholding an award of prefiling attorney fees, the court in *Stokus v Marsh* (1990) 217 CA3d 647, 266 CR 90, extended the reasoning of *La Mesa-Spring Valley Sch. Dist. v Otsuka, supra,* to all civil actions in municipal court. For further discussion of *Stokus,* see §13.29.

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§13.31 f. Award of Fees Against Successors in Interest

Although the prevailing party is entitled to attorney fees under CC §1717 if they are expressly authorized in a lease or rental agreement (see §13.25), it is less certain whether such a contractual provision is enforceable between a landlord's successor in interest and the tenant or the tenant's assignee. This question is significant because parties to the litigation often succeed to the interests of either the landlord or the tenant, without having executed an assignment of an existing lease or rental agreement. See caveat in §13.26.

Under CC §821, a person to whom any real property is conveyed is entitled to the same remedies for breach of any of the terms of the lease as the grantor might have had. This provision is complemented by CC §823, which states:

> Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against encumbrances or relating to the title or possession of the premises.

Those two statutes preserve the reciprocal rights of both parties to the lease or rental agreement to enforce a contractual attorney fee provision when there are successors in interest to one or both parties who have not executed a new lease (see §§3.52, 3.54). *Upton v Toth* (1940) 36 CA2d 679, 684, 98 P2d 515; *Rosenkranz v Pellin* (1950) 99 CA2d 650, 652, 222 P2d 249. For discussion of assignment and subletting generally, see §§3.49-3.59.

Civil Code §§821 and 823 apply, however, only when the lease does not provide to the contrary. *Commonwealth Mem., Inc. v Telophase Soc'y* (1976) 63 CA3d 867, 871, 134 CR 58 (sales agreement between landlord and successor reserved rights under lease to landlord; court held that successor did not become tenant's landlord). Similarly, a tenant is not bound by a preexisting lease that the tenant neither signed, nor agreed to be bound by. See *Canal-Randolph Anaheim, Inc. v Wilkoski* (1978) 78 CA3d 477, 485, 144 CR 474 (attorney-tenant, who moved into suite occupied by law firm under lease with owner, not entitled to attorney fees under CC §1717 after successfully defending unlawful detainer action).

When a party did not execute the lease or rental agreement, or agree to be bound by it, the test for applicability of CC §1717 appears to be whether the plaintiff claims that the nonsignatory party is bound to the contract by principles of agency or "coventureship." If such a relationship is established, a prevailing plaintiff is entitled to attorney fees against both a signatory and a nonsignatory defendant. A nonsignatory defendant who successfully defends against such a claim should also be entitled to attorney fees under CC §1717. See *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 128, 158 CR 1.

When a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees had the plaintiff prevailed. *Real Prop. Servs. Corp. v City of Pasadena* (1994) 25 CA4th 375, 30 CR2d 536. But see *Whiteside v Tenet Healthcare Corp.* (2002) 101 CA4th 693, 708, 124 CR2d 580, as to when there is a sufficient nexus between a signatory landlord and a nonsignatory sublessee so that the sublessee may enforce an attorney fee provision in the lease as a third party beneficiary.

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§13.32 g. Attorney Fees on Appeal

Attorney fees may be awarded for services rendered in successfully prosecuting or opposing an appeal. *Erbe Corp. v W & B Realty Co.* (1967) 255 CA2d 773, 63 CR 462; *Care Constr., Inc. v Century Convalescent Ctrs.* (1976) 54 CA3d 701, 126 CR 761. Attorney fees are generally determined by the trial court, following remand, when it determines costs on appeal under CCP §1034(b) (see *Genis v Krasne* (1956) 47 C2d 241, 302 P2d 289) and Cal Rules of Ct 8.278 and 8.891.

Fees on appeal may be fixed by the appellate court, although the trial court is normally considered to be in a better position to determine the amount. *Beverly Hills Nat'l Bank v Glynn* (1968) 267 CA2d 859, 870, 73 CR 808. See Cal Rules of Ct 3.1702(c); California Attorney Fee Awards, chap 15 (2d ed Cal CEB 1994).

See Cal Rules of Ct 8.278(c) and 8.891(c), which respectively govern the procedure for claiming costs awarded on appeal to an appellate court and to the appellate division of the superior court from limited civil cases.

See also Cal Rules of Ct 8.276(a), which allows the court of appeal to impose sanctions, including the award or denial of costs under Rule 8.278 on a party or an attorney for taking a frivolous appeal or appealing solely to cause delay, for including in the record matters not needed for the appeal's determination, for filing a frivolous motion, or for committing other unreasonable violation of the rules.

On the timing of a motion for attorney fees after a postjudgment appeal, see Cal Rules of Ct 3.1702(c). Note that a party may postpone seeking attorney fees for a prejudgment appeal until after entry of judgment in the trial court (see §13.33C). The parties may stipulate to extend the time for filing a motion for attorney fees on appeal as well as at trial or may seek an order of court to extend the time for filing the motion. Cal Rules of Ct 3.1702(b)(2), (c)(2), (d).

If the underlying judgment is reversed, but the losing party has already paid the attorney fees of the prevailing party, the party that paid the fees may be able to petition for relief from the fee judgment. See, *e.g., California Med. Ass'n v Shalala* (9th Cir 2000) 207 F3d 575.

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§13.33 h. Procedure for Claiming Fees

Attorney fee awards in unlawful detainer actions are frequently based on contractual provisions for such awards to the prevailing party (found in many leases and rental agreements; see §1.74). Occasionally, attorney fees are granted to the prevailing party under a statute (*e.g.,* a successful defense to an unlawful detainer action based on a landlord's violation of fair housing laws; see §§2.47, 2.56, 2.59). For further examples and additional grounds for attorney fees, see California Attorney Fee Awards, chaps 4-8 (2d ed Cal CEB 1994).

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(1) Basis of Award Governs Procedure

§13.33A (a) Contractual Attorney Fees

When the basis of the award is contractual, attorney fees are adjudicated during or after trial in one of the following three ways:

(1) Fixed by a noticed motion after entry of judgment;

(2) Awarded on entry of default judgment; or

(3) Claimed in a memorandum of costs after entry of judgment.

See CC §1717(a); CCP §1033.5(a)(10)(A), (c)(5); Cal Rules of Ct 3.1702(a), (e). See also *Santisas v Goodin* (1998) 17 C4th 599, 618, 71 CR2d 830. A noticed motion after judgment is the most common method, although attorney fees are claimed in the memorandum of costs without a motion when "a party is entitled to statutory or contractual attorney's fees that are fixed without the necessity of a court determination." See Cal Rules of Ct 3.1702(a), (e). See examples in §13.23.

The noticed motion procedure is based on a combination of statutes, decisional law, and rules of court. Civil Code §1717(a) provides: "Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit." See also CCP §1033.5(c)(5); Stats 1990, ch 804, §2. Under CC §1717(b)(1), on notice and motion, the court must first determine the party prevailing on the contract for the purpose of awarding fees under CC §1717. The motion can and should also request that the court fix the amount of the award. See Cal Rules of Ct 3.1702(a). See also California Attorney Fee Awards, chaps 6 and 14 (2d ed Cal CEB 1994).

A question of how to proceed may arise when a court has adopted a local rule fixing attorney fees in a schedule that is based on the amount in controversy or some other standard. Some courts have a sliding scale system and vary the fees, depending on whether the case is contested or defaulted. Other jurisdictions have a policy (if not a local rule) for contested unlawful detainer actions (*e.g.,* in several divisions of the Los Angeles Courts a standard attorney fee of $350 is set for contested cases). Under CCP §1033.5(c)(5), attorney fees are awarded only on a noticed motion unless the parties stipulate otherwise or the judgment is entered by default (see Stats 1990, ch 804, §2). Therefore, a motion apparently may be avoided in a contested case only if the parties stipulate to an award consistent with the fee schedule or local policy, or if the parties have agreed on a fixed fee in the rental agreement. Despite the lack of authority, a few courts award attorney fees at the end of trial under the local fee schedule without a fee stipulation to expedite entry of judgment in unlawful detainer actions.

PRACTICE TIP: Most judges try to resolve attorney fees at the end of trial, if judgment is announced at that time, by asking the parties to stipulate to an award based on the local policy or rule of court. This is generally a good idea. The fixed fee is usually low enough to reward a stipulation from the losing party, who would have to pay more attorney fees to oppose a motion after trial. Many courts will not deviate from the local policy or rule unless there are extraordinary circumstances, such as a lengthy trial or a bankruptcy. In such courts, or if a prevailing landlord knows that the tenant is judgment-proof, the prevailing party may also benefit from stipulating in lieu of a motion.

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Source: Real Property/California Landlord-Tenant Practice/13 Unlawful Detainer: Judgment and Posttrial Proceedings/ §13.33B (b) Statutory Attorney Fees

§13.33B (b) Statutory Attorney Fees

When the basis of an attorney fee award is statutory, the fee amount may be fixed as follows:

- On a noticed motion after entry of judgment;
- At the time a statement of decision is rendered;
- On application (supported by a declaration) accompanying the filing of the memorandum of costs; or
- On entry of a default judgment.

See CCP §§1033.5(a)(10)(B), (c)(5); Cal Rules of Ct 3.1702(a), (e). See also California Attorney Fee Awards, chaps 4-5 and 11-14 (2d ed Cal CEB 1994) for a thorough discussion of statutory fees.

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Source: Real Property/California Landlord-Tenant Practice/13 Unlawful Detainer: Judgment and Posttrial Proceedings/ §13.33C (2) Time Limits for Claiming Attorney Fees

§13.33C (2) Time Limits for Claiming Attorney Fees

If attorney fees are allowed to be claimed along with or in the memorandum of costs, the memorandum and supporting documents must be served and filed within the time prescribed by Cal Rules of Ct 3.1700. See CCP §1033.5(a)(10), (c)(5); Cal Rules of Ct 3.1702(e) and discussion in §13.23.

If the attorney fees must be claimed in a motion filed after entry of judgment in the trial court, the motion to determine the prevailing party or the amount of attorney fees, or both, must be served and filed within the time for filing a notice of appeal under Cal Rules of Ct 8.104 and 8.108, *i.e.,* usually within 60 days. This appears to apply to both limited and unlimited civil cases. See Cal Rules of Ct 3.1-3.10, 3.1702(b)(1). The notice of entry of judgment (or copy of the judgment) must show the date on which the clerk mailed the document in order to establish the date on which the time period begins to run. Cal Rules of Ct 8.104(a)(1); Advisory Committee Comment to Rule 8.104 (2006).

WARNING: Cal Rules of Ct 3.1702 only refers to the time to file a notice of appeal under Cal Rules of Ct 8.104 and 8.108, which govern appeals in unlimited jurisdiction matters. The time to file a notice of appeal in a limited jurisdiction matter may be as short as 30 days. See Cal Rules of Ct 8.822-8.823. While it is unclear whether the attorney fees claim must be brought within the shorter period, the cautious practitioner should do so in order to avoid any argument that the fee claim has been waived.

Entry of judgment triggers the time period for filing an attorney fee motion under Cal Rules of Ct 3.1702(b)(1). See *Saben, Earlix & Associates v Fillet* (2005) 134 CA4th 1024, 36 CR3d 610 (order granting summary judgment, unlike entry of judgment, is not appealable order and, thus, does not trigger deadline).

A party may postpone seeking attorney fees for a successful appeal that occurred "before the rendition of judgment in the trial court" until after the entry of judgment, and then seek both the attorney fees for that appeal and the attorney fees for trial in the same motion. See Cal Rules of Ct 3.1702(b)(1).

Because the time for making a motion for an award of attorney fees refers only to the appeal periods in unlimited civil cases (see Cal Rules of Ct 3.1702(b)(1)), the time for making the motion arguably is automatically extended when certain posttrial motions are made. For example, under Cal Rules of Ct 8.108(b) and 8.823(b), when a notice of intention to move for a new trial is served and filed and the motion is denied, the appeal time (and the time for an attorney fees motion (see Cal Rules of Ct 3.1702(b)(1)) is increased until 30 days (15 days in a limited civil case) after either the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order or denial by operation of law, but in no event later than 180 days (90 days in a limited civil case) after the date of entry of judgment. This filing time is also automatically extended by various formulae for other posttrial procedures: under Cal Rules of Ct 8.108(c) and 8.823(c) when a notice of intention to move to vacate a judgment, or to vacate a judgment and enter a different judgment, is made; under Cal Rules of Ct 8.108(d) and 8.823(d) when a motion for judgment notwithstanding the verdict is made; and under Cal Rules of Ct 8.108(e) and 8.823(e) when a motion for reconsideration of an appealable order is made.

Under Cal Rules of Ct 3.1702(b)(2), the time for an attorney fee motion may be extended further by stipulation:

- Until 60 days after the expiration of the time for filing a notice of appeal; or
- If a notice of appeal has been filed, until the time in which a memorandum of costs must be filed as required in Cal Rules of Ct 8.278(c).

For good cause, the trial judge may extend the time for a period that is the same as (or longer than) that allowed by stipulation. Cal Rules of Ct 3.1702(d).

In *California Recreation Indus. v Kierstead* (1988) 199 CA3d 203, 209, 244 CR 632, the court held that failure to file a noticed motion under the former version of CC §1717 did not deprive the court of jurisdiction to award attorney fees when the party seeking fees filed and served only a memorandum of costs and the party opposing fees was not prejudiced by the lack of a noticed motion. See also *M.C. & D. Capital Corp. v Gilmaker* (1988) 204 CA3d 671, 678, 251 CR 178 (following *Kierstead* concerning attorney fees on appeal). Although these cases were decided before

amendments to CCP §1033.5(c)(5) (see Stats 1990, ch 804, §2), they may be relevant to an argument about whether a court may proceed on an attorney fees motion that is filed later than currently allowed by Cal Rules of Ct 3.1702(b). See, *e.g., Russell v Trans Pac. Group* (1993) 19 CA4th 1717, 1725, 24 CR2d 274 (trial court has no discretion to disregard compliance with noticed motion requirement, although it has discretion to grant relief for excusable neglect under CCP §473). Compare *Russell* with *Gunlock Corp. v Walk on Water, Inc.* (1993) 15 CA4th 1301, 19 CR2d 197 (filing memorandum of costs instead of noticed motion for fees within statutory time period constitutes substantial compliance with "notice and motion" requirement).

PRACTICE TIP: The safest practice is to file a timely and properly noticed motion within the time frame established in Cal Rules of Ct 3.1702(b). The opinion in *Gunlock* is questionable in view of the legislative intent stated in Stats 1990, ch 804, §2. See *Russell v Trans Pac. Group* (1993) 19 CA4th 1717, 1724, 24 CR2d 274.

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§13.33D 7. Landlord Posttrial Inspections

A court of appeal created, at least in commercial leases, a duty for the landlord to inspect the premises to avoid injury to third parties after obtaining a judgment on its unlawful detainer action. In *Stone v Center Trust Retail Props., Inc.* (2008) 163 CA4th 608, 77 CR3d 556, a slip and fall case resulting from the tenant's negligence in maintaining the premises, the court of appeal ruled that the date on which a landlord obtains a judgment for possession of the premises is the date on which the landlord becomes liable for the condition of the premises. For further discussion of *Stone*, see §§3.68C, 3.72.

Another similar, judicially created duty requires the landlord to:

- Inspect the premises before leasing and on renewal to ascertain and correct "unsafe conditions";
- Use reasonable care to correct an unsafe condition in an area under the landlord's control after a tenant has taken possession if the landlord knows or reasonably should have known about the condition; and
- Use reasonable care to correct an unsafe condition in an area under the tenant's control after a tenant has taken possession if the landlord has actual knowledge of the condition and the right and ability to correct it.

This duty is summarized in a Judicial Council-approved jury instruction, CACI 1006. For further discussion, see §3.68C.

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§13.34 8. Form: Judgment for Plaintiff (Attorney-Drafted)

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Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _,	**)**	**No. _ _ _ _ _ _**
Plaintiff(s)	**)**	
	)	**JUDGMENT AFTER TRIAL OF**
vs	**)**	**UNLAWFUL DETAINER**
	)	**ACTION**
_ _[*Name(s)*]_ _,	**)**	
Defendant(s)	**)**	
_____	**)**	

This action came on regularly for trial on _ _[*date*]_ _, at _ _[*time*]_ _. Appearing were _ _[*name*]_ _, as attorney for plaintiff, and _ _[*name*]_ _, as attorney for defendant.

[*Option 1: If court trial*]

A jury trial having been waived; the Court having heard and considered testimony, documentary evidence, and argument of counsel; the matter having been submitted for decision; and

[*Add if statement of decision is requested*]

the Court having issued its statement of decision;

[*Add if statement of decision is not requested or is waived*]

a statement of decision _ _[*not having been requested/having been waived*]_ _;

[*Option 2: If jury trial*]

A jury of _ _[*number*]_ _ persons was impaneled and sworn to try the action. Witnesses for both plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of attorneys, and the instructions of the Court, the jurors retired to consider their verdict. After returning to court, the jurors rendered their verdict as follows: _ _[*State verdict, e.g., plaintiff is entitled to recover possession of the premises and to recover damages in the sum of _ _[dollar amount]_ _ or both damages in the sum of _ _[dollar amount]_ _ and unpaid rent in the sum of _ _[dollar amount]_ _]_ _.

[*Continue*]

IT IS ADJUDGED AND DECREED that plaintiff _ _[*name*]_ _ recover possession of the premises located at _ _[*address*]_ _ from defendant(s) _ _[*name(s)*]_ _. The clerk of this Court is directed to issue a writ of possession directing the _ _[*sheriff/marshal*]_ _ to take all legal steps necessary to remove defendant(s) _ _[*name(s)*]_ _ from the premises.

IT IS FURTHER ADJUDGED AND DECREED that plaintiff _ _[*name*]_ _ recover from defendant(s) _ _[*name(s)*]_ _:

1. The following monetary relief:

a. Damages in the sum of _ _[*dollar amount*]_ _;

[*Add b or c, if applicable; see §§13.18-13.19*]

b. Unpaid rent in the sum of _ _[*dollar amount*]_ _**;**

c. Statutory damages in the sum of _ _[*dollar amount*]_ _**;**

[*Continue*]

2. Costs _ _[*according to memorandum of costs to be filed after entry of judgment/in the sum of* _ _[*dollar amount*]_ _]_ _**.**

[*Add if applicable; see §§13.25-13.33*]

3. Attorney fees _ _[*to be fixed by motion after entry of judgment/according to memorandum of costs/in the sum of* _ _[*dollar amount*]_ _]_ _**.**

[*Add if applicable; see §§13.17, 13.56*]

IT IS FURTHER ADJUDGED AND DECREED that all rights of defendant(s) _ _[*name(s)*]_ _ **under the** _ _[*lease/rental agreement*]_ _ **between the parties to this action are forfeited.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name of Judge*]_ _
JUDGE, SUPERIOR COURT

Copies: Original (to be presented to judge for signature); conformed copies (one for each attorney of record and unrepresented party) or for attaching to notice of entry of judgment (to be served and filed with original proof of service); office copies; copies for client(s).

Comment: This judgment form is drafted for the most simple case, in which the tenants lose on all defenses. For judgment forms to be used when the tenant prevails on the defense of breach of the implied warranty of habitability, see §§13.40B-13.41. Counsel should adapt this form to meet the requirements of the specific case. On preparing and serving a notice of entry of judgment, see California Trial Practice: Civil Procedure During Trial §§23.28, 23.40 (3d ed Cal CEB 1995). The attorney preparing the notice may either recite the terms of the judgment in the notice or simply attach a conformed copy of the judgment as an exhibit to the notice.

Code of Civil Procedure §1174(b) generally limits the kind of damages that may be awarded in unlawful detainer actions (see §§13.18-13.19), but also authorizes an award of "statutory" damages of up to $600 for a malicious holding over, in place of the former provision for treble damages.

Costs are described in a judgment either "according to memorandum of costs to be filed after entry of judgment" or, if costs were proved at trial, in the dollar amount awarded by the court. See §13.23.

Attorney fees are characterized in a judgment in one of the following three ways, which are mutually exclusive: (1) to be fixed by a noticed motion after entry of judgment, (2) to be claimed in the memorandum of costs, or, if attorney fees were proved at trial, (3) in the dollar amount awarded by the court. See §13.33.

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B. When Defendant Prevails

§13.35 1. Tenant's Retention of Possession

Because the primary objective of an unlawful detainer action is recovery of possession of the premises (see *Gray v Whitmore* (1971) 17 CA3d 1, 17, 94 CR 904), the tenant must be considered to have prevailed in the action if the landlord for any reason is denied recovery of the premises. This result is clear-cut if, for example, judgment were entered in the tenant's favor because the landlord failed to prove an element of the unlawful detainer cause of action (see §§12.19-12.35), or because the tenant established that the eviction was retaliatory (see §§12.38, 12.60-12.63; see also §§8.109-8.136).

If the tenant were to prove successfully an affirmative defense of breach of any warranty of habitability (see §§12.36-12.37, 12.46, 12.53-12.59; see also §§3.16-3.48), the tenant's victory may not be clear-cut, however, because the trier of fact probably would award the landlord some amount for "reasonable rent" due (see §§12.36, 12.56; see also §§3.35-3.38), entitling the landlord to a favorable judgment and execution by writ of possession if the rent found due is not paid. See CCP §1174.2. See also *Lee v Vignoli* (1979) 98 CA3d Supp 24, 29, 160 CR 79; *Strickland v Becks* (1979) 95 CA3d Supp 18, 157 CR 656 (when defendant prevails on affirmative defense, error to award costs to plaintiff). See forms in §§13.40B-13.41.

A trial court, however, may not condition entry of judgment for the tenant on payment of unpaid rent if the landlord has failed to prove an unlawful detainer. In *Balassy v Superior Court* (1986) 181 CA3d 1148, 226 CR 817, the court of appeal reversed the trial court's order conditioning judgment for the tenant on payment of back rent because the landlord's unlawful detainer action was based solely on an alleged nuisance committed by tenant.

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§13.36 2. Warranty of Habitability Damages

Under CCP §1174.2(a), when a court finds that a substantial breach of any warranty of habitability has occurred, the court must determine the reasonable rental value of the premises in their untenantable state to the date of trial, and it must adjudge the tenant to be the prevailing party conditioned on the tenant's payment of the reasonable rental value within a reasonable period not to exceed 5 days from the date of judgment (plus additional time under CCP §1013 if service of the court's decision is by mail, express delivery, or facsimile). If the tenant fulfills this condition, judgment will be entered in the tenant's favor, and the tenant will be awarded costs and attorney fees if they are authorized by statute or contract.

Under CCP §1174.2(b), judgment will be entered for the landlord, who will be the prevailing party for purposes of awarding costs and attorney fees, if a tenant who successfully establishes the defense of breach of any warranty of habitability fails to pay the reasonable rental value, as determined by the court, within a 5-day period. See §§13.26, 13.41 (comment to form). For an example of application of this rule (based on *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, rather than on statute), see *Park Magnolia v Fields* (1987) 191 CA3d Supp 1, 6, 236 CR 900. The court may order the landlord to make repairs and correct defective conditions, and may reduce the monthly rent until repairs are completed and retain jurisdiction to ensure compliance. CCP §1174.2(a).

This conditional judgment approach appears to be consistent with the decision in *Green v Superior Court, supra*. See §13.41 for a sample form of order for a defendant prevailing on the issue of landlord's breach of the implied warranty of habitability. The trier of fact should make an express finding of the extent of uninhabitability, no matter what method of measuring damages for breach of the implied warranty is used. See CCP §1174.2(a); *Lee v Vignoli* (1979) 98 CA3d Supp 24, 29, 160 CR 79. The tenant's damages should be measured by the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy by the tenant in the unsafe or unsanitary condition. For further discussion of measuring damages for breach of the warranty of habitability, see §§3.35-3.38, 12.36-12.37, 12.46, 12.53-12.59.

An unresolved question is whether the factfinder is limited to assessing damages from the landlord's partial breach of the warranty only for the period during which the tenant withheld rent, or may determine the extent of damages for the period of the tenancy during which the landlord had notice of the breach. No reported California decision expresses a preference for either approach, although each party would select or urge the court to follow the most advantageous formula, depending on a number of factors, including:

- The amount of delinquent rent before the termination notice was served on the tenant;
- The period of unlawful detainer to the date of judgment;
- The duration of the landlord's actual or constructive knowledge of the conditions giving rise to the breach;
- The applicable statute of limitations, as governed by whether the agreement is written or oral; and
- The degree of uninhabitability.

NOTE: The consequences resulting from each assessment approach (see §§13.37-13.38) are different. In order to keep the case as simple as possible, most trial judges do not allow evidence of uninhabitability for any time before the period described in the 3-day notice, especially in light of the precedence that unlawful detainer cases have on the trial calendar under CCP §1170.5(a).

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§13.37 a. Assessing Only Against Delinquent Rent

Under the formula that offsets breach of warranty damages only for the period during which the tenant withheld rent, if the landlord serves a 3-day notice to pay rent or quit immediately after the tenant's first rent withholding, and trial occurs 3 months later, the factfinder would be concerned only with damages for that 3-month period. Unless the breach is total, the tenant probably would be ordered to pay reduced rental value for that period to the landlord in order to retain possession. If the defects constituting the breach existed before the rent withholding, the tenant would not be able to claim them as an offset to the back rent and unlawful detainer damages due for the period of rent withholding. Instead, the tenant would have to seek damages in the form of "retroactive rent abatement" for the alleged overpayments in a separate lawsuit (see §§3.35, 3.45-3.47). As an affirmative claim, the tenant's damages would be subject to the applicable statute of limitations. See CCP §§337.2 (written contract), 339(1) (oral agreement).

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§13.38 b. Assessing Against All Rent Due After Notice

Under the approach offsetting breach of warranty damages for the entire period of the tenancy during which the landlord had either actual or constructive notice of the breach, the factfinder would determine the extent of the tenant's damages from the landlord's breach throughout the period of the tenancy that the landlord had notice of the breach, and these damages would be offset against any back rent due for the rent withholding period and any damages for unlawful detainer. The statute of limitations would not apply to a setoff by the tenant under this approach, but the amount of the setoff would be limited to the extent of affirmative relief awarded to the landlord. See CCP §431.70.

In *Nork v Pacific Coast Med. Enters.* (1977) 73 CA3d 410, 416, 140 CR 734, the court held that a tenant could not allege, as a defense to an unlawful detainer action, an unrelated debt owed to the tenant by the landlord that was irrelevant to the issue of immediate possession. Other cases suggest that a factfinder may offset damages against back rent in a breach of warranty case. The court in *Knight v Black* (1912) 19 CA 518, 126 P 512, held that:

- A tenant could allege that rent had been paid or that a security deposit had been left with the landlord; and
- Both of these sums could be used to offset rent due.

Note, however, that the tenant had vacated the premises prior to the judgment. See also *Berzito v Gambino* (NJ 1973) 308 A2d 17, 21 ("in action by landlord for unpaid rent, tenant may plead, by way of defense and set-off, breach by landlord of continuing obligation to maintain adequate standard of habitability").

Although not squarely faced with the issue of determining the extent of damages, the California Supreme Court discussed the issue in *Green v Superior Court* (1974) 10 C3d 616, 638, 111 CR 704. Additionally, as part of its rationale for abandoning the independent covenant doctrine and allowing breach of the warranty as a defense, the court in *Green* noted the authorities that have taken or recommended this result, and stated that this position accords with the trend toward adjudicating the rights and liabilities of litigants in one action, rather than multiple actions (quoting from *Jack Spring, Inc. v Little* (Ill 1972) 280 NE2d 208, 213). 10 C3d at 636. Those authorities suggest that offsetting damages for breach of the warranty against rent for a duration of the tenancy beyond the period of rent withholding might be appropriate in a partial breach case. The order of proof would be approximately as follows:

- The time limit for the setoff would commence when the owner had notice of the alleged uninhabitable conditions, whether the notice was the result of an inspection, notification by the tenant, constructive knowledge, or any other source.
- Because proof of the breach during the period of rent withholding is clearly admissible, additional proof of the breach for the time during which the landlord had notice (and during which the tenant did not withhold rent), if admitted, would not unduly prolong the proceedings.
- The setoff would be applied only to sums otherwise found due for back rent and damages but not result in an affirmative award of money damages to the tenant in the unlawful detainer action.

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§13.39 3. Res Judicata Effect

Because of the summary nature of the unlawful detainer remedy (see §§9.6-9.8), the significant limitation on allowable affirmative defenses (see §10.53), and the unavailability of relief by cross-complaint (see §10.73), unlawful detainer judgments should have collateral estoppel or res judicata effect only when an issue could have been raised, or actually was adjudicated, in the unlawful detainer proceeding. See *Vella v Hudgins* (1977) 20 C3d 251, 142 CR 414 (unlawful detainer judgment following trustee sale was not res judicata because no transcript of unlawful detainer trial existed and no findings of fact or conclusions of law were in record). See also *Gombiner v Swartz* (2008) 167 CA4th 1365, 1371, 85 CR3d 83 (determination of rent control ordinance's applicability to property in final judgment in unlawful detainer action was binding on parties in tenant's subsequent action for damages against landlord). In *Lovely v Laliberte* (1st Cir 1974) 498 F2d 1261, the court held that the tenant's civil rights action against the landlord was barred because the tenant could have raised the defense of retaliatory eviction in an earlier eviction action, but did not do so.

The doctrine of res judicata will not apply to an issue if a party to the action did not have a fair adversary hearing on the issue. *Gonzalez v Toews* (2003) 111 CA4th 977, 4 CR3d 434. See also *Gonzales v Gem Props.* (1974) 37 CA3d 1029, 112 CR 884 (no res judicata effect because plaintiff did not have opportunity to litigate fully contentions regarding title); *Bacciocco v Curtis* (1938) 12 C2d 109, 82 P2d 385 (tenant's action for return of security deposit held not barred by unlawful detainer judgment). But see *Wood v Herson* (1974) 39 CA3d 737, 745, 114 CR 365 (judgment given res judicata effect because tenants had full hearing on their contentions). Compare *McAlister v Essex Prop. Trust* (CD Cal 2007) 504 F Supp 2d 903 (state court judgment given res judicata effect because tenants prevailed on affirmative defense based on discrimination in unlawful detainer action) with *Stein v Braum Inv. & Dev., Inc.* (9th Cir Cal 2007) 2007 US App Lexis 18971 (state court judgment not given res judicata effect, because record did not establish that tenants' defense based on discrimination was fully and fairly litigated in eviction action).

A related question is whether a judgment in favor of the tenant based on the defense of breach of the warranty of habitability or retaliatory eviction would bar the landlord from relitigating those issues in the tenant's subsequent affirmative suit for damages. No reported decision has addressed this issue. The key to the question would be whether the landlord had a full and fair opportunity to litigate the issue in the prior proceeding. If the tenant raised the issue as an affirmative defense, which the landlord had a full opportunity to meet, a ruling on the issue should bar further litigation except over any damages not adjudicated in the unlawful detainer action.

In *Pelletier v Alameda Yacht Harbor* (1986) 188 CA3d 1551, 230 CR 253, the court held that a stipulated judgment in an unlawful detainer action was not a bar to a later action for retaliatory eviction. The court reasoned that "[t]he retaliation defense was not fully and fairly litigated in an adversary hearing, and thus was not conclusively established." 188 CA3d at 1557. This result could have been avoided if the landlord had insisted on a clause in the stipulated judgment releasing the parties from any further liability arising out of the matter in controversy. See also *Landeros v Pankey* (1995) 39 CA4th 1167, 46 CR2d 165, discussed in §3.35, in which the tenant was not collaterally estopped (by the settlement of the landlord's unlawful detainer action) from suing the landlord for damages for breach of the implied warranty of habitability. Careful drafting of the settlement documents could have avoided this problem for the landlord.

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4. Attorney Fees and Costs

§13.40 a. Under Contract

If the lease or rental agreement contains an attorney fee provision, a tenant who prevails in the action is entitled to an award of reasonable attorney fees and costs. CC §1717; *Strickland v Becks* (1979) 95 CA3d Supp 18, 157 CR 656 (although landlord awarded back rent, tenant prevailing on habitability defense entitled to costs).

In *Hsu v Abbara* (1995) 9 C4th 863, 877, 39 CR2d 824, the court held that "[w]hen a defendant obtains a simple, unqualified victory by defeating the only contract claim in the action," the trial court has no discretion to deny an award of attorney fees to the defendant under CC §1717. The trial court has discretion, however, to award no attorney fees to either party (CC §1717(b)(1)) if the ostensibly prevailing party receives only part of the relief sought.

In *Public Employees' Retirement Sys. v Winston* (1989) 209 CA3d 205, 258 CR 612, the court held that the tenant, who was entitled to return of the security deposit, which exceeded the amount of unpaid rent, was the prevailing party. A tenant was held to be the prevailing party in *Haire v Stevenson* (1987) 196 CA3d 1249, 242 CR 433, although the landlord prevailed in the unlawful detainer action. Because the tenant's judgment for damages in his action for breach of the lease exceeded the landlord's judgment in the unlawful detainer action, the tenant was the prevailing party.

In *Beverly Hills Props. v Marcolino* (1990) 221 CA3d Supp 7, 270 CR 605, a legal services organization that represented the tenant without a fee recovered attorney fees despite a lease provision that the successful litigant could recover fees "actually" paid or to be paid. Currently, legal aid attorneys, based on a directive from the Legal Services Corporation, are not pursuing attorney fees when they prevail in unlawful detainer actions.

In *A & M Produce Co. v FMC Corp.* (1982) 135 CA3d 473, 494, 186 CR 114, the court upheld an award of attorney fees when the contract provided for their recovery to enforce the contract and the action was for a breach of express or implied warranty. The court reasoned that the fact that a warranty is not stated in the agreement "does not mean it is not part of the contract." 135 CA3d at 495.

The *A & M Produce* decision seems particularly applicable to cases resolved in a defendant's favor on issues of breach of the implied warranties of habitability and quiet enjoyment. Would CC §1717 apply, however, if a defendant prevails on the defense of retaliatory eviction, or other improper, discriminatory motive? The answer may turn on whether such a defense is necessary "to enforce the terms of the agreement," a phrase often found in attorney fee clauses in preprinted lease and rental agreements. See, *e.g.,* §1.74. See also *Lewis v Alpha Beta Co.* (1983) 141 CA3d 29, 189 CR 840 (CC §1717 authorized award of fees to lessees who, on basis of their own lease, sued both their landlord and another tenant to enforce restrictive covenant assumed by tenant in its lease for lessees' benefit, and each lease contained attorney fee provision).

Civil Code §1717 authorizes an award of attorney fees to a tenant who proves that the lease is invalid and unenforceable. *Care Constr., Inc. v Century Convalescent Ctrs*. (1976) 54 CA3d 701, 126 CR 761. See also *Hsu v Abbara* (1995) 9 C4th 863, 39 CR2d 824. A tenant who is not a party to a lease containing an attorney fee provision, however, may not recover attorney fees under the lease and CC §1717. *Canal-Randolph Anaheim, Inc. v Wilkoski* (1978) 78 CA3d 477, 485, 144 CR 474. That rule was questioned, however, in dictum in *Manier v Anaheim Bus. Ctr. Co.* (1984) 161 CA3d 503, 207 CR 508. See also *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 158 CR 1 (nonsignatory defendant who is sued on a contract may recover attorney fees under CC §1717). See caveat in §13.26 and discussion of cases generally in §§13.26-13.31. On procedures for claiming fees, see §13.33-13.33C. See also California Attorney Fee Awards, chaps 6, 14 (2d ed Cal CEB 1994).

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§13.40A b. Under Anti-SLAPP Statute

An important alternative basis for the tenant's attorney recovering attorney fees and costs is the anti-SLAPP statute (CCP §425.16), forbidding "strategic lawsuits against public participation." See *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377, cited in §§5.18A, 8.110, 10.38A. See also *Dowling v Zimmerman* (2001) 85 CA4th 1400, 103 CR2d 174, in which the court held that the tenant's attorney met her burden of establishing a prima facie showing that the landlord's defamation action against the tenants and their attorney arose from their free speech and petition activity. In both *Ketchum* and *Dowling,* the attorneys were entitled to recover their fees and costs under the mandatory provisions of CCP §425.16(c).

In *ComputerXpress, Inc. v Jackson* (2001) 93 CA4th 993, 113 CR2d 625, the court ruled that partial attorney fees are recoverable if the defendant prevails on some but not all of the claims attacked in its motion to strike. In order to be awarded fees, however, the defendants must obtain significant benefits by bringing the anti-SLAPP motion. If the defendants obtain limited success, they may get limited fees. See *Mann v Quality Old Time Serv., Inc.* (2006) 139 CA4th 328, 42 CR3d 607. If the defendants' motion accomplishes nothing and the potential recovery against them remains the same after the motion is adjudicated, defendants will not be awarded fees. *Endres v Moran* (2006) 135 CA4th 952, 37 CR3d 786. For further discussion of protections under the anti-SLAPP statute, see §5.18A.

On recovering fees under other statutes, see §13.25.

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Source: Real Property/California Landlord-Tenant Practice/13 Unlawful Detainer: Judgment and Posttrial Proceedings/ §13.40B 5. Form: Judgment--Unlawful Detainer (Judicial Council Form UD-110)

§13.40B 5. Form: Judgment—Unlawful Detainer (Judicial Council Form UD-110)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	
JUDGMENT—UNLAWFUL DETAINER ☐ **By Clerk** ☐ **By Default** ☐ **After Court Trial** ☐ **By Court** ☐ **Possession Only** ☐ **Defendant Did Not Appear at Trial**	CASE NUMBER:

JUDGMENT

1. ☐ **BY DEFAULT**
   a. Defendant was properly served with a copy of the summons and complaint.
   b. Defendant failed to answer the complaint or appear and defend the action within the time allowed by law.
   c. Defendant's default was entered by the clerk upon plaintiff's application.
   d. ☐ **Clerk's Judgment** (Code Civ. Proc., § 1169). For possession only of the premises described on page 2 (item 4).
   e. ☐ **Court Judgment** (Code Civ. Proc., § 585(b)). The court considered
      (1) ☐ plaintiff's testimony and other evidence.
      (2) ☐ plaintiff's or others' written declaration and evidence (Code Civ. Proc., § 585(d)).

2. ☐ **AFTER COURT TRIAL.** The jury was waived. The court considered the evidence.
   a. The case was tried on *(date and time):*
      before *(name of judicial officer):*
   b. Appearances by:
      ☐ Plaintiff *(name each):*
      ☐ Plaintiff's attorney *(name each):*
      (1)
      (2)
      ☐ Continued on *Attachment* 2b (form MC-025).
      ☐ Defendant *(name each):*
      ☐ Defendant's attorney *(name each):*
      (1)
      (2)
      ☐ Continued on *Attachment* 2b (form MC-025).
   c. ☐ Defendant did not appear at trial. Defendant was properly served with notice of trial.
   d. ☐ A statement of decision (Code Civ. Proc., § 632) ☐ was not ☐ was requested.

Form Approved for Optional Use
Judicial Council of California
UD-110 [New January 1, 2003]

Code of Civil Procedure, §§ 415.46, 585(d), 664.6, 1169

Print

PLAINTIFF:	CASE NUMBER:
DEFENDANT:	

JUDGMENT IS ENTERED AS FOLLOWS BY: ☐ **THE COURT** ☐ **THE CLERK**

3. **Parties.** Judgment is
   a. ☐ for plaintiff *(name each):*

      and against defendant *(name each):*

      ☐ Continued on *Attachment* 3a (form MC-025).
   b. ☐ for defendant *(name each):*

4. ☐ Plaintiff ☐ Defendant is entitled to possession of the premises located at *(street address, apartment, city, and county):*

5. ☐ Judgment applies to all occupants of the premises including tenants, subtenants if any, and named claimants if any (Code Civ. Proc., §§ 715.010, 1169, and 1174.3).

6. **Amount and terms of judgment**
   a. ☐ Defendant named in item 3a above must pay plaintiff on the complaint:

(1) ☐ Past-due rent	$
(2) ☐ Holdover damages	$
(3) ☐ Attorney fees	$
(4) ☐ Costs	$
(5) ☐ Other *(specify):*	$
(6) **TOTAL JUDGMENT**	$

   b. ☐ Plaintiff is to receive nothing from defendant named in item 3b.
      ☐ Defendant named in item 3b is to recover costs: $
      ☐ and attorney fees: $.

   c. ☐ The rental agreement is canceled. ☐ The lease is forfeited.

7. ☐ **Conditional judgment.** Plaintiff has breached the agreement to provide habitable premises to defendant as stated in *Judgment—Unlawful Detainer Attachment* (form UD–110S), which is attached.

8. ☐ **Other** *(specify):*

   ☐ Continued on *Attachment* 8 (form MC-025).

Date: ☐ _____
JUDICIAL OFFICER

Date: ☐ Clerk, by _____, Deputy

(SEAL)

CLERK'S CERTIFICATE *(Optional)*

I certify that this is a true copy of the original judgment on file in the court.

Date:

Clerk, by _____, Deputy

Copies: Original (to be presented to judge for signature); conformed copies (one for each attorney of record and

unrepresented party) or for attaching to notice of entry of judgment (to be served and filed with original proof of service); office copies; copies for client(s).

Comment: This form may be used by itself or, when needed, in conjunction with the attachment form in §13.40C. See Comment to §13.41.

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Source: Real Property/California Landlord-Tenant Practice/13 Unlawful Detainer: Judgment and Posttrial Proceedings/ §13.40C 6. Form: Judgment--Unlawful Detainer Attachment (Judicial Council Form UD-110S)

§13.40C 6. Form: Judgment—Unlawful Detainer Attachment (Judicial Council Form UD-110S)

PLAINTIFF:	CASE NUMBER:
DEFENDANT:	

JUDGMENT—UNLAWFUL DETAINER ATTACHMENT

7. ☐ **Conditional judgment.** Plaintiff breached the covenant to provide habitable premises to defendant.
   a. ☐ Defendant must pay plaintiff a reduced rent because of the breach in the amount and for the period shown below. *(Specify each defect on a separate line, the month or months (or other period) that the defect existed, and the percentage or amount of the reduced rent as a result of the defect to arrive at the reasonable value of the premises for the period that the defect or defects existed.)*

Month defect existed	Defect	Reasonable rental value is reduced by *(specify percentage)* or *(specify amount)*	Reduced monthly rent due
(1)		% $	$
(2)		% $	$
(3)		% $	$
☐ Continued on *Attachment* 7a (form MC-025).			
		Total rent due in the 3-day notice is now *(specify):*	$

   b. ☐ Defendant is entitled to attorney fees *(specify):* $ and costs *(specify):* $
   c. ☐ Defendant is the prevailing party if defendant pays plaintiff *(specify total rent in item 7a, less any attorney fees and costs in item 7b):* $ by p.m. on *(date):* at *(address):*
   d. ☐ Judgment will be entered for defendant when defendant has complied with item 7c shown ☐ by defendant's filing of a declaration under penalty of perjury (see form MC-030), with proof of service on the plaintiff, OR ☐ at a hearing that has been set in this court as follows:

Date:	Time:	Dept.:	Room:

   (1) ☐ Defendant must continue to pay rent after expiration of the 3-day notice if the defendant continues in possession of the premises in the amount of $ per month. The total rent at item 7a is the corrected amount under the 3-day notice.
   (2) ☐ Plaintiff must repair the defects described in item 7a. The court retains jurisdiction over the case until those repairs are made. Rent remains reduced in the amount of *(specify monthly rent)* $ until the repairs are made.
   (3) ☐ Rent will increase to *(specify monthly rent)* $ the day after ☐ plaintiff files a declaration under penalty of perjury (see form MC-030), with proof of service on the defendant, stating that all the repairs have been made OR ☐ it is established that all the repairs have been made at a hearing set in this court as follows:

Date:	Time:	Dept.:	Room:

   e. ☐ Plaintiff is the prevailing party if defendant fails to comply with items 7c and 7d.

Form Approved for Optional Use
Judicial Council of California
UD-110S [New January 1, 2003]

Code of Civil Procedure, § 1174.2
Civil Code, §§ 1941, 1942.3

Print

PLAINTIFF:	CASE NUMBER:
DEFENDANT:	

f. ☐ Judgment will be entered for plaintiff ☐ when plaintiff files a declaration under penalty of perjury (see form MC-030), with proof of service on the defendant, that the amount in item 7c has not been paid, OR ☐ at a hearing that has been set in the court as follows:

Date:	Time:	Dept.:	Room:

(1) ☐ Past-due rent *(item 7a)*	$
(2) ☐ Holdover damages*	$
(3) ☐ Attorney fees *(item 7b)*	$
(4) ☐ Costs *(item 7b)*	$
(5) ☐ Other *(specify):*	$
(6) **TOTAL JUDGMENT**	$

*Use one of the following formulas: From expiration of the 3-day notice to ☐ today's date ☐ date the premises were vacated *(specify number of days)* times
☐ *(specify reduced monthly rent $* *times 0.03228 (12 months divided by 365 days).)*
☐ *(specify reduced rent per month divided by 30): $*
= Total holdover damages

g. ☐ Plaintiff is awarded possession of the premises located at *(street address, apartment, city, and county):*

h. ☐ The rental agreement is canceled. ☐ The lease is forfeited.

8. ☐ **Other** *(specify):*

Copies: Original (to be presented to judge for signature); conformed copies (one for each attorney of record and

unrepresented party) or for attaching to notice of entry of judgment (to be served and filed with original proof of service); office copies; copies for client(s).

Comment: This form is a supplement to the Judicial Council form in §13.40B, and together they provide an alternative to the form in §13.41. See Comment to §13.41.

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§13.41 7. Form: Order for Judgment for Defendant—Warranty of Habitability (Attorney-Drafted)

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	**)**	**No. _ _ _ _ _ _**
Plaintiff(s)	**)**	
	)	**ORDER FOR JUDGMENT**
vs	**)**	**CONDITIONED ON PAYMENT**
	)	**OF RENT AFTER TRIAL**
_ _[*Name(s)*]_ _,	**)**	**(UNLAWFUL DETAINER)**
Defendant(s)	**)**	
_____	**)**	

This action came on regularly for trial on _ _[*date*]_ _, at _ _[*time*]_ _. Appearing were _ _[*name*]_ _, as attorney for plaintiff, and _ _[*name*]_ _, as attorney for defendant.

[*Option 1: If court trial*]

A jury trial having been waived; the Court having heard and considered testimony, documentary evidence, and argument of counsel; the matter having been submitted for decision; and

[*Add if statement of decision is requested*]

the Court having issued its statement of decision;

[*Add if statement of decision is not requested or is waived*]

a statement of decision _ _[*not having been requested/having been waived*]_ _;

[*Continue*]

the Court finds that defendant _ _[*name*]_ _ has established that plaintiff _ _[*name*]_ _ breached the implied warranty of habitability, and that for the period _ _[*state beginning date through date of trial*]_ _ said plaintiff is entitled to the reduced sum of _ _[*dollar amount*]_ _.

[*Option 2: If jury trial*]

A jury of _ _[*number*]_ _ persons was impaneled and sworn to try the action. Witnesses for both plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of attorneys, and the instructions of the Court, the jurors retired to consider their verdict. After returning to court, the jurors rendered their verdict as follows: _ _[*Specify verdict, e.g., plaintiff having breached the implied warranty of habitability for specified untenantable conditions, defendant is entitled to retain possession of the premises, and plaintiff is not entitled to recover possession of the premises. Further, because of the breach of the implied warranty of habitability, the reasonable monthly rental value for the premises for the period of the breach is _ _[dollar amount]_ _, making the total rental value owed to plaintiff the sum of _ _[dollar amount]_ _]_ _.

[*Continue*]

IT IS THEREFORE ORDERED AND ADJUDGED AS FOLLOWS:

1. Defendant _ _[*name*]_ _ is to pay into court the sum of _ _[*dollar amount*]_ _ no later than 5 days after _ _[*the date of this Order/service of notice of this Order on the parties under CCP §1013, if service is by mail*]_ _.

2. Should said defendant pay the above-specified sum by the above-specified date, defendant _ _[*name*]_ _ shall be deemed the prevailing party in this action. The clerk of this Court is directed under such circumstances to pay forthwith to plaintiff _ _[*name*]_ _ the entire sum thus paid into court. On submission by either party of an appropriate form of judgment, final judgment will be entered in said defendant's favor as follows:

a. For possession of the premises commonly known and described as _ _[*address*]_ _.

b. For costs of suit, according to memorandum of costs to be filed within the prescribed time after entry of such judgment.

c. Plaintiff _ _[*name*]_ _ _ _[*is/is not*]_ _ ordered to repair or correct on said premises the following conditions, which have been found to be a breach of the implied warranty of habitability: _ _[*list separately and describe each condition found to constitute the breach*]_ _.

d. After entry of such judgment, whether or not plaintiff is ordered to repair or correct any such condition, and until each and every condition set forth above has been repaired or corrected, the monthly rent shall be limited to the reasonable rental value of the premises, which has been found to be _ _[*dollar amount per month*]_ _.

[*Add if applicable*]

e. This Court retains jurisdiction after entry of final judgment to enforce the terms of the judgment pertaining to the order to repair or correct the conditions found to be a breach of the implied warranty of habitability.

[*Add if applicable*]

f. For reasonable attorney fees, to be fixed by the court upon motion made by defendant after entry of such judgment.

[*Continue*]

3. Should said defendant not pay into court the above-specified sum by the above-specified date, plaintiff _ _[*name*]_ _ shall be deemed to be the prevailing party in this action. On submission to the Court by either party of an appropriate form of judgment, final judgment will be entered in said plaintiff's favor as follows:

a. For possession of the premises commonly known and described as _ _[*address*]_ _.

b. For rent and rental value damages in the sum total of _ _[*dollar amount from paragraph 1*]_ _.

c. For costs of suit, according to memorandum of costs to be filed within the prescribed time after entry of such judgment.

[*Add if applicable*]

d. For reasonable attorney fees, to be fixed by the court upon motion made by plaintiff after entry of such judgment.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name of Judge*]_ _
JUDGE, SUPERIOR COURT

Copies: Original (to be presented to judge for signature); conformed copies (one for each attorney of record and unrepresented party) or for attaching to notice of entry of order (to be served and filed with original proof of service); office copies; copies for client(s).

Comment: Under CCP §1174.2(a), when a substantial breach of any warranty of habitability has occurred, the trier of fact determines the reasonable rental value of the premises in its untenantable state to the date of trial, and adjudges the tenant to be the prevailing party conditioned on the tenant's payment of the reasonable rental value within a period not to exceed 5 days from the date of the order (plus additional time under CCP §1013 if service is by mail). If the

tenant fulfills this condition, judgment will be entered in his or her favor (see §§13.35-13.38), and the tenant will be awarded costs and attorney fees if authorized by statute or contract. See §§13.23, 13.33-13.33C.

If the tenant fails to pay the amount found due within the prescribed period, judgment will be entered in the landlord's favor, and the landlord will be awarded possession and adjudicated the prevailing party for purposes of awarding costs and attorney fees. CCP §1174.2(b). If a tenant misses the deadline for payment, rights under CCP §1174 are not forfeited. CCP §1174.2(a).

As an alternative to the terms in this form, some judges prefer to order the tenant to pay the reduced rent directly to the landlord rather than deposit it into court (see ¶1), place the burden on the landlord to apply ex parte for entry of judgment if the tenant fails to pay by the date prescribed (see ¶3), and additionally order that judgment will be entered for the tenant automatically if the landlord does not apply for entry of judgment by a specified date.

The judgment form in §13.34 may be modified for submission to the court when the tenant becomes the prevailing party by complying with the terms of ¶2 of this form of order. On preparing and serving a notice of entry of judgment, see California Trial Practice: Civil Procedure During Trial §§23.28, 23.40 (3d ed Cal CEB 1995). The attorney preparing the notice may either recite the terms of the judgment in the notice or simply attach a conformed copy of the judgment as an exhibit to the notice. On captions for court papers, see California Civil Procedure Before Trial, chap 11 (4th ed Cal CEB 2004).

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§13.42 C. Successive Actions Not Barred by Appeal

Under CCP §1176(b), a subsequent unlawful detainer action "on the same agreement for the rental of real property" is not barred by the pendency of an appeal of an earlier action. This provision, added by the legislature in 1979 (Stats 1979, ch 958) overturned the decision in *Woods-Drury, Inc. v Superior Court* (1936) 18 CA2d 340, 63 P2d 1184, in which the court held that the municipal court had no jurisdiction to entertain a subsequent unlawful detainer action based on nonpayment of rent after the tenant had lost the first action (based on a 30-day termination notice) and had obtained a stay pending appeal. The subsequent action, however, must be on a "new cause of action." CCP §1176(b).

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IV. POSTTRIAL PROCEEDINGS

§13.43 A. Posttrial Motions Generally

The usual motions available after trial of civil actions are available to the parties to an unlawful detainer action. The court may stay execution of judgment pending the determination of posttrial motions or an appeal. CCP §§918, 1176(a). See §§13.52-13.53, 13.60, 13.63. For extensive discussion of posttrial motions after unlawful detainer actions, see California Eviction Defense Manual, chap 27 (2d ed Cal CEB 1993). For further discussion of posttrial motions generally, see California Trial Practice: Civil Procedure During Trial, chap 25 (3d ed Cal CEB 1995).

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§13.44 1. Motion for New Trial

Either party may move for a new trial to seek reexamination of an issue of fact after trial and a determination by a jury or judge. CCP §§656, 659. The party may make the motion by noticing the intention to move for a new trial. CCP §659. The grounds specified in CCP §657 are the only grounds on which the motion may be granted. *Fomco, Inc. v Joe Maggio, Inc.* (1961) 55 C2d 162, 10 CR 462. If the trial court grants the defendant's motion for a new trial on the basis of insufficient evidence and states findings that support the granting of the motion, such an order is entitled to deference from a reviewing appellate court and should be reversed only if the opposing party demonstrates that no reasonable trier of fact could have found for the moving party on the trial court's theory. *Lane v Hughes Aircraft Co.* (2000) 22 C4th 405, 93 CR2d 60. All the statutory grounds base the court's granting of the motion on a finding that there has been a miscarriage of justice. See *Mercer v Perez* (1968) 68 C2d 104, 112, 65 CR 315.

Under CCP §659, the notice of motion for a new trial may be made either:

- Before the entry of judgment; or
- By the earliest of:
- 15 days after the date of mailing by the clerk of written notice of entry of judgment;
- 15 days after the date of service of that notice by any party, or
- Within 180 days after the entry of judgment.

The new trial motion statutes do not require the party that gives notice of entry of judgment to file an original notice of entry (or a file-stamped copy of the judgment) accompanied by proof of service to start the time limits for bringing and determining the motion. *Palmer v GTE Cal., Inc.* (2003) 30 C4th 1265, 135 CR2d 654. If neither the clerk of the court nor the prevailing party give notice of entry of judgment, but notice is mailed by the losing party who thereafter files a motion for new trial, the 60-day period in which the court must decide the new trial motion will begin when the defendant files the motion for new trial. *People ex rel Dep't of Transp. v Cherry Highland Props.* (1999) 76 CA4th 257, 90 CR2d 214, disapproved on other grounds in *Palmer v GTE Cal., Inc., supra*.

Code of Civil Procedure §1013(a), which extends the time to act when notice is served by mail, does not apply to the 60-day time limit for granting a new trial under CCP §660. Once the 60 days have passed, the new trial motion is automatically denied, and the court lacks jurisdiction to grant the motion. *Westrec Marina Mgmt. v Jardine Ins. Brokers Orange County* (2000) 85 CA4th 1042, 102 CR2d 673.

WARNING: The requirement under CCP §657 that the trial court's statement of reasons be filed no later than 10 days after the order granting a new trial is jurisdictional, and a statement of reasons filed more than 10 days after the order is ineffective. See *Oakland Raiders v National Football League* (2007) 41 C4th 624, 634, 61 CR3d 634 (new trial order reversed because trial court's order failed to set out reasons for granting new trial on ground of jury misconduct); *Malkasian v Irwin* (1964) 61 C2d 738, 40 CR 78 (trial court orally stated ground for granting new trial, but clerk mistakenly failed to specify ground in written order).

For further discussion of motions for new trial, see California Trial Practice: Civil Procedure During Trial, chap 25 (3d ed Cal CEB 1995). In addition to the power to grant a new trial, the court in a nonjury trial has broad discretion to modify the statement of decision, and may reopen the case for further proceedings and the introduction of additional evidence, in order to do so. CCP §662. See Civ Proc During Trial §§25.22-25.63.

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§13.45 2. Judgment Notwithstanding Verdict

Under CCP §629, a trial court may enter judgment notwithstanding the verdict in favor of a party against whom a jury verdict was rendered, when a motion for a directed verdict should have been granted had the motion been made. See *Garrett v Shenson Meat Co.* (1970) 5 CA3d 69, 85 CR 65. The trial court may enter such judgment on the motion of a party or its own motion. Like a directed verdict, a judgment notwithstanding the verdict is proper only when the court determines that there is insufficient evidence to support a verdict for the nonmoving party, after viewing the evidence in the light most favorable to that party, accepting every inference in that party's favor, and disregarding conflicting evidence. *Baker v Manning's, Inc.* (1953) 122 CA2d 390, 393, 265 P2d 96; *Lehmann v Mitchell* (1952) 109 CA2d 719, 723, 241 P2d 573. For further discussion, see California Trial Practice: Civil Procedure During Trial §§25.2-25.14 (3d ed Cal CEB 1995).

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§13.46 3. Motion to Vacate and Enter Different Judgment

Another posttrial procedural device is a motion to set aside and vacate a judgment and enter a different judgment under CCP §663. This motion is available only when the judgment is:

- Based on incorrect or erroneous conclusions of law not consistent with or supported by the facts; or
- Inconsistent with or unsupported by the jury's special verdict.

CCP §663. Thus, this procedure allows the court to substitute a proper judgment when the judgment is improper in view of the facts found in the statement of decisions or special verdict. It does not provide for an attack on findings made in the statement of decision or special verdict; those findings cannot be modified under this motion. The appropriate method for attacking the findings is a motion for new trial. *Dahlberg v Girsch* (1910) 157 C 324, 327, 107 P 616. For more discussion of motions to vacate, see California Trial Practice: Civil Procedure During Trial §§25.72-25.76 (3d ed Cal CEB 1995).

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§13.47 4. Motion to Correct Clerical Error

The parties may move to correct a clerical error in the judgment, under CCP §473(d) or under the court's inherent power to correct those errors. See *Bastajian v Brown* (1941) 19 C2d 209, 214, 120 P2d 9. This procedure could be useful in unlawful detainer actions to correct errors made in recording the factfinder's mathematical calculation of rent and damages, or to correct the street designation, *e.g.,* "street" instead of "avenue," and transposed numbers. On motions to correct clerical errors, see California Trial Practice: Civil Procedure During Trial §§25.78-25.82 (3d ed Cal CEB 1995).

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§13.48 B. Stay of Execution

When a landlord prevails in an unlawful detainer action, judgment must be entered for "possession of the premises." CCP §1174(a). In the usual action, the landlord obtains a writ of possession under CCP §§715.010-715.040, and the sheriff or marshal physically evicts the tenant from the premises. See §§13.64-13.69. The tenant may be able to obtain an order from the trial court, staying execution of the judgment for possession for some period of time, either to pay the rent due and be restored to possession (see §13.49) or for some other reason under the court's inherent power to stay execution (see §13.52).

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§13.49 1. 5-day Stay; Restoring Possession on Unexpired Lease (CCP §1174(c))

In limited instances, and under a lease that has not expired by its own terms, a tenant may obtain a 5-day stay of execution of judgment for the purpose of paying the back rent and having possession restored under his or her leasehold interest. For such stay to be available, the landlord must have failed to declare a forfeiture of the lease in the termination notice. See §13.17. During the stay period, the tenant (or other interested party) may pay into court the amount found owing as back rent (with interest), the amount of damages awarded for the unlawful detainer, and costs. The judgment is then considered to be satisfied, and the tenant's right to possession is restored for the balance of the lease term. CCP §1174(c). The stay is either mandatory or discretionary, depending primarily on the reason for the eviction, the terms of the lease, and other factors described in §§13.50-13.51.

No statute requires a noticed motion to obtain an order under CCP §1174(c) for a 5-day stay of execution of judgment in unexpired lease cases. Counsel for the tenant should be prepared to make and argue the motion orally or on written application at the end of trial, so that if the matter is taken under submission, the court will provide for a stay of execution in the judgment itself, in its notice of ruling, or in its statement of decision. To obtain that result, evidence supporting either a mandatory or discretionary stay should be offered at trial (the documentary evidence or testimony will take minimal time to present) or on written application at the end of trial.

PRACTICE TIP: If not made directly at the end of trial, the stay motion should be made in writing ex parte as soon as possible after notice that possession was awarded to the landlord. Under Cal Rules of Ct 3.1202(c) and 3.1203, notice to the opposing party is generally required no later than 10:00 a.m. the court day before a party seeks an ex parte order, but in a unlawful detainer action shorter notice may be given if reasonable, and "an affirmative factual showing… of irreparable harm, immediate danger," or other statutory basis for ex parte relief is required. The forms in §§13.54-13.55 may be adapted for a motion under CCP §1174(c).

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§13.50 a. Mandatory Stay

The court must order a stay of execution for 5 days after entry of judgment under CCP §1174(c), when all of the following apply:

- The unlawful detainer proceeding is for nonpayment of rent;
- The 3-day notice did not declare a forfeiture of leasehold rights (see §13.17);
- The lease or rental agreement has not expired by its terms; and
- The lease or rental agreement is written, is for a term of more than 1 year, and does not contain a forfeiture clause.

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§13.51 b. Discretionary Stay

The 5-day stay of execution is discretionary under CCP §1174(c), if all of the following apply:

- The unlawful detainer proceeding is for nonpayment of rent;
- The 3-day notice did not declare a forfeiture of leasehold rights; and
- The lease or rental agreement has not expired by its terms.

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2. Court's Inherent Power (CCP §918)

§13.52 a. Grounds

The trial court has discretionary authority under CCP §918(a) to stay execution of any judgment or order. See *Colby v Colby* (1954) 127 CA2d 602, 274 P2d 417; *Buffandeau v Edmondson* (1861) 17 C 436. Although CCP §918 does not expressly so provide, the usual grounds for a request by a tenant for a stay under this statute are:

- Hardship or other good cause (see §13.55 for a tenant's declaration form setting forth facts constituting hardship);
- To allow time to give notice and be heard on the tenant's application for relief from forfeiture and restoration of the tenancy, under CCP §1179 (see §13.56); and
- To allow a full hearing before execution of judgment on posttrial procedures such as noticed motions for a new trial, for judgment notwithstanding the verdict, and to vacate the judgment (see §§13.43-13.47 for discussion of posttrial motions; see §13.54 for an application form for stay of execution).

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§13.53 b. Length and Conditions of Stay

Under CCP §918(b), if enforcement of the judgment would be stayed on appeal only on posting of an undertaking (see CCP §917.4), the trial court may not stay enforcement for more than 10 days beyond the last date on which a notice of appeal could be filed, without the consent of the opposing party. This usually would mean that execution could not be stayed more than 40 days from the date that the notice of entry of judgment is served for unlawful detainer actions in limited civil cases. See §13.59 on the time for filing a notice of appeal, and §13.60 on procedures for a stay pending appeal.

In *Medford v Superior Court* (1983) 140 CA3d 236, 240, 189 CR 227, the court stated in dictum that a stay of execution may be conditioned on the tenant's payment of rent accruing during the period of the stay, but not on payment of back rent:

> The possibility of loss of back rent or accrued damages is not a consequence of granting such relief to the tenant. The landlord gains sufficient protection from the deposit of the contract rent as it becomes due.

A landlord can oppose a request for stay of execution by claiming and proving that the tenant has committed and will commit or cause waste on (or damage to) the premises. The landlord must appear at the hearing on the request for stay, which is usually conducted under an ex parte notice, prepared with sufficient declarations alleging waste and damage. Alleging loss of rent is usually insufficient because most stays are granted on the condition that rent be paid into court. Allegations of disruptive behavior or threats of violence, sale of the subject property conditioned on giving possession to buyer, and a new lease allowing tenants to take possession are reasons that are more likely to allow the landlord successfully to oppose a request for stay of execution.

PRACTICE TIP: If the trial court gives judgment orally at the end of the trial for plaintiff in a case in which defendant is not at fault (*i.e.,* an eviction under a rent control law—for the landlord or a family member to move into defendant's unit—or an eviction after a foreclosure; see §§7.65, 8.68B-8.68C, 10.54) and defendant is a long-term tenant (*i.e.,* 5 years or longer), many courts will permit an immediate oral request for a stay pursuant to CCP §918. Requesting the stay immediately may provide comfort to a tenant who faces a need to move quickly in a tight, difficult, or expensive housing market.

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Source: Real Property/California Landlord-Tenant Practice/13 Unlawful Detainer: Judgment and Posttrial Proceedings/ §13.54 3. Form: Ex Parte Application for Stay of Execution

§13.54 3. Form: Ex Parte Application for Stay of Execution

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant _ _[*Name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**APPLICATION FOR EX PARTE**
vs	)	**ORDER TO STAY EXECUTION**
	)	**OF UNLAWFUL DETAINER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**JUDGMENT; ORDER OF THE COURT**
	)	_ _[*list supporting documents*]_ _
_____	)	

1. Defendant, _ _[*name*]_ _**, respectfully applies under Code of Civil Procedure §918 for an order from this Court, directed to the** _ _[*marshal's/sheriff's*]_ _ **office of** _ _ _ _ _ _ **County, to plaintiff, and to any other persons acting on behalf of or in concert with plaintiff, staying execution of the unlawful detainer judgment entered in this action on the grounds that** _ _[*defendant would suffer hardship if the judgment were to be executed at this time/the judgment may be set aside or modified in accordance with defendant's motion* _ _[*for new trial/for judgment notwithstanding the verdict/to vacate the judgment/for relief from forfeiture and restoration of the tenancy under Code of Civil Procedure §1179*]_ _*, which is filed with this application and is now pending before this Court*]_ _**.**

2. This application is based on all pleadings and records on file in this action; matters of which this Court takes judicial notice; oral testimony which may be presented; the accompanying memorandum of points and authorities and declaration of _ _[*name*]_ _**;** _ _[*and on the* _ _[*describe motion*]_ _*, which is filed concurrently with this application*]_ _**.**

3. In further support of this application, I declare that the following facts are personally known to me, and that if called as a witness I could competently testify to them:

a. _ _[*Insert statement of facts supporting that there is need for immediate issuance of order staying execution of judgment because, e.g., a writ of execution was issued, a notice of eviction was served, or the eviction is scheduled for a particular date*]_ _**.**

b. On _ _[*date*]_ _**, at** _ _[*time*]_ _**, I notified** _ _[*name*]_ _**, attorney for plaintiff, by** _ _[*describe method of notice*]_ _**, that this application for a stay of execution of judgment would be made before this Court on this date and at this time.**

[*Add if applicable*]

c. _ _[*Continue with additional statement of facts supporting that notice to opposing counsel/party is reasonable under California Rules of Court 3.1203(b) because, e.g., actual eviction is imminent*]_ _**.**

[*Continue*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and

correct, and that this declaration was executed on _ _[*date*]_ _, at _ _[*city*]_ _, California.

Dated: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name of attorney*]_ _
Attorney for _ _[*name*]_ _

[*Add brief points and authorities if appropriate*]

ORDER OF THE COURT

The application of defendant _ _[*name*]_ _ having been considered,

IT IS ORDERED THAT execution of judgment in the above-mentioned action is stayed immediately on entry of this Order through _ _[*date*]_ _.

[*Add if applicable*]

This order is made on condition that _ _[*state conditions ordered, such as the deposit into court of contract rent as it becomes due for the duration of the stay*]_ _.

[*Continue*]

IT IS FURTHER ORDERED THAT any writ of execution issued pursuant to the judgment entered in this action is stayed by this Order on the same terms and conditions applicable to the judgment.

This Order is directed to the _ _[*marshal's/sheriff's*]_ _ office of _ _ _ _ _ _ County, to plaintiff _ _[*name*]_ _, and to any other person or entity acting on behalf of or in concert with plaintiff.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name of Judge*]_ _
JUDGE, SUPERIOR COURT

Copies: Original (to be presented to judge for signature); conformed copies (one for each attorney of record and unrepresented party) or for attaching to notice of entry of order (to be served and filed with original proof of service); office copies; copies for client(s).

Comment: Application for a stay of execution is typically made ex parte. Under Cal Rules of Ct 3.1202(c) and 3.1203, notice to the opposing counsel/party is generally required no later than 10:00 a.m. the court day before a party seeks an ex parte order, but in a unlawful detainer action, shorter notice may be given if reasonable, and "an affirmative factual showing… of irreparable harm, immediate danger," or other statutory basis for ex parte relief is required. (Note, always review Cal Rules of Ct 3.1200-3.1207, which are subject to frequent amendment.)

There are no specific grounds for granting a stay of execution under CCP §918, but it is common for such relief to be granted on either the basis of hardship or to allow posttrial motions to be heard. See §13.52. Under CCP §918 and Cal Rules of Ct 8.824, execution generally may be stayed for not more than 40 days from the date of entry of judgment in a limited civil case. See §13.53. If the application is based on a motion made contemporaneously (*e.g.,* a motion for new trial), the argument for the application is quite straightforward. In the landlord-tenant context, the most commonly encountered alternative ground is the hardship that the tenant would endure by immediate execution of the judgment. See §13.55. As discussed in §13.53, an order staying execution may be conditioned on the tenant's payment of rent during the period of the stay, but not on payment of the judgment. The application should be supported by declarations setting forth the facts on which it is based and by a supporting memorandum (see Cal Rules of Ct 3.1113). On captions for court papers and further discussion of ex parte motions, see California Civil Procedure Before Trial, chaps 11, 13 (4th ed Cal CEB 2004).

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§13.55 4. Form: Tenant's Declaration of Hardship

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Attorney for Defendant _ _[*Name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **IN SUPPORT OF**
	)	**APPLICATION FOR ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**TO STAY EXECUTION OF**
	)	**JUDGMENT**

_ _[*Name*]_ _ **declares:**

1. I am a defendant in this action. This declaration is made in support of my application for _ _[*stay of execution of judgment/relief from forfeiture*]_ _**. All of the following facts are within my personal knowledge, and I can testify competently to them.**

2. I am currently a residential tenant at the premises commonly known as _ _[*address of tenant's unit*]_ _**, California. Plaintiff obtained judgment in unlawful detainer on** _ _[*date*]_ _**, for possession of the premises, and for** _ _[*describe any other relief obtained, such as damages, back rent, costs, attorney fees*]_ _**. If a writ is issued or executed pursuant to the judgment, I will be evicted from the premises on or about** _ _[*date*]_ _**.**

[*Specify facts constituting hardship, as in the following examples*]

[*Example 1; physical hardship*]

3. I am currently under the care of a physician for a broken hip. My physician advises me that it would be dangerous for me to move at this time; that I must remain in bed until _ _[*date*]_ _**; and that after my cast is removed, I must have an opportunity for rehabilitation. A** _ _[*letter/declaration*]_ _ **from** _ _[*name*]_ _**, my physician, is attached to this** _ _[*declaration/motion*]_ _**. Because of my condition, it is not possible for me to search for housing or undertake a move. If I am forced to move, I fear that my health will suffer greatly and my condition will deteriorate.**

[*Example 2; financial hardship*]

3. I am receiving a _ _[*low/fixed*]_ _ **income of** _ _[*dollar amount*]_ _ **per month and I cannot afford more than** _ _[*dollar amount*]_ _ **per month for housing. Due to the very low vacancy rate for rental housing in this city, especially at rents that I can afford, I estimate that it will take me at least** _ _[*e.g., 8 weeks*]_ _ **to find replacement housing.**

[*Example 3; special needs*]

3. I have special needs in that _ _[*specify tenant's physical or other condition*]_ _ **that must be accommodated by housing with** _ _[*specify housing conditions or requirements necessary to meet special needs*]_ _**. Due to the very**

low vacancy rate for rental housing in this city, especially at rents that I can afford, I estimate that it will take me at least _ _[*e.g., 12 weeks*]_ _ to find replacement housing of the kind that will meet my needs.

[*Continue*]

4. I am ready and able to pay rent as it falls due for the period during which execution is stayed.

[*Add if applicable*]

5. _ _[*Continue in additional paragraphs with additional facts supporting need for immediate issuance of order staying execution of judgment, e.g., writ of possession issued, notice of eviction served on declarant, eviction scheduled for a particular date, unsuccessful attempts to find replacement housing*]_ _**.**

[*Continue*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

__[*Signature of declarant*]__
_ _[*Declarant's typed name*]_ _

Copies: Original (filed with court clerk); copies for each attorney of record and unrepresented party; office copies.

Comment: A declaration like this (see CCP §2015.5) may be submitted in connection with an application for stay under CCP §918 which *may* be based on hardship (see §13.52), or for relief from forfeiture under CCP §1179 which *must* be based on a showing of hardship (see §13.56). For further strategy on preparing declarations, see California Civil Procedure Before Trial, chaps 12-13 (4th ed Cal CEB 2004).

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C. Relief From Forfeiture (CCP §1179)

§13.56 1. Statutory Requirements

When an unlawful detainer judgment (see §§13.17, 13.34) declares a forfeiture of the lease or rental agreement, whether written or oral, and whether or not the tenancy has terminated, the tenant may obtain relief from the forfeiture and restoration of the tenancy under CCP §1179. Relief from forfeiture may be granted only on the condition that the tenant make full payment of rent due or fully perform other breached covenants of the lease to the extent that performance is practicable. CCP §1179. When there has been no declaration of forfeiture, the tenant may be able to obtain restoration of the tenancy under CCP §1174(c). See §§13.49-13.51.

A general statute authorizing relief from forfeiture is CC §3275, which expressly disallows relief from forfeiture caused by a grossly negligent, willful, or fraudulent breach. Code of Civil Procedure §1179 is a specific statute, however, and thus governs relief from forfeiture in unlawful detainer actions. Arguably, relief from forfeiture may not be granted under CC §3275 for a willful breach, but the fact that the breach and holding over are willful does not itself bar relief under CCP §1179. In *Superior Motels, Inc. v Rinn Motor Hotels, Inc.* (1987) 195 CA3d 1032, 1063, 241 CR 487, however, the court expressed a "deep distaste for forfeitures" and noted its authority to grant relief from forfeitures under the broader scope of CC §3275. Whether the application is made under CCP §1179 or CC §3275 or both, the standard of appellate review of the trial court's decision on the application is the same: The appellate court will not reverse unless an abuse of discretion is shown. 195 CA3d at 1064.

Relief from forfeiture under CCP §1179 is peculiar to unlawful detainer actions, and only to a tenant who loses the action. It is not available to a tenant's secured creditor who is not a party to an unlawful detainer action. *366-386 Geary St., LP v Superior Court* (1990) 219 CA3d 1186, 268 CR 678.

In 2009, the legislature enacted Health & S C §11571.1(b), which declares that certain state law civil remedies for illegal drug activities, such as nuisance abatement in the form of an unlawful detainer action (see §§4.44, 8.59), are not intended to prevent a tenant from obtaining relief from forfeiture under CCP §1179.

Hardship is the only ground on which a trial court may relieve a tenant from forfeiture under CCP §1179. The court should balance the equities, and take into consideration the circumstances of the case, the hardship to both tenant and landlord, and the nature of the breach (*e.g.,* whether it was willful or malicious). The court must then exercise its "best discretion in determining whether relief will be granted." *Hignell v Gebala* (1949) 90 CA2d 61, 71, 202 P2d 378 (case remanded to trial court for consideration of, *e.g.,* willfulness and amount of money subtenant expended during tenancy for repairs and improvements). A finding that hardship would result from forfeiture does not automatically require the court to grant the relief. *Olympic Auditorium, Inc. v Superior Court* (1927) 81 CA 283, 253 P 944.

Although the statute does not refer to payment of damages, costs, or attorney fees as conditions to be performed by the tenant, the court has the discretion to require payment of any of these amounts as a condition to granting relief. *Olympic Auditorium, Inc. v Superior Court, supra*. By the phrase, "so far as the same is practicable," in reference to payment of rent due or performance of conditions or covenants, CCP §1179 allows a court to grant relief even if the conditions, including the payment of back rent, cannot be fully performed. In *Gill Petroleum, Inc. v Hayer* (2006) 137 CA4th 826, 40 CR3d 648, the landlord obtained an unlawful detainer judgment against a commercial tenant which awarded the landlord forfeiture of the lease and fair market rent for each day the tenant remained in possession after expiration of the 3-day notice. The fair market rent was substantially higher than the rent provided by the lease. The trial court granted the tenant's motion for relief from forfeiture under CCP §1179. In setting the conditions for the tenant to obtain the relief, the court required payment of the lease rent for the post 3-day notice period, not the fair rental value. The court of appeal affirmed, holding that while §1179 requires the tenant to pay past rent due as a condition to obtaining relief from forfeiture, the trial court retains broad equitable discretion to determine other conditions for relief.

The application for relief must be made before restoration of the premises, and may be made by the tenant, a subtenant, a "mortgagee of the term," or other person "interested in the continuance of the term." CCP §1179. The application may be filed and served as early as the conclusion of trial with as few as 5 days' notice before the hearing.

The application must be made by a verified petition and state the grounds for relief. Notice of the application and a copy of the petition must be served on the landlord, who may appear and contest the application. The court also has discretion to grant relief from forfeiture on its own motion. CCP §1179.

PRACTICE TIP: Tenant: Although CCP §1179 allows the application to be made anytime before restoration of the premises, counsel for the tenant should act quickly on losing the case and request an ex parte stay of execution pending a hearing on the application. See §§13.52-13.55. A pro per tenant may make an oral motion for relief under §1179 without notice if the landlord either is present and has an opportunity to contest the motion or was given ex parte notice of the hearing and its purpose. This could occur as early as the end of the unlawful detainer trial regardless of whether the court announces its decision from the bench at that time.

PRACTICE TIP: Landlord: The landlord's attorney should oppose any attempt to extend the coverage of CCP §1179 or CC §3275 to cases beyond those in which a literal "declaration of forfeiture" has been made. Arguably, a declaration of forfeiture under CCP §1174(a) is appropriate only in an action based on "neglect" or nonpayment of rent or other breach of an express lease term. Evictions based on nuisance, illegal use of the premises, or a notice to vacate under CC §§1946 and 1946.1 do not require that the notice elect a forfeiture, or that a forfeiture be requested in the complaint. Most form judgments issued by courts routinely declare a forfeiture whether or not the notice or complaint mentions it. To preserve the landlord's objections to a possible petition for relief from forfeiture by the tenant, boilerplate forfeiture clauses should be deleted from judgment forms whenever they are not relevant to the immediate action.

An argument can also be made that CC §3275 does not permit relief from forfeiture when a landlord sues to enforce a 30-day or 60-day notice to vacate. The statute provides relief on "full compensation to the other party" (*e.g.,* the landlord). Because full compensation in this context arguably means that the tenant vacates the premises, the statute should not apply when relief from forfeiture means that the tenant will continue to occupy the premises. If the statute is applied, the landlord might argue that "full compensation" should at least include payment of attorney fees and costs to the landlord.

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§13.57 2. Form: Application for Relief From Forfeiture

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant _ _[*Name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF PETITION FOR**
vs	)	**RELIEF FROM FORFEITURE**
	)	**(CCP §1179); POINTS AND**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**AUTHORITIES;**
	)	**DECLARATIONS**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*name*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Judgment:** _ _[*date of entry*]_ _

To plaintiff and plaintiff's attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _ **of the above Court, located at** _ _[*address*]_ _**, defendant,** _ _[*name*]_ _**, will petition the court for relief from forfeiture of** _ _[*his/her*]_ _ **leasehold rights to the premises, located at** _ _[*address*]_ _**, which rights were declared to be forfeited in the Court's judgment entered on** _ _[*date*]_ _**. Defendant's petition is based on** _ _[*briefly summarize facts showing hardship to defendant if judgment declaring forfeiture were to be enforced*]_ _**. Defendant is ready and able to pay all rent presently due and owing to plaintiff, or to perform other covenants of the lease, on the granting of this petition.**

The petition is based on this notice; all pleadings, papers, and records in this action; matters of which the court takes judicial notice; the accompanying memorandum of points and authorities and declaration(s) of _ _[*name(s)*]_ _**;** _ _[*and on such evidence as may be presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name of attorney*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk); copies for each attorney of record and unrepresented party; office copies.

Comment: The petition should be supported by declarations setting forth the facts on which it is based, and by a memorandum in support of motion. See Cal Rules of Ct 3.1113.

For a declaration form stating facts showing hardship, see §13.55. On captions for court papers and noticed motion procedures generally, see California Civil Procedure Before Trial, chaps 11-12 (4th ed Cal CEB 2004).

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D. Appeal

§13.58 1. Governing Statutes and Rules of Court

Appeals in unlawful detainer cases are governed by the general provisions of the Code of Civil Procedure (*i.e.,* CCP §§901-936.1) to the extent that they comport with the provisions of CCP §§1159-1179a and Judicial Council unlawful detainer rules. CCP §1177.

Judgments and orders that may be appealed are set forth in CCP §§904.1 (superior court, unlimited civil cases) and 904.2 (superior court, limited civil cases). These include:

- Appeals from a final judgment;
- An order made after final judgment;
- An order granting a motion to quash service of summons;
- An order granting a new trial or denying a motion for judgment notwithstanding the verdict;
- An order discharging or refusing to discharge an attachment; and
- An order granting or dissolving an injunction.

For discussion of appealable orders generally, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996).

Even though CCP §916 provides that perfecting an appeal generally stays proceedings on a judgment in the trial court automatically, the trial court is governed by CCP §1176 on staying enforcement of an unlawful detainer judgment pending an appeal. See §13.60.

PRACTICE TIP: A tenant's attorney planning to appeal should first seek a stay of execution ex parte under CCP §918 (see §§13.52-13.55). This would stay execution until the appeal is perfected and the trial judge decides whether to stay execution of judgment pending appeal under CCP §1176.

Most unlawful detainer actions are brought as limited civil cases, for which the appropriate court of appeal is the appellate division of the superior court. See Cal Rules of Ct 8.800-8.843, 8.880-8.891, 8.930-8.936. A party has no absolute further right of appeal from a decision of the superior court appellate division. The district court of appeal may hear an appeal from the appellate division if the superior court certifies, or the court of appeal determines, that transfer of the case to the court of appeal appears necessary to secure uniformity of decision or to settle important questions of law. CCP §911. See Cal Rules of Ct 8.1000-8.1018. If the case is accepted and decided by the court of appeal, a dissatisfied party may file a petition for review with the California Supreme Court. Cal Rules of Ct 8.500(a)(1). The petitioner may file a reply to the answer. Rule 8.500(a)(3). For discussion of appellate courts and procedure generally, see Civ App Prac.

An appellant might avoid imposition of costs by dismissing a nonmeritorious appeal early in the process. See *Small v Hall's Furniture Defined Benefit Pension Plan* (2000) 79 CA4th 648, 94 CR2d 313. For discussion on an appellate court's inherent authority to impose sanctions for the making of a frivolous motion on appeal, see *Dana Commercial Credit Corp. v Ferns & Ferns* (2001) 90 CA4th 142, 108 CR2d 278. See also *Evans v CenterStone Dev. Co.* (2005) 134 CA4th 151, 35 CR3d 745 (case remanded to determine both attorney fees for the appeal and the motion for sanctions plus additional sanctions and to report attorney to State Bar).

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§13.59 2. Procedure and Time Limits

California Rules of Court 8.104(a) requires that a notice of appeal from a judgment in an unlimited civil case (see Rule 8.4) be filed on or before the earliest of the following dates: 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was mailed; 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or 180 days after the date of entry of judgment. The 60-day period is not triggered by service of a minute order that notes the date of entry but is not entitled "Notice of Entry." *Cuenllas v VRL Int'l, Ltd.* (2001) 92 CA4th 1050, 112 CR2d 383.

If there are multiple counsel for appellant, service of the notice of entry of judgment and the notice of entry of the order denying a new trial on only the original attorney is sufficient to start the 60-day notice period in which to appeal. *Adaimy v Ruhl* (2008) 160 CA4th 583, 72 CR3d 926.

A postjudgment award of attorney fees is separately appealable. A notice of appeal from the original judgment alone does not give the appellate court jurisdiction to hear a challenge to the award of attorney fees. *DeZerega v Meggs* (2000) 83 CA4th 28, 99 CR2d 366. See also *Colony Hill v Ghamaty* (2006) 142 CA4th 1408, 48 CR3d 798 (court of appeal lacked jurisdiction to review attorney fee award because order granting fees was neither included in judgment nor separately appealed).

A notice of appeal from a judgment in a limited civil case (see Rule 8.821), normally must be filed within 30 days after the date that the notice of entry of judgment is mailed by the clerk or by any party, or within 90 days after the date of entry of judgment, whichever is earlier. Cal Rules of Ct 8.822(a). Times for filing appeals after various postjudgment motions have been filed are specified in Cal Rules of Ct 8.822-8.823.

A motion for reconsideration that is filed but not heard before the entry of judgment does not extend the time to file an appeal. *Safeco Ins. Co. v Architectural Facades Unlimited, Inc.* (2005) 134 CA4th 1477, 36 CR3d 754. To avoid the effects of the decision in *Safeco,* a request to stay entry of judgment pending the hearing on the motion can be made in the trial court, and if the request is denied, the appeal must be filed in the period prescribed by the court rules.

A party may initiate an appeal by filing a notice of appeal with the clerk of the superior court. See Cal Rules of Ct 8.100(a), 8.821(a). Note that in unlimited civil cases, Cal Rules of Ct 8.100(b) requires payment of a $655 filing fee and a $100 deposit when a notice of appeal is filed, and the appealing party must prepare a Civil Case Information Statement under Cal Rules of Ct 8.100(g). The clerk must mail notification of the filing of the notice to the opposing party's attorney. Cal Rules of Ct 8.100(e), 8.821(d).

If the appellant fails to pay the deposit to the superior court, the superior court clerk must notify the appellant in writing of the default. The appellant has 15 days to deposit the funds or seek a fee waiver. If the appellant fails to take action, the superior court clerk must notify the appellate court of the default; the appellate court may dismiss the appeal. Cal Rules of Ct 8.100(d).

The party noticing the appeal must then arrange for preparation of the clerk's and reporter's transcripts, if needed, as provided in Cal Rules of Ct 8.120-8.163 and 8.830-8.843 and pay associated fees. The reporter's transcript must contain an index listing the volume and page where any exhibit is marked for identification and where it is admitted or refused; the index must identify each exhibit by number or letter and a brief description of the exhibit. Cal Rules of Ct 8.144(b)(3), 8.838(b). When an appellant proceeds in forma pauperis, Cal Rules of Ct 3.61(9) authorizes a waiver of clerk's transcript fees. *Mehdi v Superior Court* (1989) 213 CA3d 1198, 261 CR 919. See generally California Civil Appellate Practice, chap 9 (3d ed Cal CEB 1996). The parties must also adhere to applicable rules on the preparation, service, and filing of appellate briefs; these rules require use of recycled paper for all records and briefs. See Cal Rules of Ct 8.144, 8.200-8.224, 8.880-8.884. See generally Civ App Prac, chaps 12-13. For appeals in the court of appeal, one electronic copy or four paper copies of each brief must be served on the supreme court. Cal Rules of Ct 8.212(c).

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§13.60 3. Stay Pending Appeal (CCP §1176)

A tenant appealing the judgment in an unlawful detainer action must obtain a stay of execution of the judgment for the appeal to be effective. Possession of the premises is the principal issue in unlawful detainer proceedings, and a reversal on appeal often is of little benefit to a tenant who has already been evicted. Notably, an appeal is not moot if the tenant was evicted under the judgment (see *Lee v Vignoli* (1979) 98 CA3d Supp 24, 160 CR 79), and the tenant may have important reasons to pursue the appeal even if the court does not grant a stay.

Under CCP §916, perfecting an appeal in civil actions generally stays enforcement of the judgment. In unlawful detainer actions, however, there is no automatic stay of execution when the tenant appeals; rather, the trial court *shall* order a stay if it finds "that the moving party will suffer extreme hardship in the absence of a stay and that the nonmoving party will not be irreparably injured by its issuance." CCP §1176(a). See *Mehr v Superior Court* (1983) 139 CA3d 1044, 189 CR 138, decided before the statute was amended in 1985. In *Goldie's Bookstore, Inc. v Superior Court* (9th Cir 1984) 739 F2d 466, 471, the court held that the lack of an automatic stay in unlawful detainer actions does not violate a tenant's equal protection rights.

Code of Civil Procedure §1176 does not specifically require an undertaking as a condition to the court's granting a stay. As a condition of an order to stay execution pending appeal under CCP §1176(a), the tenant *must* pay the "reasonable monthly rental value" into court, in advance, as rent would otherwise become due. The value is the same as the contract rent unless the trial court has modified the rental value. The statute does not say whether such a modification must have occurred at the trial or whether it could be considered solely on the motion for a stay. The court has discretion to impose other conditions.

Under CCP §§916-936.1, a party must post an undertaking, along with perfecting the appeal, to obtain a stay of certain types of judgments pending the appeal. Because these provisions are subject to CCP §1176, posting an undertaking and perfecting the appeal do not automatically stay enforcement of an unlawful detainer judgment. *Mendoza v Small Claims Court* (1958) 49 C2d 668, 671, 321 P2d 9; *St. Clair v Joos* (1924) 66 CA 398, 226 P 623. In any event, if the judgment debtor pays the underlying judgment and appeals only from the postjudgment award of costs, no appeal bond is required. CCP §917.1(d); *Ziello v Superior Court* (1999) 75 CA4th 651, 89 CR2d 398.

Code of Civil Procedure §1176(a), rather than CCP §917.4, governs the propriety of a bond required for the stay during an appeal of an unlawful detainer judgment. *Selma Auto Mall II v Superior Court* (1996) 44 CA4th 1672, 1681, 52 CR2d 599. The trial judge has discretion to determine whether to require an undertaking at all and, if so, to set the amount. The court in *Selma Auto Mall* held that the trial court had abused its discretion by conditioning the stay on a requirement that the tenant guarantee payment of attorney fees awarded to that landlord against other, nonappealing parties "to balance the equities between the parties." 44 CA4th at 1676. The court stated a general principle that might apply to many unlawful detainer appeals (44 CA4th at 1686):

> We conclude that section 1176(a)'s provision, "the court may condition the stay on whatever conditions the court deems just," must be read as authorizing the court to impose a just condition otherwise authorized by law and bearing some reasonable relationship to the injury the nonmoving party might otherwise suffer from an unconditional stay. Such conditions would include provisions to protect the status quo pending appeal and to pay the damages the nonmoving party may sustain by virtue of the stay.

EXAMPLE: The manner in which a reviewing court might grant a stay pending appeal is illustrated in *Mehr v Superior Court, supra*. The tenants petitioned the court of appeal for a writ of mandate compelling the trial court to grant a stay pending appeal. The tenants alleged that they were about to be evicted from their home of 15 years, had paid the rental value awarded in the judgment, and were willing to pay the rental value pending appeal. The court of appeal denied their petition, but the supreme court stayed execution (on condition that the tenants pay the monthly rental value of $950), pending its determination of whether to grant the petition for review. 139 CA3d at 1048. The supreme court then granted review, transferred the case to the court of appeal for issuance of an alternative writ of mandate, and ordered that the stay remain in effect pending final resolution of the appeal. 139 CA3d at 1049. The court of appeal held that, because the tenants had shown a "substantial question" for appeal

(concerning fraud in a sale under a deed of trust), the trial court had abused its discretion in denying their motion for a stay. 139 CA3d at 1050.

A denial of a motion for a stay pending appeal is immediately reviewable by a petition for an extraordinary writ. CCP §1176(a). Denial of a stay by the trial court may also be avoided if the reviewing court decides to review the case on its merits under an extraordinary writ (see §13.63). In *Schweiger v Superior Court* (1970) 3 C3d 507, 90 CR 729, the tenant unsuccessfully sought to assert the defense of retaliatory eviction in the trial court and in successive appellate courts. The supreme court granted an alternative writ of mandate, however, and stayed execution of the judgment (without mentioning CCP §1176), pending a full hearing before it on the merits of the defense. See also *Green v Superior Court, supra.* In *Custom Parking, Inc. v Superior Court* (1982) 138 CA3d 90, 187 CR 674, the court granted a stay pending its decision on a petition for writ of mandate to compel the trial court to vacate its judgment and permit the tenant to raise the defense of retaliatory eviction. The court subsequently granted a peremptory writ of mandate, stating (138 CA3d at 91 n1):

> Writ of mandate is appropriate even though there is a right to immediate appeal. Code of Civil Procedure section 1176 permits the *trial judge* to issue a stay pending appeal. Here, the trial judge issued only a temporary stay to permit the filing of this petition. Without a stay pending appeal, appeal is not an adequate remedy for the dispossessed tenant.

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§13.61 4. Effect of Tenant's Vacating Pending Appeal

If an unlawful detainer judgment awarding a landlord possession of the premises is reversed, the appellate court may direct the trial court to restore possession to the tenant as long as this result is consistent with the rights of third parties (such as new tenants). CCP §908. Thus, a tenant's appeal is not necessarily moot even though the tenant has vacated the premises after losing an unlawful detainer action. *Old Nat'l Fin. Servs., Inc. v Seibert* (1987) 194 CA3d 460, 467, 239 CR 728 (court rejected argument of mootness because (1) tenant vacated only after being compelled by the trial court's order to vacate, and (2) tenant could still obtain relief on appeal by obtaining an order restoring right to possession). See *Union Oil Co. v Chandler* (1970) 4 CA3d 716, 720, 84 CR 756 (tenant's appeal not moot because tenant vacated premises as a result of trial court's decision).

An appeal may be taken whether or not the tenant sought a stay of execution. *Lee v Vignoli* (1979) 98 CA3d Supp 24, 160 CR 79. An appeal will not be dismissed as moot even if the tenant is no longer in possession of the premises, when the issue in the case is an important one that is likely to arise frequently (see *Green v Superior Court* (1974) 10 C3d 616, 622 n6, 111 CR 704; *Kriz v Taylor* (1979) 92 CA3d 302, 308, 154 CR 824), or when the judgment awarded the landlord damages, attorney fees, or both.

If a tenant vacates the premises while the landlord is appealing an adverse unlawful detainer judgment, the action is not moot per se. In *Cinnamon Square Shopping Ctr. v Meadowlark Enters.* (1994) 24 CA4th 1837, 1842, 30 CR2d 697, the tenant, who had prevailed in the trial court by proving that the eviction notice was deficient, argued that its relinquishment of possession made the appeal moot. The court of appeal held that, because the landlord's unlawful detainer action sought back rent as well as possession, the action was not moot, and its decision (after review of the trial court's finding on the amount of rent owed) would operate as collateral estoppel in any subsequent action by the landlord to recover the rental obligation.

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§13.62 5. Form: Notice of Motion for Stay of Execution Pending Appeal

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant _ _[*Name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited/Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION FOR**
vs	)	**STAY OF EXECUTION**
	)	**PENDING APPEAL (CCP**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**§1176); POINTS AND**
	)	**AUTHORITIES;**
	)	**DECLARATIONS**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*name*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Judgment:** _ _[*date of entry*]_ _

To plaintiff and plaintiff's attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _ **of the above Court, defendant,** _ _[*name*]_ _**, will move for an order from the Court staying execution of the judgment in this action pending appeal. Judgment was entered on** _ _[*date*]_ _ **awarding plaintiff,** _ _[*name*]_ _**,** _ _[*state award*]_ _**. Notice of appeal was filed on** _ _[*date*]_ _**. The grounds for this motion are that defendant moving party will suffer extreme hardship in the absence of a stay and that the nonmoving party will not be irreparably injured by the issuance of a stay.**

This motion is based on this notice; all pleadings, papers, and records in this action; matters of which the court takes judicial notice, the accompanying memorandum of points and authorities and declarations of defendant's attorney, defendant, _ _[*and others, if applicable*]_ _**;** _ _[*and on such evidence as may be presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name of attorney*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk); copies for service on each attorney of record and unrepresented party; office copies.

Comment: Because granting or denying the stay is grounded on a balancing of the equities (see §13.60), supporting declarations must be filed to indicate the importance of a stay in the particular case.

The attorney's declaration should (a) state that he or she believes the appeal to be meritorious, and (b) outline the reasons for this belief.

The tenant's declaration should (a) state that he or she believes the appeal to be meritorious (and not taken for purposes of delay), and (b) describe the hardship that would be involved in moving. See, *e.g.,* the facts in *Mehr v Superior Court* (1983) 139 CA3d 1044, 189 CR 138, discussed in §13.60.

Because the court is now required to condition a stay on a monthly deposit of reasonable rental value to protect the landlord during the appeal, the tenant's declaration might set forth his or her ability to meet this condition. The landlord may file his or her opposition to the stay, including counterdeclarations that either negate the tenant's claim of hardship, or assert the irreparable injury that a stay would impose on the landlord, or both.

The format by which the tenant may request a stay of execution is not specified in CCP §1176. Opposition from the landlord is likely, however, because a stay might work a real hardship on a landlord in light of the time required for an appeal to be decided. For this reason, the tenant's application for a stay has been put in the form of a noticed motion. A memorandum must be filed in support of the motion and should be filed in opposition to it. Cal Rules of Ct 3.1113.

On captions for court papers, see California Civil Procedure Before Trial, chap 11 (4th ed Cal CEB 2004).

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§13.63 E. Extraordinary Writs

Relief by appeal may be ineffective for the tenant in an unlawful detainer action because an appeal does not automatically stay enforcement of the judgment. See §§13.58, 13.60. When the trial judge is unwilling to grant a stay, or will do so only on posting of a substantial bond or undertaking, the judgment may be executed before the appeal is heard. Thus, the appeal will be of little practical benefit to the tenant. In this situation, tenant's counsel might resort to an extraordinary writ proceeding to have the matter heard and execution stayed pending the hearing. Some of the most significant California landlord-tenant decisions have resulted from writ proceedings. See, *e.g., Green v Superior Court* (1974) 10 C3d 616, 111 CR 704 (implied warranty of habitability); *Schweiger v Superior Court* (1970) 3 C3d 507, 90 CR 729 (retaliatory eviction).

Extraordinary writs available include prohibition, supersedeas, and certiorari (see generally California Civil Writ Practice (4th ed Cal CEB 2008)), but the writ most likely to be used in an unlawful detainer action is mandamus. A writ of mandate (see CCP §§1084, 1097) may be issued by any superior or appellate court to compel performance of an act specially enjoined by law (including an act by a judicial officer). See CCP §1085. It may be issued only when no plain, speedy, and adequate remedy exists in the ordinary course of law. CCP §1086. On common situations in which relief by writ is sought, see California Eviction Defense Manual §30.10 (2d ed Cal CEB 1993).

The breadth of a tenant's mandamus writ right was clarified in *Sites v Superior Court* (review dismissed Nov. 20, 2002, and remanded to court of appeal due to repeal and adoption of former Cal Rules of Ct 62-64, effective January 1, 2003; former opinion at 86 CA4th 504, 103 CR2d 432). In *Sites*, the municipal court entered judgment in the landlord's favor in an unlawful detainer proceeding. The appellate division of the superior court summarily affirmed, and the superior court denied the tenant's request for certification of the case to the court of appeal. The tenants responded with a writ of mandate to compel the appellate division to certify the case. The court of appeal held that mandamus relief is not available to permit transfer, because that transfer is governed by the California Rules of Court.

NOTE: Former Cal Rules of Ct 62-64 were renumbered as Cal Rules of Ct 8.1002-8.1008. Under Rule 8.1008(b)(4), a party must not file an answer to a petition for transfer unless the court requests an answer.

A reviewing court that grants an alternative writ of mandate, in order to hear the matter presented in the mandamus proceeding, may stay enforcement of the judgment despite CCP §1176. In an unlawful detainer action, the reviewing court may stay the action to preserve the status quo pending a hearing on the merits of the mandamus action. See *Green v Superior Court, supra*; *Schweiger v Superior Court, supra*; *Custom Parking, Inc. v Superior Court* (1982) 138 CA3d 90, 187 CR 674. Even if an appellate court stays the action on substantive grounds beyond those provided in CCP §1176, it is required to condition the stay on monthly deposits of reasonable rental value pending the review. See §13.60. On obtaining stays of execution pending a decision of petition for a writ of mandate, see California Eviction Defense Manual §30.6 (2d ed Cal CEB 1993).

A party seeking a stay of the enforcement of a judgment pending an appeal in a limited civil case may file a petition for writ of supersedeas in the appellate division of the superior court under Cal Rules of Ct 8.824. Similarly, a party seeking a stay of the enforcement of a judgment pending an appeal in an unlimited civil case may file a petition for writ of supersedeas in the court of appeal under Cal Rules of Ct 8.112 and 8.116.

WARNING: On the risk of filing a writ of supersedeas to stay an eviction pending appeal and of abandoning the appeal following the writ's denial, see *Coast Sav. & Loan Ass'n v Black* (1986) 187 CA3d 1494, 1501, 232 CR 483 (pro per tenant ordered to pay landlord $10,000 in damages under CCP §907 for delay tactics).

Extraordinary writ proceedings present a complex area of practice well beyond the scope of this book. Counsel considering initiating such proceedings should consult available authorities, including California Civil Writ Practice (4th ed Cal CEB 2008), California Eviction Defense Manual, chap 30 (2d ed Cal CEB 1993), and 8 Witkin, California Procedure, *Writs* (5th ed 2008).

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V. ENFORCING THE JUDGMENT

A. For Possession

§13.64 1. Writ of Possession; Procedure

Under CCP §1174(a), the unlawful detainer judgment may award the landlord possession of the premises. The judgment is not self-executing, however, and the landlord must obtain a writ of possession from the court to have a tenant who does not voluntarily vacate the premises removed by a sheriff or marshal (see CCP §1174(d)). Procedures for executing the writ of possession are set forth in CCP §§715.010-715.040, which are made applicable to unlawful detainer actions by CCP §1174(d). For the Judicial Council Writ of Possession Form, see §13.69.

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§13.65 a. Contents of Writ

The writ of possession must contain the following information required by CCP §712.020, which covers enforcement of nonmonetary judgments generally:

- Pertinent dates, including date writ is issued, date judgment was entered, date of judgment renewals, and location of entry or renewal of judgment information;
- Title of court and number of the action; and
- Names and addresses of both judgment creditor and judgment debtor.

In addition, pursuant to CCP §715.010 the writ must:

- Describe the subject real property (*i.e.,* the rental premises);
- Notify the party that, if the property is not vacated within 5 days from the date that the writ is served, the levying officer will remove the occupants and restore the judgment creditor (*i.e.,* the landlord) to possession;
- Notify the party that any personal property left on the premises will be disposed of in accordance with CCP §1174 (see §§8.154-8.159);
- State the date on which the complaint was filed;
- State the date on which the court will hear objections of unnamed occupants making a *postjudgment* claim of right to possession (see §§13.70-13.73), unless the landlord elected to serve notice of right to a *prejudgment* claim of possession with the complaint under CCP §415.46 (see §§9.51-9.55);
- Specify daily rental value of the premises as of the date of filing of the complaint, unless the landlord elected to serve notice of right to a *prejudgment* claim of possession under CCP §415.46; and
- If the landlord did serve notice of right to a *prejudgment* claim of possession under CCP §415.46, state that the writ applies to all tenants, subtenants, or named claimants, if any, and any other occupants of the premises.

Under CCP §715.010(c), the levying officer must also serve or post a copy of the form for a *postjudgment* claim of right to possession (see §13.73) at the time the writ of possession is served or posted, unless the landlord previously gave notice of the right to a *prejudgment* claim of possession under CCP §415.46. Such notice would have been given by serving a *prejudgment* claim of right to possession form at the commencement of the action with the summons and complaint. See §§9.51-9.55.

Code of Civil Procedure §712.010 requires that the "application" of a judgment creditor for a writ of possession of real property "include a declaration under penalty of perjury stating the daily rental value of the property as of the date the complaint for unlawful detainer was filed." The apparent purpose of this amendment is to document or support the "daily rental value" figure included on the writ form itself. Because all unlawful detainer complaints must be verified (CCP §1166) and because most plaintiffs file declarations on reasonable rental value in support of their applications for default judgment, this requirement serves no useful purpose, except in the uncommon case in which there is no written declaration or judgment on file in the action establishing the reasonable rental value.

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§13.66 b. Service of Writ

The levying officer who performs the eviction is usually a deputy from the civil division of the county sheriff's department or the office of the county marshal. Most departments will not enforce the writ until they have received a deposit from the landlord to cover the estimated expenses of serving the writ. Procedures for serving and enforcing the writ of possession are set forth in CCP §715.020. To execute the writ, the levying officer must serve it on one occupant of the property. CCP §715.020(a). Service must be made by the officer's leaving a copy with the occupant personally, with a person of suitable age and discretion on the premises who is either an employee or agent of the occupant, or with a member of the occupant's household. CCP §715.020(a).

If the levying officer is unable to effect service in this manner, he or she may execute the writ by posting a copy of it in a conspicuous place on the premises and serving a copy on the judgment debtor (either personally or by mail). CCP §715.020(b). If the judgment debtor's address is unknown, the copy may be mailed to the premises. CCP §715.020(b). In most residential tenancies, the judgment debtor and the occupant specified in CCP §715.020(a) are the same person. However, if the original tenant has assigned or sublet the premises, he or she would no longer be an occupant at the time of the unlawful detainer judgment, but would usually still be a judgment debtor.

The levying officer must serve or post a copy of the form for a postjudgment claim of right to possession at the time the writ of possession is served or posted, unless the landlord previously gave notice of the right to a prejudgment claim of possession under CCP §415.46. See §13.65.

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§13.67 c. Eviction Under the Writ

If the judgment debtor, members of the judgment debtor's household, and any other occupants holding possession of the premises under the judgment debtor do not vacate within 5 days after service of the writ on an occupant or judgment debtor, the levying officer must remove the occupants and restore the judgment creditor to possession. CCP §715.020(c). The provisions of CCP §684.120, extending time for service by mail, do not apply to the 5-day period specified in this subsection. CCP §715.020(c).

If the landlord did not previously give notice of the right to a *prejudgment* claim of possession under CCP §415.46 (see §13.65), the levying officer may not remove from the premises a person not named in the writ who (a) claims a right to possession of the premises accruing before commencement of the unlawful detainer action, or (b) claims to have been in possession of the premises on the date that the unlawful detainer action was filed. CCP §715.020(d). See §§13.70-13.73. As a practical matter, a backlog of evictions may prevent the levying officer from returning on the sixth day to evict the occupants. In addition, some sheriff's and marshal's offices evict tenants only on certain days of the week, and the sixth day might not fall on one of those days.

An eviction under a writ of execution based on a judgment that has been set aside will cause the landlord to be liable for forcible entry. *Bedi v McMullan* (1984) 160 CA3d 272, 275, 206 CR 578. Although the landlord in *Bedi* had obtained a subsequent, valid judgment for possession after the original judgment had been set aside, the latter judgment established only his entitlement to possession. "There is no substitute for the crucial element of a valid writ of execution." 160 CA3d at 277. But see *Glass v Najafi* (2000) 78 CA4th 45, 92 CR2d 606. In *Glass,* the court held a landlord not liable for forcible entry and detainer when the plaintiff-tenants were evicted under an invalid writ of possession, because defendants complied with judicial process in evicting plaintiffs under a judicially granted writ of possession. See also *George v County of San Luis Obispo* (2000) 78 CA4th 1048, 93 CR2d 595 (no liability for sheriff who served writ of possession regular on its face that was issued by court with competent jurisdiction).

On whether a landlord who has a valid writ of possession may proceed to evict a tenant who files a bankruptcy after entry of an unlawful detainer judgment, see §13.68.

On postjudgment claims of right to possession by occupants who were residing on the premises when the unlawful detainer action was filed but not named in the judgment for possession, see CCP §1174.3, discussed in §13.70.

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§13.68 d. Effect of Bankruptcy; CCP §715.050

In many instances, the filing of a bankruptcy petition effectively stays a residential eviction until the bankruptcy court permits the eviction to proceed by an order lifting or modifying the stay. See §§14.4-14.10, 14.17-14.29. A California statute (CCP §715.050) that allows immediate execution of a writ of possession issued after an unlawful detainer judgment (despite the tenant's filing of a subsequent bankruptcy petition) has been both challenged and clarified. A California court of appeal gave full force to §715.050 by applying the reasoning found in federal decisions holding that a tenancy interest terminated by a judgment cannot be property of the bankruptcy estate. See *Lee v Baca* (1999) 73 CA4th 1116, 86 CR2d 913 (petition for review denied by California Supreme Court).

In *Baca v Lee* (2000) 529 US 1020, 146 L Ed 2d 314, 120 S Ct 1422, the United States Supreme Court denied a writ of certiorari, letting stand the court of appeal ruling in *Lee v Baca, supra,* that §715.050 was not inconsistent with federal law in that, under bankruptcy decisional law, the laws of the state define what constitutes an asset belonging to the debtor. Although under *Lee* a residential lease that is declared forfeited in an unlawful detainer judgment is no longer an asset belonging to the debtor-tenant, whether the landlord must file a motion to terminate or modify the automatic stay remains a federal question.

A district court in the Ninth Circuit held in 2002 that §715.050 was preempted by federal bankruptcy law and, therefore, unconstitutional. Consequently, the landlord had to request relief from the automatic bankruptcy stay from the bankruptcy court. See *Westside Apartments v Butler (In re Butler)* (Bankr CD Cal 2002) 271 BR 867, discussed in §§14.9, 14.11, 14.16-14.17. But see *In re Smith (Marquand v Smith)* (Bankr CD Cal 1989) 105 BR 50, also discussed throughout chap 14.

NOTE: Despite the unsettled state of the law, some sheriff's and marshal's offices are complying with §715.050, which applies only to unlawful detainer judgments; prejudgment petitions are not affected and a motion for relief from stay is always required in those situations (see §14.17). The Central and Southern District Bankruptcy Courts have officially taken the position that they will not do a lock-out, even postjudgment, until relief from stay is obtained in federal bankruptcy court.

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Source: Real Property/California Landlord-Tenant Practice/13 Unlawful Detainer: Judgment and Posttrial Proceedings/ §13.69 2. Form: Writ of Execution (Judicial Council Form EJ-130)

§13.69 2. Form: Writ of Execution (Judicial Council Form EJ-130)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):* ☐ ATTORNEY FOR ☐ JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	
WRIT OF ☐ **EXECUTION (Money Judgment)** ☐ **POSSESSION OF** ☐ **Personal Property** ☐ **Real Property** ☐ **SALE**	CASE NUMBER:

1. **To the Sheriff or Marshal of the County of:**

   You are directed to enforce the judgment described below with daily interest and your costs as provided by law.

2. **To any registered process server:** You are authorized to serve this writ only in accord with CCP 699.080 or CCP 715.040.

3. *(Name):*
   is the ☐ judgment creditor ☐ assignee of record whose address is shown on this form above the court's name.

4. **Judgment debtor** *(name and last known address):*

   ☐ Additional judgment debtors on next page

5. **Judgment entered** on *(date):*

6. ☐ **Judgment renewed** on *(dates):*

7. **Notice of sale** under this writ
   a. ☐ has not been requested.
   b. ☐ has been requested *(see next page).*

8. ☐ Joint debtor information on next page.

9. ☐ See next page for information on real or personal property to be delivered under a writ of possession or sold under a writ of sale.

10. ☐ This writ is issued on a sister-state judgment.

11. Total judgment . . . . . $

12. Costs after judgment (per filed order or memo CCP 685.090) . . . . . $

13. Subtotal *(add 11 and 12)* . . . . . $

14. Credits . . . . . $

15. Subtotal *(subtract 14 from 13)* . . . . . $

16. Interest after judgment (per filed affidavit CCP 685.050) (not on GC 6103.5 fees). . . $

17. Fee for issuance of writ . . . . . $

18. **Total** *(add 15, 16, and 17)* . . . . . $

19. Levying officer:
    (a) Add daily interest from date of writ *(at the legal rate on 15)* (not on GC 6103.5 fees) of. . . . . $
    (b) Pay directly to court costs included in 11 and 17 (GC 6103.5, 68511.3; CCP 699.520(i)) . . . . . $

20. ☐ The amounts called for in items 11–19 are different for each debtor. These amounts are stated for each debtor on Attachment 20.

[SEAL]

Issued on *(date):* Clerk, by _____ , Deputy

NOTICE TO PERSON SERVED: SEE NEXT PAGE FOR IMPORTANT INFORMATION.

Form Approved for Optional Use
Judicial Council of California
EJ-130 [Rev. January 1, 2006]

WRIT OF EXECUTION

Code of Civil Procedure, §§ 699.520, 712.010, Government Code, § 6103.5
www.courtinfo.ca.gov

Print

PLAINTIFF: / DEFENDANT:	CASE NUMBER:

— Items continued from page 1—

21. ☐ **Additional judgment debtor** *(name and last known address):*

22. ☐ **Notice of sale** has been requested by *(name and address):*

23. ☐ **Joint debtor** was declared bound by the judgment (CCP 989–994)
a. on *(date):*
b. name and address of joint debtor:
a. on *(date):*
b. name and address of joint debtor:
c. ☐ additional costs against certain joint debtors *(itemize):*

24. ☐ *(Writ of Possession* or *Writ of Sale)* **Judgment** was entered for the following:
a. ☐ Possession of real property: The complaint was filed on *(date):*
(Check (1) or (2)):
(1) ☐ The Prejudgment Claim of Right to Possession was served in compliance with CCP 415.46.
The judgment includes all tenants, subtenants, named claimants, and other occupants of the premises.
(2) ☐ The Prejudgment Claim of Right to Possession was NOT served in compliance with CCP 415.46.
(a) $ was the daily rental value on the date the complaint was filed.
(b) The court will hear objections to enforcement of the judgment under CCP 1174.3 on the following dates *(specify):*
b. ☐ Possession of personal property.
☐ If delivery cannot be had, then for the value *(itemize in 9e)* specified in the judgment or supplemental order.
c. ☐ Sale of personal property.
d. ☐ Sale of real property.
e. Description of property:

NOTICE TO PERSON SERVED

WRIT OF EXECUTION OR SALE. Your rights and duties are indicated on the accompanying *Notice of Levy* (Form EJ-150).
WRIT OF POSSESSION OF PERSONAL PROPERTY. If the levying officer is not able to take custody of the property, the levying officer will make a demand upon you for the property. If custody is not obtained following demand, the judgment may be enforced as a money judgment for the value of the property specified in the judgment or in a supplemental order.
WRIT OF POSSESSION OF REAL PROPERTY. If the premises are not vacated within five days after the date of service on the occupant or, if service is by posting, within five days after service on you, the levying officer will remove the occupants from the real property and place the judgment creditor in possession of the property. Except for a mobile home, personal property remaining on the premises will be sold or otherwise disposed of in accordance with CCP 1174 unless you or the owner of the property pays the judgment creditor the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the judgment creditor takes possession of the premises.
► *A Claim of Right to Possession form accompanies this writ (unless the Summons was served in compliance with CCP 415.46).*

Copies: Original (issued by court clerk); copies for levying officer to serve on parties being evicted; office copies.

Comment: The writ of execution form effectuates the provisions of CCP §§715.010 (see §13.64) and 1174.3 (see §13.70), concerning the effect of scheduling an eviction of persons not named in the writ. See §13.65 for contents of the writ, and §13.66 for serving the writ. The fee for enforcing a writ of possession of real property is now $75 plus (if needed) an additional fee of $50 "for removing an occupant or occupants from the premises and putting a person in possession of the premises." Govt C §26733.5.

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3. Postjudgment Claim of Right to Possession

§13.70 a. Notice Procedure and Limitations on Use

A statutory procedure, set forth in CCP §1174.3, enables nontenant occupants, not named in the judgment and writ of possession, to object to enforcement of the judgment after service of the writ by filing a *postjudgment* claim of right to possession. See §13.71. An occupant or tenant who is named in the action, however, "shall not be required to file a claim of right to possession to protect that occupant's right to possession of the premises." CCP §1174.3(a). This language appears to overrule the decision in *Cardenas v Noren* (1991) 235 CA3d 1344, 1 CR2d 367, and to require a landlord always to serve known tenants and occupants with a summons and a complaint, for which a simple notice of right to claim of possession cannot be a substitute.

Under CCP §715.010(c), the levying officer must serve or post a copy of the form for a *postjudgment* claim of right to possession (see §§13.65-13.66) at the time the writ of possession is served or posted, unless the landlord previously gave notice of the right to a *prejudgment* claim of possession under CCP §415.46. A *postjudgment* claim of right to possession is distinct from a *prejudgment* claim, and the procedures are mutually exclusive. See CCP §1174.3(a).

Code of Civil Procedure §415.46(a) permits a landlord to serve a prejudgment claim of right to possession form on any previously unidentified person who appears to be occupying or may claim to have occupied the premises at the time of the filing of the unlawful detainer action. Service is made in accordance with a complicated procedure prescribed by CCP §415.46(c). See §§9.51-9.55.

If the prejudgment claim of right to possession is served in accordance with CCP §415.46, no occupant, *whether named or unnamed in the judgment for possession*, may object to the enforcement of the judgment under a postjudgment claim of right to possession provided in CCP §1174.3. See CCP §§415.46(e), 715.010(c), 715.020(d), 1174.3(a). Instead, an occupant served with notice of the right to a prejudgment claim of possession must file a claim with the court within 10 days after the date of service. CCP §§415.46(f), 1174.25(a). See §9.54. See claim form in §9.55. Presumably, the statutory claim procedures under CCP §§415.46, 715.020(d), 1174.25, and 1174.3 supersede the claim process developed in *Arrieta v Mahon* (1982) 31 C3d 381, 182 CR 770.

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§13.71 b. Filing of Postjudgment Claim

Under CCP §1174.3(a), any occupant not named in the judgment for possession, not served with notice of the right to a prejudgment claim of possession, and who resided on the premises on the date the unlawful detainer action was filed, can object to the enforcement of judgment "against that occupant" by filing a postjudgment claim of right to possession. The claim must be made on the form prescribed by CCP §1174.3(h), reproduced in §13.73. The claim may be filed at any time after service or posting of the writ of possession up to and including the time at which the levying officer returns to evict those named in the judgment. CCP §1174.3(a). Because the claim constitutes a general appearance, a fee must be collected under Govt C §70614. The fee may be waived if the claimant qualifies for appearing in forma pauperis. CCP §1174.3(a). See §10.13.

When the completed claim of possession is presented to the levying officer, the officer must immediately "stop the eviction of occupants" at the premises. CCP §1174.3(b). The statute is ambiguous about whether the officer may proceed with the eviction of those persons who are named in the judgment, as the statute also indicates that enforcement is to cease as "against that occupant" filing the claim. See CCP §1174.3(a).

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§13.72 c. Hearing on Postjudgment Claim

The court issuing the writ of possession of real property must schedule a hearing to determine the validity of objections to enforcement of the judgment. CCP §1174.3(b). If the claimant presents the completed form to the levying officer, and within 2 court days presents 15 days' rent plus the appropriate fee (or form for proceeding in forma pauperis) to the court, the hearing on the claim must be set not less than 5 nor more than 15 days after the claim is filed with the court. CCP §1174.3(c)(1). If the claimant presents the completed form and within 2 court days presents the fee (or an in forma pauperis form) to the court without delivering the equivalent of 15 days' rent, the hearing on the claim must be held on the fifth day after the filing is completed. CCP §1174.3(c)(2).

If the court determines that the claim is valid and that the unlawful detainer is based on a curable breach, the claimant is given an opportunity to cure the breach. If the claimant fails to cure the breach within the required time, the plaintiff can file and serve a supplemental complaint against the claimant as a defendant in the same unlawful detainer action. CCP §1174.3(e)(1). If the court determines that the claim is valid and that the unlawful detainer is not based on a curable breach, the claimant is deemed to be a served defendant in the unlawful detainer action and must answer or otherwise respond within 5 days. CCP §1174.3(e).

Under CCP §1174.3(f)-(g), the court must deny the claim and order the levying officer to proceed with enforcement of the original writ of possession, deemed amended to include the claimant if any one of the following events occurs:

- The claimant fails to pay an appearance fee or obtain a waiver of that fee;
- The claimant fails to appear at the hearing;
- The court, after hearing, decides the claim is invalid; or
- The claimant loses on the merits at trial.

The original writ is "deemed amended" presumably to avoid the possibility of new claims being made with respect to a new writ. Execution must be effected within a reasonable time not to exceed 5 days. On receipt of the court's order, the levying officer can enforce the writ of possession of real property against any of the occupants. CCP §1174.3(g). Typically, the sheriff's or marshal's office completes the lockout procedures within 2-3 days from the time it receives new instructions and the amended writ of possession.

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Source: Real Property/California Landlord-Tenant Practice/13 Unlawful Detainer: Judgment and Posttrial Proceedings/ §13.73 4. Form: Claim of Right to Possession and Notice of Hearing (Judicial Council Form CP10)

§13.73 4. Form: Claim of Right to Possession and Notice of Hearing (Judicial Council Form CP10)

CLAIMANT OR CLAIMANT'S ATTORNEY *(Name and Address)*:	TELEPHONE NO.:	***FOR COURT USE ONLY***
ATTORNEY FOR *(Name)*:		
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
PLAINTIFF: DEFENDANT:		
CLAIM OF RIGHT TO POSSESSION AND NOTICE OF HEARING		CASE NUMBER:

Complete this form only if ALL of these statements are true:

1. **You are NOT named in the accompanying form called Writ of Possession.**
2. **You occupied the premises on or before the date the unlawful detainer (eviction) action was filed.** *(The date is in the accompanying Writ of Possession.)*
3. **You still occupy the premises.**
4. **A Prejudgment Claim of Right to Possession form was NOT served with the Summons and Complaint.**

NOTICE TO LEVYING OFFICER:

☐ Claim granted ☐ Claim denied

Clerk, by _____

(For levying officer use only)

Completed form was received on

Date: _____ Time: _____

By: _____

I DECLARE THE FOLLOWING UNDER PENALTY OF PERJURY:

1. My name is *(specify)*:
2. I reside at *(street address, unit No., city and ZIP code)*:
3. The address of "the premises" subject to this claim is *(address)*:
4. On *(insert date)*: _____, the landlord or the landlord's authorized agent filed a complaint to recover possession of the premises. *(This date is in the accompanying Writ of Possession.)*
5. I occupied the premises on the date the complaint was filed *(the date in item 4)*. I have continued to occupy the premises ever since.
6. I was at least 18 years of age on the date the complaint was filed *(the date in item 4)*.
7. I claim a right to possession of the premises because I occupied the premises on the date the complaint was filed *(the date in item 4)*.
8. I was not named in the Writ of Possession.
9. I understand that if I make this claim of possession, a COURT HEARING will be held to decide whether my claim will be granted.
10. *(Filing fee)* To obtain a court hearing on my claim, I understand that after I present this form to the levying officer I must go to the court and pay a filing fee of $ or file with the court the form "Application for Waiver of Court Fees and Costs." I understand that if I don't pay the filing fee or file the form for waiver of court fees *within two court days,* the court will immediately deny my claim.
11. *(Immediate court hearing unless you deposit 15 days' rent)* To obtain a court hearing on my claim, I understand I must also deliver to the court a copy of this completed claim form or a receipt from the levying officer. I also understand the date of my hearing will be set immediately if I don't deliver to the court an amount equal to 15 days' rent.

(Continued on reverse)

Print

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

12. I am filing my claim in the following manner *(check the box that shows how you are filing your claim. Note that you must deliver to the court a copy of the claim form or a levying officer's receipt)*:
    a. ☐ *(With 15 days' rent payment)* I presented this claim form to the sheriff, marshal, or other levying officer, AND within two court days I shall deliver to the court the following: (1) a copy of this completed claim form or a receipt, (2) the court filing fee or form for proceeding in forma pauperis, and (3) an amount equal to 15 days' rent. — OR —
    b. ☐ *(Without 15 days' rent payment)* I presented this claim form to the sheriff, marshal, or other levying officer, AND within two court days I shall deliver to the court the following: (1) a copy of this completed claim form or a receipt, and (2) the court filing fee or form for proceeding in forma pauperis.

IMPORTANT: Do not take a copy of this claim form to the court unless you have first given the form to the sheriff, marshal, or other levying officer.

(To be completed by the court)
Date of hearing: Time: Dept. or Div.: Room:
Address of court:

NOTICE: If you fail to appear at this hearing you will be evicted without further hearing.

13. **Rental agreement.** I have *(check all that apply to you)*:
    a. ☐ an oral rental agreement with the landlord.
    b. ☐ a written rental agreement with the landlord.
    c. ☐ an oral rental agreement with a person other than the landlord.
    d. ☐ a written rental agreement with a person other than the landlord.
    e. ☐ other *(explain)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

WARNING: Perjury is a felony punishable by imprisonment in the state prison.

Date:

. . . . . ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF CLAIMANT)

NOTICE: If your claim to possession is found to be valid, the unlawful detainer (eviction) action against you will be determined at trial. At trial, you may be found liable for rent, costs, and, in some cases, treble damages.

—NOTICE TO OCCUPANTS—

YOU MUST ACT AT ONCE if all the following are true:

1. **You are NOT named in the accompanying form called Writ of Possession.**
2. **You occupied the premises on or before the date the unlawful detainer (eviction) action was filed.** *(The date is in the accompanying Writ of Possession.)*
3. **You still occupy the premises.**
4. **A Prejudgment Claim of Right to Possession form was NOT served with the Summons and Complaint.**

You can complete and SUBMIT THIS CLAIM FORM *(in person with identification)*

(1) before the date of eviction at the sheriff's or marshal's office located at *(address)*:

(2) OR at the premises at the time of the eviction. *(Give this form to the officer who comes to evict you.)*

If you do not complete and submit this form (and pay a filing fee or file the form for proceeding in forma pauperis if you cannot pay the fee), YOU WILL BE EVICTED along with the parties named in the writ.

After this form is properly filed, A HEARING WILL BE HELD to decide your claim. If you do not appear at the hearing, you will be evicted without a further hearing.

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§13.74 B. For Rent and Damages

To collect rent and damages awarded in the judgment, the landlord may seek to execute the judgment on the tenant's property. The landlord may not simply withhold possession of personal property remaining on the premises in an attempt to recover the monetary portion of the judgment. *Love v Keays* (1971) 6 C3d 339, 98 CR 811; *Gray v Whitmore* (1971) 17 CA3d 1, 94 CR 904. (For discussion of procedures for disposition of the tenant's personal property, see §§8.154-8.161.) Provisions for enforcement of money judgments are set forth in CCP §§695.010-695.220. (For discussion of methods of enforcing money judgments generally, see Debt Collection Practice in California, chaps 7, 9, 10 (2d ed Cal CEB 1999).)

Much of the tenant's property may be exempt from execution to satisfy the landlord's money judgment. Exemptions are specified in CCP §§704.010-704.210. Those of most concern in the residential landlord-tenant context are exemptions for:

- A motor vehicle with an equity of no more than $2300 (CCP §704.010);
- Household furnishings, appliances, and apparel (CCP §704.020);
- Personal property used in a trade, business, or profession (CCP §704.060);
- Personal earnings (CCP §§704.070, 706.010-706.154);
- Social Security deposit accounts (CCP §704.080); and
- Benefits paid under various retirement, insurance, disability, and unemployment compensation programs (CCP §§704.110-704.130).

The homestead exemption is usually not significant in enforcing a residential unlawful detainer judgment, except for mobilehome tenancies, which are subject to this exemption (CCP §704.710(a)(2)).

Wage garnishments are governed by the Wage Garnishment Law (CCP §§706.010-706.154), which provides a detailed procedure for executing on the debtor's wages. Garnishment is accomplished by means of an earnings withholding order. CCP §706.021. The amount to be withheld under state law is the same as that provided by federal law. CCP §706.050. Under 15 USC §1673, the maximum amount to be withheld is defined in terms of a weekly paycheck, and may not exceed 25 percent of a debtor's disposable earnings or all amounts above 30 times the federal minimum wage, whichever is less.

The earnings withholding order contains a chart showing how much should be withheld for one pay period. All earnings over the maximum amount that may be withheld are automatically exempt. CCP §706.050. The judgment debtor may also claim an exemption for any amounts necessary to support his or her family. CCP §706.051. Note, however, that this total wage exemption does not apply to debts incurred for the common necessaries of life. CCP §706.051(c). Rent is likely to be considered a debt for a common necessity of life when the landlord executes on an unlawful detainer judgment. See *Evans v Noonan* (1912) 20 CA 288, 293, 128 P 794 (common necessaries of life include shelter).

The procedures for claiming most exemptions are found in CCP §§703.510-703.610. Procedures for claiming exemptions from wage garnishments are set forth in CCP §706.105. The tenant must file a claim of exemption within 10 days after the date of the levy. CCP §§703.520, 706.105. The landlord may oppose the claim of exemption by filing a notice of opposition and a notice of motion for order determining the claim. CCP §§703.550, 706.105. A hearing is then held in the trial court to determine whether the property is exempt. CCP §§703.580, 706.105.

Although some federal employees are exempt from wage garnishments, wages due from the federal government that are not subject to garnishment by an earnings withholding order under CCP §§706.010-706.154 may be assigned to a judgment creditor by a court order following a noticed motion under CCP §§708.510-708.560. See CCP §708.510(a)(1). This procedure is very similar in its result to an earnings withholding order, and the debtor may file a claim of exemption. In addition, other federal employees (*e.g.,* the military) may be subject to an involuntary allotment of pay under 5 USC §5520a.

If the debtor is self-employed, the creditor has the option of instructing the levying officer to conduct a "till tap." See

CCP §§687.020-687.030. This means that the levying officer will appear at the place of business during regular business hours and empty all the cash registers on the premises.

If there are no known assets, wages, or bank accounts to attach, the landlord can compel the judgment debtor to appear in court to answer questions under penalty of perjury concerning the location and existence of the debtor's assets. CCP §§708.120-708.205. The court may issue a bench warrant for the debtor's arrest and award attorney fees if the debtor fails to appear. CCP §708.170.

PRACTICE TIP: Landlords should advise their clients of the importance of maintaining accurate information on the tenant's rental application, especially bank account information and work addresses. See also §§4.4-4.16.

On occasion, the tenant's performance under the lease is guaranteed by a third party (usually a parent or guardian). If the tenant defaults on the lease, the landlord has basically three options:

(1) Name the guarantor as a defendant in the unlawful detainer action (if the guarantee agreement so provides);

(2) Add the guarantor to the judgment through CCP §989; or

(3) File a separate action against the guarantor.

On collection against cosigners of the lease, see CC §§1799.90-1799.99.

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§13.75 C. Credit Reporting Issues

Landlords pursuing debts that are not yet in the form of a judgment should be careful to comply with state and federal credit reporting laws. For instance, under the provisions of the Fair Credit Reporting Act (15 USC §§1681-1681t), if the completeness or accuracy of any information furnished by a creditor to the credit bureau is disputed by a consumer, the creditor may not furnish the information to the credit bureau without notice that such information is disputed by the consumer. 15 USC §1681s-2. Under California law, a landlord intending to report a defaulting tenant to a credit reporting agency must give notice to the tenant, prior to or within 30 days after the landlord transmits the negative credit information, by personal delivery or first class mail to the tenant's last known address. CC §1785.26(c). See also CC §§1785.13, 1785.20-1785.26, discussed in §§1.29, 1.43, 2.9, 4.9.

A credit reporting agency is permitted to provide credit reports containing information from public records. CC §1785.11.2. See *U.D. Registry, Inc. v State* (2006) 144 CA4th 405, 50 CR3d 647. A credit reporting agency may be liable under 15 USC §§1681e and 1681i for inaccurately investigating or reporting whether a judgment exists against a tenant. *Dennis v BEH-1, LLC* (9th Cir 2007) 504 F3d 892.

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§13.76 D. Fair Debt Collection Practices Act

Of concern for California landlords and practitioners is the potential for damages actions under the Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692o). In *Romea v Heiberger & Assocs.* (2d Cir 1998) 163 F3d 111, the court held that an attorney who sends a 3-day notice to pay rent or quit for the client is subject to the requirements of the FDCPA. The notice was defective for failing to advise that the tenant had 30 days after receipt of the notice to dispute the validity of the back rent sought. Two New York cases found 3-day notices to pay rent or quit to be subject to the FDCPA and void as a basis for an eviction because they failed to comply with the requirements of the Act. *Dearie v Hunter* (1998) 676 NYS2d 896; *Eina Realty v Calixte* (1998) 679 NYS2d 796.

The *Romea* case was taken one step further in *Goldman v Cohen* (2d Cir 2006) 445 F3d 152, where the court ruled that the filing of an unlawful detainer action seeking recovery of unpaid resident rent is an initial communication within the FDCPA. This ruling necessitated landlord attorneys to include a debt validation notice in the unlawful detainer complaint. This validation notice added much confusion to the complaint as the complaint required payment of rent in 3 days, while the debt validation notice allows a tenant 30 days to dispute the debt. Congress addressed the problem in the Financial Services Regulatory Relief Act of 2006 (Pub L 109-351, 120 Stat 1966), specifically exempting "formal pleadings" as an initial communication under the FDCPA. See 15 USC §1692g(d).

PRACTICE TIP: Many landlord attorneys are now advising owners and managers to serve their own pre-lawsuit notices. The safest course for attorneys serving prerequisite notices for an unlawful detainer (requesting rent or other monetary payment from the tenant) is to comply with current conditions of correspondence required of debt collectors under the FDCPA. This includes the so-called "mini-Miranda" notification and notification of the debtor's right to dispute the debt and receive verification of the validity of the debt. For further discussion and strategies, see §8.26A.

Defending violations of the FDCPA is not easy. The Act imposes strict liability subject to a narrow exception for bona fide errors. In *Reichert v National Credit Sys., Inc.* (9th Cir 2008) 531 F3d 1002, a suit brought by a tenant after terminating his tenancy on a dispute about the amount of money owing under the lease, the court found that the collection agency for the landlord failed to establish the bona fide defense because it did not produce evidence of reasonable preventive procedures to avoid the error.

Property managers apparently are not considered to be debt collectors subject to the FDCPA. See, *e.g., Franceschi v Mautner-Glick Corp.* (SD NY 1998) 22 F Supp 2d 250 (landlord's management agent was not "debt collector" under FDCPA, since it obtained right to collect tenant's rent before it became overdue).

For further discussion of fair debt collection laws, see Debt Collection Practice in California, chaps 1, 4 (2d ed Cal CEB 1999).

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14

Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues

Nancy J. Newman

I. INTRODUCTION
- A. Chapter Scope §14.1
  - 1. BAPCPA §14.1A
  - 2. Table: BAPCPA Effective Dates §14.1B
- B. Bankruptcy Notices and Forms §14.2
- C. When Tenant Files Bankruptcy §14.3

II. AUTOMATIC STAY AFFECTS LEASE RIGHTS
- A. Stay Arises on Filing of Bankruptcy Petition §14.4
  - 1. Notice of Stay of State Court Proceedings §14.5
  - 2. Violation of Automatic Stay Carries Serious Consequences §14.6
  - 3. Automatic Stay May Not Be Waived in Advance §14.7
- B. Scope of Automatic Stay Is Broad
  - 1. Activity Subject to Stay
    - a. All Litigation, Administrative Procedures, and Informal Actions Against Debtor §14.8
    - b. Acts of Landlord §14.9
    - c. Acts of State Court §14.10
  - 2. Property Protected by Stay
    - a. Lease Rights §14.11
    - b. Security Deposits §14.12
  - 3. Persons Shielded by Stay §14.13
- C. Exceptions to Automatic Stay
  - 1. Expired Commercial Leases §14.14
  - 2. Declaratory Relief and Dischargeability Actions Not Subject to Stay §14.15
  - 3. Possessory Rights After Termination of Lease or Entry of Judgment §14.16
  - 4. Actions Against Chapter 13 Debtors on Postpetition Obligations After Plan Confirmation §14.16A
  - 5. Eviction Action Against Residential Tenant for Endangerment of Property or Illegal Use of Controlled Substance §14.16B

III. AVOIDING EFFECT OF AUTOMATIC STAY
- A. When Order for Relief From Stay Is Required §14.17
- B. Motion for Relief From Stay
  - 1. Grounds for Relief From Stay §14.18
    - a. Property Interests Defined by State Law §14.19
    - b. State Judgment Given Collateral Estoppel Effect §14.20
    - c. Eviction Following Foreclosure §14.21
  - 2. Procedure for Motion for Relief From Stay §14.22
    - a. Format and Supporting Documents §14.23
    - b. Filing Motion for Relief From Stay §14.24
    - c. Serving Motion for Relief From Stay §14.25
    - d. Scheduling and Attending the Hearing §14.26
  - 3. Defending Stay Relief Motion
    - a. Bankruptcy Discharge of Delinquent Rent in Public or Subsidized Housing §14.27
    - b. Other Defenses §14.28
    - c. Responsive Pleadings §14.28A
  - 4. Relief Granted on Conditions §14.29
- C. Stipulation for Relief From Stay §14.30
- D. Application for Surrender of Premises §14.31
- E. Motion to Dismiss Bankruptcy §14.32

IV. RESIDENTIAL LEASE ASSUMPTION OR REJECTION
- A. Purpose §14.33
- B. 60-Day Limit for Assumption or Rejection §14.34
- C. Effect of Lease Assumption
  - 1. Rights of Assuming Trustee or Debtor §14.35
  - 2. Obligations of Assuming Trustee or Debtor
    - a. Curing Existing Defaults §14.36
    - b. Prepetition Rent Workouts §14.37

D. Effect of Rejection
1. Rejection Implies Voluntary Termination §14.38
2. Postpetition Rent Must Be Paid §14.39
3. Landlord Claim Issues §14.40
E. Exceptions: Expired or Terminated Leases §14.41
F. Government Housing Cases §14.42

V. NONRESIDENTIAL LEASE ASSUMPTION OR REJECTION
A. Overview §14.43
B. Time Limits
1. Decision or Extension Required in 120 Days §14.44
2. Debtor Must Remain Current on Postpetition Rent; Proration Versus Payment Date Approach §14.45
3. Performance of Nonmonetary Obligations §14.45A
4. Priority Claim for Postpetition Rent §14.46
5. Extensions of Time and Grounds for Objection
a. Extension for Cause §14.47
b. Prejudice to Landlord; Stipulations to Extend §14.48
C. Assumption and Assignment Procedures
1. Motion Required §14.49
2. Grounds for Motion or Objection §14.50
3. Recovering Attorney Fees to Enforce Lease §14.51
4. Effect of Assumption and Assignment §14.52
D. Rejection of Lease
1. Automatic Rejection or Noticed Motion §14.53
2. Requires Relinquishment of Possession §14.54
3. Effect on Rights Held by Nondebtor Parties §14.54A
4. Landlord's Claim for Rejection Damages; Unsecured Claim §14.55

VI. SANCTIONS AND ETHICAL CONSIDERATIONS §14.56

VII. BANKRUPTCY FORMS
A. Form: Notice of Stay of Proceedings (Judicial Council Form CM-180; Mandatory) §14.57
B. Form: Request for Special Notice and
Proof of Service §14.58
C. Landlord's Claim Forms
1. Form: Proof of Claim (Official Bankruptcy Form B10) §14.59
2. Form: Landlord's Request for Payment of Postpetition Administrative Rent; Sample Letter to Debtor's Counsel §14.60
3. Form: Motion for Allowance and Payment of Administrative Rent Claim; Supporting Memorandum; Supporting Declarations §14.61
D. Sample Landlord Objections
1. Form: Objection of Landlord to Debtor's Motion to Extend Date to Assume or Reject Nonresidential Lease §14.62
2. Form: Objection to Proposed Going Out of Business Sale §14.62A
3. Form: Objection to Proposed Expedited Procedures for Assumption and Rejection of Leases §14.62B
E. Motion for Relief From Automatic Stay
1. Form: Motion to Terminate or Modify Stay; Supporting Memorandum; Supporting Declaration §14.63
2. Form: Order Granting Motion to Terminate or Modify Automatic Stay §14.64
3. Form: Motion for Relief From the Automatic Stay Under 11 USC §362 (Central District Form F 4001-1M.UD; Unlawful Detainer; Mandatory) §14.65
4. Form: Order Granting Motion for Relief From Stay Under 11 USC §362 (Central District Form F 4001-1O.UD; Unlawful Detainer; Mandatory) §14.66
5. Form: Order Denying Motion for Relief From the Automatic Stay Under 11 USC §362 (Central District Form F 4001-1O.DENY; Mandatory) §14.66A
F. Form: Stipulation and Order for Relief From Automatic Stay §14.67
G. Form: Notice of Termination or Modification of Stay (Judicial Council Form CM-181; Mandatory) §14.67A
H. Application for Order to Vacate Premises
1. Form: Ex Parte Application §14.68
2. Form: Order to Vacate Real Property §14.69
3. Form: Memorandum in Support of Application for Order to Surrender Property §14.70
I. BAPCPA Forms; Residential Evictions
1. Form: Debtor's Certification That Circumstances Exist Which Would Allow Cure of Monetary Default (Central District Form F 4001-1.1; Optional) §14.70A
2. Form: Debtor's Further Certification of Cure of Monetary Default (Central District Form F 4001-1.2; Optional) §14.71
3. Form: Lessor's Objection to Debtor's Certification and/or Debtor's Further Certification Concerning Residential Property (Central District Form F 4001-1.3; Optional) §14.72
4. Form: Lessor's Certification of Endangerment of the Property or Illegal Use of Controlled Substance (Central District Form F 4001-1.4; Optional) §14.73
5. Form: Debtor's Objection to Lessor's Certification (Central District Form F 4001-1.5; Optional) §14.74

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I. INTRODUCTION

§14.1 A. Chapter Scope

This chapter addresses basic principles of bankruptcy law that apply when a tenant files bankruptcy, including:

- The effect and scope of the automatic stay that becomes effective upon a tenant's filing of a bankruptcy petition (see §§14.2-14.16B);
- Alternatives for relief from or termination of the stay (see §§14.17-14.32);
- The purpose and the process of assuming or rejecting an unexpired residential lease (see §§14.33-14.42);
- Special issues and rules concerning assumption and assignment or rejection of nonresidential leases, including landlord claims for rejection damages (see §§14.43-14.55); and
- Ethical considerations and remedies for the filing of bankruptcy petitions in bad faith (see §14.56).

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§14.1A 1. BAPCPA

On April 20, 2005, after years of debate and impasse, the Bankruptcy Abuse Prevention and Consumer Protection Act (Pub L 109-8, 119 Stat 23) (cited throughout this chapter as "BAPCPA") was signed into law. The BAPCPA represented the most sweeping revision of bankruptcy law since 1978. Most of its provisions are more stringent rules applicable to debtors filing for bankruptcy protection, and are beyond the scope of this chapter. Some provisions, however, directly affect landlord-tenant relationships in the bankruptcy context, and significantly changed the law in this area. Those changes are discussed in this chapter, and include:

- Exceptions to the automatic stay applicable to residential debtor tenants, if the landlord already has a judgment for possession, or if the landlord is attempting to evict the tenant for endangering the property or illegally using controlled substances upon it (see §§14.16, 14.16B; see also §§14.3, 14.8-14.9, 14.17, 14.19, 14.31);
- A firm deadline for assumption or rejection of commercial leases (see §§14.44, 14.47; see also §§14.43, 14.48-14.49, 14.53);
- Clarification of the effect of a nonmonetary default on a debtor-tenant's right to assume a lease (see §14.45A);
- Stronger protections against a nonconforming lease assignment (see §14.50); and
- Capping a landlord's administrative claim for rejection of a lease after it has been assumed in bankruptcy (see §§14.52, 14.55).

The BAPCPA generally applies to all bankruptcy cases filed on or after October 17, 2005. Bankruptcy petitions filed before that date remain governed by the former version of the Bankruptcy Code. A few provisions of BAPCPA became effective upon the enactment in April 2005, or on different dates, but those provisions generally do not affect the issues addressed in this chapter. (See the BAPCPA effective dates table in §14.1B.)

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§14.1B 2. Table: BAPCPA Effective Dates

Print

Table of Effective Dates

***GENERAL EFFECTIVE DATE - BAPCPA applies to cases filed on or after October 17, 2005 [180 days after Date of Enactment - April 20, 2005] — Section 1501**

Section of Bankruptcy Code and Rule Enacted	General Effective Date Exceptions	Provisions of BAPCPA
11 U.S.C. § 104(b)	Shall apply to cases filed on or after Date of Enactment	Section 1501(b)
11 U.S.C. § 303	Date of Enactment (all cases)	Section 1234(b)
11 U.S.C. § 308	60 days after rules are prescribed to establish forms	Section 434(b)
11 U.S.C. § 363(d)	Date of Enactment (all cases)	Section 1221(d)
11 U.S.C. § 507(a)(4)&(5)	Date of Enactment (does not apply to pending cases)	Section 1406
11 U.S.C. § 521(a)	18 months after Date of Enactment	Section 603(c)
11 U.S.C. § 522(o),(p),&(q)	Shall apply to cases filed on or after Date of Enactment	Section 1501(b)
11 U.S.C. § 523(a)(19)(B)	Retroactive to July 30, 2002	Secton 1404(b)
11 U.S.C. § 541(f)	Date of Enactment (all cases)	Section 1221(d)
11 U.S.C. § 547(i)	Date of Enactment (all cases)	Section 1213(b)
11 U.S.C. § 548(a)(1)&(e)	Date of Enactment (does not apply to pending cases)	Section1406
11 U.S.C. § 548(a)&(b)	"2 year" provision applies only to cases filed 1 year after Date of Enactment	Section 1406(b)(2)
11 U.S.C. § 727(a)(12)	Shall apply to cases filed on or after Date of Enactment	Section 1501(b)
11 U.S.C. § 727(d)(4)	18 months after Date of Enactment	Section 603(e)
11 U.S.C. § 1104(e)	Date of Enactment (does not apply to pending cases)	Section 1406
11 U.S.C. § 1114(l)	Date of Enactment (does not apply to pending cases	Section 1406
11 U.S.C. § 1129(a)(16)	Date of Enactment (all cases)	Section 1221(d)
11 U.S.C. § 1141(d)(5)(C)	Shall apply to cases filed on or after Date of Enactment	Section 1501(b)
11 U.S.C. § 1201-1231	As of July 1, 2005	Section 1001(a)(2)
11 U.S.C. § 1222(a)(2)(A)	Date of Enactment (does not apply to pending cases)	Section 1003(c)
11 U.S.C. § 1228(f)	Shall apply to cases filed after Date of Enactment	Section 1501(b)
11 U.S.C. § 1231(b)	Date of Enactment (does not apply to pending cases)	Section 1003(c)
11 U.S.C. § 1328(h)	Shall apply to cases filed on or after Date of Enactment	Section 1501(b)
28 U.S.C. § 586(a)(6)&(f)	18 months after Date of Enactment	Section 603(e)
28 U.S.C. § 1334(b)&(e)	Cases filed after Date of Enactment	Section 324

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§14.2 B. Bankruptcy Notices and Forms

Because a bankruptcy filing instantly stays a state court proceeding against the debtor or property of the estate, counsel must notify the state court that this has occurred as soon as counsel becomes aware of the filing. See §§14.4-14.5 and mandatory form in §14.57.

Similarly, because counsel representing parties affected by the bankruptcy need to know about developments in the bankruptcy case that may affect their client's interests or require a response, counsel should promptly file a request for special notice in the bankruptcy court as soon as they learn of the bankruptcy filing. See Practice Tip in §14.25 and form in §14.58. Requesting notice is a critical first step to being able to represent a landlord or creditor effectively after a tenant files a petition in bankruptcy.

Additional sample forms for use in bankruptcy proceedings are also provided in this chapter, including:

- Landlord forms for requesting or compelling payment (see §§14.59-14.61);
- Landlord's objections to extension of time to assume or reject nonresidential lease, to proposed going out of business sale procedures, and to expedited procedures for assuming or rejecting commercial leases (see §§14.62, 14.62A, and 14.62B);
- Forms for initiating alternative procedures for obtaining permission from the bankruptcy court to proceed with an eviction and court orders (see §§14.63-14.70);
- Forms for debtor's further certification of cure of monetary default underlying eviction judgment and landlord's objections to it (see §§14.71-14.72); and
- Forms for proceedings arising from new exceptions to the automatic stay concerning prepetition judgment for possession or residential eviction based on endangerment of property or illegal use of a controlled substance (see §§14.73-14.74).

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§14.3 C. When Tenant Files Bankruptcy

In today's economy, counsel practicing in the landlord-tenant area are likely to encounter the obstacles associated with a tenant bankruptcy. In the 1980s, bankruptcy courts were clogged with residential tenants filing petitions in bankruptcy simply to delay inevitable evictions. See *Marquand v Smith (In re Smith)* (Bankr CD Cal 1989) 105 BR 50, 51. Immediately after the BAPCPA went into effect, however, bankruptcy filings declined substantially nationwide, presumably based on the more stringent requirements for consumer filings. Nonetheless, with the recent collapse of the housing market and the freeze in commercial credit availability, consumer bankruptcies have hit record levels, and retail bankruptcies are sharply up nationwide.

Landlord counsel often respond to tenant bankruptcies by either engaging bankruptcy counsel to assist them or developing their own set of countermeasures to protect their rights or keep an eviction moving after a tenant files (see §§14.17-14.32). Whether appearing as attorney of record in bankruptcy court or not, all counsel involved in landlord-tenant relationships should familiarize themselves and their clients with the basic consequences of a bankruptcy filing, primarily the automatic stay (see §§14.4-14.13). While a bankruptcy filing will ordinarily stop an eviction or collection action in its tracks, provisions in the BAPCPA have attempted to address the problem identified in *In re Smith, supra* (see §§14.16, 14.16B). Still, because the stay is effectively a federal court injunction, and a violation of the stay carries serious consequences (see §14.6), counsel must carefully follow the procedures for invoking exceptions to the stay, or for seeking relief from the stay.

Tenant bankruptcies can have significant effects on commercial landlords and raise special issues under the Bankruptcy Code. While landlords generally cannot avoid these issues by drafting special rights or options triggered by bankruptcy in their leases, the bankruptcy statutes provide important protections for the interests of commercial landlords. The Bankruptcy Code provides special limits on the right of a bankrupt nonresidential tenant to assume or assign its lease (see §§14.43-14.55), and requires that any such assumption or assignment be of all terms of the lease —debtor-tenants may not pick and choose which terms to accept or ignore. See 11 USC §365(b)(1), (b)(3)(C); *Stewart Title Guar. Co. v Old Republic Nat'l Title Ins. Co.* (5th Cir 1996) 83 F3d 735. Moreover, provisions added to the Bankruptcy Code in the BAPCPA (see §14.1A) have confirmed a landlord's right to obtain compensation for damages caused by nonmonetary defaults and to object to an assignment to a nonconforming use. See 11 USC §365(b)(1)(A), (b)(3), (f), discussed in §§14.45A, 14.50.

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II. AUTOMATIC STAY AFFECTS LEASE RIGHTS

§14.4 A. Stay Arises on Filing of Bankruptcy Petition

When a debtor files a bankruptcy petition, the Bankruptcy Code provides an automatic stay (11 USC §362(a)) that immediately prevents a third party, such as a landlord or any other creditor, from taking action or continuing to take any action against the debtor or property of the bankruptcy estate. The scope of the stay is very broad. It specifically enjoins:

- Commencement or continuation of judicial proceedings against the debtor;
- Enforcement of a judgment obtained before the petition was filed;
- Any act to obtain possession of property of the estate; and
- Any action that may affect or interfere with the reorganization of the debtor's financial affairs.

In general, an action taken by a third party in violation of the stay is void at its inception, not merely voidable. See *Burkhart v Coleman (In re Tippett)* (9th Cir 2008) 542 F3d 684. This is true even if the bankruptcy petition is later dismissed as a bad faith filing. *40235 Washington St. Corp. v Lusardi* (9th Cir 2003) 329 F3d 1076, cert denied (2003) 540 US 983. While a bankruptcy court could retroactively annul the stay after dismissal to ratify an otherwise void act, the bankruptcy court has no authority to decline jurisdiction over a dispute concerning whether the stay has been violated, nor may it attempt to avoid future automatic stays with an in rem order. See *40235 Washington St. Corp., supra, Johnson v TRE Holdings (In re Johnson)* (BAP 9th Cir 2006) 346 BR 190, and *In re Johnson* (Bankr ND Cal 2008) 2008 Bankr Lexis 983.

Because the stay is a federal injunction against the prohibited actions, violation of the stay is punishable by contempt or other sanctions. See §14.6. Courts frequently cite the legislative history of 11 USC §362(a), which indicates that Congress intended to give debtors "a breathing spell" from their creditors and to stop "all collection efforts, all harassment, and all foreclosure actions." Accordingly, §362 is "*extremely broad* in scope" and "should apply to *almost any* type of formal or informal action against the debtor or the property of the estate." See *Kertesz v Ostrovsky* (2004) 115 CA4th 369, 373, 8 CR3d 907, quoting *Delpit v Commissioner* (9th Cir 1994) 18 F3d 768, 771, and legislative history from 1978. The stay applies even if the bankruptcy petition is ultra vires or a sham. *Wekell v U.S.* (9th Cir 1994) 14 F3d 32, 33.

Unless an exception to the stay applies under 11 USC §362(b), or relief from the stay is granted by the Bankruptcy Court, the stay of an act against property of the estate continues until the property is no longer property of the estate. 11 USC §362(a), (c)(1). Property of the estate is broadly defined. 11 USC §541. The stay of any other prohibited act, such as actions or proceedings against the debtor, continues until the earliest of:

- The time the bankruptcy case is closed;
- The time the bankruptcy case is dismissed; or
- The time a discharge is granted or denied.

11 USC §362(c)(2). A mere ruling granting a motion to dismiss, or even a writing setting forth the court's findings or determinations in considering such a motion, is not effective as a dismissal of a bankruptcy case. A separate, unambiguous order is required before the dismissal will be effective. *Garland v Estate of Maloney (In re Garland)* (BAP 9th Cir 2003) 295 BR 347. See also §14.32.

In addition, confirmation of a plan of reorganization may have the effect of lifting the automatic stay as to acts that would result in exercise of control over property of the estate, because confirmation of the plan usually terminates the existence of the bankruptcy estate. See *Hillis Motors, Inc. v Hawaii Auto. Dealers' Ass'n* (9th Cir 1993) 997 F2d 581. Whether plan confirmation would have this effect in any particular case depends upon the terms of the plan in that case.

NOTE: The BAPCPA (see §14.1A) limits the availability of the stay to individual or joint debtors who are repeat bankruptcy filers whose previous bankruptcy cases were recently dismissed. See, *e.g., Nelson v George Wong Pension Trust (In re Nelson)* (BAP 9th Cir 2008) 391 BR 437 (no automatic stay took effect when Chapter 13 debtors had two prior cases dismissed within 1 year). Landlord counsel faced with repeat filer situations should carefully review the statutes on this issue to determine if they apply. 11 USC §362(c)(3)-(4). See California Mortgages, Deeds of Trust, and Foreclosure Litigation §11.6 (4th ed Cal CEB 2009). The debtor may file a motion

asking the court to extend or impose the stay if the repeat filing was made in good faith. See ND Cal Local Bankr R 4001-2.

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§14.5 1. Notice of Stay of State Court Proceedings

Because the automatic stay immediately stays existing state court litigation against the debtor, the state court should be promptly informed of the bankruptcy filing. Thus, Cal Rules of Ct 3.650(a) requires the party that caused a stay of the state court proceeding to immediately file in that proceeding a notice of the stay, and attach a copy of the order or other document evidencing the automatic stay. See §14.57 for a mandatory form notice of stay. The usual practice is to attach a copy of the file-stamped bankruptcy petition or the notice to creditors (also referred to as the notice of commencement of bankruptcy action or case) sent out by the clerk of the bankruptcy court (see Practice Tip in §14.40) to the notice of stay. If the party that caused the stay has not appeared in the state court action, or fails to promptly notify the state court, even if that party has appeared, the other party should promptly notify the state court of the bankruptcy filing and resulting stay of the action.

When a stay is vacated or no longer in effect, the party who filed the original notice of the stay is required to immediately serve and file a notice to the effect that the stay is vacated or no longer in effect. Cal Rules of Ct 3.650(d). See mandatory form in §14.67A. If a levying officer is requested to execute a writ of possession after the stay has been vacated, the landlord would usually provide such officer with a copy of such notice.

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§14.6 2. Violation of Automatic Stay Carries Serious Consequences

A willful violation of the automatic stay exposes the offending party to serious consequences. In general, an individual injured by a willful violation of the stay may recover actual damages, including costs and attorney fees, and, in appropriate circumstances, punitive damages. 11 USC §362(k)(1); see also *Associated Credit Servs., Inc. v Campion (In re Campion)* (9th Cir 2003) 294 BR 313 (creditor liable for stay violations attributable to its computer). "Willful" has been very broadly defined to include mere knowledge of the automatic stay and intentionally taking the action; a good faith belief that the stay did not apply is irrelevant to whether a willful violation of it has occurred. See, *e.g., Ozenne v Bendon (In re Ozenne)* (BAP 9th Cir 2006) 337 BR 214 (decided under pre-BAPCPA law). The BAPCPA created a limited exception to this principle: where an entity violates the stay concerning personal property, based on a good faith belief that personal property is no longer property of the estate, the recovery may be limited to actual damages. 11 USC §362(k)(2). Nor may creditors safely quibble with the debtor concerning the application of the automatic stay; debtors have no burden of proving to creditors that the stay exists before liability for violating the stay can be imposed. *Morris v Peralta (In re Peralta)* (BAP 9th Cir 2004) 317 BR 381, 389.

Emotional distress damages are recoverable for a violation of the stay if clear evidence establishes that the debtor suffered significant harm. *Dawson v Washington Mut. Bank, F.A. (In re Dawson)* (9th Cir 2004) 390 F3d 1139; *Sternberg v Johnston* (9th Cir 2009) 582 F3d 1114 (attorney liable for emotional distress damages for willfully violating stay by defending overly broad state court order on spousal support).

A trustee may obtain sanctions under the civil contempt authority of 11 USC §105(a) or the bankruptcy court's inherent sanction authority. *Knupfer v Lindblade (In re Dyer)* (9th Cir 2003) 322 F3d 1178. Unlike under §362(k), "serious" punitive damages are not available under §105(a) or the court's inherent sanction authority. 322 F3d at 1192. See §14.56. Moreover, a sanction of contempt should not be issued for violating the automatic stay or a discharge injunction without a finding of fact that the violation was made with actual knowledge of the injunction. *ZiLog, Inc. v Corning (In re ZiLog, Inc.)* (9th Cir 2006) 450 F3d 996.

PRACTICE TIP: Because a willful violation of the automatic stay presents a risk of severe penalties, the better practice in a questionable case is to file a motion for relief from (or modification or termination of) the stay. See §§14.18-14.29. Alternatively, counsel may consider negotiating a stipulation for relief from the stay, which is generally quicker than a motion, even with a notice period and the time it takes for the bankruptcy court to review and approve the stipulation. See §14.30. It also may be possible to obtain an order for possession or surrender of the premises directly from the bankruptcy court. See §14.31. In some cases, a motion to dismiss the bankruptcy may be available. See §14.32.

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§14.7 3. Automatic Stay May Not Be Waived in Advance

Because the automatic stay is a binding federal injunction of the prohibited action, only the bankruptcy court can provide relief from the stay. The stay therefore cannot be waived, modified, or changed in advance through artful drafting. Hence, landlords should not rely on any contractual terms that purport to alter the parties' rights when a bankruptcy is filed. So-called "ipso facto" clauses in many leases, which provide that the lease terminates automatically when the tenant files for bankruptcy (*Nelson v Angel* (1954) 124 CA2d 861, 269 P2d 626), becomes insolvent (*People v California Safe Deposit & Trust Co.* (1919) 41 CA 727, 183 P 289), or makes an assignment for the benefit of creditors (*Boness v Richardson Mineral Springs* (1956) 141 CA2d 251, 296 P2d 581), are not enforceable against debtors or trustees in bankruptcy (11 USC §365(e)), and do not justify a landlord's "self-help" eviction (see §§8.137-8.153). Moreover, even a bankruptcy court does not have authority to nullify future automatic stays by issuing an "in rem" order to insulate property from the effect of a bankruptcy filing. *Johnson v TRE Holdings (In re Johnson)* (BAP 9th Cir 2006) 346 BR 190. On the other hand, during a pending bankruptcy, a debtor-tenant may stipulate to an order for relief from automatic stay, but only with permission from the bankruptcy court after notice to interested parties. See Fed R Bankr P 4001; §14.30.

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B. Scope of Automatic Stay Is Broad

1. Activity Subject to Stay

§14.8 a. All Litigation, Administrative Procedures, and Informal Actions Against Debtor

Generally, 11 USC §362(a) provides a broad stay of any act to collect a debt from the debtor or retrieve property from the debtor or the estate in bankruptcy. Such acts include commencement of litigation, service of process, arbitration, actions to enforce liens or administrative actions to collect debts, and continuing the process of pending litigation, such as discovery or law and motion proceedings. 11 USC §362(a)(1). The automatic stay also prohibits any action to enforce existing judgments against either the debtor or the property of the bankruptcy estate, such as recording an abstract of judgment, issuing a writ of execution, or conducting an examination of judgment debtor. 11 USC §362(a)(2). In general, the stay applies to any action after the bankruptcy petition is filed that seeks to obtain possession of property of the estate or to exercise control over property of the estate. 11 USC §362(a)(3). Demand letters, telephone calls, and other informal collection or enforcement activities to collect, assess, or recover funds or property to further a prepetition claim against a debtor are also prohibited. 11 USC §362(a)(6).

The BAPCPA (see §14.1A) contains additional exceptions to the stay for residential tenants, if a judgment for possession was entered before the bankruptcy or the landlord is seeking possession based on endangerment of the property or the illegal use of controlled substances on it. 11 USC §362(b)(22), (23). Those exceptions are governed by specific procedures which must be carefully followed to be applicable or invoked. See §§14.16 and 14.16B.

While broad, the scope of the automatic stay is limited by its underlying purposes. *Rett v White Motor Sales Co.* (ND Cal 1989) 99 BR 12, 14. A person is not prohibited by the automatic stay, *e.g.,* from prosecuting a civil action under CCP §527.6 to enjoin the conduct of a debtor that "alarms, annoys, or harasses the person, and which serves no legitimate purpose." *Grant v Clampitt* (1997) 56 CA4th 586, 65 CR2d 727. An insurer does not violate the stay when it determines its obligations under a policy and acts to withdraw defense of a prepetition lawsuit. *Benz v DTRIC Ins. Co. (In re Benz)* (BAP 9th Cir 2007) 368 BR 861. Moreover, a settlement negotiated in violation of the automatic stay may nonetheless be enforceable if the bankruptcy is later dismissed, lifting the stay. *Valencia v Rodriguez* (2001) 87 CA4th 1222, 105 CR2d 281. For exceptions related to common lease issues, see §§14.14-14.16B.

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§14.9 b. Acts of Landlord

When a tenant files a petition in bankruptcy, the landlord is enjoined from enforcing the lease by, *e.g.,* serving a 3-day notice to cure a default or quit, filing an unlawful detainer complaint, proceeding in a pending action against the tenant, or proceeding with an eviction by a writ of execution. See 11 USC §362(a). In somewhat overlapping provisions, 11 USC §362(a)(1) forbids the prosecution of an action to collect a prepetition debt, while 11 USC §362(a)(6) precludes an action to collect, assess, or recover against the debtor "claims" existing or arising prepetition. Because the definition of a "claim" is read more broadly than "debt," even an action for possession of property, as well as collection of rent, will fall within the scope of the stay. 11 USC §§362(a)(6), 101(5), 101(12); *Lanford v Northwest Bell Tel. Co. (In re Lanford)* (Bankr D Minn 1981) 10 BR 129, 131. In addition, 11 USC §362(a)(3) bars actions for possession of property of the estate.

Under bankruptcy law before the BAPCPA (see §14.1A), if a bankruptcy petition was filed after a judgment for possession had been entered, execution of the writ would violate the automatic stay of 11 USC §362(a) if such action affected "property of the estate" of the debtor. Title 11 USC §541(a)(1) defines "property of the estate," as used in 11 USC §362(a), to include "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." If the tenant were deemed to have no legal or equitable interests after entry of judgment, however, then the stay would not prevent execution of the writ. Thus, whether a tenant's mere possessory interest in such circumstances is a property right protected by the stay has been a controversial issue in recent years.

The BAPCPA partially resolved the controversy, by creating an exception to the automatic stay if a judgment for possession of residential premises was entered before the petition was filed. 11 USC §362(b)(22). See §14.16. Since these provisions do not apply to commercial tenancies, landlords with judgments for possession of commercial premises would still be stayed from enforcement, but now have additional arguments for relief, based on the added exceptions for residential tenancies.

In general, state law is used to determine the debtor's rights in property at the time bankruptcy is commenced, subject to any qualifying or contrary Bankruptcy Code provisions. See, *e.g*., *Raleigh v Illinois Dep't of Revenue* (2000) 530 US 15, 147 L Ed 2d 13, 120 S Ct 1951; *Vanderpark Props. v Buchbinder (In re Windmill Farms, Inc.)* (9th Cir 1988) 841 F2d 1467, 1469.

In 1989, a bankruptcy court held that entry of a judgment for possession causes the tenant to lose whatever interest the tenant previously had in the apartment. *Marquand v Smith (In re Smith)* (Bankr CD Cal 1989) 105 BR 50. Further, CCP §715.050, enacted in 1994, ostensibly permits enforcement of a writ of possession issued after a judgment in an unlawful detainer action despite the tenant's filing bankruptcy, but the enforceability of this section is doubtful. In 1996, a federal district court ruled that §715.050 conflicted with the Bankruptcy Code and declared it invalid under US Const art VI, cl 2 (the supremacy clause). *Di Giorgio v Lee* (*In re Di Giorgio)* (Bankr CD Cal 1996) 200 BR 664, judgment vacated as moot, remanded with instructions to dismiss (9th Cir 1998) 134 F3d 971 (see §§14.11, 14.16). While a California appellate court in 1999 agreed with *Smith* and held that §715.050 was constitutional, a later California bankruptcy court opinion agreed with *DiGiorgio* that §715.050 is unconstitutional and preempted by bankruptcy law. Compare *Lee v Baca* (1999) 73 CA4th 1116, 1119, 86 CR2d 913, with *Westside Apartments v Butler (In re Butler)* (Bankr CD Cal 2002) 271 BR 867. In *Butler,* the court stated that creditors who seek to rely on *Smith, Baca,* or CCP §715.050 to avoid obtaining relief from the automatic stay risk liability for violating the automatic stay.

Because the BAPCPA added procedures that provide an exception to the stay if a judgment for possession of residential property has been entered (see 11 USC §362(b)(22); see §14.16), the problem addressed in *Butler* is now of diminished significance in the residential context. The policy issues and arguments concerning postbankruptcy enforcement of a judgment for possession of commercial property, however, remain in play. For further discussion, see §§14.14, 14.16-14.16B, 14.17.

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§14.10 c. Acts of State Court

The acts of state courts, such as rendering judgments or orders against the debtor, are generally prohibited in the same manner after the filing of the bankruptcy petition as are acts of creditors under 11 USC §362(a). See §§14.8-14.9. State court actions, including entry of judgment, taken in violation of the automatic stay are void. *Wright v Turner (In re Turner)* (BAP 9th Cir 1997) 204 BR 988, 992. See also *Sindler v Brennan* (2003) 105 CA4th 1350, 129 CR2d 888 (state court's dismissal of action while stay in effect is void).

Is a state court judgment entered after a trial on the merits a violation of the automatic stay, when the bankruptcy petition is filed after the completion of trial but before judgment is entered? The Second Circuit has held that entry of judgment postbankruptcy, following a verdict or a statement of decision on the merits made before the bankruptcy, is a ministerial act not subject to the automatic stay. *Rexnord Holdings, Inc. v Bidermann* (2d Cir 1994) 21 F3d 522, 527. No published Ninth Circuit case has squarely addressed this issue. Some courts have recognized an implied exception under 11 USC §362(a) for a technical violation of the stay, and have ruled that, under appropriate circumstances, the automatic stay may be annulled retroactively to give effect to an act that would otherwise be voidable as a violation of the stay. See authorities and discussion in *Wright v Turner (In re Turner)* (BAP 9th Cir 1997) 204 BR 988, 991. See also *National Envt'l Waste Corp. v City of Riverside (In re National Envt'l Waste Corp.)* (9th Cir 1997) 129 F3d 1052 (court will balance equities on case-by-case analysis to determine whether retroactive annulment is justified). Note that in the First Circuit, if the nonbankruptcy court has not publicly announced its judgment or submitted its decision to the clerk before the bankruptcy, the ministerial act exception to the automatic stay will not apply. *Bonilla v Trebol Motors Corp.* (1st Cir 1998) 150 F3d 77.

On the sheriff's right to proceed with an eviction when the tenant files a bankruptcy petition after the state court issues the writ of possession, see §§14.16-14.17.

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2. Property Protected by Stay

§14.11 a. Lease Rights

The protection of the automatic stay inures to the benefit only of the debtor, property of the debtor, or property of the bankruptcy estate. *Advanced Ribbons v Interstate Distrib., Inc. (In re Advanced Ribbons & Office Prods.*) (BAP 9th Cir 1991) 125 BR 259, 263. The sweeping definition of property of the estate, "all legal and equitable interests of the debtor in property as of the commencement of the case" (11 USC §541(a)(1)), includes lease rights when the lease remains unexpired or unterminated. *Marquand v Smith (In re Smith)* (Bankr CD Cal 1989) 105 BR 50, 54. Further, until the state legislature expressly eliminates any equitable interest in possession after lease termination, the automatic stay also protects bare possessory interests in a terminated lease, even if a judgment for unlawful detainer has been entered, although the BAPCPA (see §14.1A) made it easier for landlords to enforce such judgments in the residential context. See 11 USC §362(b)(22); *Westside Apartments v Butler (In re Butler)* (Bankr CD Cal 2002) 271 BR 867. See also §§14.16-14.17. During a bankruptcy, any lease rights that have become property of the estate must be either accepted or rejected by the trustee or debtor in possession. See §§14.33-14.55.

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§14.12 b. Security Deposits

The automatic stay prohibits "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor." 11 USC §362(a)(7). By considering a deposit as having created a "debt" owed to the debtor, some view this statute as prohibiting application of a security deposit without relief from stay. A bankruptcy decision from Delaware, however, disputes this view, holding that a security deposit is not a "debt" owing from the landlord to the debtor-tenant unless the term had expired and there were no defaults. *In re APF Co.* (Bankr Del 2001) 270 BR 363. The court therefore held that the landlord did not need to seek relief from stay to preserve its right to apply the deposit in partial satisfaction of the amount of rent owed to it.

Because a security deposit provides a landlord with a secured claim in the amount of the deposit for unpaid rent due at the filing of the petition, or for any damages resulting from the rejection of the lease, it may be claimed as such when a proof of claim is filed. See, *e.g., In re Far W. Corp.* (Bankr ED Cal 1990) 120 BR 551. When a proof of claim is filed, the deposit must be applied to the *capped amount* of damages allowable under 11 USC §502(b)(6). *In re Connectix Corp.* (Bankr ND Cal 2007) 372 BR 488, based on a rule from *Oldden v Tonto Realty Corp.* (2d Cir 1944) 143 F2d 916. This rule applies even if the security deposit is in the form of a letter of credit rather than cash. *In re Connectix Corp., supra; Redback Networks, Inc. v Mayan Networks Corp. (In re Mayan Networks Corp.)* (BAP 9th Cir 2004) 306 BR 295. Indeed, rejection of a lease does not bar an action to recover on the balance of a security deposit, even if held as a letter of credit. *First Ave. W. Bldg. LLC v James (In re Onecast Media, Inc.)* (9th Cir 2006) 439 F3d 558. If the debtor was current on the rent before the bankruptcy was filed, the trustee may offset any security deposit against postpetition rental obligations. *In re Standard Furniture Co.* (Bankr SD Cal 1980) 3 BR 527, 531. For a discussion of postpetition rental obligations in residential tenancies, see §§14.39-14.40; in nonresidential tenancies, see §§14.45-14.46. If the deposit is greater than the capped amount of damages the landlord may claim, and the amount of postpetition administrative rent due, it may be subject to disgorgement back to the bankruptcy estate. *In re Pyxsys Corp.* (Bankr D Mass 2003) 288 BR 309, 319, citing *Oldden* and legislative history of §502(b)(6).

WARNING: If the debtor was current under a commercial lease before the lease terminated, the landlord may have to return *the entire deposit,* and cannot use it offset the landlord's damages for lost future rent, unless CC §1950.7 is waived. See *250 L.L.C. v Photopoint Corp.* (2005) 131 CA4th 703, 32 CR3d 296. For a discussion of security deposits, see §8.167. In order to reduce the prospect of disgorgement, landlords should add express waivers of CC §1950.7 to their commercial lease forms.

Because security deposits must be applied to a landlord's *capped* amount of damages, and are subject to disgorgement if held in an amount in excess of a landlord's allowable general and administrative claims, landlords holding very large deposits may not be as "secured" as they think they are against the consequences of a tenant bankruptcy. However, the rule requiring application of a letter of credit to a capped claim may not apply if no proof of claim is filed. *EOP-Colonnade of Dallas Ltd. Partnership v. Faulkner (In re Stonebridge Technols., Inc.)* (5th Cir. 2005) 430 F3d 260. In *Stonebridge,* the Fifth Circuit held that the cap on rejection damages allowed under §502(b)(6) "does not limit the beneficiary's entitlement to the proceeds of a letter of credit unless and until the lessor makes a claim against the estate." 430 F3d at 270. This holding appears analytically correct based on the words of the statute, but it has not yet been addressed in the 9th Circuit, where the *Oldden* rule is firmly established. See *In re AB Liquidating Corp.* (9th Cir 2005) 416 F3d 961, 964-965 (*Oldden* rule bars drawing on letter of credit in excess of damages allowed under §502(b)(6)) and *In re Connectix Corp., supra.*

PRACTICE TIP: After a bankruptcy has been filed, landlords with large security deposits in the form of letters of credit in excess of the allowed amount of a claim under §502(b)(6) should consider *not* filing a claim against the estate, in effect waiving recovery from the bankruptcy estate in order to claim the full amount available under a letter of credit. This tactic allowed the landlord in *Stonebridge* to apply the full amount of its letter of credit to its damages. On the other hand, it is uncertain whether courts in the Ninth Circuit will follow *Stonebridge,* and the debtor may attempt to impose the damages limitation of §502(b)(6) by filing a proof of claim on behalf of the landlord under Fed R Bankr P 3004. The extent of the landlord's actual damages, the size of the letter of credit, and the potential amount of security lost under the *Oldden* rule may determine whether this tactic is prudent under the circumstances.

For more on the damages cap of §502(b)(6), see §14.55. See also Wang & Bradbury, *Commercial Lease Termination Damages—Calculation and Application of the Bankruptcy Cap,* 26 Cal Real Prop J 33 (Vol 26, No 2,

2008).

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§14.13 3. Persons Shielded by Stay

The automatic stay protects only the debtor, not codefendants in the same lawsuit. 11 USC §362(a); *Almy v Terrace Land Dev., Ltd.* (ND Cal 1983) 32 BR 390. Therefore, in most cases a landlord can proceed against nondebtor codefendants (*i.e.,* nonfiling tenants) in an unlawful detainer action, although as a practical matter, execution of the judgment for possession should wait until the writ can be enforced against all occupants. Also, a landlord may pursue a separate action for damages against a co-obligor on the lease who is not in possession of the premises, such as a guarantor or nonfiling cosigner of the lease. See *Veeco Inv. Co. v Mercantile Nat'l Bank (In re Veeco Inv. Co.)* (Bankr ED Mo 1993) 157 BR 452, 454; *Anniston Fed. Sav. & Loan Ass'n v E.K.P., Inc. (In re E.K.P., Inc.)* (Bankr ND Ala 1984) 42 BR 19, 20.

WARNING: Chapter 13 cases impose a codebtor stay for the benefit of nonfiling parties who may be jointly liable with the debtor for "consumer debts," *i.e.,* debts incurred primarily for personal or household purposes. 11 USC §§101(8), 1301. The broad definition of consumer debt can be a two-edged sword, however, since the BAPCPA contains provisions making it easier for bankruptcies involving primarily consumer debt to be dismissed. See 11 USC §707(b); *In re Maya* (Bankr SD Cal 2007) 374 BR 750; *In re Davis* (Bankr ND Ohio 2007) 378 BR 539.

In any event, counsel should be alert to the possibility of successive filings in cases in which there are multiple occupants.

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C. Exceptions to Automatic Stay

§14.14 1. Expired Commercial Leases

With respect to nonresidential real property leases, the Bankruptcy Code allows recovery of possession after expiration of the term, without seeking relief from stay. While the automatic stay prohibits acts to recover possession of "property of the estate" (11 USC §362(a)(3)), a debtor/lessee's interest in a nonresidential lease that expired before the bankruptcy or during the pendency of the bankruptcy case is excluded from the definition of property of the bankruptcy estate. 11 USC §541(b)(2). Acts against such property are therefore not subject to the automatic stay. 11 USC §362(b)(10), (c)(1). Note, however, that this exception applies only to leases where the stated term has expired. If a lease has been terminated before the expiration of the stated term, for example because of a tenant default, the landlord must seek relief from the stay or a surrender order from the bankruptcy court, unless one of the exceptions to the stay provided in the BAPCPA (see §14.1A) applies. See §§14.16-14.31.

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§14.15 2. Declaratory Relief and Dischargeability Actions Not Subject to Stay

The automatic stay does not prohibit a creditor or any other interested party from filing an adversary proceeding in the bankruptcy court to seek a decree or declaratory judgment of what is or is not property of the estate. *Civic Ctr. Square, Inc. v Ford (In re Roxford Foods, Inc.)* (9th Cir 1993) 12 F3d 875.

Adversary proceedings against a debtor in bankruptcy to determine the dischargeability of debts are not prohibited by the automatic stay. They are specifically authorized by 11 USC §523(c)(1) and Fed R Bankr P 4007. For an example of a landlord's unsuccessful attempt to have a debt for back rent and damages declared nondischargeable, see *Kuan v Lund (In re Lund)* (BAP 9th Cir 1996) 202 BR 127.

The trustee, a creditor, or the United States trustee may object to a debtor's Chapter 7 discharge (11 USC §727(c)(1)) on the grounds set forth in 11 USC §727(a), or request revocation of a discharge (11 USC §727(d)-(e)) on the grounds set forth in 11 USC §727(d). Because the BAPCPA expanded the grounds for denying a discharge, the relevant bankruptcy rules were revised accordingly. See Fed R Bankr P 4004 and 4007. A state court judgment against a debtor on a fraudulent misrepresentation claim can preclude the debtor from contesting the issue in a subsequent proceeding to declare the debt to be nondischargeable. *Diamond v Kolcum (In re Diamond)* (9th Cir 2002) 285 F3d 822. See also *Muegler v Bening* (9th Cir 2005) 413 F3d 980 affirming the preclusive effect of a state court fraud judgment on nondischargeability action in bankruptcy court.

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§14.16 3. Possessory Rights After Termination of Lease or Entry of Judgment

A 2002 bankruptcy court opinion confirms that because of the broad definition of property interests under 11 USC §541, the automatic stay protects a tenant's bare possessory interest in a terminated lease. *Westside Apartments v Butler (In re Butler)* (Bankr CD Cal 2002) 271 BR 867. Previously, other reported cases disregarded bare possession as a property interest protected under the stay, at least with respect to residential tenancies. See *Lee v Baca* (1999) 73 CA4th 1116, 86 CR2d 913; *Marquand v Smith (In re Smith)* (Bankr CD Cal 1989) 105 BR 50, 54 n6. The *Butler* court, however, expressly warned creditors against relying on *Lee* or *Smith* to "end run" the automatic stay. 271 BR at 876.

The BAPCPA (see §14.1A) resolved the controversy concerning whether and to what extent the automatic stay applies to a residential lease in which a judgment for possession has been entered before the bankruptcy was filed. Congress created an exception to the stay to allow a *residential* landlord to enforce a judgment for possession obtained before the tenant files a petition for bankruptcy. 11 USC §362(b)(22). Generally, if the landlord has obtained a judgment for possession before the bankruptcy and it is based on a *nonmonetary* default, the automatic stay will not apply to enforcement of the judgment. See 11 USC §362(b)(22), (*l*). The exception in §362(b)(22) is subject, however, to the provisions of 11 USC §362(*l*), concerning judgments based on monetary defaults, such as nonpayment of rent. Under §362(*l*), if the judgment is based on a default in paying rent, in jurisdictions like California where the state law may allow the tenant to remain in possession if the default is cured after judgment is entered (see CCP §1179, discussed in §§13.56-13.57), the tenant may be able to keep the stay in effect to block eviction.

Residential tenants filing bankruptcy must disclose in their petitions if a judgment for possession of their residence has been entered. 11 USC §362(*l*)(5). If the judgment is based on a monetary default, the exception to the stay applies automatically to allow the eviction to proceed unless the tenant files with the petition and serves upon the landlord a certification that:

- There are circumstances under which he or she would be permitted to cure, under nonbankruptcy law applicable in that jurisdiction, the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered (11 USC §362(*l*)(1)(A)); *and*
- He or she (or an adult dependant of the tenant) has deposited with the clerk of the court any rent that would become due in the 30 days following the filing of the petition (11 USC §362(*l*)(1)(B)).

Both conditions must be satisfied. Filing such a certification allows the tenant to retain the protection of the automatic stay for 30 days after the petition is filed, with specified exceptions. 11 USC §362(*l*)(1); see Central District Form F 4001-1.1 at §14.70A. If such a certification is filed, the clerk will arrange for the rent deposited to be promptly transmitted to the landlord. 11 USC §362(*l*)(5)(D).

After filing the certification, the tenant may extend the automatic stay beyond 30 days by filing and serving an additional certification, within 30 days after the bankruptcy petition was filed, that the tenant "has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment." 11 USC §362(*l*)(2); see Central District Form F 4001-1.2 at §14.71. In that case, the automatic stay will apply to the landlord's action for possession *unless* the landlord successfully objects to the tenant's certifications. 11 USC §362(*l*)(2)-(3).

WARNING: Whether bankruptcy courts will interpret "cure" as simply requiring payment of the money owed, or as including some additional equitable showing, is unknown. Under applicable nonbankruptcy law, a court has discretion to grant or deny relief from forfeiture; tendering the full amount of rent due is simply a condition required for the court to consider such an application. See CCP §1179.

If no certification is filed, the clerk immediately serves upon the parties a certified copy of the docket indicating the absence of a filed certification and the applicability of 11 USC §362(b)(22) as an exception to the stay. 11 USC §362(*l*)(4)(B). If the exception applies, the landlord can proceed to enforce the judgment for possession without further court order. See 11 USC §362(*l*)(4).

If the tenant files the certifications to keep the stay in effect, the landlord can try to invoke the exception to the stay by objecting to the veracity of the tenant's certifications. 11 USC §362(*l*)(3); see Central District Form F 4001-1.3 at §14.72. The court must then hold a hearing on the objection within 10 days to determine whether the certification is true. 11 USC §362(*l*)(3)(A). If the court sustains the landlord's objection, §362(b)(22) applies immediately and relief from the stay is not required to enable the landlord to complete the eviction process. 11 USC §362(*l*)(3)(B). If the court finds that the certifications are true, the eviction will be stayed and the exception to the stay provided by §362(b)(22) will not go into effect. See 11 USC §362(*l*)(2).

These elaborate provisions reflect an awkward balancing of Congress's desire to make it easier to proceed with residential evictions notwithstanding a bankruptcy filing (the problem identified in *In re Smith* and discussed in §§14.3 and 14.9), against a tenant's state law rights to request relief from forfeiture even after a judgment for possession has been entered. Congress did not address how bankruptcy courts should apply these provisions in the context of applicable nonbankruptcy law. For instance, while California law does allow relief from forfeiture to be granted after judgment is entered, such relief is *discretionary.* CCP §1179. See §13.56. Until case law is developed on these issues under the BAPCPA, it remains unclear whether this would allow a bankruptcy court that conducts the hearing on the landlord's objection to the tenant's certifications to exercise its discretion and sustain the landlord's objections, even if the certifications are true. See also §§14.9, 14.17.

WARNING: Although the problem of tenants filing bankruptcy to stall and delay evictions occurs in the commercial context, as well as with residential leases, the BAPCPA exception for terminated leases applies only to *residential* leases. See 11 USC §362(b)(22). Yet there is arguably less need for the stay to apply in the commercial context, because housing is a more basic need than retaining possession of commercial space. Until the law changes on this issue, however, commercial landlords must still seek relief from the bankruptcy court before attempting to enforce any writ of possession concerning a terminated commercial lease. On consequences of violating the automatic stay, see §14.6.

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§14.16A 4. Actions Against Chapter 13 Debtors on Postpetition Obligations After Plan Confirmation

If the obligation of a debtor-tenant in Chapter 13 arose postpetition, three reported trial cases within the Ninth Circuit suggest that the automatic stay would not apply to efforts to collect that debt after confirmation of the debtor's Chapter 13 plan. *In re Petruccelli* (Bankr SD Cal 1990) 113 BR 5, 6; *In re Mason* (D Ore 1985) 51 BR 548; *In re Rhodes* (Bankr D Idaho, Mar. 2, 1995, No. 93-02411) 1995 Bankr Lexis 2175. This exception is based upon the language of 11 USC §1327(b), which provides: "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." The automatic stay created under 11 USC §362 generally applies to any actions against a debtor on account of a *prepetition* obligation, and applies to protect "property of the estate" even after the petition is filed. Because the stay does not protect debtors from postpetition obligations, and because plan confirmation "revests" estate property in the debtor, the *Petruccelli, Mason,* and *Rhodes* courts held that the automatic stay did not apply to efforts to collect a postpetition obligation against a Chapter 13 debtor under a confirmed plan.

This conclusion is not without controversy. One opinion from the Eighth Circuit suggests a different result. *Security Bank of Marshalltown v Neiman* (8th Cir 1993) 1 F3d 687. In *Security Bank*, the issue was whether a Chapter 13 debtor's debt incurred post-confirmation but before conversion to Chapter 7 was entitled to administrative status. In finding that such debts were entitled to administrative status, the Court of Appeals held that the bankruptcy estate continued to exist post-confirmation. To the extent something of the "estate" remains after confirmation, this case suggests that the automatic stay would protect it. The decision did not, however, address exactly what property is in the post-confirmation estate, and therefore it is unclear what the stay might protect. In addition, one earlier reported trial case in the Ninth Circuit suggests that revesting in the debtor does not "convert property of the estate into property of the debtor." *In re Aneiro* (Bankr SD Cal 1987) 72 BR 424, 429. Instead, the *Aneiro* court suggests that the "revesting" referred to in §1327(b) means the debtor regains supervision and control of the estate property, but such rights are limited to the extent that the property is committed to successful performance of the plan. 72 BR at 429.

A 2001 Internal Revenue Service General Litigation Bulletin analyzed the diverging authorities on this issue, noting that "many courts have agreed that after confirmation of the Chapter 13 plan, all property revests in the debtor except property that is specifically retained as property of the estate in the plan or order confirming the plan." IRS GLB 200127046, at p 13, citing *Petruccelli* and several other cases within and outside the Ninth Circuit. It described the view expressed in *Aneiro,* requiring creditors to obtain relief from stay to pursue a postpetition debt post-confirmation, as a "minority" view. Note, however, that assets that vest in the debtor upon confirmation may revest in the bankruptcy estate upon conversion to Chapter 7. See *Captain Blythers, Inc. v Thompson (In re Captain Blythers, Inc.)* (BAP 9th Cir 2004) 311 BR 530, aff'd (9th Cir 2006) 182 Fed App 708.

PRACTICE TIP: The split of authority on this issue presents a dilemma for practitioners. On the one hand, because the penalties for violating the stay are harsh, it is generally advisable to seek relief from stay if there is any possible doubt. On the other hand, seeking relief from stay invariably burdens a creditor with significant additional expense and delay. In situations like this, where a majority of courts within one's circuit have held that the stay does not apply, the risk of being sanctioned for violating the stay may be small enough that a client could rationally decide to authorize an attempt to proceed without moving for relief. Such a decision should only be made after counsel has carefully explained the risks and benefits of each alternative course of action to the client.

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§14.16B 5. Eviction Action Against Residential Tenant for Endangerment of Property or Illegal Use of Controlled Substance

Another exception to the stay was added by the BAPCPA (see §14.1A), for residential evictions based on endangerment of the property or the illegal use of controlled substances on it. See 11 USC §362(b)(23). This exception is subject to 11 USC §362(m), however, so that unlike a true "exception" to the stay, this exception will apply only if it is affirmatively invoked by the landlord. See 11 USC §362(b)(23). It provides landlords with a procedure to nullify the stay after the tenant files bankruptcy, to allow an eviction based on the tenant's endangering the property or using controlled substances on it to proceed. The stay applies for at least 15 days after the tenant files for bankruptcy, but if a landlord files the proper certification, and if the certification withstands any challenges the tenant may raise as to truth or legal sufficiency, then the stay will be nullified. 11 USC §362(b)(23), (m).

Procedurally, the landlord must file and serve on the tenant a certification that (11 USC §362(b)(23)):

- A pending eviction action seeks possession of residential property based on endangerment of the property or the illegal use of controlled substances on it; *or*
- The tenant, during the 30-day period before the date of the filing of the certification, has endangered the property or illegally used or allowed to be used a controlled substance on the property.

See Central District Form F 4001-1.4 at §14.73.

The stay on the landlord's eviction action will then expire 15 days after the certification is filed, *unless* the tenant files and serves upon the landlord an objection to the truth or legal sufficiency of the landlord's certification. 11 USC §362(m)(1), (2); see Central District Form F 4001-1.5 at §14.74.

If the tenant fails to object to the truth or legal sufficiency of the landlord's certification within 15 days, the §362(b)(23) exception applies immediately, and relief from stay is not required for the landlord to proceed with the process to recover possession. 11 USC §362(m)(3)(A). The clerk of the court will then immediately serve upon the parties a certified copy of the docket indicating lack of objection. 11 USC §362(m)(3)(B). If the tenant files and serves upon the landlord an objection to the landlord's certification, the court must hold a hearing within 10 days to determine if the situation giving rise to the landlord's certification existed or has been remedied. 11 USC §362(m)(2)(B).

If the tenant can demonstrate to the satisfaction of the court that the situation giving rise to the landlord's certification did not exist or has been remedied, the stay remains in effect until otherwise terminated. 11 USC §362(m)(2)(C). Conversely, if the tenant cannot convince the bankruptcy court that the situation giving rise to landlord's certification did not exist or has been remedied, the court will decree that 11 USC §362(b)(23) applies and relief from stay will not be required for the landlord to continue with the eviction. 11 USC §362(m)(2)(D)(i). The clerk of the court will immediately serve upon the parties a certified copy of the court's order upholding the landlord's certification. 11 USC §362(m)(2)(D)(ii).

Under this scheme, the Bankruptcy Court is required to decide ultimate facts concerning the viability of the eviction action on just 10 days' notice, even though state courts decide these kinds of facts with the full panoply of due process procedures. It is unknown whether or to what extent bankruptcy courts will allow pre-hearing discovery on an expedited basis, an opportunity for pre-trial motions, or live testimony at such exception hearings.

PRACTICE TIP: Landlord counsel concerned that the 10-day hearing may not provide adequate due process on the issues should consider seeking *relief from the stay* as an alternative remedy, in case the court is not convinced by the landlord's certifications that the §362(b)(23) exception to the stay should apply. See §§14.18-14.29.

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III. AVOIDING EFFECT OF AUTOMATIC STAY

§14.17 A. When Order for Relief From Stay Is Required

Unless a clear exception to the stay applies, there is still debate among practitioners concerning whether a formal motion for permission from the bankruptcy court to proceed with an eviction is required. If the law is uncertain, there is tension between taking the conservative approach (always seeking relief from stay before taking any action of any sort against debtors in bankruptcy) and accepting the risk of reliance on a legal authority that indicates the stay may not apply.

Previously, practitioners desiring to avoid the expense and delay of moving for relief from stay to execute a writ of possession issued before the bankruptcy could arguably rely on two decisions that held that the stay did not apply to a landlord seeking to execute a state court prepetition judgment for physical possession of premises. *Marquand v Smith (In re Smith)* (Bankr CD Cal 1989) 105 BR 50, 55; *Lee v Baca* (1999) 73 CA4th 1116, 86 CR2d 913, cert denied (2000) 529 US 1020. In 1994, the California legislature passed a statute that expressly authorizes enforcement of a writ of possession without delay, "notwithstanding receipt of notice of the filing by the defendant of a bankruptcy petition." CCP §715.050.

But bankruptcy courts have indicated that §715.050 was unconstitutional and warned against relying on *Smith* and *Lee* to end run the automatic stay. See *Di Giorgio v Lee (In re Di Giorgio)* (Bankr CD Cal 1996) 200 BR 664, 672, judgment vacated as moot, remanded with instructions to dismiss (9th Cir 1998) 134 F3d 971, and *Westside Apartments v Butler (In re Butler)* (Bankr CD Cal 2002) 271 BR 867, 876.

This controversy was resolved as to residential tenancies with the exceptions to the stay added by the BAPCPA (see §§14.1A, 14.16, 14.16B). With the new provisions set forth in §362(b)(22)-(23), residential landlords have now specific procedures to enable them to proceed with an eviction if the tenancy was terminated before the bankruptcy or if the tenant is endangering the property or illegally using controlled substances on it. Moreover, the tenant's equitable rights under state law, recognized in *Di Giorgio* as supporting the stay, are expressly recognized and given a place in the statutory scheme. Such rights provide the tenant a basis for keeping the tenancy in effect, if the tenant certifies the existence of such rights under state law and posts the appropriate cure amount. See 11 USC §362(*l*). The BAPCPA also provides a means for the landlord to challenge such certifications. The exceptions provide a means for residential landlords to avoid the expense and delay of moving for relief from the stay, although questions remain concerning how these provisions will be applied. Moreover, the BAPCPA contains no additional exceptions to the stay for commercial leases. See §§14.16, 14.16B.

The consequences of violating the automatic stay are serious. See §14.6. Therefore, in almost all instances where the law is uncertain, the safe course is to seek either permission to enforce the writ or a surrender order from the bankruptcy court. As a practical matter, a landlord may not have any choice but to seek relief from stay because a California sheriff may be unwilling to proceed with an eviction after bankruptcy without an order for relief, regardless of the holding in *Lee*. See, *e.g.,* California State Sheriffs' Association Civil Procedural Manual (rev'd 2005), indicating practices adopted statewide on the circumstances under which sheriffs will perform evictions without a release of the stay.

PRACTICE TIP: If time is crucial and if necessary to prevent irreparable injury, relief may be sought on an emergency or ex parte basis under 11 USC §362(f). If either of the BAPCPA exceptions to the stay might apply, landlords should file the appropriate documentation in the bankruptcy court to be sure they can proceed without obtaining relief from the stay. See 11 USC §362(b)(22)-(23), discussed in §§14.16, 14.16B, and Forms at §§14.73-14.74. If no statutory exception applies, and only in the limited context of collecting a postpetition obligation against a Chapter 13 debtor after confirmation of a plan, a practitioner could make a reasonable decision not to seek relief from stay and be able to convince a levying officer (or the local county counsel with whom the sheriff consults) that such relief is not required. See authorities cited in §14.16A.

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B. Motion for Relief From Stay

§14.18 1. Grounds for Relief From Stay

The landlord may request relief from the automatic stay on specific grounds. 11 USC §362(d). For example, the motion may allege that the debtor has no equity or interest in the property and that the property is not necessary for reorganization (11 USC §362(d)(2)), or that nonpayment of rent or other reason for termination of the stay constitutes "cause" (11 USC §362(d)(1)). In addition, the same facts that support dismissal of a bankruptcy may also support a motion for relief from stay. *Farber v 405 N. Bedford Dr. Corp.* (*In re 405 N. Bedford Dr. Corp.)* (9th Cir 1985) 778 F2d 1374, 1378. See §14.32.

In the context of a nonresidential lease, a district court held that the filing of a complaint for unlawful detainer terminates the lease for purposes of preventing it from being an executory contract, which can be assumed in bankruptcy. *In re Escondido W. Travelodge* (SD Cal 1985) 52 BR 376. In *Escondido,* the court noted that cause exists to lift the automatic stay if the lease cannot be assumed, and that termination under California landlord-tenant law occurs when a landlord, after complying with the appropriate notice requirements, files an unlawful detainer in state court. Although the court recognized that mere filing is not a formal adjudication of the validity of the termination, it reasoned that relief from stay was nonetheless appropriate, to allow the validity of the termination to be litigated in the state court forum under state law. 52 BR at 382.

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§14.19 a. Property Interests Defined by State Law

When considering a motion for relief from the stay, bankruptcy courts look to state law to determine whether the debtor has an interest in the leased property. The prevailing view in the Ninth Circuit is that a lease is terminated for nonpayment of rent at least by the time that the landlord files an unlawful detainer action after proper notice is given. *Vanderpark Props. v Buchbinder (In re Windmill Farms, Inc.)* (9th Cir 1988) 841 F2d 1467, 1470. In California, bankruptcy courts have held that once a lease is terminated, the leasehold interest no longer exists, and therefore the reason for the stay no longer exists as to that interest. Thus, the termination of a lease constitutes "cause" within the meaning of 11 USC §362(d) to terminate the stay. *In re Windmill Farms, Inc., supra*; *In re Eureka S. R.R., Inc.* (Bankr ND Cal 1987) 72 BR 813, 817; *In re Escondido W. Travelodge* (SD Cal 1985) 52 BR 376; *Kearny Mesa Crossroads v Acorn Invs. (In re Acorn Invs.)* (Bankr SD Cal 1981) 8 BR 506, 509.

Although a debtor's possessory interest may be asserted as property of the estate subject to protection under the stay (see, *e.g.*, *Westside Apartments v Butler (In re Butler)* (Bankr CD Cal 2002) 271 BR 867, discussed in §§14.9, 14.11, 14.16), this consideration arguably should carry little weight. After all, the basic function of the bankruptcy courts is to facilitate reorganization or the orderly liquidation of the debtor's assets and the payment of creditors. A residential leasehold holds no value to the trustee or the creditors, at least in a Chapter 7 bankruptcy, because the leasehold cannot be liquidated and typically has no value as an asset. Hence, there is little justification for protecting it from at least nonmonetary relief. *In re Torrez* (Bankr ED Cal 1991) 132 BR 924, 941; *California Sec. Mgmt. Corp. v Kennedy (In re Kennedy)* (Bankr CD Cal 1984) 39 BR 995, 997. This reasoning is likely underlying the BAPCPA exception to the stay for residential tenancies that have been terminated before the bankruptcy. See 11 USC §362(b)(22), discussed in §14.16. Further, while a residential lease in a rent controlled jurisdiction may have value for allowing occupancy at below market rates, such a leasehold interest may not be property which the trustee could assume and assign, if the rent control law excuses the landlord from accepting performance of the lease from anyone other than the debtor. See, *e.g.,* 11 USC §365(c); *B.N. Realty Assocs. v Lichtenstein* (SD NY 1999) 238 BR 249, 254. Specific analysis of the landlord's right to relief from stay under such circumstances would be required. *B.N. Realty Assocs. v Lichtenstein, supra.*

PRACTICE TIP: A debtor in a Chapter 13 bankruptcy may argue, however, that maintaining an equitable possessory interest in his or her residence is necessary or essential to successful reorganization, especially if the debtor would have to pay significantly more rent in a new residence. An increase in rent and moving expenses would deplete the available resources of the debtor to pay creditors under the reorganization plan. See §14.33.

A nonresidential leasehold that has been terminated before the bankruptcy holds no value to the estate, because there is no longer an interest that can be assumed and assigned. *In re Escondido W. Travelodge* (SD Cal 1985) 52 BR 376. When there is nothing to assume or assign, a landlord may seek an order from the bankruptcy court directing the debtor to surrender possession, without even litigating an unlawful detainer action. 11 USC §365(d)(4); *Anderson v Elm Inn, Inc. (In re Elm Inn, Inc.)* (9th Cir 1991) 942 F2d 630, 633. See §14.31.

NOTE: Under the BAPCPA (see §14.1A), exceptions to the stay for residential tenancies may obviate the need to move for relief from the stay in some circumstances. See 11 USC §362(b)(22)-(23) to determine if any motion is necessary. See §§14.16, 14.16B. Practitioners should always review the most current version of the Bankruptcy Code to ascertain whether the tenant's interest remains protected by automatic stay.

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§14.20 b. State Judgment Given Collateral Estoppel Effect

If the BAPCPA exceptions to the stay (see §§14.16, 14.16B) do not apply, landlords can argue that the state court proceedings should provide the basis for relief from the stay. For instance, if the tenant has filed bankruptcy after a judgment for possession of commercial property has been entered, the new exceptions to the stay for judgments in residential eviction actions would not apply. But on the landlord's motion for relief, the bankruptcy court could rule that the judgment for possession is preclusive under collateral estoppel principles. *Brown v Felsen* (1979) 442 US 127, 139 n10, 60 L Ed 2d 767, 776 n10, 99 S Ct 2205 (noting that state court judgments cannot bind the bankruptcy court on issues of exclusively federal law but that "questions actually and necessarily decided" may be collaterally estopped); *McArthur v Bugna (In re Bugna)* (Bankr CD Cal 1992) 137 BR 785, aff'd (9th Cir 1994) 33 F3d 1054; *Nelson v Tsamasfyros (In re Tsamasfyros)* (10th Cir 1991) 940 F2d 605, 606. See also *Huse v Huse-Sporsen (In re Birting Fisheries, Inc.)* (BAP 9th Cir 2003) 300 BR 489 (bankruptcy court had exclusive jurisdiction to determine whether foreign judgment conflicted with bankruptcy law or orders). Thus, an unlawful detainer judgment can be given preclusive effect on the bankruptcy court absent fraud or similar circumstances. *Beaver St. Assocs. v Lady Liberty Tavern Corp. (In re Lady Liberty Tavern Corp.)* (Bankr SD NY 1988) 94 BR 812, 814.

A state court judgment against a debtor on a fraudulent misrepresentation claim can preclude the debtor from contesting the issue in a subsequent proceeding to declare the debt to be nondischargeable. *Diamond v Kolcum (In re Diamond)* (9th Cir 2002) 285 F3d 822. See also *Muegler v Bening* (9th Cir 2005) 413 F3d 980, affirming the preclusive effect of a state court fraud judgment on a nondischargeability action in bankruptcy court. Likewise, even a state court default judgment will be given preclusive effect in a later adversary proceeding to exempt a judgment debt from discharge, if the elements of collateral estoppel under state law are present. See *Baldwin v Kilpatrick (In re Baldwin)* (9th Cir 2001) 249 F3d 912 and *Bankruptcy Recovery Network v Garcia (In re Garcia)* (BAP 9th Cir 2004) 313 BR 307.

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§14.21 c. Eviction Following Foreclosure

Special considerations may apply to evictions under CCP §1161a, which involve recovery of possession of residential property from the occupants or former owners by a purchaser after a foreclosure sale. The first example involves a bankruptcy filing before foreclosure; the second a bankruptcy filing after foreclosure.

EXAMPLE 1: A borrower defaults on a loan secured by real property, then files bankruptcy. The secured lender obtains relief from the automatic stay to conduct the foreclosure sale. The purchaser (who may or may not be the lender) then wants to proceed with an eviction of the occupants or former owners. In such case, there should be no question that there is no longer a stay against proceeding with and completing an eviction. In fact, once the foreclosure sale has taken place and the trustee's deed on sale has been recorded, the property is no longer property of the estate. The bankruptcy court has given the lender permission to complete the foreclosure process and title becomes vested in a party other than the debtor.

In addition, if the purchaser is not the original lender, it is arguable that the stay cannot apply because the cause of action under CCP §1161a did not arise until after the bankruptcy petition was filed. In other words, it follows from the nature of the action that an eviction suit, brought by a stranger to the creditor-debtor relationship after a trustee's sale, is not a prepetition claim against the debtor.

Unlawful detainer proceedings are summary in nature and are limited to issues concerning the right to possession. See §§9.5-9.9. The plaintiff's burden on a cause of action under CCP §1161a is limited to demonstrating that it acquired the property at a regularly conducted sale and thereafter perfected title. *Vella v Hudgins* (1977) 20 C3d 251, 255, 142 CR 414; *Cruce v Stein* (1956) 146 CA2d 688, 692, 304 P2d 118. Generally, neither a landlord nor a tenant may raise other issues. See §§9.8, 10.53-10.55.

There is a narrow exception, however, that allows raising lack of title defensively if the plaintiff alleges acquisition of title by foreclosure under CCP §1161a. See §10.54. In *Vella v Hudgins, supra,* the supreme court stressed that availability of such a challenge to title is "a narrow and sharply focused examination of title" limited to the formalities of the trustee's sale. 20 C3d at 255. An attack on title acquired at a foreclosure sale, other than to show a purchaser's noncompliance with the statutes governing such sales, does not constitute a valid defense to recovery of possession. *MCA, Inc. v Universal Diversified Enters. Corp.* (1972) 27 CA3d 170, 177, 103 CR 522; *Old Nat'l Fin. Servs., Inc. v Seibert* (1987) 194 CA3d 460, 239 CR 728.

Similarly, a defense to eviction based on lack of compliance with statutory formalities should not prevent the landlord from obtaining relief from stay to proceed with an eviction after the foreclosure. This is because the order that terminated the stay to allow the foreclosure in the first place is often an adjudication that the debtor has no protectable interest in the property, allowing the landlord to argue that the stay literally does not apply to the subsequent eviction proceeding. Further, at least one court has declared that the bankruptcy court has no jurisdiction over a debtor in possession after foreclosure, requiring the landlord to proceed in state court to obtain possession. See *California Sec. Mgmt. Corp. v Kennedy (In re Kennedy)* (Bankr CD Cal 1984) 39 BR 995.

PRACTICE TIP: To prevent confusion, in any proposed order granting relief from stay to proceed with a foreclosure, counsel should include language that allows the creditor or lender and its successors to obtain possession from the debtor after the sale according to procedures under state law, in addition to allowing the foreclosure sale itself. See, *e.g.,* form in Moving for Relief From an Automatic Stay in Bankruptcy, App S (Cal CEB Action Guide Sept. 2006). See also Practice Tip in §14.26.

Although the better practice in pleading for an order for relief from the automatic stay on behalf of a lender is to include the right to both conduct the sale *and* recover possession of the property, this does not always happen. The lender's counsel and eviction counsel may be different. If the purchaser is also the foreclosing lender, the debtor may argue that the action for possession constitutes yet another (albeit separate) aspect of enforcing a prepetition claim and that the order did not provide for that action. If the order is ambiguous or uncertain, it may mean that proceedings in state court must come to a halt, or it may yield a claim for violation of the stay.

In that event, counsel should seek an amended order providing for additional relief, nunc pro tunc, if necessary, to validate any notices or complaints already served. Although even unknowing violations of the automatic stay are void, bankruptcy courts have discretion to *annul* the automatic stay retroactively so as to validate past actions that would otherwise be void. See *Jewett v Shabahangi (In re Jewett)* (BAP 9th Cir 1992) 146 BR 250, 252; and *Davis v Courington (In re Davis)* (BAP 9th Cir 1995) 177 BR 907, 911. The bankruptcy court will balance the equities on a

case-by-case basis to determine whether retroactive annulment is justified. *National Envt'l Waste Corp. v City of Riverside (In re National Envt'l Waste Corp.)* (9th Cir 1997) 129 F3d 1052.

The lender may also seek relief from stay on the separate issue of possession, if necessary.

EXAMPLE 2: A borrower defaults on a loan secured by real property. The secured lender conducts the foreclosure sale. Then the borrower files bankruptcy. When a foreclosure sale is completed before the petition is filed, proof of the debtor's lack of interest in the property is usually straightforward and made by offering the trustee's deed into evidence. The debtor cannot undo a completed *valid* sale by filing a bankruptcy petition. However, debtors claiming an irregularity in the sale may argue that the right to bring an action to cancel the sale is a chose in action, which is personal, if not real, property of the estate. *Crevier v Welfare & Pension Fund for Local 701 (In re Crevier)* (9th Cir 1987) 820 F2d 1553.

Potentially, debtors in this position could seek an injunction under the bankruptcy court's general injunctive powers found in 11 USC §105 as a substitute for the stay under 11 USC §362. *Grundy Nat'l Bank v Looney (In re Looney)* (4th Cir 1987) 823 F2d 788, 792; *Explorer Drilling Co. v Martin Exploration Co. (In re Martin Exploration Co.)* (5th Cir 1984) 731 F2d 1210, 1214. But see *Official Creditors Comm. v Metzger (In re Dominelli)* (9th Cir 1986) 788 F2d 584, 586 (noting limitations on bankruptcy court's broad equitable powers). Such injunctive relief may be pursued alternatively or in addition to defending the eviction based on an irregularity in the sale. See §§9.3, 9.36, 10.54, 11.62.

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§14.22 2. Procedure for Motion for Relief From Stay

Relief from the automatic stay is obtained primarily by a motion to modify or terminate the stay under 11 USC §362(d). See grounds in §§14.18-14.21 and sample forms in §§14.63-14.66. If time is critical, the landlord's motion can be made ex parte or be accompanied by a request for an order shortening notice time on the hearing. See, *e.g.*, 11 USC §362(f); Fed R Bankr P 4001(a)(2). Bankruptcy courts routinely grant such requests because unlawful detainer actions are summary proceedings entitled to preference in state court. Likewise, bankruptcy courts routinely grant relief from the automatic stay when the landlord seeks only possession of residential rental property and no unexpired long-term lease is involved.

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§14.23 a. Format and Supporting Documents

The motion should be supported by admissible evidence of the factual basis for the relief sought. Declarations should be made by competent witnesses who have personal knowledge of the facts; if they are not within the personal knowledge of the attorney for the moving party, then a declaration signed under penalty of perjury by the creditor or landlord, or an employee or representative of the creditor or landlord, is required. See, *e.g.,* declaration in Central District motion form in §14.65. (If the motion itself contains the necessary foundational facts, it may be verified as in the form in §14.63). The motion should state:

- The landlord's interest in the property;
- The debtor's continued possession;
- The existence, nature, and status of any existing or former lease;
- Any defaults, such as nonpayment of rent; and
- Any steps taken to terminate the tenancy.

If an unlawful detainer action was filed before the tenant's filing of the bankruptcy petition, the motion should include copies of any termination notices, complaints, answers, or other procedural matters and request that judicial notice be taken of them. See forms in §§14.63, 14.65. Note that under the BAPCPA (see §14.1A), a motion for relief from stay would not be needed to proceed with a residential eviction if judgment was entered before the bankruptcy, subject to provisions allowing the debtor to cure the default. See 11 USC §362(b)(22), (*l*), discussed in §14.16.

The motion should argue with reference to authorities that the debtor has no interest or equity in the property or that the defaults, and any subsequent actions to terminate based on them, constitute cause for relief from stay, or both. Finally, the prayer for relief should seek termination of the stay, or if counsel wishes to avoid invalidation of notices or other actions already taken, for example, in ignorance of the stay, retroactive annulment of the stay. *National Envt'l Waste Corp. v City of Riverside (In re National Envt'l Waste Corp.)* (9th Cir 1997) 129 F3d 1052; *Schwartz v U.S. (In re Schwartz)* (9th Cir 1992) 954 F2d 569, 572; *Jewett v Shabahangi (In re Jewett)* (BAP 9th Cir 1992) 146 BR 250, 252.

WARNING: Because Fed R Bankr P 4001(a)(3) stays the order granting relief from stay for 14 days after entry of the order unless the bankruptcy court orders otherwise, counsel should request in the moving papers that the stay period be shortened or that the order become effective immediately on being entered.

Counsel should always consult local rules on any relief from stay motion, and ascertain whether the court requires submission of a proposed order with the motion. See forms in §§14.64, 14.66. Particular requirements for the format and contents of moving papers are also set forth in local district court rules and in the policies of individual court departments; counsel should check these before preparing and filing the motion. In the bankruptcy courts of the southern district of California, *e.g.,* specific motion forms for cases involving unlawful detainer matters are required. SD Cal Local Bankr R 4001-2; Form CSD 1163. In the central district, *e.g.,* preprinted forms for motions for relief from automatic stay in unlawful detainer matters are mandatory. See forms in §§14.65-14.66A.

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§14.24 b. Filing Motion for Relief From Stay

A motion to modify or terminate the automatic stay is the initiation of a contested matter in a bankruptcy case, but it will not always be filed before it is served. The court (or the attorney) may assign a separate number to the motion (usually called an "RS [Relief from Stay] number" or "Motion Control Number"), so that the moving papers and opposing papers will show both the bankruptcy case and motion number on the caption of all pleadings. ED Cal Local Bankr R 9014-1(c); ND Cal Local Bankr R 4001-1; SD Cal Local Bankr R 4001-1(b)(1). All districts require some form of cover (or information) sheet for the motion. Forms may be obtained from the respective clerks' offices.

NOTE: Bankruptcy courts are moving toward requiring electronic filing and may not permit paper filing; counsel should consult local rules and the court's website for current filing requirements and how to apply for an exemption from them. See Warning at §14.58.

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§14.25 c. Serving Motion for Relief From Stay

Local rules usually require service of the motion, by first class mail or personal service, on or before the same day as it is filed. See, *e.g.,* ND Cal Local Bankr R 9013-3; ED Cal Local Bankr R 4001-1, 9014-1(m). Proof of service should be filed promptly, because the failure to show proper notice can be cause for denial. See, *e.g.,* ED Cal Local Bankr R 9014-1(m)(1). Some rules require the proof of service to identify the capacity (*e.g.,* debtor, creditor, debtor attorney) in which the person was served. See, *e.g.,* ND Cal Local Bankr R 9013-3(b) and sample proof of service in §14.58.

In a Chapter 7 case, the motion should be served on the debtor, debtor's counsel, and the Chapter 7 trustee (note that CD Cal Local Bankr R 9013-1(a)(5)(A) only requires service on the debtor and debtor's attorney). In a Chapter 13 case, the motion should be served on the debtor, debtor's counsel, the Chapter 13 trustee, and the United States trustee for the district and division in which the case is pending.

In a Chapter 11 case, notice should be given to the debtor, debtor's counsel, the Chapter 11 trustee if one has been appointed; the United States trustee for the district and division in which the case is pending; and the committee of unsecured creditors (if one has been appointed) and its counsel. If a committee has not been appointed, notice should be given to the 20 largest unsecured creditors. The identities of all these parties can be obtained from the court files. Fed R Bankr P 4001(a)(1), 9014; ND Cal Local Bankr R 4001-1, 9013-3; SD Cal Local Bankr R 4001-1, 4001-2.

PRACTICE TIP: In all cases, counsel should check local rules to see if notice should be given to any party who has filed a request for special notice with the court under Fed R Bankr P 2002. See, *e.g.,* ND Cal Local Bankr R 9013-3(b). The identities and addresses of all these parties can be readily obtained from the court files. Particular requirements of the time periods and methods of service of moving papers are also set forth in local district rules, and in the policies of individual court departments, so counsel should also check these before serving the motion.

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§14.26 d. Scheduling and Attending the Hearing

When there is a pending execution of a writ of possession (see §§13.64-13.67), and assuming the writ pertains to commercial property, counsel may want to set a hearing date for the landlord's motion for relief from the stay as close as possible to the next available date for the sheriff to complete the eviction and lockout. The earlier the hearing, the less time will be available, for example, for delaying tactics such as successive bankruptcy filings on behalf of another occupant. Because the BAPCPA (see §14.1A) provides an exception to the stay for residential leases that were terminated before the bankruptcy, those provisions would control the landlord's rights in that context, and relief from stay would not be necessary if the exception applies. See 11 USC §362(b)(22), (*l*), discussed in §14.16.

Under 11 USC §362(g), the moving party has the burden of showing at the hearing lack of equity in the property. The burden on all other issues is on the party resisting the motion.

PRACTICE TIP: Because time is crucial in an eviction, counsel should bring a proposed order and copies of it to the hearing for immediate signature and entry on granting of the motion. The order should provide that it be effective in the pending bankruptcy despite conversion of the case to another chapter. It should also include relief to seek and enforce remedies incidental to recovery of possession, such as disposition of abandoned personal property. See also Warning in §14.23.

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3. Defending Stay Relief Motion

§14.27 a. Bankruptcy Discharge of Delinquent Rent in Public or Subsidized Housing

There is a split of authority concerning whether 11 USC §525(a) precludes evicting a public housing tenant for nonpayment of rent. Section 525(a) prohibits bankruptcy-based discrimination by governmental units against debtors.

In 2002, the Second Circuit issued a controversial opinion concerning the application of §525(a) to public housing debtor-tenants. See *Stoltz v Brattleboro Hous. Auth. (In re Stoltz)* (2d Cir 2002) 315 F3d 80, 92. The *Stoltz* court ruled that a debtor-tenant's current right to participate in public housing is a governmental grant protected under §525(a), and that this provision trumps conflicting provisions of 11 USC §365 in the public housing context. Accordingly, *Stoltz* holds that debtor-tenants whose unpaid prepetition rent is discharged are shielded from eviction for nonpayment of such rent under §525(a). The *Stoltz* opinion follows a line of prior bankruptcy court decisions. See, *e.g., Johnson v Chester Hous. Auth. (In re Johnson)* (Bankr ED Pa 2000) 250 BR 521, 530, and *Curry v Metropolitan Dade County (In re Curry)* (Bankr SD Fla 1992) 148 BR 966, 972.

Other courts have declined to protect public housing tenants from eviction because of their unpaid prepetition rent. For instance, in *In re Valentin* (Bankr ED Pa 2004) 309 BR 715, the court disagreed with *Stoltz* and granted relief from stay to allow the housing authority to evict. The *Valentin* court explained that relief was appropriate so long as the creditor did not attempt to preclude the debtor from future participation in public housing programs. Several cases support this view. See, *e.g., Housing Auth. v Caldwell (In re Caldwell)* (Bankr ND Ga 1994) 174 BR 650 (even if the rent debt was discharged in bankruptcy, nothing in the Bankruptcy Code precludes a public housing authority from requiring a tenant to cure past rent defaults in order to continue occupancy), and *Housing Auth. v Collins (In re Collins)* (Bankr WD Pa 1996) 199 BR 561 (11 USC §365(b)(1) expressly permits landlords to require that tenants cure prepetition delinquent rent when tenants assume unexpired leases). Likewise, the court in *In re Bacon* (Bankr ED Pa 1997) 212 BR 66 held that as long as a landlord's in rem remedies to evict a debtor-tenant are not used to deprive the tenant of a protected "grant" under 11 USC §525(a) (*i.e.,* the right to participate in public housing), the landlord is free to exercise its contractual rights to terminate the tenancy for nonpayment of rent if it does not seek to collect the dischargeable rent debt. Thus, eviction from the leasehold does not prohibit the tenant from reapplying for housing. See §§14.36, 14.52.

Similarly, in *Robinson v Chicago Hous. Auth.* (*In re Robinson)* (Bankr ND Ill 1994) 169 BR 171, the trial court held that a lease terminated under Illinois state law could not be assumed by the bankruptcy trustee. The court of appeals affirmed the judgment in *Robinson v Chicago Hous. Auth.* (7th Cir 1995) 54 F3d 316. Under the reasoning in *Robinson,* a landlord who serves a proper notice to pay rent or quit on the tenant may obtain relief from stay to proceed with an eviction if the notice expired before the tenant filed its bankruptcy petition and even if the lease term is otherwise unexpired. See §§14.17-14.26.

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§14.28 b. Other Defenses

In addition to defenses based on lack of proper procedures in the motion for relief from stay (see §§14.22-14.26), a debtor may be able to raise substantive issues. For example, in an eviction following a foreclosure sale, the debtor may claim that there were mistakes made during the foreclosure process that invalidate the sale. See §14.21. Also, if no judgment was entered in the state court eviction proceeding, the debtor may try to litigate the eviction in the bankruptcy court and raise state court defenses, such as warranty of habitability (see §10.64), retaliatory eviction (see §10.65), discrimination (see §§10.67-10.68), or others (see §§10.53-10.69). In that event, the bankruptcy court will usually grant relief and abstain from adjudicating the defenses because the forum for such defenses is more properly the state court in which the eviction is pending. See, *e.g., California Sec. Mgmt. Corp. v Kennedy (In re Kennedy)* (Bankr CD Cal 1984) 39 BR 995 (bankruptcy court lacked jurisdiction to hear complaint for possession after foreclosure). The bankruptcy judge may, however, limit any recovery by the landlord to possession only, and require the landlord to come back to the bankruptcy court for any orders or to file a claim to allow the landlord to collect money damages from the debtor. See §14.59.

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§14.28A c. Responsive Pleadings

The United States Bankruptcy Court, Central District of California, adopted an optional, preprinted form for use in opposing a stay relief motion, unless an individual judge or court department makes this form mandatory. See Response to Motion for Order to Terminate, Annul, Modify, or Condition the Automatic Stay Under 11 USC §362 (Central District Form F 4001-1M.RES; Optional).

Like the moving papers, the opposing papers must contain supporting law and declarations regarding contested facts.

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§14.29 4. Relief Granted on Conditions

The court may grant relief from stay to proceed with the eviction, or it may wish to stay the order on condition that the debtor meets specific obligations, *e.g.,* payment of postpetition rent to the landlord when due or according to a specified schedule. If the debtor's interests have terminated or the leased property is not property of the bankruptcy estate, landlords have a strong argument against imposing any conditions on relief from stay in order to proceed swiftly with an eviction, and relief from stay may not even be necessary under the BAPCPA. See §§14.1A, 14.4, 14.11-14.16B. Indeed, if a judge has ruled that there is no estate or debtor interest to be protected, the judge arguably has no jurisdiction to address issues related to the debtor's bare possessory interest. See, *e.g.*, *California Sec. Mgmt. Corp. v Kennedy (In re Kennedy)* (Bankr CD Cal 1984) 39 BR 995. But see discussion of the BAPCPA exception to automatic stay in §14.16.

On the other hand, if a state court action is in its early stages, and the landlord's objective is to collect the rent or get possession as soon as possible, a landlord might wish to have the bankruptcy court impose these types of conditions on the debtor and specifically order that the debtor must relinquish possession directly if the conditions are not met; this could save the landlord the time and expense of litigating a state court eviction action from beginning to end. Bankruptcy courts may issue surrender orders when a debtor's rights to possession have terminated, and they have broad authority to issue orders necessary to carry out the provisions of the Bankruptcy Code. See, *e.g., Anderson v Elm Inn, Inc. (In re Elm Inn, Inc.)* (9th Cir 1991) 942 F2d 630, 633. See also 11 USC §105. In any event, Fed R Bankr P 4001(a)(3) provides that an order granting relief from stay is stayed for 14 days after entry of the order unless the bankruptcy court orders otherwise.

One common condition to relief from stay is that the landlord may only seek possession of the property in state court, but may not attempt to collect any rent due. Typically, a landlord would be required to pursue any monetary claim by filing a proof of claim against the estate (or a request for payment of administrative expense, with respect to postpetition amounts that are due), and would not be allowed to collect any judgment from the debtor or estate without a separate order from the bankruptcy court granting relief from the stay for that purpose. See §14.59 for claim form and §14.60 for request for payment of administrative expense. Note that if limited relief is granted for the purpose of continuing existing state court claims, a material amendment to the pleadings that changes the nature of the relief sought could violate the automatic stay and render any findings made in the state court void. *Griffin v Wardrobe (In re Wardrobe)* (9th Cir 2009) 559 F3d 932.

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§14.30 C. Stipulation for Relief From Stay

Before or after the filing of a motion to modify, terminate, or obtain relief from the automatic stay, nothing prevents landlord counsel from attempting to obtain from the debtor or debtor's attorney a stipulation for an order for relief from (or modification of) the stay. Generally, if the parties cooperate, a stipulation is quicker, less costly, and usually more reliable than a motion, even if additional terms are imposed by the debtor. A stipulation for an order granting relief from the bankruptcy stay to allow an eviction to proceed will frequently be accepted by a debtor-tenant if the landlord is willing to grant a temporary stay of execution of the state court writ of possession to allow the tenant additional time to move out voluntarily. See sample form in §14.67.

WARNING: The stipulation should only grant relief to allow entry and execution of judgment for possession of the premises. Any attempt to exact a monetary judgment for prepetition debts against the tenant, as a condition of allowing more time for the tenant to move, will inevitably meet with objections from creditors and the trustee, and result in the court not approving the stipulation.

Theoretically, the stipulation could be conditioned on certain payments from the debtor, but the basis for the amount must clearly be represented as a postpetition obligation and must be reasonable, and may be characterized as ensuring the landlord adequate protection under 11 USC §362(d). (See, *e.g.,* 11 USC §365(b)(1)(B), which provides a method for adequate protection on a lease assumption in bankruptcy.) Any overreaching in this respect will result in the court rejecting the stipulation.

If a stipulation can be reached among the parties, simplified procedures and special forms exist to give notice and obtain approval by the court in the form of an order. Fed R Bankr P 4001(d). See, *e.g.,* ND Cal Local Bankr R 9014-1(b)(3); ED Cal Local Bankr R 9019-1, Form 92. Parties to the stipulation will nearly always include the creditor and the debtor, and the trustee if the stipulation allows the creditor to take action against property of the estate. The stipulation will be more easily approved by the court if it contains a recitation of facts sufficient to enable the court to determine whether:

- The property against which the creditor intends to take action is property of the debtor, the bankruptcy estate, or neither;
- There is a statutory or equitable basis for the relief requested;
- The terms imposed on the debtor are reasonable under the circumstances; and
- Any other creditor's rights or rights of the trustee are affected by the terms of the stipulation.

Whether the order should be prepared as a document separate from the stipulation is largely a matter of local practice. See sample form in §14.67. Also, the application process for court approval of a stipulation varies, including the form of the application and to whom (and the number of days for which) notice must be given. Local rules and individual court department practices should be consulted even though most courts in all districts generally follow Fed R Bankr P 4001(d). An ex parte application for an order shortening time for notice to interested parties of the stipulation may be routinely granted in some courts. In the Northern District of California, a Chapter 7 trustee can move to reject a lease on 24 hours' notice without a formal hearing, so court approval of a stipulation with the trustee in such circumstances should be similarly swift. See ND Cal Local Bankr R 6006-1(b). For a detailed outline of additional matters to be considered when preparing and negotiating a stipulation for an order granting relief from stay, and sample forms for a stipulation and a motion for approval and notice to interested parties, see Moving for Relief From an Automatic Stay in Bankruptcy, Steps 12-14, Apps G, L (Cal CEB Action Guide September 2006).

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§14.31 D. Application for Surrender of Premises

A landlord may attempt to recover possession by obtaining relief directly from the bankruptcy court by applying for an order requiring the debtor to surrender or vacate the property after the debtor fails to assume a lease of commercial property (see §14.54) or rejects it. See 11 USC §365(d)(4); *Anderson v Elm Inn, Inc. (In re Elm Inn, Inc.)* (9th Cir 1991) 942 F2d 630, 633). See sample forms in §§14.68-14.70. This process may also be used in a case involving a commercial lease that has terminated by its own terms or by operation of law. See §14.14. In the residential context, where a judgment for possession was entered before the bankruptcy, relief from stay is generally no longer necessary under the BAPCPA (defined in §14.1A). See 11 USC §362(b)(22), (*l*). This exception could save landlords significant expense and delay, although the practical application of its new procedures remains uncertain. See §14.16.

PRACTICE TIP: In a bankruptcy case involving a commercial lease, the issues of whether the lease was assumed in a timely manner, whether the lease was validly terminated, or whether possession should be turned over to the landlord may be contested in a lease assumption motion filed by the trustee or debtor. A landlord may oppose such a motion by submitting an application for surrender of the premises in the forms found in §§14.68-14.70.

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§14.32 E. Motion to Dismiss Bankruptcy

Motions to dismiss are available in all chapters of bankruptcy actions (see, *e.g.,* 11 USC §§105(a), 349, 707, 1112, 1307). Historically, they have been used less frequently to terminate the automatic stay than motions for relief under 11 USC §362(d). See §§14.17-14.29. The primary disadvantage of moving to dismiss had been that such motions were rarely granted. Indeed, until the BAPCPA, there was a statutory presumption in favor of allowing bankruptcy relief requested by the debtor. See *Voelkel v Naylor (In re Voelkel)* (BAP 9th Cir 2005) 322 BR 138 (bankruptcy court's dismissal order reversed for not reciting facts rebutting statutory presumption of 11 USC §707(b) and articulating clear abuse found). In the BAPCPA, however, the presumption has been deleted from §707(b), and the circumstances in which bankruptcy cases may be dismissed have been expanded, encouraging bankruptcy courts to dismiss more cases, more often.

A bankruptcy may be dismissed for "cause," *e.g.,* for the debtor's failure to propose a plan in Chapter 11 or 13, for the debtor's failure to file the necessary schedules and financial information, or for any unreasonable delay by the debtor or trustee in prosecuting the case that is prejudicial to the creditors, especially the landlord. See 11 USC §707(a) (Chapter 7), §1112(b) (Chapter 11), §1208(c) (Chapter 12), §1307(c) (Chapter 13); Fed R Bankr P 1017. Other reasons under these statutes include:

- Failure to timely propose a plan;
- Inability to effectuate or denial of confirmation of a proposed plan;
- Inability to effectuate, material default under, or revocation of a confirmed plan;
- Nonpayment of fees; and
- Failure to file required information with the court.

"Cause" also includes the filing of a bankruptcy case in bad faith. *Marsch v Marsch (In re Marsch)* (9th Cir 1994) 36 F3d 825 (affirming dismissal based on filing used solely as litigation tactic by solvent debtor).

The BAPCPA (see §14.1A) made major changes to the dismissal statutes to make dismissal of bankruptcy cases more readily available. In Chapter 7 cases before the BAPCPA, for example, dismissal or, with the debtor's consent, conversion to Chapter 11 or Chapter 13 was appropriate if granting relief under Chapter 7 to a debtor with primarily consumer debts would be a "substantial abuse" of Chapter 7. See former 11 USC §707(b). Under the BAPCPA, 11 USC §707(b) requires only "abuse" and further *presumes* that "abuse" exists if the debtor's monthly income, after deduction for certain standardized expenses over a 60-month period, is not less than the lesser of $10,000 or 25 percent of the debtor's unsecured debt (not to exceed $6000). The BAPCPA also expanded the definition of "cause" for conversion or dismissal of Chapter 11 cases in 11 USC §1112(b)(4). Notable additions include:

- Failure to maintain appropriate insurance;
- Unauthorized use of cash collateral;
- Gross mismanagement of the estate;
- Failure to attend meetings of creditors or a scheduled examination of the debtor;
- Failure to comply with reporting requirements, court orders, or requests for information from the United States Trustee; and
- Nonpayment of fees or taxes.

Section 521(i)(1), added in the BAPCPA, also mandates an "automatic" dismissal on the 46th day after a bankruptcy petition is filed, if a Chapter 7 or 13 debtor fails to file all of the information required, though it is unclear what is meant by "automatic." See *In re Riddle* (Bankr SD Fla 2006) 344 BR 702 (explaining the uncertainty of new provision with opinion entirely in verse). Counsel concerned that a bankruptcy filing might be improper should carefully consult the BAPCPA amendments in the applicable chapter to determine if grounds for dismissal of the case might exist.

It is improper for a solvent tenant to use the bankruptcy process to obtain the section 502(b)(6) cap on its landlord's damages for breach of a commercial lease. Recent authorities have dismissed such cases, confirming that using the bankruptcy process in this way does not meet the requirement of "good faith." See *NMSBPCSLDHB, LP v Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)* (3d Cir 2004) 384 F3d 108 and *In re Liberate Technols.* (Bankr ND Cal 2004) 314 BR 206, 214. In *Integrated Telecom Express, Inc.,* the debtor had over $200 million in cash and assets, and its liabilities were primarily a $26 million obligation under a long term lease. The Third Circuit reversed the Delaware bankruptcy court, holding that the landlord's motion to dismiss the case for bad faith should have been

granted. See also *BEPCO, LP v 15375 Mem. Corp. (In re 15375 Mem. Corp.)* (D Del 2009) 400 BR 420 (reversing bankruptcy court's denial of dismissal of debtors' petitions). In the event of such a dismissal, the landlord may, in a separate state court proceeding, recover the attorney fees it incurred in obtaining a dismissal of the bankruptcy matter. See, *e.g., Circle Star Assocs. v Liberate Technols.* (2007) 147 CA4th 1203, 55 CR3d 232; *Chinese Yellow Pages v Chinese Overseas Mktg. Serv. Corp.* (2008) 170 CA4th 868, 88 CR3d 250.

In the context of an unlawful detainer for nonpayment of rent, a motion to dismiss a tenant bankruptcy may be successful, particularly if there is evidence that the landlord is the only creditor (or one of a few) and that the bankruptcy was filed in bad faith. See, *e.g., Meadowbrook Invs. Group v Thirtieth Place, Inc. (In re Thirtieth Place, Inc.)* (BAP 9th Cir 1983) 30 BR 503, 505; *In re Fast Food Props., Ltd. No. 1* (Bankr CD Cal 1980) 5 BR 539, 540. But see *Smyrnos v Padilla (In re Padilla)* (BAP 9th Cir 1997) 213 BR 349; *In re Johns-Manville Corp.* (Bankr SD NY 1984) 36 BR 727, 737.

A dismissal revests property of the bankruptcy estate in the person or entity in which it was vested before the filing of the petition (11 USC §349(b)(3)). An advantage to this procedure over a motion for relief under 11 USC §362(d) is that counsel may be able to obtain in the dismissal order a bar to the refiling of another bankruptcy by the same debtor for 180 days. See 11 USC §109(g)(1). In addition, a judgment of dismissal is effective when entered. See Fed R Bankr P 9021. On the effect of dismissal on the adjudication of creditors' claims made before dismissal, see *Nathanson v Hecker* (2002) 99 CA4th 1158, 121 CR2d 773, discussed in §14.40.

PRACTICE TIP: Some practitioners argue that a motion to dismiss may be employed even after an unsuccessful motion for relief from stay because the statutory grounds are different for each procedure. Also, if a landlord is aware of facts supporting grounds for dismissal, they may be raised in a motion for relief from stay, because the same facts that support a dismissal may also support a motion for relief from stay. *Farber v 405 N. Bedford Dr. Corp.* (*In re 405 N. Bedford Dr. Corp.)* (9th Cir 1985) 778 F2d 1374, 1378. See §14.18.

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IV. RESIDENTIAL LEASE ASSUMPTION OR REJECTION

§14.33 A. Purpose

Lease assumption or rejection by formal process was instituted to inject a degree of certainty into the landlord-tenant relationship after a bankruptcy filing. It allows the court, the landlord, and other creditors to ascertain whether the debtor or trustee will perform the obligations of the lease, and it provides a landlord assurances that defaults in rent will be cured if the lease is assumed. It also allows for the rejection of burdensome obligations while permitting retention of those which have some value to the estate. *Dellway Villa Apartments v Goodloe (In re Goodloe)* (Bankr MD Tenn 1986) 61 BR 1016, 1018.

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§14.34 B. 60-Day Limit for Assumption or Rejection

The trustee in bankruptcy must accept or reject a lease of residential property within 60 days after the order for relief in a Chapter 7 proceeding (liquidation). 11 USC §365(d)(1). In a proceeding under Chapter 9 (adjustment of municipality debts), Chapter 11 (reorganization of debts of an individual not qualified for Chapter 13), or Chapter 13 (adjustment of debts of an individual with regular income), the trustee may accept or reject a lease of residential property at any time before a plan is confirmed. 11 USC §365(d)(2).

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C. Effect of Lease Assumption

§14.35 1. Rights of Assuming Trustee or Debtor

A trustee who assumes the lease within the required time may assign the lease despite lease restrictions on transfers. 11 USC §365(f)(3); *Cukierman v Mechanics Bank (In re J. F. Hink & Son)* (9th Cir 1987) 815 F2d 1314; *In re David Orgell, Inc.* (Bankr CD Cal 1990) 117 BR 574. While transfer restrictions will be disregarded to allow the debtor to assign the lease under bankruptcy law, a debtor who assumes a lease must assume the entire lease, taking all the burdens with the benefits and with all other covenants and rights unchanged as to both parties. See *Stewart Title Guar. Co. v Old Republic Nat'l Title Ins. Co.* (5th Cir 1996) 83 F3d 735, 741.

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2. Obligations of Assuming Trustee or Debtor

§14.36 a. Curing Existing Defaults

An assuming trustee (or debtor) must cure all existing defaults under the lease or give prompt assurance that the defaults will be cured. 11 USC §365(b)(1)(A). The assurance also must cover the future performance of the lease. 11 USC §365(b)(1)(C). As a condition of assumption, the trustee must pay all delinquent rent, and pay or give adequate assurance of payment of actual consequential out-of-pocket losses. 11 USC §365(b)(1)(B).

The Bankruptcy Code does not distinguish between "former," "existing," or "current" landlords, so a landlord may claim a right to cure payment on assignment of the lease even after the property is sold, provided the right is preserved in the sale agreement. *ECPG (Peoria) Assocs. Ltd. Partnership v Building Block Child Care Ctrs. (In re Building Block Child Care Ctrs.)* (BAP 9th Cir 1999) 234 BR 762. In *Building Block Child Care Ctrs.,* the tenant had filed its bankruptcy petition before the sale and assignment, and the landlord expressly retained its interest in the past due payments when it assigned the lease to the new owner. If the tenant is in default under the lease when the petition is filed, the trustee may not require the landlord to continue paying for utilities or other services incidental to the lease before the trustee assumes the lease, unless the landlord is compensated for any such services supplied before the assumption. 11 USC §365(b)(4).

Under California law, a landlord who intentionally interrupts or terminates a tenant's utility service with the intent of terminating the tenant's occupancy is subject to statutory penalties. CC §789.3. Although the statute does not create a presumption that a landlord who interrupts services does so with the intent to evict, a landlord runs a risk of such a claim if utility services happen to be interrupted without notice after a tenant bankruptcy. Thus, a landlord who stops paying utilities should provide advance notice to both the tenant and the trustee in bankruptcy that payment will cease (as permitted by 11 USC §365(b)(4)) on a specified date, and that the landlord expects the trustee to assume the payments if the trustee intends to retain the services. Proceeding in this manner permits the trustee to assume the payments without interrupting utility service to the tenant, and minimizes the risk of a claim that the landlord violated. CC §789.3(a).

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§14.37 b. Prepetition Rent Workouts

Occasionally, before the filing of the petition, the debtor and the landlord may informally resolve rent delinquencies by mutual agreement in the form of a payment schedule or even a promissory note that extends the time for payment of past due rental obligations. Such arrangements present the question of whether the debtor can separate this obligation as a mere monetary claim and avoid curing the default in order to remain in possession. The problem has been addressed, with mixed results, in the context of nonresidential leases.

In *In re Offices & Servs. of White Plains Plaza* (Bankr SD NY 1986) 56 BR 607, *e.g.,* the court held that when back rent obligations had been reduced to a promissory note payable over an extended period of time, defaults under the note had to be cured as part of the assumption of the lease. The Ninth Circuit confirmed that payments under promissory notes defined as "further rent" under a lease are considered administrative rent claims under 11 USC §365(d)(3). *Cukierman v Uecker (In re Cukierman)* (9th Cir 2001) 265 F3d 846. But see *Moore v Pollock (In re Pollock)* (BAP 9th Cir 1992) 139 BR 938, 940 (court reached opposite result on similar facts); *Upstairs Gallery v Macklowe W. Dev. Co. (In re Upstairs Gallery)* (BAP 9th Cir 1994) 167 BR 915).

In *Pollock,* the court considered an attempt by Chapter 11 debtors to assume a sublease of commercial property. The sublease had been executed by the debtors in connection with a purchase agreement, note, and security agreement, all entered into contemporaneously with the objecting sublessor for the purchase of a campground. Before the order for relief, the debtors defaulted on the note. While the sublessor argued that the note and sublease were integral and indivisible parts of the purchase transaction, the trial court and the bankruptcy appellate panel both concluded that the obligations were divisible such that one could be assumed without performing the other, based on three principal factors: (1) ruling for the sublessor would result in forfeiture, "which courts of equity abhor"; (2) the sublessor had received the agreed consideration—a secured note; and (3) the sublease had already been pledged to the sublessor under the security agreement, putting it in secured status. 139 BR at 941.

In *Upstairs Gallery,* the court held that lease termination payments made to a landlord may be recoverable as a preference under 11 USC §547. The issue was whether compromise of rent obligations that extended into the future gave rise to payments on account of an antecedent debt, or provided "new value" by releasing the future rent obligation. The court looked at the substantive effect of the agreement over its form, and held that because the lease obligation was incurred when the lease was formed, the later compromise of the obligation did generate a payment on account of an antecedent debt. 167 BR at 918. See also *Richardson v Philadelphia Hous. Auth. (In re Richardson)* (Bankr ED Pa 1988) 94 BR 56, 62 (prepetition payment agreement for delinquent rent was preferential transfer under §547(b) requiring landlord to remit to bankruptcy estate).

Note that the BAPCPA (see §14.1A) modified §547 to provide that a transfer would not be preference to the extent that it was in payment of a debt incurred by the debtor in the ordinary course of business with the transferee, and if it was made in the ordinary course of business *or* according to ordinary business terms (previously, a showing of both was required for the defense). See 11 USC §547(c)(2). Additionally, the BAPCPA modified §547 to exclude transfers of less than $5000 from preference exposure in cases in which the debtor's debts "are not primarily consumer debts". See 11 USC §547(c)(9). Nonetheless, landlords should be aware of preference issues when substituting or modifying rent obligations for potentially insolvent tenants.

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D. Effect of Rejection

§14.38 1. Rejection Implies Voluntary Termination

The Ninth Circuit has yet to squarely address the effect of rejection on a residential lease. The Ninth Circuit has repeatedly held, however, that rejection of a nonresidential lease terminates the lease and the right of possession. See *Anderson v Elm Inn, Inc. (In re Elm Inn, Inc.)* (9th Cir 1991) 942 F2d 630; *George v City of Morro Bay (In re George)* (9th Cir 1999) 177 F3d 885, based on 11 USC §365(d)(4) which expressly applies to nonresidential leases. These cases have held that when a nonresidential lease was rejected, the landlord was entitled to an immediate order directing the surrender of possession, avoiding the need for relief from stay.

Although 11 USC §365(d)(4) on its face applies only to nonresidential leases, the reasoning of these cases could also apply to rejection of residential leases. As a practical matter, rejection of the leasehold interest is logically inconsistent with continued possession by the tenant. Rejection indicates a voluntary decision to discontinue the relationship represented by the lease. Thus, although a tenant's equitable possessory interest may be protected by the stay after an *involuntary* termination (*Westside Apartments v Butler (In re Butler)* (Bankr CD Cal 2002) 271 BR 867), the 2005 exceptions to the stay for terminated residential leases reflect Congressional intent to reduce the protection of such interests. See, *e.g.*, 11 USC §362(b)(22), (*l*), discussed in §14.16. Moreover, a lease rejection indicates a *voluntary* termination of the lease and thus an arguable relinquishment of any equitable interest the tenant might otherwise have had. See *George v City of Morro Bay (In re George)* (9th Cir 1999) 177 F3d 885; *Anderson v Elm Inn, Inc.* (*In re Elm Inn, Inc.)* (9th Cir 1991) 942 F2d 630, 633, cited in §14.54. See also *Marquand v Smith (In re Smith)* (Bankr CD Cal 1989) 105 BR 50, 55; *Lee v Baca* (1999) 73 CA4th 1116, 86 CR2d 913; discussion of *Butler*, *Smith*, and *Lee* in §§14.16-14.17.

Outside the Ninth Circuit, it has been said that the effect of rejection of a *residential* lease "is one of the great mysteries of bankruptcy law." *In re Henderson* (Bankr SD NY 2000) 245 BR 449, 453. Although rejection of a lease is treated as a breach that occurred before the bankruptcy was filed (see 11 USC §365(g)(1)), the Second Circuit has held that this does *not* mean that the lease has terminated (see *Medical Malpractice Ins. Ass'n v Hirsch (In re Levigne)* (2d Cir 1997) 114 F3d 379, 386). Under this authority, courts addressing the effect of rejection on rent-controlled leases have suggested that, although a rejection of a residential lease may terminate the *estate's interest* in the lease, it leaves a right of possession to revert to the debtor. See, *e.g.*, *In re Henderson, supra*; *B.N. Realty Assocs. v Lichtenstein* (SD NY 1999) 238 BR 249, 254. Therefore, especially in the context of a residential rent-controlled lease, a landlord would be required to seek relief from stay to regain the right of possession after rejection.

PRACTICE TIP: If a tenant remains in possession after rejection of the lease, a landlord could request a surrender order (see §14.31) under the reasoning of *Smith, Lee, Elm Inn,* and *George* and the court's broad equitable powers under 11 USC §105. Although this method is certainly the quickest in regaining possession, the landlord should always seek relief from stay in the alternative (see §14.17), because it is unclear whether a court would apply the principles of 11 USC §365(d)(4) in a residential context.

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§14.39 2. Postpetition Rent Must Be Paid

Even if a lease is rejected, the landlord is entitled to compensation for rent or rental value of the premises from the date of the petition through the date of rejection, which should also be the date by which possession is relinquished. 11 USC §503(b); *Thompson v IFG Leasing Co. (In re Thompson)* (9th Cir 1986) 788 F2d 560. The compensation is set at the reasonable rental value, which may be, but is not always, the same as the lease rate. *Brown v Danning (In re Frederick Meats, Inc.)* (9th Cir 1973) 483 F2d 951; *Merchants Fund, Inc. v Bartl (In re Merchants Storage Co.)* (Bankr ED Va 1981) 15 BR 448. On setoffs for security deposits held by the landlord, see §14.12.

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§14.40 3. Landlord Claim Issues

Rent that accrues from and after the order for relief (which is usually the date the bankruptcy petition is filed) but before the effective date of a lease rejection is granted administrative priority under 11 USC §503(b)(1). *Towers v Chickering & Gregory (In re Pacific-Atlantic Trading Co.)* (9th Cir 1994) 27 F3d 401; *Thompson v IFG Leasing Co. (In re Thompson)* (9th Cir 1986) 788 F2d 560. This means the claim will ordinarily be paid ahead of other claims against the estate. See §§14.45-14.46. In cases commenced by involuntary petitions or resulting from a conversion from one chapter to another, the order for relief would occur after the date of the original petition. See 11 USC §§303(h), 348(b). Nonetheless, claims arising in the ordinary course of business after the filing date but before the order for relief are still accorded administrative priority status. See 11 USC §502(f) on claims for the "gap" period between an involuntary petition and the order for relief; §502(f) claims are granted administrative priority under §507(a)(2).

In general, landlords claiming postpetition rent should not use the standard proof of claim form required for other kinds of claims (see, *e.g.,* §14.59). Rather, a request for payment of administrative expenses under §503(b)(1) should be made. If the debtor does not pay the amount claimed or if a dispute is anticipated, the request should be set for hearing, and made in the form of a motion for allowance and payment of administrative expenses. See forms in §§14.60-14.61 and Practice Tip in §14.46. If a lease is terminated prepetition and the debtor does not move to assume the lease or obtain relief from forfeiture, damages for rental value accruing in unlawful detainer are not allowed as an administrative claim. *In re Boll Weevil, Inc.* (Bankr SD Cal 1996) 202 BR 762.

To seek recovery of amounts due for prepetition rent and damages resulting from rejection of the lease, a landlord should file a proof of claim, as a general unsecured creditor. See form in §14.59. The amount of a landlord's claim for damages from lease rejection is capped according to a formula provided by statute. See 11 USC §502(b)(6) and §14.55. If the debtor-tenant contests the claim, the bankruptcy court's determination of the allowable amount of the claim may be res judicata of the lease liability, prohibiting the tenant from contesting the liability in a subsequent state court proceeding after the bankruptcy has been dismissed. *Nathanson v Hecker* (2002) 99 CA4th 1158, 121 CR2d 773.

PRACTICE TIP: The notice of commencement of a case in Chapters 7 or 13 (essentially, a notice sent out by the bankruptcy clerk to the creditors listed in the debtor's schedules; see §14.5) contains the deadline for filing claims. That date is called the "Claims Bar Date," and should be promptly calendared because claims filed after that date may be disallowed. In cases under Chapter 11, the bar date is generally set by the court on the debtor's motion. In all cases, any notice of a bar date should be calendared to be sure the claim is timely filed.

Note that special rules apply to the assumption or rejection of nonresidential leases. 11 USC §365(d)(3)-(4). See §§14.43-14.55.

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§14.41 E. Exceptions: Expired or Terminated Leases

If a lease has expired by its own terms or has terminated, in most cases, the debtor or trustee cannot assume the lease. See 11 USC §365(a). "Bankruptcy cannot breathe new life into a terminated lease." *In re Bacon* (Bankr ED Pa 1997) 212 BR 66, 70. In such cases the landlord may proceed against the tenant to recover possession as if the lease were rejected. See §§14.14, 14.38, 14.43, 14.54.

EXAMPLE: Under a public housing lease, the trustee of the bankruptcy estate of a defaulting tenant could not assume the lease because the lease had terminated before the bankruptcy petition was filed. See *Robinson v Chicago Hous. Auth. (In re Robinson)* (Bankr ND Ill 1994) 169 BR 171, 174, aff'd (7th Cir 1995) 54 F3d 316.

Note that the court in *Robinson* construed the term "expired" in reference to 11 USC §365(a) to include a residential lease that was terminated under Illinois state law by a judgment of possession before the filing of the bankruptcy petition.

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§14.42 F. Government Housing Cases

Whether a debtor is obligated to assume the lease to retain rights to possession in public or government-subsidized housing after the filing of a bankruptcy petition is the subject of conflicting reported opinions. Some courts have held that such a debtor is protected by 11 USC §525(a) and may retain the tenancy despite the failure of the trustee to assume the lease. See *Stoltz v Brattleboro Hous. Auth. (In re Stoltz)* (2d Cir 2002) 315 F3d 80 (debtor-tenant may retain lease if unpaid prepetition rent is discharged, even though lease is deemed rejected due to trustee's failure to assume); *In re Day* (Bankr ED Pa 1997) 208 BR 358, 363; *In re Sudler* (Bankr ED Pa 1987) 71 BR 780, 786. Furthermore, such a debtor may confirm a Chapter 13 plan, if proposed in good faith, without assuming the lease, unless the Chapter 13 petition was filed within 6 years of a Chapter 7 discharge; in that case, all rent owing after the discharge must be paid in the Chapter 13 reorganization. *In re Day* (Bankr ED Pa 1997) 208 BR 358, 374.

Another line of cases has declined to follow the *Sudler* rule altogether. See *In re Valentin* (Bankr ED Pa 2004) 309 BR 715 (disagreeing with *Stoltz* and granting relief from stay); *In re Bacon* (Bankr ED Pa 1997) 212 BR 66, 69 n4 (states in dictum that Chapter 7 debtor has no right to assume lease; it is only trustee's right); *Housing Auth. v Collins (In re Collins)* (Bankr WD Pa 1996) 199 BR 561 and authorities cited. See also §14.27.

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V. NONRESIDENTIAL LEASE ASSUMPTION OR REJECTION

§14.43 A. Overview

The policy underlying the Bankruptcy Code provisions for assumption or rejection of commercial leases recognizes that a debtor's nonresidential leasehold may have value that can be realized for the benefit of the estate and creditors by allowing the lease to be assumed and assigned. Leases for desirable properties or that might be considered to be at below market rents can be among a debtor's most valuable assets. Similarly, the Bankruptcy Code provides debtors a valuable right to reject leases that require above market rent payments or that are otherwise burdensome to the estate. Because debtors do not always know whether a leasehold has value or not, the stakes in nonresidential assumption or rejection can be high. If the debtor rejects a lease prematurely, it may lose value that should be brought into the estate for the benefit of creditors. On the other hand, if a debtor assumes the lease, the obligations under it become postpetition administrative priority obligations of the estate. See, *e.g., Nostas Assocs. v Costich (In re Klein Sleep Prods.)* (2d Cir 1996) 78 F3d 18; *In re Bergt* (Bankr D Alaska 1999) 241 BR 17, 25. Under the BAPCPA, premature assumption now presents less risk to debtors, because the BAPCPA (see §14.1A) caps the landlord's administrative claim for rejection of an assumed lease at 2 years' rent. See 11 USC §503(b)(7), discussed in §14.52. See also discussion of rejection damages in §14.55.

For business planning, commercial landlords need to know whether their leases will be assumed. They also have a keen interest in ensuring that any prospective assignee will be committed to full performance of the lease obligations and not adversely affect the synergy of the landlord's commercial property. With 1984 amendments to 11 USC §365, the so-called "shopping center amendments," Congress sought to balance these competing interests, by imposing special rules on the timing of the decision to assume or reject, and new parameters on the debtor's rights to assume and assign commercial leases. Over time, however, the desire of bankruptcy courts to accommodate the needs of debtors and creditors resulted in a relaxation of the principles of the 1984 amendments. In the BAPCPA, Congress made changes to reinforce the principles of the 1984 amendments. Those changes include additional protections for landlords against the uncertainty of a prolonged period of time to assume or reject, clarification of the effect of a nonmonetary default on the tenant's right to assume the lease, and strengthening the protections against an assignment to a nonconforming use. See §§14.44, 14.45A, 14.48, 14.50, 14.52, 14.55.

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B. Time Limits

§14.44 1. Decision or Extension Required in 120 Days

Under the BAPCPA (see §14.1A), after a bankruptcy petition has been filed, the debtor-tenant under a nonresidential real property lease must assume or reject the lease by *the earlier of* 120 days after the date of the order for relief (which is typically the day the petition was filed) or the date of entry of an order confirming a plan of reorganization. See 11 USC §365(d)(4)(A). Before the 120-day period expires, the bankruptcy court may extend the period an additional 90 days on motion "for cause." 11 USC §365(d)(4)(B). If the court grants the additional 90-day extension, however, it may not grant any further extension without the *prior written consent* of the landlord in each instance. 11 USC §365(d)(4)(B)(ii). Thus, the uncertainty for commercial landlords concerning whether a lease will be assumed or rejected is limited to a maximum of 210 days, unless the landlord consents to a further extension. If the debtor-tenant fails to assume the lease within the 120 days, or 210 days if an extension is granted, the lease is *deemed rejected,* and the debtor must immediately surrender possession to the landlord. 11 USC §365(d)(4)(A).

This represents a significant and beneficial change in the law for landlords in commercial tenant bankruptcies. Under the former version of §365(d)(4) (which still applies to cases filed before October 17, 2005), a debtor-tenant had to make its decision within 60 days, or such additional time as the court "for cause" would fix. Although the wording of the statute suggested that any extension must be "fixed" by the court "within such 60-day period," the Ninth Circuit interpreted this as only requiring that the motion be made within the 60-day period, even if it was heard or decided after the expiration of the 60 days. See *Turgeon v Victoria Station, Inc. (In re Victoria Station, Inc.)* (9th Cir 1988) 840 F2d 682, 684; *Southwest Aircraft Servs., Inc. v City of Long Beach (In re Southwest Aircraft Servs., Inc.)* (9th Cir 1987) 831 F2d 848, 850, cert denied (1988) 487 US 1206, 101 L Ed 2d 885, 108 S Ct 2848. While the time could be shortened or extended by motion of the debtor, it was held that such motion must be filed (but not necessarily heard) within the 60-day period. *Southwest Aircraft Servs., Inc. v City of Long Beach, supra.*

Outside the Ninth Circuit, courts criticized the view that §365(d)(4) only required that the motion be *made* within the initial period; they held that the statute unambiguously requires that any additional time be granted within the initial 60-day period. See, *e.g., In re DCT, Inc.* (Bankr ED Mich 2002) 283 BR 442, 444 (failure to have extension motion heard within 60 days resulted in lease being deemed rejected), citing *DeBartolo Props. Mgmt., Inc. v Devan (In re Merry-Go-Round Enters.)* (D Md 1996) 194 BR 46, 51, and many others. Likewise, in a case decided under the BAPCPA, a bankruptcy court held that any order extending the initial (120-day) deadline must be entered before the deadline expires, and the court has no discretion to extend the time after the date expires. *In re Tubular Technols. LLC* (Bankr D SC 2006) 362 BR 243; see also *In re Monahan Ford Corp.* (Bankr ED NY 2008) 390 BR 493 (attorney's failure to make timely motion for extension under §365(d)(4) was negligence as matter of law).

While the BAPCPA lengthened the initial assumption period to 120 days, and placed a firm limit of 210 days without landlord consent, it is unclear whether or to what extent bankruptcy courts in the Ninth Circuit will follow these authorities. By only authorizing an additional 90-day extension "prior to the expiration of the 120-day period," the BAPCPA suggests that the extension motion can only be granted before the 120 days expire. Yet the prior version of 11 USC §365(d)(4) also required the further extension to be granted within the original 60 days, and the Ninth Circuit interpreted this to mean that only the motion had to be made within that time, and the order granting it could come after the period had expired.

PRACTICE TIP: Landlord counsel faced with an extension motion set for hearing after the 120-day period has expired should argue that the motion cannot be granted, because the BAPCPA only allows an extension to be granted prior to the expiration of the 120-day period. The argument would be that the Ninth Circuit's decision in *Victoria Station* has been superseded, and the strict statutory construction applied in other jurisdictions should be applied in the Ninth Circuit. Similarly, because it is unclear whether *Victoria Station* would still apply to extension motions under the BAPCPA, counsel for debtor-tenants will be taking a risk in filing an extension motion too late to be heard before the 120-day period runs; an incorrect guess about whether a bankruptcy court will still follow the rule of *Victoria Station* could mean that a valuable lease is inadvertently deemed rejected.

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§14.45 2. Debtor Must Remain Current on Postpetition Rent; Proration Versus Payment Date Approach

In the 1984 amendments to the Bankruptcy Code, Congress expressly required debtors to remain current on postpetition rent arising under nonresidential real property leases pending assumption or rejection, and this obligation is unchanged in the BAPCPA (defined in §14.1A). 11 USC §365(d)(3). Prepetition rent arrearages need not be paid currently. If a lease is rejected, they are claimed as a general unsecured claim (see §14.59); if a lease is assumed, they must be cured (see §14.52). Section 365(d)(3) expressly requires performance of lease obligations arising under a commercial lease from the date of the order for relief until such lease is assumed or rejected. See *Feld v S & F Concession, Inc. (In re S & F Concession, Inc.)* (Bankr ED Pa 1985) 55 BR 689. In most cases, the date of the "order for relief" is the date that the bankruptcy petition is filed, and hence that is the date the obligations under §365(d)(3) commence. If the bankruptcy case was commenced by an involuntary petition, or if it has been converted from one chapter to another, however, the order for relief will be after the petition date. See 11 USC §303(h) (entry of order for relief in involuntary cases).

Previously, courts generally interpreted 11 USC §365(d)(3) to require the debtor to pay *prorated* daily rent for each day from and after the date the petition is filed until a lease is rejected, even if the first of the month (when rent is normally due) occurred before the petition was filed. See, *e.g., Feld v S & F Concession, Inc., supra*; *In re Galvan* (Bankr SD Cal 1986) 57 BR 732, 734; *Matter of Swanton Corp.* (Bankr SD NY 1986) 58 BR 474, 475; *Child World, Inc. v Campbell Mass. Trust (In re Child World, Inc.)* (SD NY 1993) 161 BR 571, 576; *In re Ernst Home Ctr.* (Bankr WD Wash 1997) 209 BR 955, 964. The highest-level court to adopt the proration rule is the Seventh Circuit. *In re Handy Andy Home Improvement Ctrs., Inc.* (7th Cir 1998) 144 F3d 1125. In *Handy Andy,* Judge Posner (Chief Judge of the 7th Circuit Court) explained that the proration rule is more sensible, tracks the purpose of the statute by giving postpetition creditors their rightful due, and allocates expenses equitably among the pre- and postpetition periods, rather than on the happenstance of billing dates and the strategic moves of landlord and tenants. 144 F3d at 1128. Later cases from other jurisdictions agreed with *Handy Andy's* approach and prorated expenses. *In re Furr's Supermarkets, Inc.* (BAP 10th Cir 2002) 283 BR 60, 67, *In re NETtel Corp.* (Bankr DC 2002) 289 BR 486, 490, *In re Phar-Mor, Inc.* (Bankr ND Ohio 2003) 290 BR 319, 323 (proration is "majority rule").

Decisions from courts of appeals for the Sixth, Third, Fourth, and Eighth Circuits, however, rejected the proration rule, holding that whether an obligation is postpetition depends on the date the obligation is due. See *In re Koenig Sporting Goods, Inc.* (6th Cir 2000) 203 F3d 986 (lease rejected on second of month; landlord awarded postpetition rent for whole month); *Centerpoint Props. v Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)* (3d Cir 2001) 268 F3d 205 (requiring debtor to make tax payments that related to prepetition period because they came due postpetition); *In re Rose's Stores, Inc.* (4th Cir 1998) 155 F3d 560 (affirming district court decision that rent due after filing petition was postpetition obligation, even though it related to prepetition period); *Burival v Creditor Comm. (In re Burival)* (BAP 8th Cir 2009) 406 BR 548 (reversing proration applied to crop land lease that required two payments per crop per year); and *In re Appletree Markets, Inc.* (Bankr SD Tex 1992) 139 BR 417, 420.

Later decisions applying this "payment date" or "billing date" approach have relied on the wording of §365(d)(3), finding that an obligation "arises" when it is due and finding it is inconsistent with the statute to prorate obligations which became due before or after the petition was filed, even if they relate to work done or services rendered during both periods. See, *e.g., Urban Retail Props. v Loews Cineplex Entertainment* (SD NY 2002) 2002 US Dist Lexis 6186, 2002 WL 535479 (landlord's capital improvement expense that came due postpetition required to be paid in full, although some work done prepetition); *In re CCI Wireless, LLC* (Bankr D Colo 2002) 279 BR 590; *In re UAL Corp.* (Bank ND Ill 2003) 291 BR 121 (calls payment date approach "majority view"). But see *In re Pac-West Telecomm, Inc.* (Bankr Del 2007) 377 BR 119 (utility bill, usually sent by landlord to tenant on monthly basis, but because of malfunctioning meter was billed postpetition in one lump sum for 18-month prepetition period, was not required to be paid under §365(d)(3)).

The split of authority on this issue makes it difficult to predict which approach may ultimately be applied. Both sides claim to follow the "majority" approach, and lower court decisions are not even consistent with cases decided by their own circuit court of appeals or within their own district. For example, the bankruptcy court in *In re UAL* applied the payment date approach notwithstanding that *Handy Andy,* a court of appeals opinion from the same circuit, applied proration. Similarly, the bankruptcy court in *Phar-Mor* applied proration, notwithstanding that in *Koenig,* the Sixth Circuit applied the payment date approach. While the Second Circuit has not yet decided the issue, in *In re Stone Barn Manhattan LLC* (Bankr SD NY 2008) 398 BR 359, the court recently held that landlords were entitled to prorated

postpetition rent for the month in which the bankruptcy petition was filed, notwithstanding that the payment date approach was applied in *Urban Retail Props. v Loews, supra*.

The Ninth Circuit itself has not squarely addressed the proration versus billing date issue. Earlier opinions from bankruptcy courts within the Ninth Circuit applied proration. See, *e.g., In re Nat'l Refractories & Minerals Corp.* (Bankr ND Cal 2003) 297 BR 614, 619 (adopting proration and calling it "majority" approach); *Sticka v Lambert (In re Lambert)* (BAP 9th Cir 2002) 283 BR 16 (tax refund pertaining to year 2001 is properly prorated to number of days prepetition and postpetition). More recently, after extensive discussion of the split of authority on this issue, a bankruptcy court in Arizona held that the performance date determined whether an expense was required to be paid currently under §365(d)(3). See *In re Designer Doors, Inc.* (Bankr D Ariz 2008) 389 BR 832. Ironically, just as this bankruptcy court in the Ninth Circuit seems to be following a trend toward the payment date approach, courts in the east seem to be trending back to proration, at least as to prorated postpetition rent for the month in which the bankruptcy was filed (called "stub rent"). See, *e.g., Goody's Family Clothing, Inc. v Mountaineer Prop. Co. II, LLC (In re Goody's Family Clothing, Inc.)* (D Del 2009) 401 BR 656 (while Third Circuit in *Centerpoint Props. v Montgomery Ward Holding Corp., supra,* applied payment date approach for amounts due under §365(d)(3), district court affirmed bankruptcy court's allowing stub rent as administrative expense under §503(b)(3)); *In re Stone Barn Manhattan LLC, supra* (allowing stub rent claim under §365(d)(3), including lengthy analysis of the divergent views on the issue); *In re Manis Lumber Co.* (Bankr ND Ga, Feb. 6, 2009, No. 08-40398) 2009 Bankr Lexis 506 (agreeing with *Stone Barn* regarding proration).

Failure to stay current on postpetition lease obligations is grounds for deeming the lease rejected or, at a minimum, for an order for relief from stay. *Buffkin v Goodson (In re Goodson)* (Bankr SD Fla 1981) 12 BR 883; *In re Future Growth Enters., Inc.* (Bankr ED Pa 1986) 61 BR 469. It can provide cause for denying an extension of time to assume or reject a nonresidential real property lease. *In re Perfectlite Co.* (Bankr ND Ohio 1990) 116 BR 84, 87, citing *Southwest Aircraft Servs., Inc. v City of Long Beach (In re Southwest Aircraft Servs., Inc.)* (9th Cir 1987) 831 F2d 848. Postpetition defaults may also be a factor in determining whether a lease option may be exercised by a debtor-tenant. Compare *Cannery Row Co. v Leisure Corp. (In re Leisure Corp.)* (BAP 9th Cir 1999) 234 BR 916 with *Coleman Oil Co. v Circle K Corp. (In re Circle K Corp.)* (9th Cir 1997) 127 F3d 904.

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§14.45A 3. Performance of Nonmonetary Obligations

Under 11 USC §365(d)(3), the tenant must perform "all the obligations" of a lease, except those specified in 11 USC §§365(b)(2), arising from and after the order for relief, until the lease is assumed or rejected. Since the phrase "all the obligations" is not limited to *monetary obligations*, courts have struggled to determine the impact of a nonmonetary default on rights to assume a lease. See, *e.g., Worthington v GMC (In re Claremont Acquisition Corp.)* (9th Cir 1997) 113 F3d 1029 (debtor's default under covenant requiring continuous operations was "historical fact" that could not be cured and rendered contract unassumable); *Eagle Ins. Co. v Bankvest Capital Corp. (In re Bankvest Capital Corp.)* (1st Cir 2004) 360 F3d 291 (disagreeing with *Claremont*); and *Bank of America v Garcia (In re Garcia*) (Bankr D Ariz 2002) 276 BR 627 (limiting *Claremont*). In the BAPCPA (see §14.1A), however, Congress added provisions that address this issue and resolve the controversy.

In the BAPCPA, Congress modified §365(b)(2)(D) to confirm that nonmonetary defaults need not be cured before assumption and will not preclude the debtor from assuming the lease; however, if the default is for failure to operate in accordance with a commercial lease, then the default must be cured at or after the time for assumption of the lease and the debtor must compensate the landlord for "pecuniary losses" resulting from the nonmonetary breach, as part of the cure obligation required to assume the lease. See 11 USC §365(b)(1)(A). Thus, a breach of a covenant to operate under a commercial lease will no longer result in losing the right to assume the lease, but a debtor must compensate the landlord for damages resulting from such a breach as part of the cure required to assume the lease.

PRACTICE TIP: The right to claim damages resulting from breach of an operating covenant still presents landlords with a dilemma of how to calculate such damages. Claims that cannot be quantified cannot be cured, and Congress provided no guidance on how landlords might calculate such claims. Landlords suffering from a bankrupt tenant whose store has gone dark in violation of an operating covenant should consider the impact of the dark store on foot traffic, percentage rent, and image of the shopping center, and may need expert testimony to quantify such damages for purposes of making a complete cure claim when the lease is being assumed.

Even though debtors must perform all obligations under the lease while deciding whether to assume or reject, many debtors desire to have store closing or "going out of business" ("GOB") sales during the pendency of the bankruptcy. While many commercial leases prohibit conducting such sales at leased premises, those provisions are generally unenforceable in bankruptcy because of the great need to provide debtors an efficient means to liquidate inventory. On the other hand, this need does not give debtors carte blanche to conduct GOB sales in violation of lease provisions. Instead, debtors must specifically move for permission to conduct GOB sales according to a proposed set of guidelines; bankruptcy courts have recognized the need for reasonable modifications to proposed GOB sale guidelines to protect landlord interests. See, *e.g., In re Ames Dep't Stores, Inc.* (Bankr SD NY 1992) 136 BR 357, 359. Thus, while debtor motions to conduct GOB sales are routinely granted, timely landlord objections often result in modifications to proposed guidelines for GOB sales, including limitations on signage, duration, and advertising for the sale, and providing procedures for termination of the sale and handling of personal property that may be abandoned. For a sample landlord objection to a proposed GOB sale, see §14.62A.

In addition, while courts have wrestled with the payment date or proration controversies concerning payment of rent under §365(d)(3), similar controversies exist concerning non-rent obligations due under a lease. In addition to following the payment date approach for postpetition rent under §365(d)(3), the bankruptcy court in *In re Designer Doors, Inc.* (Bankr D Ariz 2008) 389 BR 832 (see §14.45) held that the obligation to remove a mechanics' lien filed postpetition was not a §365(d)(3) obligation, because the obligation "arose" when the work was performed, which was prepetition. In *In re BH S&B Holdings LLC* (Bankr SD NY 2009) 401 BR 96, the court analyzed a similar lease obligation to keep the premises free of liens, agreed with the analysis from *Designer Doors,* but reached the opposite result because under New York law, a lien arises when it is filed rather than when the work is done. See also *In re Plastech Engineered Prods., Inc.* (Bankr ED Mich 2009) 402 BR 217 (holding that *Koenig* (see §14.45) does not require billing date approach for cost of repairs; administrative status depends on when costs accrued).

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§14.46 4. Priority Claim for Postpetition Rent

Under 11 USC §503(b)(1), administrative expenses are required to be "actual and necessary" to the estate, and they are allowed only in their "reasonable value." See, *e.g., Figone v Spear (In re GFS Creations, Inc.)* (Bankr ND Cal 1999) 240 BR 43, 45 (reasonable rental value used when no lease specified rent due); *In re Dant & Russell, Inc.* (9th Cir 1988) 853 F2d 700, 707. Under 11 USC §365(d)(3), however, debtors must remain current on postpetition obligations, "notwithstanding section 503(b)(1)." Hence, the Ninth Circuit has held that 11 USC §365(d)(3) gives landlords an administrative claim for the full amount of lease rent due for the postpetition, prerejection period, *regardless* of the actual value conferred by the lease on the estate. See *Towers v Chickering & Gregory (In re Pacific-Atlantic Trading Co.)* (9th Cir 1994) 27 F3d 401.

Further, because §365(d)(3) applies "notwithstanding section 503(b)(1)," there has been much discussion in reported cases concerning whether §365(d)(3)'s mandate for "immediate payment of postpetition lease obligations" provides commercial landlords a de facto superpriority, requiring payment regardless of the administrative solvency of the estate. The common view is that §365(d)(3) requires immediate performance of all lease obligations. *Towers v Chickering & Gregory (In re Pacific-Atlantic Trading Co.)* (9th Cir 1994) 27 F3d 401, 404; *In re Telesphere Communications, Inc.* (Bankr ND Ill 1992), 148 BR 525, 530; *In re Leisure Time Sports, Inc.* (Bankr SD Cal 1995) 189 BR 511 (citing *In re Telesphere*). Under this interpretation, postpetition rent payments are immune from the usual tests applied to assertions of administrative priority and must be made regardless of the estate's solvency. See, *e.g., Omni Partners, Ltd. Partnership v Pudgie's Dev. of NY, Inc. (In re Pudgie's Dev. of NY, Inc.)* (Bankr SD NY 1999) 239 BR 688, 694, and *In re Brennick* (Bankr D Mass 1995) 178 BR 305, 307 (rent payments are immune from disgorgement). See also *In re Pyxsys Corp.* (Bankr D Mass 2003) 288 BR 309, 316 (landlord entitled to immediate payment for rent, but it is subject to disgorgement in event of later administrative insolvency).

Previously, some cases in the Ninth Circuit held that §365(d)(3) did not give landlords a superpriority right to immediate payment of postpetition rent, but only an administrative claim for it, payable like other administrative claims under 11 USC §503(b). See *Great W. Sav. Bank v Orvco, Inc. (In re Orvco, Inc.)* (BAP 9th Cir 1989) 95 BR 724; *In re Daisy/Cadnetix, Inc.* (Bankr ND Cal 1991) 126 BR 87 (citing *Orvco*). Later cases have expressed the view that *Orvco* was rejected by the Ninth Circuit in *In re Pacific-Atlantic Trading Co., supra*. See, *e.g., In re Leisure Time Sports, supra*; *Cukierman v Uecker (In re Cukierman)* (9th Cir 2001) 265 F3d 846 (on final appeal, Ninth Circuit did not address *Orvco*). Other courts noted, however, that because *Pacific-Atlantic* did not squarely overrule *Orvco* on the super-priority issue, a lessor is not entitled to immediate payment "unless it is shown that there are sufficient funds in the estate to pay the claim without jeopardizing full payment to all current and future administrative expense claimants." See, *e.g.*, *In re MS Freight Distrib.* (Bankr WD Wash 1994) 172 BR 976, 979. The Ninth Circuit ultimately came to the same conclusion in *Kir Temecula, Ltd. Partnership v LPM Corp. (In re LPM Corp.)* (9th Cir 2002) 300 F3d 1134 (affirming bankruptcy court's refusal to grant relief from stay to allow landlord to collect postpetition rent payments when estate was administratively insolvent). See also *In re Palace Quality Servs. Indus., Inc.* (Bankr ED Mich 2002) 283 BR 868, 906 (rent payments due after conversion have administrative priority, but need not be paid immediately if estate's administrative solvency is uncertain).

Further, if a landlord's claim does not arise from postpetition, prerejection conduct, it will not have administrative priority. See, *e.g., K-4, Inc. v Midway Engineered Wood Prods., Inc. (In re Treesource Indus.)* (9th Cir 2004) 363 F3d 994 (because damages for breach of lease obligation to restore property arose on rejection, they were not administrative expense); *In re Nat'l Refractories & Minerals Corp.* (Bankr ND Cal 2003) 297 BR 614 (landlord's claim for postrejection rent applicable to period necessary for landlord to repair damage to premises would not be recoverable as administrative expense if debtor did not actually occupy premises during that time); *In re Designer Doors, Inc.* (Bankr D Ariz 2008) 389 BR 832 (obligation to remove postpetition mechanics' lien was not section 365(d)(3) obligation, because obligation "arose" prepetition). Note, however, the obligation to stay current on postpetition obligations under 11 USC §365(d)(3) applies only to debtor-*tenants*, not debtor-*landlords*. *Einstein/Noah Bagel Corp. v Smith (In re BCE W., Ltd. Partnership)* (9th Cir 2003) 319 F3d 1166 (denied administrative claim by subtenants for debtor-sublandlord's breach of sublease).

PRACTICE TIP: If a debtor-tenant fails to keep postpetition rent current, a request for payment of administrative expenses and, if necessary, a motion to compel payment should be made. See forms in §§14.60-14.61. In addition, if permitted under applicable state law, a landlord may claim attorney fees incurred in making the motion, which may be recoverable to compensate the landlord for "actual pecuniary loss" resulting from the debtor's failure

to pay the postpetition rent as required under 11 USC §365(d)(3). See §14.51.

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5. Extensions of Time and Grounds for Objection

§14.47 a. Extension for Cause

The standard governing a request for an extension of the initial 120-day period of time to assume or reject leases is vague, specifying only that "cause" be shown. See 11 USC §365(d)(4)(B). Before the BAPCPA (see §14.1A), when extensions could be granted repeatedly, the "cause" requirement was intended to protect commercial landlords "from delay and uncertainty by forcing a trustee or a debtor in possession to decide quickly whether to assume unexpired leases." *Sea Harvest Corp. v Riviera Land Co.* (9th Cir 1989) 868 F2d 1077, 1079. The seminal case on this issue of "cause" was *In re Wedtech Corp.* (Bankr SD NY 1987) 72 BR 464, 471. *Wedtech* held that debtors seeking an extension had the burden of persuasion to show why they needed more that the 60 days allowed by the former law, and landlords opposing a motion for an extension had to show how they would be prejudiced if the extension were granted (see §14.48).

The *Wedtech* decision cited a number of factors for courts to consider in determining whether cause existed to extend the deadline, such as whether the case was exceptionally complex and involved a large amount of leases, whether the leases were a primary asset of the estate or if they gave potential value and importance to a plan, and whether the debtor was current on the rent. As it played out, however, the risk of making a decision too soon, specifically the risk of assuming leases that may be burdensome or rejecting those that might be valuable to the estate, led bankruptcy courts to grant extensions virtually whenever debtors asked for them, rendering the standard of "cause" almost meaningless.

Congress addressed this issue in the BAPCPA. Although "cause" is still required to obtain a 90-day extension of the initial 120-day period, the meaning of "cause" is less important because bankruptcy courts no longer have discretion to grant repeated or open-ended extensions. Thus, under current law, even if cause is found to support a 90-day extension, no further extensions can be granted without the landlord's written consent. See 11 USC §365(d)(4)(B).

This change has had a dramatic impact on the course of retail bankruptcies after the BAPCPA went into effect. Debtors in large retail cases are finding that the maximum 210 days is not enough time for them to make the decisions they want to make, and they are developing new approaches for trying to meet the statutory requirement of obtaining landlord's written consent. In many cases, debtors are negotiating with landlords more directly, trying to persuade landlords that the extension benefits them by keeping the debtor in possession paying rent. Landlords with more valuable space may seek conditions on granting the written consent, such as requiring debtors to operate and pay rent for some portion of the extension, such as through the winter holiday season.

PRACTICE TIP: If the first extension has already been granted, landlord counsel should be alert for debtor attempts to obtain "written consent" from landlords who might not wish to provide such consent. In some cases, debtors are moving to approve "procedures" that would automatically extend the time based on a schedule debtor might file listing the landlord consents it claims to have, thus avoiding any scrutiny of whether or to what extent written consent was actually obtained. In other cases, debtors may seek to bypass counsel of record, seeking a signature from a property manager or leasing agent who may not be aware of the landlord's rights in bankruptcy. To avoid any inadvertent granting of "consent," landlord counsel should insist that all communications go through counsel and carefully review any motion to establish procedures for further extensions, so that a timely objection can be filed.

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§14.48 b. Prejudice to Landlord; Stipulations to Extend

Under the former law, a common basis for asserting "prejudice" to a landlord in response to a debtor's showing of cause for an extension, was if the extension sought would be unreasonably long or indefinite. Indeed, the courts recognized that the 1984 amendments were intended to limit the amount of time in which debtors may hold landlords in limbo. See, *e.g.*, *Southwest Aircraft Servs., Inc. v City of Long Beach (In re Southwest Aircraft Servs., Inc.)* (9th Cir 1987) 831 F2d 848, 850, cert denied (1988) 487 US 1206, 101 L Ed 2d 885, 108 S Ct 2848. Hence, open-ended extensions were generally disfavored. *Chapman Inv. Assocs. v American Healthcare Mgmt. (In re American Healthcare Mgmt., Inc.)* (5th Cir 1990) 900 F2d 827, 830; *In re Musikahn Corp.* (Bankr ED NY 1986) 57 BR 938, 942 n5.

Because the BAPCPA (see §14.1A) limits the period of uncertainty for commercial landlords to 210 days (unless they consent to a further extension), landlords need no longer worry about long or indefinite extensions, and will have less need to litigate the issue of "cause" for an extension. See 11 USC §365(d)(4). Nonetheless, landlords who would be prejudiced by even one 90-day extension of the 120-day period should make a showing of such prejudice in response to the debtor's extension motion. For instance, failure to pay postpetition rent, as required under 11 USC §365(d)(3) until the lease is assumed or rejected, can be grounds for denying an extension. See, *e.g., In re Muir Training Technols., Inc.* (Bankr SD Cal 1990) 120 BR 154, 160).

Specific facts may also show sufficient prejudice to warrant denial of an extension as to a particular lease. For instance, a landlord with another prospective tenant ready to lease the premises would be prejudiced if debtor's decision is delayed, the prospective tenant goes away, and the lease is later rejected, leaving the landlord with a costly vacancy it could have filled earlier. See form in §14.62 (objection to motion for extension of time to assume or reject lease).

Previously, when debtors could obtain multiple extensions of the time to assume or reject, stipulated compromises of the competing needs of the parties were common. For example, landlords objecting to long or open ended extensions often stipulated to a finite extension if the debtor would agree to a "lock-in" through the December holiday season. Under such a scenario, a debtor might obtain a stipulated extension through January 31, while agreeing that it cannot reject the lease, and must remain open, operating, and paying the rent through December 31. Because the period for decision can no longer be extended beyond 210 days without the landlord's consent (see 11 USC §365(d)(4)(B), cited in §§14.44, 14.47), it remains to be seen how much litigation over extensions will occur in cases governed by the BAPCPA. To the extent any extension is sought over the holiday shopping season, however, landlords are likely to continue to press for "lock-in" commitments.

PRACTICE TIP: Debtors often agree to "lock-in" stipulations for the holiday season because they do their best business during the holidays, and have no need of the right to reject the lease before the holidays have concluded, while landlords often seek stipulations to avoid the prospect of a rejected lease and a vacancy too late to relet the space for the key retail season.

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C. Assumption and Assignment Procedures

§14.49 1. Motion Required

Unlike rejection of a lease, which may occur automatically if a debtor allows the 120 days (provided by amendment to 11 USC §365(d)(4) in the BAPCPA; see §§14.1A, 14.44) to run without taking action, a debtor must affirmatively move to assume, or assume and assign, a lease. *Turgeon v Victoria Station, Inc. (In re Victoria Station, Inc.)* (9th Cir 1988) 840 F2d 682. The standard applied to a debtor's motion (provided it meets statutory requirements) is the "business judgment" test, which generally defers to the debtor's reasonable business judgment that assumption would be beneficial to the estate. *Orion Pictures Corp. v Showtime Networks, Inc. (In re Orion Pictures Corp.)* (2d Cir 1993) 4 F3d 1095. Under 11 USC §365(b), however, a debtor will not be allowed to assume a lease unless the debtor:

- Cures, or provides adequate assurances of a prompt cure, of any prepetition default (other than a nonmonetary default that cannot be cured by performance at or after assignment; however, a breach of a covenant to operate must be cured at or after assignment, and the landlord's damages from such a breach must be paid as part of the cure; see §14.45A);
- Compensates the landlord for any actual pecuniary loss resulting from a such default; and
- Provides adequate assurances of future performance under the lease.

Similarly, a debtor may not assign a lease unless the debtor assumes the lease in accordance with the requirements of 11 USC §365(b) and provides adequate assurance of future performance by the assignee. 11 USC §365(f)(2).Thus, a debtor-tenant moving to assume or assign a lease must make an affirmative showing addressing these issues, and a landlord objecting to such a motion would challenge such a showing (see §14.50). Because of the need for retail tenants to move quickly on decisions once made, however, retail debtors often seek court approval of expedited procedures for assumption or rejection of leases, and bankruptcy courts routinely grant such motions. Once such procedures are in place, the time and opportunity for landlords to object to debtors' decisions about their leases are often considerably reduced.

PRACTICE TIP: Because of the current trend of approving expedited procedures, the need for vigilant monitoring and taking swift action to assert a landlord's rights is more acute than ever. For a sample objection to a proposed expedited procedures motion, see §14.62B.

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§14.50 2. Grounds for Motion or Objection

As with a residential lease (see §14.36), when a trustee (or debtor in possession) assumes a commercial lease, all defaults must be cured and adequate assurances of future performance must be given. 11 USC §365(b)(1). In addition, however, with respect to assumption of a lease in a shopping center under 11 USC §365(b)(3), adequate assurance of future performance is specifically defined to mean that:

- The source of rent and financial condition of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, when the debtor became the lessee;
- The percentage rent due under the lease will not substantially decline;
- Assumption or assignment is subject to all the terms of the lease, including radius, use, location, and exclusivity provisions, and will not breach any such provisions; and
- Assumption of assignment will not disrupt the tenant mix or balance in the shopping center.

Because the requirements for assumption and assignment of nonresidential real property leases are so specific, the grounds for landlords to object to assumption or assignment are obviously that the statutory requirements are not met. Landlords may oppose a motion to assume the lease if the motion, *e.g.,* does not provide for a complete and prompt cure of defaults, does not provide adequate assurances that the assignee will be able to pay the rent, or (in the case of a shopping center lease) does not show that the assignee will abide by all terms of the lease, including the use, radius, and other terms mentioned in §365(b)(3). In order to preserve the time and opportunity to analyze a proposed showing of adequate assurances before an assignment, landlords should carefully scrutinize any motion to approve expedited procedures for assumption of leases. See §§14.49 and 14.62B.

Although §365(b)(3) contains restrictions on the right to assign a shopping center lease, §365(f)(1) allows a court to approve an assignment despite language in a lease that would restrict or limit the tenant's right to assign. Formerly, it was unclear whether §365(f)(1) would allow a court to approve an assignment that violated §365(b)(3). Because bankruptcy courts are generally focused on realizing value from leases for the estate, some courts held that a use restriction that effectively prevented assignment could be viewed as an unlawful restriction on bankruptcy rights and disregarded under §365(f). See, *e.g., In re Rickel Home Ctrs.* (D Del 1998) 240 BR 826*,* appeal dismissed as moot (3d Cir 2000) 209 F3d 291. Other courts held that the specific provisions in §365(b)(3) trump the more general provision of §365(f), so an assignment in violation of a use restriction in a shopping center lease cannot be approved. *Trak Auto. Corp. v West Town Ctr. (In re Trak Auto Corp.)* (4th Cir 2004) 367 F3d 237 (reversing lower court decisions allowing the assignment). The BAPCPA resolved this debate and strengthened a landlord's ability to object to an assignment of the lease for a nonconforming use. The BAPCPA confirms that the restrictions on assignment in §365(b) prevail over the court's ability to disregard anti-assignment language in §365(f). The power to assign under §365(f) is now expressly limited by §365(b). See 11 USC §365(f)(1).

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§14.51 3. Recovering Attorney Fees to Enforce Lease

For years, counsel representing landlords in bankruptcy proceedings were burdened with an anomalous rule that attorney fees incurred in bankruptcy litigation seeking to "enforce the contract" may be recoverable (if recoverable under substantive state law), but fees incurred litigating issues unique to the bankruptcy context were not. See, *e.g.*, *Collingwood Grains, Inc. v Coast Trading Co. (In re Coast Trading Co.)* (9th Cir 1984) 744 F2d 686; *Fobian v Western Farm Credit Bank (In re Fobian)* (9th Cir 1991) 951 F2d 1149. This rule was problematic, because the only way to enforce contractual rights against a party in bankruptcy was in a bankruptcy proceeding. Yet under *Fobian*, fees incurred litigating bankruptcy issues were not recoverable. In 2007, a unanimous United States Supreme Court struck down the *Fobian* rule, holding that a claim for attorney fees could not be disallowed solely because the fees were incurred litigating bankruptcy issues. *Travelers Cas. & Sur. Co. of Am. v Pacific Gas & Elec. Co.* (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199. The Court confirmed that a contract allowing recovery of attorney fees that is enforceable under substantive nonbankruptcy law is enforceable in a bankruptcy context unless the Bankruptcy Code expressly provides otherwise. The Court noted that under 11 USC §502(b), a claim is allowed except to the extent the claim implicates any of the nine exceptions in that statute, and since attorney fees are not included in such sections they could not be disallowed simply for arising in the bankruptcy context. The demise of the *Fobian* rule has had a material impact on litigants seeking fees in bankruptcy proceedings, as litigants have pressed for fees in a wide variety of contexts. In *Qmect, Inc., v Burlingame Capital Partners II, LP (In re Qmect, Inc.)* (Bankr ND Cal 2007) 368 BR 882, for instance, a bankruptcy court that had previously denied a motion for attorney fees to a successful defendant in an adversary proceeding, based on the *Fobian* rule, granted an amended motion to recover such fees based on the change in law represented by *Travelers.* In other cases, courts have denied fees anyway, finding the litigation was not the source of the state law right, or that the claim was not entitled to administrative status. See, *e.g., In re Decker* (Bankr D Mont 2008) 2008 Bankr Lexis 982 and *In re Security Aviation, Inc.* (Bankr D Alaska 2007) 374 BR 720.

In the landlord-tenant context, the source in federal law of a landlord's claim to attorney fees is 11 USC §365(b)(1), which requires compensation for "actual pecuniary loss" as part of a debtor-tenant's cure of defaults required for assumption of the lease. See, *e.g., Andrew v KMR Corp. (In re Bullock)* (BAP 9th Cir 1982) 17 BR 438. In *Bullock,* after a "considerable amount of legal maneuvering," the trustee was permitted to assume the lease. In connection with the assumption, the bankruptcy court awarded the landlord its fees and the bankruptcy appellate panel affirmed, stating that the purpose of 11 USC §365(b)(1)(B) is "to indemnify the other party to the contract or lease being assumed, against loss," and noted that the purpose of an attorney fee clause in a lease was the same. 17 BR at 439. Moreover, attorney fees and interest may be recoverable if necessary to enforce a landlord's right to receive postpetition amounts due under a lease and authorized by the lease. See *Urban Retail Props. v Loews Cineplex Entertainment* (SD NY 2002) 2002 US Dist Lexis 6186, 2002 WL 535479 (allowing fees and interest under §365(d)(3)); *In re Entertainment, Inc.* (Bankr ND Ill 1998) 223 BR 141, 151 (allowing fees and interest in connection with an assumed lease).

Some bankruptcy courts have relied on the reasoning in *Bullock* to award lessors their attorney fees as part of the obligations of 11 USC §365. See, *e.g., In re Pacific Sea Farms, Inc.* (Bankr D Haw 1991) 134 BR 11, 16; *In re 2495 Broadway Supermarket, Inc.* (Bankr SD NY 1989) 97 BR 765; *In re Westworld Community Healthcare, Inc.* (Bankr CD Cal 1989) 95 BR 730. In *Westworld,* the court devised a three-pronged test for approving attorney fees in connection with an assumed lease (95 BR at 734):

(1) Does the expense directly or indirectly relate to a default under the lease?

(2) If so, was the expense necessary to cure the default, adequately protect the landlord against future defaults, or indemnify the landlord against loss?

(3) If so, was the expense reasonable under the circumstances?

This test was cited and applied in *In re Pacific Sea Farms, Inc., supra*.

But the decision in *Westworld* was criticized by the bankruptcy appellate panel in *Lacey v Westside Print Works, Inc. (In re Westside Print Works, Inc.)* (BAP 9th Cir 1995) 180 BR 557 for indicating in dicta that fees might be allowed independent of a fees clause. Attorney fees may not be recoverable if the scope of the fees clause in the contract would not cover the actions taken by the landlord for which the fees were claimed, if they were incurred for handling bankruptcy matters unrelated to the curing of defaults or for prepetition matters, or if the lease is ultimately rejected. See, *e.g., Abercrombie v Hayden Corp. (In re Abercrombie)* (9th Cir 1998) 139 F3d 755, 759; *In re Westside Print Works, Inc.*, *supra; In re Pacific Arts Publ'g, Inc.* (Bankr CD Cal 1996) 198 BR 319. Likewise, one court held that an attorney fees clause allowing recovery of fees to the prevailing party in a dispute arising from a breach of the lease is

not broad enough to support recovery of fees on assumption of the lease in bankruptcy. *In re I-Mind Educ. Sys., Inc.* (Bankr ND Cal 2001) 269 BR 47. In addition, attorney fees resulting from a debtor's postpetition conduct are not recoverable as an administrative expense if they arise from litigation commenced prepetition on a prepetition contract. *Decker v Kadjevich (In re Kadjevich)* (9th Cir 2000) 220 F3d 1016. On the other hand, if the litigation is commenced by the trustee and fails, fundamental fairness may support an award of attorneys fees to the prevailing party, as an administrative expense. *In re Good Taste, Inc.* (Bankr D Alaska 2004) 317 BR 112.

In recent years, the Ninth Circuit has emphasized that the language of the attorney fees clause in the particular lease is a threshold issue in allowing administrative priority to attorney fees incurred in obtaining payment of administrative obligations. In *Cukierman v Uecker (In re Cukierman)* (9th Cir 2001) 265 F3d 846, the Ninth Circuit reversed the BAP's decision that attorney fees incurred in an administrative rent claim were entitled to administrative priority. The court noted that the fee clause in the contract—like many such clauses—applied to an action or proceeding in which there was a prevailing party, and the Ninth Circuit did not view the bankruptcy litigation as falling within that definition. In light of *Travelers Cas. & Sur. Co. of Am. v Pacific Gas & Elec. Co.* (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199, it is unclear to what extent the Ninth Circuit's strict interpretation of the attorney fee clause in *Cukierman* will still apply to a claim for attorney fees as an administrative expense under 11 USC §365(b), since "bankruptcy litigation" itself is no longer a bar to recovery of contractual attorney fees.

PRACTICE TIP: Although the usual language awarding attorney fees to the prevailing party in an action or proceeding is appropriate in the context of nonbankruptcy litigation, practitioners may want to modify their attorney fees clauses with additional language to apply in the event of the tenant's bankruptcy, such as specifically providing that attorney fees are due "on demand" when they are incurred in connection with asserting or protecting the landlord's rights under the lease in a bankruptcy proceeding of the tenant. Moreover, because the *Fobian* rule against recovering fees in "bankruptcy litigation" is gone, counsel should not hesitate to press for recovery of attorney fees when a lease is assumed or, in appropriate contexts, for claims litigation, as well as in state court litigation after a bankruptcy case has been dismissed. See *e.g., Circle Star Assocs. v Liberate Technols.* (2007) 147 CA4th 1203, 55 CR3d 232; *Chinese Yellow Pages v Chinese Overseas Mktg. Serv. Corp.* (2008) 170 CA4th 868, 88 CR3d 250 (reversing trial court's denial of postjudgment attorney fees incurred in connection with judgment debtor's bankruptcy, in light of rule in *Travelers*).

See §14.55 concerning the impact of the cap (on a landlord's claim for rejection damages) on the recoverability of attorney fees.

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§14.52 4. Effect of Assumption and Assignment

As part of the assumption process, landlords are entitled to a cure of all existing defaults. 11 USC §365(b)(1). This means the debtor will typically submit proposed cure amounts in any motion to approve the assumption or assignment of a commercial lease.

WARNING: Landlord counsel should scrutinize such motions and confirm with clients the correct amount of the proposed cure payment, so that a landlord can timely object or submit the correct amount required to be paid as a cure in connection with the assumption.

After a lease has been assumed and assigned, the new assignee becomes the responsible tenant under the lease, and the debtor has no further liability under it. 11 USC §365(k). If the lease is assumed but not assigned, the obligations of the lease become administrative obligations of the estate, entitled to payment and priority under the Bankruptcy Code, even if a lease is later rejected when a reorganization fails. 11 USC §§503(b), 507; *Nostas Assocs. v Costich (In re Klein Sleep Prods.)* (2d Cir 1996) 78 F3d 18; *Eliot v Four Seasons Props. (In re Frontier Props.)* (9th Cir 1992) 979 F2d 1358, 1367. Note, however, that the BAPCPA (see §14.1A) limits a landlord's administrative claim for rejection of a lease after it has been assumed. 11 USC §503(b)(7).

Under the BAPCPA, the landlord's administrative claim for rejection of a previously assumed lease is capped at the sum of all monetary obligations due under the lease (except those arising from a failure to operate or a penalty rate or provision) for a period of 2 years from the *later of* rejection of the lease or the date of actual surrender of the premises. 11 USC §503(b)(7). No setoffs or reductions of this administrative claim amount are allowed except for amounts actually received or to be received from a third party. 11 USC §503(b)(7). While this amendment caps the administrative claim, the balance of the landlord's damages from the rejection would be a general unsecured claim, calculated in accordance with §502(b)(6). See 11 USC §503(b)(7). See also §14.55.

The administrative obligation of an assumed lease may be converted to a general unsecured claim if the debtor *refiles* a second Chapter 11 bankruptcy (sometimes referred to as a "Chapter 22"). See, *e.g., In re Jartran, Inc.* (7th Cir 1989) 886 F2d 859, 871; *In re Jamesway Corp.* (Bankr SD NY 1996) 202 BR 697, 702. If the reorganization plan has not been substantially consummated by a distribution to creditors, and the circumstances underlying the refiling were foreseeable, however, creditors may be able to get the second filing dismissed. *In re Delaware Valley Broadcasters Ltd. Partnership* (Bankr Del 1994) 166 BR 36. See also *In re Brown* (Bankr WD Va 2009) 399 BR 162 (dismissing Chapter 13 debtor's second filing while first case pending, as filed in bad faith). Note also that the BAPCPA includes substantial changes to the dismissal statutes in the Bankruptcy Code, expanding the availability of dismissal for repeat filings. See §14.32.

For further discussion of bankruptcy limitations on landlords' damage awards, as well as pre-bankruptcy workout agreements, see Office Leasing: Drafting and Negotiating the Lease, chap 47 (Cal CEB 1996).

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D. Rejection of Lease

§14.53 1. Automatic Rejection or Noticed Motion

Unlike moving to assume a lease or for an extension of time to make the decision, a debtor may reject a lease by doing nothing at all. If a debtor does not make a motion to assume or to extend the time within 120 days after the petition is filed, or within the additional 90 days that the court may allow, the lease is "deemed rejected." 11 USC §365(d)(4). If the court grants a 90-day extension, the court may only grant a subsequent exception if the lessor gives prior written consent. 11 USC §365(d)(4)(B)(ii). If the debtor wishes to reject the lease *sooner* than the expiration date for assumption, the debtor must make a noticed motion. Because postpetition (administrative) rent must be paid through the date that the order approving the rejection is entered, regardless of whether the estate derives any benefit from the premises before the rejection, debtors typically make motions to reject leases in order to shorten the time period during which they must pay postpetition rent. Debtors have much latitude to reject executory contracts (including leases), and courts will apply a liberal business judgment rule to the decision. See *e.g.*, *Agarwal v Pomona Valley Med. Group, Inc. (In re Pomona Valley Med. Group, Inc.)* (9th Cir 2007) 476 F3d 665, 670, citing many cases on this point.

Because landlords have an administrative claim for postpetition rent through the date of rejection, landlords and debtor-tenants have disagreed about whether a formal order approving the rejection is required before the debtor's administrative rent obligation ceases. If the lease has not been deemed rejected under 11 USC §365(d)(4), many courts have held that rejection is effective when the court enters an order approving the rejection. See, *e.g., Thinking Machs. Corp. v Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.)* (1st Cir 1995) 67 F3d 1021; *Maroon v Four Star Pizza (In re Four Star Pizza)* (Bankr WD Pa 1992) 135 BR 498, 501. See also *WB, Ltd. v Tobago Bay Trading Co. (In re Tobago Bay Trading Co.)* (Bankr ND Ga 1991) 142 BR 528, 532; *In re Worths Stores Corp.* (Bankr ED Mo 1991) 130 BR 531.

Some courts have held that court authorization is not required and that a rejection can be effective when a motion to reject is filed. See, *e.g., In re Joseph C. Spiess Co.* (Bankr ND Ill 1992) 145 BR 597, authorities allowing retroactive rejection, cited in *Thinking Machs. Corp. v Mellon Fin. Servs. Corp., supra,* and *In re South Lincoln Med. Group* (Bankr D Neb 2008) 2008 Bankr Lexis 468. Moreover, a bankruptcy court has equitable authority to allow rejection of a commercial lease retroactive to the date of the motion, when a debtor-tenant acts diligently and the landlord does nothing to secure rejection sooner. *Pacific Shores Dev., LLC v At Home Corp. (In re At Home Corp.)* (9th Cir 2004) 392 F3d 1064. In *Pacific Shores,* the tenant gave notice on the day of its petition of an intent to reject leases for premises it had never actually occupied, and sought an emergency hearing to allow rejection to be retroactive to the date of the motion. Although the landlord did not receive actual possession until the order was entered 11 days later, the Ninth Circuit affirmed the equitable authority of the bankruptcy court to allow the retroactive rejection on such facts. See also *Duke Realty Ltd. Partnership v North Metro Mill Work Distribs., Inc. (In re Manis Lumber Co.)* (Bankr ND Ga, Feb. 6, 2009, No. 08-40398) 2009 Bankr Lexis 506 (allowing equitable adjustment of effective date of rejection to 10 days after service of debtor's rejection motion). In recent years, debtors in larger cases have sought to avoid these issues by seeking bankruptcy court approval of streamlined procedures for assumption or rejection of leases. Through such procedures, debtors can avoid the time and expense of a formal motion to reject a lease, and have such rejection effective automatically after giving a notice and expiration of a specified period (often 10 days) without a landlord objection.

PRACTICE TIP: The result in *Pacific Shores* was heavily dependent on the unique facts of that case. In the usual context, with a tenant in possession, administrative rent should continue to accrue, and rejection should not be effective until possession is actually surrendered. To preserve the right to administrative rent for the full post-petition period until the landlord can effectively relet the premises, landlords should ask that any rejection not be effective until the *later of* the date of entry of the order or the date that possession is actually surrendered. See §14.54. Landlords should also insist that any rejection procedures order include a minimum amount of notice of a rejection and an *outside date* for exercising the right. See form at §14.62B.

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§14.54 2. Requires Relinquishment of Possession

If a nonresidential lease is rejected, it may no longer be assumed and assigned, and hence the premises must *immediately* be surrendered to the landlord. 11 USC §365(d)(4); *George v City of Morro Bay (In re George)* (9th Cir 1999) 177 F3d 885; *Anderson v Elm Inn, Inc. (In re Elm Inn, Inc.)* (9th Cir 1991) 942 F2d 630, 633. See §14.31. If the property is not voluntarily vacated, a landlord may apply ex parte for an order directing the tenant to surrender the property and permitting a sheriff or marshal to execute the order for possession. See sample forms in §§14.68-14.69. Moreover, if personal property remains on the premises after the debtor's tenant has vacated and rejected the lease, the landlord has an administrative priority claim for the reasonable value of storage of the property until it is removed. See *In re Pyxsys Corp.* (Bankr D Mass 2003) 288 BR 309, 316.

Note, however, that if possession is not surrendered after rejection, and no action is taken to compel surrender, the rejection itself may not terminate the lease. See *McLaughlin v Walnut Props., Inc.* (2004) 119 CA4th 293, 14 CR3d 369. In *McLaughlin,* a ground lease was deemed rejected for failure to timely assume it in bankruptcy, but the ground tenant never formally surrendered possession, and the bankruptcy case was later dismissed. Noting a recent federal trend to require surrender along with rejection to terminate lease obligations, the court of appeal held that the rejection of the ground lease was only a breach and did not terminate a lease. 119 CA4th at 300. The court reasoned that to conclude otherwise "would allow unscrupulous lessees to evade their contractual obligations by the simple expediency of filing for bankruptcy, then dismissing their petition after the lease had been rejected." 119 CA4th at 301.

PRACTICE TIP: Although the *McLaughlin* decision concluded that lease rejection did not equal lease termination, its main concern was to preserve the landlord's right to contractual damages against the debtor-tenant when the case is dismissed after rejection. For this purpose, its rejection/termination analysis may be unnecessarily confusing. In bankruptcy, the landlord's claim for damages after a lease rejection would be capped according to the formula of 11 USC §502(b)(6). See §14.55. But if the bankruptcy is dismissed, the landlord can claim the full damages allowed by state law under CC §1951.2. Thus, the practical effect of the *McLaughlin* analysis appears to be that the landlord's obligation to mitigate its rental damages did not accrue until after the rejection, when the debtor clearly relinquished any interest in the property.

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§14.54A 3. Effect on Rights Held by Nondebtor Parties

While rejection of a nonresidential lease requires the tenant to vacate and surrender possession, the impact on third parties is less obvious but can be very important. For instance, subtenants claiming a right of possession through a master tenant that has rejected a lease *lose their right of possession* if the master lease is rejected in bankruptcy. *Syufy Enters. Ltd. Partnership v City of Oakland* (2002) 104 CA4th 869, 128 CR2d 808. Unlike a right of possession, however, a right of first refusal or third party option rights attached to a lease may survive a debtor's rejection of the lease. Because landlords sometimes include specific property rights (*e.g.,* to purchase equipment) that arise upon termination of the lease, they need to know whether a tenant can frustrate those rights by rejecting its other obligations under a lease. In the Ninth Circuit, a debtor is unlikely to be allowed to avoid an option by rejecting the underlying contract. *In re Helms Constr. & Dev. Co.* (9th Cir 1998) 139 F3d 702; *In re Bergt* (Bankr D Alaska 1999) 241 BR 17.

In *Helms*, the debtor sought to sell property free and clear of an option of the original seller to repurchase the property, claiming the option was an executory contract that it had rejected. 139 F3d at 703. Reciting the *Countryman* definition, the Ninth Circuit noted that an option is not executory unless further performance is required from both sides before the bankruptcy petition is filed. If an option has been paid for and requires no performance unless it is exercised, and has not been exercised when the petition is filed, it is not executory and thus cannot be rejected by the debtor. 139 F3d at 706. In *Bergt*, the bankruptcy court analyzed a right of first refusal, and went a step further than *Helms* in holding that even if the right were an executory contract, a debtor's rejection of it would not result in avoidance of any property interest held by a nondebtor party. 241 BR at 21. In *Bergt*, Judge Herbert Ross supported his conclusion with an exhaustive and scholarly analysis of the numerous divergent authorities on this question, which can provide great assistance to any court or counsel grappling with the issue in the future. A later decision from Delaware, however, rejected the *Bergt* decision and called it the "minority" view. See *In re Kellstrom Indus., Inc.* (Bankr D Del 2002) 286 BR 833 (creditor's right of first refusal to purchase debtor's property was executory contract that could be rejected).

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§14.55 4. Landlord's Claim for Rejection Damages; Unsecured Claim

Rejection of a lease is deemed to be a breach of the lease occurring immediately *before* the petition was filed. 11 USC §365(g)(1). Consequently, a landlord's claim for damages resulting from the breach is treated as a general unsecured claim that is not entitled to administrative priority under 11 USC §507. (In contrast, the BAPCPA (see §14.1A) allows a landlord an administrative claim for rejection of a lease *after* it has been assumed. See 11 USC §503(b)(7), discussed in §§14.43, 14.52.)

The landlord can and should assert its unsecured claim for rejection damages by filing a proof of claim promptly after the rejection occurs and definitely before any claims bar date (see form in §14.59). Note that in Chapter 7 and 13 cases, the claims bar date is set by statute to be 90 days following the *first date* set for the meeting of creditors under 11 USC §341. See Fed R Bankr P 3002(c). In Chapter 11 cases, the claims bar date is set by the court, usually in response to the debtor's motion to set it on a particular date. Fed R Bankr P 3003(c)(3).

Under 11 USC §502(a), a proof of claim is deemed allowed unless a party in interest objects. Thus, filing a timely claim with sufficient documentation creates a presumption of the validity of the claim. Moreover, a bare objection to a claim, without substance, may be inadequate to overcome the presumption of a claim's validity, even if the claim lacks appropriate documentation. See *Campbell v Verizon Wireless S-CA (In re Campbell)* (BAP 9th Cir 2005) 336 BR 430. Moreover, recent amendments to the bankruptcy rules include new limitations on debtors' ability to make "omnibus" objections to invalidate large numbers of claims without making a showing as to each one. See Fed R Bankr P 3007. These changes make it more likely that a proper proof of claim, timely filed, will survive and that the claimant will receive its share in any eventual distribution, absent a specific objection by the debtor. If the debtor rebuts the presumption of validity with a meritorious objection, however, the claimant has the burden of proving the amount of the claim. See *Litton Loan Servicing v Garvida (In re Garvida)* (BAP 9th Cir 2006) 347 BR 697.

The amount of a landlord's unsecured claim for damages resulting from the rejection of a lease is limited in bankruptcy. Although the claim may include the full amount of any unpaid prepetition rents (11 USC §502(b)(6)(B)), the amount of a claim for damages resulting from the rejection of the lease is limited to the greater of (a) 1 year's rent or (b) 15 percent of the rent reserved for the remainder of the term of the lease, not to exceed 3 years' rent. 11 USC §502(b)(6)(A).

NOTE: While the cap can substantially reduce a tenant's exposure under a long-term lease, obtaining such a limit on damages is not, by itself, a legitimate basis for filing bankruptcy. If a solvent tenant files bankruptcy simply to cap the lease damages, the landlord should move to dismiss the case for bad faith. See §§14.32, 14.56.

This cap on damages that a landlord may claim in bankruptcy applies not only to a debtor-tenant, but also to a debtor-guarantor of lease obligations. *Arden v Motel Partners (In re Arden)* (9th Cir 1999) 176 F3d 1226. In order for charges that may not be designated as "rent" to be included in a claim for rejection damages, they must be equivalent to rent under the lease. *Kuske v McSheridan (In re McSheridan)* (BAP 9th Cir 1995) 184 BR 91, 99. *McSheridan* provides a three-part test for determining which charges are equivalent to rent and thus includable in the calculation of the claim, subject to the cap; they must be:

- Designated as "rent" or "additional rent" in the lease;
- Related to the value of the lease; and
- Fixed, regular, and periodic.

In re McSheridan, supra. In a shopping center lease, recurring charges for common area maintenance, insurance, and taxes typically meet the definition of "rent" and may be included in the claim. Note that the cap will apply to all damages resulting from lease termination. Hence, if the lease is terminated under state law before the bankruptcy, the damages limitation of 1 year or 15 percent under 11 USC §502(b)(6)(A) will apply to all amounts accruing from that prepetition termination date. *In re Connectix Corp.* (Bankr ND Cal 2007) 372 BR 488. This is true even if future damages attributable to lost rent for the full lease term were awarded to the landlord in a judgment before the bankruptcy. *Mid-Wilshire Assocs. v Lomax (In re Lomax)* (BAP 9th Cir 1996) 194 BR 862. Attorney fees recoverable under such an action, however, may be claimed in addition to the capped amount of rental damages allowed by §502(b)(6). See *Wall Street Plaza, LLC v JSJF Corp. (In re JSJF Corp.)* (BAP 9th Cir 2006) 344 BR 94, aff'd and remanded (9th Cir 2008) 2008 US App Lexis 10320.

On its face, 11 USC §502(b)(6) applies to cap damages "resulting from the termination of a lease of real property." Courts have reached divergent conclusions, however, concerning whether all of a landlord's potential damages against

a debtor-tenant were subject to this statute. Previously, dicta in *In re McSheridan, supra,* stating that a debtor's rejection of a lease "results in the breach of each and every provision of the lease, including covenants," suggested that a landlord's claim was limited to whatever could be included in a claim under §502(b)(6). *Kuske v McSheridan,* 184 BR at 102. Under this analysis, if a landlord had damages from a tenant breach that did not meet the definition of "rent reserved" under *McSheridan,* not only could such damages not be included in the calculation of the claim allowed by §502(b)(6), but also they arguably could not be claimed at all. See *e.g., In re Gantos, Inc.* (Bankr WD Mich 1995) 181 BR 903, 907 (unused construction allowance cannot be claimed separately from §502(b)(6)); *In re Pacific Arts Publ'g, Inc.* (Bankr CD Cal 1996) 198 BR 319, 322 (sustaining objection based on §502(b)(6) to lessor's claim for attorney fees); *In re Edwards Theatres Circuit, Inc.* (Bankr CD Cal 2002) 281 BR 675 (disallowing landlord's damages claim for failure to construct theatre, without reaching scope of §502(b)(6)); *New Valley Corp. v Corporate Prop. Assocs. (In re New Valley Corp.)* 2000 US Dist Lexis 12663 (holding deferred maintenance claim is subject to §502(b)(6) and disallowing claim because it did not meet the definition of "rent reserved").

This view was rejected in 2006 in *Wall Street Plaza, LLC v JSJF Corp., supra,* which clarified *McSheridan* and criticized *Pacific Arts Publ'g* and *Edwards Theatres Circuit,* in confirming that a lessor may have an uncapped claim for something other than damages resulting from the termination of the lease. The court explained that "the 'landlord's cap' of §502(b)(6) may limit the amount of a lessor's claim, but is not a criterion for its allowance…." *Wall Street Plaza, LLC,* 344 BR at 101. Accordingly, the bankruptcy court's disallowance of a landlord's claim for attorney fees (in litigating a prepetition breach of lease case) because it is not for "rent" (as defined by *McSheridan*) is an error of law. In 2007, the Ninth Circuit confirmed that claims for damages not directly arising from the rejection of the lease are not limited by the §502(b)(6) cap, expressly overruling *McSheridan* to the extent that it suggests otherwise. *Saddleback Valley Community Church v El Toro Materials Co. (In re El Toro Materials Co.)* (9th Cir 2007) 504 F3d 978 (tort claims for waste, nuisance, and trespass arising from massive pile of dirt left on premises after rejection not subject to damages cap of §502(b)(6)).

These decisions are consistent with an established line of cases holding that certain kinds of damage claims that do not result from termination of the lease may be claimed by landlords in addition to their capped claims under §502(b)(6). See *In re Atlantic Container Corp.* (Bankr ND Ill 1991) 133 BR 980 (claim for intentional damage to property and failure to maintain); *In re Farley* (Bankr ND Ill 1992) 146 BR 739 (equipment taken); *In re Bob's Sea Ray Boats, Inc.* (Bankr D ND 1992) 143 BR 229 (property damages); *In re Q-Masters, Inc.* (Bankr SD Fla 1991) 135 BR 157 (property damages and vandalism); *In re Best Prods. Co.* (Bankr ED Va 1998) 229 BR 673 (allowing claim for prepetition deferred maintenance in addition to a §502(b)(6) claim). Moreover, claims based on nonrent breaches may also be entitled to administrative priority, depending on when they occurred. Compare, *e.g., K-4, Inc. v Midway Engineered Wood Prods., Inc. (In re Treesource Indus.)* (9th Cir 2004) 363 F3d 994 (debtor's obligation to restore premises to prelease condition was a prepetition claim, not entitled to administrative priority); *In re Nat'l Refractories & Minerals Corp.* (Bankr ND Cal 2003) 297 BR 614 (cleanup costs would be allowable and allocable as an administrative or prepetition claim, according to when events giving rise to them occurred). Of course, if the claimed damages are directly a result of the rejection breach, they will not be allowed in addition to the capped amount of rent allowable. *In re Brown* (Bankr ND Ohio 2008) 398 BR 215 (refitting costs resulting from rejection included in section 502(b)(6) capped claim).

PRACTICE TIP: Landlords with claims for damages resulting from breaches other than rejection or termination of the lease should claim them *in addition to* amounts allowable under 11 USC §502(b)(6). Such claims might include damages for failure to maintain, failure to keep the premises free of liens, failure to construct the premises, or attorney fees in litigating a prepetition breach of lease case. For a discussion regarding the recovery of attorney fees incurred in a bankruptcy proceeding, see §14.51.

Landlords with rent escalators in their leases should be aware that there is a split of authority concerning whether 15 percent "of the rent reserved" means the rent for the first 15 percent of the term remaining (a *time* calculation), or 15 percent of the total rent and charges to the end of the term (a *money* calculation). The former view, which seems to have the edge in California, generally reduces a landlord's claim by not allowing the landlord to include the value of escalated rent; the latter view allows landlords to claim a capped amount of escalated rental damages through the end of the lease term. Compare *In re Connectix Corp.* (Bankr ND Cal 2007) 372 BR 488 (time), *In re Iron-Oak Supply Corp.* (Bankr ED Cal 1994) 169 BR 414, 420 (time), and *In re Allegheny Intern., Inc.* (Bankr WD Pa 1991) 136 BR 396 (time) with *In re Gantos, Inc.* (Bankr WD Mich 1995) 176 BR 793 (money), *In re Today's Woman of Florida, Inc.* (Bankr MD Fla 1996) 195 BR 506 (money), and *In re Bob's Sea Ray Boats, Inc.* (Bankr D ND 1992) 143 BR 229 (money).

PRACTICE TIP: Counsel preparing a claim should clearly explain the basis for the claim and attach all relevant supporting documents, including a narrative explanation of the facts underlying the claim, the calculation of the

claim amount, spreadsheets itemizing the amounts included in the calculation, and a copy of the lease. By doing so, landlords can invoke the presumption that their claim is prima facie valid under Fed R Bankr P 3001(f) and reduce the chance of a later objection to the claim. It will also help landlord's counsel understand and defend the claim if an objection is made later. (Sometimes years can elapse between the filing date of a claim and the time the bankruptcy estate is actually deciding which claims to allow or challenge.)

Security deposits may only be applied to the *capped amount* of damages allowable on a landlord claim under §502(b)(6). See *AMB Prop., LP v Official Creditors for the Estate of AB Liquidating Corp. (In re AB Liquidating Corp.)* (9th Cir 2005) 416 F3d 961; *Oldden v Tonto Realty Corp.* (2d Cir 1944) 143 F2d 916. Landlords holding deposits in excess of this sum may be required to disgorge such funds to the bankruptcy estate. *In re Pyxsys Corp.* (Bankr D Mass 2003) 288 BR 309, 319. Accordingly, secured landlords should consider applying deposits promptly in the event of a tenant default. Note, however, that *Oldden* rule may not apply if the landlord never files a proof of claim. See discussion of *In re Stonebridge Technols., Inc.* (5th Cir 2005) 430 F3d 260 in §14.12.

For further discussion, see Wang & Bradbury, *Commercial Lease Termination Damages—Calculation and Application of the Bankruptcy Cap,* 26 Cal Real Prop J 33 (No. 2, 2008).

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§14.56 VI. SANCTIONS AND ETHICAL CONSIDERATIONS

The good faith mandates and remedies found in Fed R Civ P 11 apply to bankruptcy proceedings. See Fed R Bankr P 9011. The rule requires a good faith, objective basis for signing and filing pleadings in federal court proceedings. When the court determines a bankruptcy petition is filed not to reorganize, but simply to delay an existing proceeding and frustrate a creditor, the case may be properly dismissed for bad faith, with sanctions ordered against the debtor. See *Price v U.S. Trustee (In re Price)* (9th Cir 2004) 353 F3d 1135 (dismissal of Chapter 7 appropriate if debtor could have paid debts through Chapter 13); *Moneymaker v CoBen (In re Eisen)* (9th Cir 1994) 31 F3d 1447. Likewise, a debtor's bad faith concealment of assets can work a forfeiture of the debtor' right to convert from Chapter 7 to Chapter 13. *Marrama v Citizens Bank of Massachusetts* (2007) 549 US 365, 166 L Ed 2d 956, 127 S Ct 1105. When an otherwise solvent debtor files bankruptcy for the purpose of obtaining the limit on a landlord's claims for damages for breach of lease provided by 11 USC §502(b)(6), the case may be properly dismissed. See *NMSBPCSLDHB, LP v Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)* (3d Cir 2004) 384 F3d 108, *In re Liberate Technols.* (Bankr ND Cal 2004) 314 BR 206 214, and authorities cited in §14.32. Similarly, dismissal is more appropriate than conversion if more creditors would benefit from dismissal. *Shulkin Hutton, Inc. v Treiger (In the Matter of Owens)* (9th Cir 2008) 552 F3d 958. Alternatively, once the equitable jurisdiction of the bankruptcy court is invoked, a debtor's desire for a jury trial may not constitute sufficient cause to approve the debtor's request for voluntary dismissal of the case, if opposed by creditors and the trustee. *Hickman v Hana (In re Hickman)* (BAP 9th Cir 2008) 384 BR 832. See also *In re Jabarin* (Bankr ED Pa 2008) 395 BR 330 (denying debtor's motion to dismiss to protect family assets as prejudicial to creditors).

Courts are willing to impose significant sanctions against debtor's counsel for bad faith bankruptcy petitions. See *Miller v Cardinale (In re Deville)* (9th Cir 2004) 361 F3d 539 (sanctions for delaying tactics affirmed); *Dressler v Seeley (In re Silberkraus)* (9th Cir 2003) 336 F3d 864 (affirming sanctions of $57,696 against counsel who filed frivolous bankruptcy petition two days before state court trial). Creditors cannot seek redress for a bad faith petition in state court; rather, they must employ the remedies available in the bankruptcy proceeding. See *Choy v Redland Ins. Co.* (2002) 103 CA4th 789, 127 CR2d 94. The Bankruptcy Court also has continuing jurisdiction, even after dismissal of the case, to annul the stay retroactively to validate actions that might otherwise be void because of a debtor's bad faith filing. *Aheong v Mellon Mortgage Co. (In re Aheong)* (BAP 9th Cir 2002) 276 BR 233.

If a tenant files a petition in bankruptcy solely to avoid eviction, the filing may constitute an abuse of the bankruptcy process, and may subject both the tenant and his or her attorney to sanctions. See *National Home Equity Corp. v Villareal (In re Villareal)* (Bankr CD Cal 1984) 46 BR 284 (filing for bankruptcy solely to avoid foreclosure when debtor has no unsecured debts subjects debtor and attorney to sanctions). Note that the BAPCPA (see §14.1A) contains a special exception to the automatic stay if a judgment for possession of residential rental property has been entered before the bankruptcy. See 11 USC §362(b)(22), discussed in §14.16. The court may also sanction an attorney if it finds a petition was unjustifiably filed to frustrate a pending eviction. *Norwest Mortgage, Inc. v Waters (In re Waters)* (Bankr ED Wis 1986) 60 BR 339, 343. Sanctions or an injunction to enjoin a person from acting as a bankruptcy petition preparer can be issued if there is appropriate notice and specific findings. *Demos v Brown (In re Graves)* (BAP 9th Cir 2002) 279 BR 266. Moreover, on requisite findings that debtor's counsel acted in bad faith and committed willful misconduct, the bankruptcy court has inherent authority to suspend a lawyer from practicing in that court. *Price v Lehtinen (In the Matter of Lehtinen)* (9th Cir 2009) 564 F3d 1052.

Note, however, that fee-shifting sanctions for violating Rule 9011 cannot be issued on the court's own motion without providing the 21-day safe harbor (opportunity to cure) required by Rule 9011(c)(1)(a). *Chase v Kosmala (In re Loyd)* (BAP 9th Cir 2003) 304 BR 372 (bankruptcy court's sanctions order reversed). Nor may a sanction of contempt be issued for violating the automatic stay or a discharge injunction without a finding of fact that the violation was made with actual knowledge of the injunction. *ZiLog, Inc. v Corning (In re ZiLog, Inc.)* (9th Cir 2006) 450 F3d 996.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/ VII. BANKRUPTCY FORMS/§14.57 A. Form: Notice of Stay of Proceedings (Judicial Council Form CM-180; Mandatory)

VII. BANKRUPTCY FORMS

§14.57 A. Form: Notice of Stay of Proceedings (Judicial Council Form CM-180; Mandatory)

CM-180

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
TELEPHONE NO.: FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
NOTICE OF STAY OF PROCEEDINGS	CASE NUMBER: JUDGE: DEPT.:

To the court and to all parties:

1. Declarant *(name):*
   a. ☐ is ☐ the party ☐ the attorney for the party who requested or caused the stay.
   b. ☐ is ☐ the plaintiff or petitioner ☐ the attorney for the plaintiff or petitioner. The party who requested the stay has not appeared in this case or is not subject to the jurisdiction of this court.
2. This case is stayed as follows:
   a. ☐ With regard to all parties.
   b. ☐ With regard to the following parties *(specify by name and party designation):*
3. Reason for the stay:
   a. ☐ Automatic stay caused by a filing in another court. *(Attach a copy of the Notice of Commencement of Case, the bankruptcy petition, or other document showing that the stay is in effect, and showing the court, case number, debtor, and petitioners.)*
   b. ☐ Order of a federal court or of a higher California court. *(Attach a copy of the court order.)*
   c. ☐ Contractual arbitration under Code of Civil Procedure section 1281.4. *(Attach a copy of the order directing arbitration.)*
   d. ☐ Arbitration of attorney fees and costs under Business and Professions Code section 6201. *(Attach a copy of the client's request for arbitration showing filing and service.)*
   e. ☐ Other:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF DECLARANT) ▶ (SIGNATURE)

Form Adopted for Mandatory Use
Judicial Council of California
CM-180 [Rev. January 1, 2007]

NOTICE OF STAY OF PROCEEDINGS

CEB
Cal. Rules of Court, rule 3.650
www.courtinfo.ca.gov

Copies: Original (file in state court with original proof of service); copies for service (one for each attorney and unrepresented party and for eviction officer); office copy; client copy.

Comment: This form was adopted by the Judicial Council for mandatory use in the state court action to advise other parties and the court of the filing of a bankruptcy. Under Cal Rules of Ct 3.650(a), the party that caused the stay must file a notice of the stay and attach a copy of the petition or other document that gives notice of the stay of the state court proceeding. Under Cal Rules of Ct 3.650(c), the notice must state whether the action is stayed as to all parties or only certain parties. If the latter, those parties must be identified in the notice. Under Rule 3.650(d), when the stay is

vacated or terminated, the party who files the notice must immediately file and serve a notice of termination or modification of the stay. See also §§14.2, 14.5, 14.67A.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/§14.58 B. Form: Request for Special Notice and Proof of Service

§14.58 B. Form: Request for Special Notice and Proof of Service

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Claimant, _ _[*Name*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*name(s)*]_ _,	)	**Bk. No.** _ _ _ _ _ _
Debtor(s)	)	**Chapter** _ _
	)	
	)	**REQUEST FOR SPECIAL**
_____	)	**NOTICE**

TO THE CLERK OF THE UNITED STATES BANKRUPTCY COURT, THE DEBTOR AND ITS COUNSEL OF RECORD, THE TRUSTEE AND ITS COUNSEL OF RECORD, AND ALL OTHER INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

Pursuant to Bankruptcy Rule 2002, claimant _ _[*name*]_ _ **hereby appears in this action and requests that notice of all actions, proceedings, dismissals, orders, and filings in this action be sent to the claimant in care of the following address:**

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Date: _ _ _ _ _ _ _ _[*Name of Firm*]_ _

By: __[*Signature of Attorney*]__
_ _[*Name of Attorney*]_ _
Attorney for claimant,
_ _[*name*]_ _

PROOF OF SERVICE

I declare that:

I am employed in the City of _ _[*city*]_ _**, California; I am over the age of 18 years and not a party to the within action; and my business address is** _ _[*address*]_ _**.**

On _ _[*date*]_ _**, I caused documents to be served by U.S. Mail postage prepaid, by having true copies placed in a sealed envelope, addressed as follows, and placed in the United States Mail at** _ _[*city*]_ _**, California:**

PARTIES SERVED:

DEBTOR (in pro per):

_ _[*name*]_ _

_ _[*address*]_ _

ATTORNEY FOR DEBTOR:

_ _[*name*]_ _

_ _[*address*]_ _

CHAPTER _ _[*7/11/13*]_ _ TRUSTEE:

_ _[*name*]_ _

_ _[*address*]_ _

UNITED STATES TRUSTEE:

_ _[*name*]_ _

United States Trustee

_ _[*address*]_ _

DOCUMENTS SERVED:

REQUEST FOR SPECIAL NOTICE

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on _ _[*date*]_ _, at San Francisco, California.

__[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, and United States trustee); office copy; client copy.

Comment: Some bankruptcy court districts have a court-prescribed form "request for notice" or "request for special notice." Always check if such a form exists and whether its use is mandatory. Any interested person may file a request for special notice with the bankruptcy court under Fed R Bankr P 2002. See §§14.2, 14.25. Most bankruptcy courts require notice of a motion for relief from the automatic stay (and other proceedings) to be served on all persons who have filed a request for special notice. See, *e.g.,* ND Cal Local Bankr R 9013-3(b). The proof of service should be attached as a separate document at the end of the set of documents being served. The proof of service should identify the capacity and address of each person served. This proof of service form may be adapted for use with all other bankruptcy court forms in this chapter for which notice is required.

WARNING: Most bankruptcy courts have moved away from paper filing. For example, since January 1, 2005, the Bankruptcy Court for the Northern District of California has required all documents to be electronically filed, requiring special training in order to obtain a login name and password. See Amended Operating Order, August 15, 2005, Bankruptcy Court ND Cal. In such courts, paper filings *will not be accepted*, unless the filer obtains an order allowing an exemption to the e-filing requirements. The Northern District has a form application for exemption which lists the limited circumstances in which an exemption is available, including "Infrequent-Filer." See Revised Application for Exemption from Electronic Filing, Bankruptcy Court ND Cal. Nonbankruptcy practitioners intending to file papers in the bankruptcy court should consult the local rules for filing requirements in the court in which the matter is pending. Court websites generally provide extensive details and forms for filing requirements and exemptions.

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C. Landlord's Claim Forms

§14.59 1. Form: Proof of Claim (Official Bankruptcy Form B10)

B 10 (Official Form 10) (12/08)

UNITED STATES BANKRUPTCY COURT	**PROOF OF CLAIM**
Name of Debtor:	Case Number:

NOTE: *This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

Name and address where notices should be sent:

Telephone number:

☐ Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number:_____
(*If known*)

Filed on:_____

Name and address where payment should be sent (if different from above):

Telephone number:

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

If all or part of your claim is entitled to priority, complete item 5.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.

2. Basis for Claim: _____
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: _____

3a. Debtor may have scheduled account as: _____
(See instruction #3a on reverse side.)

4. Secured Claim (See instruction #4 on reverse side.)
Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other
Describe:

Value of Property:$_____ **Annual Interest Rate**___**%**

Amount of arrearage and other charges as of time case filed included in secured claim,

if any: $_____ **Basis for perfection:** _____

Amount of Secured Claim: $_____ **Amount Unsecured: $**_____

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (*See instruction 7 and definition of "redacted" on reverse side.)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

☐ Up to $2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

☐ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

Amount entitled to priority:

$_____

**Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

Date:	**Signature:** The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.	**FOR COURT USE ONLY**

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Print

B 10 (Official Form 10) (12/08) Cont.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the bankruptcy debtor's name, and the bankruptcy case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is located at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. **Amount of Claim as of Date Case Filed:**
State the total amount owed to the creditor on the date of the Bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. **Basis for Claim:**
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if the trustee or another party in interest files an objection to your claim.

3. **Last Four Digits of Any Number by Which Creditor Identifies Debtor:**
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

4. **Secured Claim:**
Check the appropriate box and provide the requested information if the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien documentation, and state annual interest rate and the amount past due on the claim as of the date of the bankruptcy filing.

5. **Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).**
If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. **Credits:**
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. **Documents:**
Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary. FRBP 3001(c) and (d). If the claim is based on the delivery of health care goods or services, see instruction 2. Do not send original documents, as attachments may be destroyed after scanning.

Date and Signature:
The person filing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity owed a debt by the debtor that arose on or before the date of the bankruptcy filing. See 11 U.S.C. §101 (10)

Claim
A claim is the creditor's right to receive payment on a debt owed by the debtor that arose on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car.

A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor should redact and use only the last four digits of any social-security, individual's tax-identification, or financial-account number, all but the initials of a minor's name and only the year of any person's date of birth.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

Copies: Original (file in bankruptcy court or with designated claims agent); copies for service, if required; office copy; client copy. Note that unlike other bankruptcy court filings, proofs of claim are not always required to be served. Counsel should consult the bar date order setting the procedure for filing and service of claims, or the local rules if there is no bar date order.

Comment: This form is available in all bankruptcy court clerks' offices, and should be used for general, unsecured claims; *e.g.,* prepetition delinquent rent and damages resulting from lease rejection are each paid as general, unsecured claims. On the use of this form, see §§14.12, 14.28-14.29, 14.37, 14.40, 14.45, 14.55. On claim filing requirements,

see Fed R Bankr P 3001-3022, and local bankruptcy court rules and regional United States Trustee Guidelines, since requirements may vary among regions, districts, and court departments (see, *e.g.,* ND Cal Bankr Local R 1002-2, 3003-1, 3007-1). See also Warning at §14.58 regarding electronic filing requirements in some courts.

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§14.60 2. Form: Landlord's Request for Payment of Postpetition Administrative Rent; Sample Letter to Debtor's Counsel

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Landlord, _ _[*Name*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*name(s)*]_ _, **Debtor(s)**	)	**Bk. No.** _ _ _ _ _ _
	)	**Chapter** _ _
	)	
	)	**LANDLORD'S REQUEST FOR PAYMENT OF POSTPETITION ADMINISTRATIVE RENT [11 USC §§365(d)(3), 503(b)]**

PLEASE TAKE NOTICE that _ _[*name of landlord*]_ _ **(Claimant), as landlord of those certain nonresidential premises located at** _ _[*address*]_ _ **(Premises), hereby requests immediate payment of** _ _[*dollar amount*]_ _ **in postpetition rental charges payable as administrative expenses for the period of** _ _[*date of default on postpetition lease obligations*]_ _ **through** _ _[*date premises vacated*]_ _**, as described below.**

On or about _ _[*date*]_ _**, Claimant as the landlord, and debtor as the tenant, entered into a written lease for approximately** _ _[*number of square feet*]_ _ **of commercial space in the Premises. The debtor filed its petition in bankruptcy on** _ _[*date*]_ _**, and remained in possession of the property after that date.**

Claimant sought debtor's cooperation in immediately rejecting the lease but debtor declined to do so. During the postpetition period, the debtor remained current on the rentals required under the lease for a period of time, but failed to pay any amounts due under the Lease after _ _[*date of default on postpetition lease obligations*]_ _**. Debtor's time to assume or reject the lease expired on** _ _[*date*]_ _**, on which date the lease was deemed rejected by operation of law under Bankruptcy Code §365(d)(4). On** _ _[*date premises vacated*]_ _**, the debtor relinquished the keys to the Premises and restored Claimant to lawful possession. A calculation and itemization of the amount of the claim, with supporting invoices, is attached hereto.**

WHEREFORE, Claimant hereby requests the debtor to make immediate payment of its postpetition administrative rent claim.

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Claimant, _ _[*name*]_ _

[*Attach itemization of rent claim*]

ITEMIZATION OF ADMINISTRATIVE RENT CLAIM

Rent (prorata)	_ _[*applicable dates*]_ _	_ _[*dollar amount*]_ _
CAM	_ _[*applicable dates*]_ _	_ _[*dollar amount*]_ _
Taxes	_ _[*applicable dates*]_ _	_ _[*dollar amount*]_ _
Total Rent Claim	_ _[*applicable dates*]_ _	_ _[*add above dollar amounts*]_ _

[*Attach supporting invoices or equivalent documentation*]

SAMPLE LETTER TO DEBTOR'S COUNSEL
(this may accompany or precede the above Request for Payment)

Re: _ _[*caption and bankruptcy case number*]**_ _**

Dear _ _[*name of debtor's counsel*]**_ _:**

To follow up on my conversations with your office of earlier this _ _[*week/month*]**_ _, enclosed please find the landlord's request that the debtor immediately remit the sum of _ _**[*dollar amount*]**_ _ due and owing for postpetition rent and charges for the period of _ _**[*date of default on postpetition lease obligations*]**_ _ through _ _**[*date premises vacated*]**_ _. The request includes an itemization of the total and supporting invoices.**

Although you have admitted your client owes rent through _ _[*date lease deemed rejected by operation of law*]**_ _, you have denied responsibility for rent after that date. My client, however, did not obtain possession until _ _**[*date premises vacated*]**_ _.**

[*If appropriate, add*]

Your client changed the locks on the premises while it was in possession, and despite my best efforts to have the keys returned as soon as possible in order to restore my client to possession, the keys were not returned until _ _[*date premises vacated*]**_ _.**

[*Continue*]

Please check with your client about this, and I think you will conclude that your client in fact retained possession and control through _ _[*date premises vacated*]**_ _. As you know, we had been seeking possession since directly after the bankruptcy was filed—we certainly wanted it as soon as possible.**

In any event, unlike other types of administrative claims, postpetition rent is required to be paid timely, and no motion should be necessary. 11 USC §365(d)(3). Further, if we are forced to incur attorney fees to enforce our rights under the lease, we can collect those fees as an administrative claim as well. *In re Narragansett Clothing Co.* (Bankr D RI 1990) 119 BR 388. As I mentioned previously, however, I would like to handle this as economically as possible to avoid unnecessary expense to both sides.

Please let me know if the debtor will pay our postpetition rent claim without requiring us to file a motion and set it for hearing. If there is an informal way to resolve this issue, let me know what you suggest. I look forward to hearing from you soon.

Very truly yours,

_ _[*name of landlord's counsel*]_ _

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy.

Comment: This form should be used to request payment of administrative priority claims, such as postpetition rent. The formal request may be preceded by a letter request, a sample of which accompanies this form. On the use of this form, see §§14.40, 14.46, and Warning at §14.58 regarding electronic filing requirements in some courts.

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§14.61 3. Form: Motion for Allowance and Payment of Administrative Rent Claim; Supporting Memorandum; Supporting Declarations

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Movant, _ _[*Name of landlord*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*name(s)*]_ _,	)	**Bk. No.** _ _ _ _ _ _
Debtor(s)	)	**Chapter** _ _
	)	
	)	**NOTICE OF MOTION AND**
	)	**MOTION FOR ALLOWANCE**
	)	**AND PAYMENT OF**
	)	**ADMINISTRATIVE RENT**
	)	**CLAIM; SUPPORTING**
	)	**MEMORANDUM;**
	)	**SUPPORTING**
	)	**DECLARATIONS [11 USC**
	)	**§§503, 365(d)(3)]**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Courtroom:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*name*]_ _

TO THE HONORABLE _ _[*Name*]_ _, UNITED STATES BANKRUPTCY JUDGE, THE DEBTOR AND ITS COUNSEL OF RECORD, THE UNSECURED CREDITORS' COMMITTEE AND ITS COUNSEL OF RECORD, THE OFFICE OF THE UNITED STATES TRUSTEE, AND ALL OTHER PARTIES IN INTEREST:

PLEASE TAKE NOTICE that on _ _[*date & time*]_ _, or as soon thereafter as counsel may be heard, before the Honorable _ _[*Name*]_ _, United States Bankruptcy Judge, in Courtroom _ _[*number*]_ _ of the United States Bankruptcy Court, located at _ _[*address*]_ _, _ _[*name of landlord*]_ _ (Movant) will and hereby does move for allowance and payment of an administrative expense in the amount of _ _[*dollar amount of rent claim*]_ _ and _ _[*dollar amount of attorney fees earned*]_ _, for a total of _ _[*dollar amount*]_ _. Movant brings this motion pursuant to 11 USC §§503(a), 503(b)(1), and 365(d)(3) to obtain compensation for the postpetition use by _ _[*name of debtor*]_ _ (Debtor) of the premises located at _ _[*address*]_ _ (the Premises) for the period of _ _[*date of default on postpetition lease obligations*]_ _ through _ _[*date premises vacated*]_ _, under a lease executed on _ _[*date*]_ _ (Lease) between the Debtor as tenant and the Movant as landlord.

This motion for allowance and payment of the administrative claim is based on this Notice of Motion and Motion, the accompanying memorandum and exhibits, all matters of record in this case, the attached Declaration(s) of _ _[*name(s)*]_ _, and any arguments or evidence adduced before or at the hearing. Any opposition to the Motion must be in writing, filed with the Clerk of the Bankruptcy Court and served on undersigned counsel at least _ _[*e.g., eleven (11)*]_ _days before the scheduled hearing date. Any failure to file and serve timely opposition shall result in a waiver of any objection to the relief sought in the Motion.

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Movant, _ _[*name*]_ _

MEMORANDUM

I. INTRODUCTION AND FACTS

This is a motion for allowance and payment of an administrative claim for both postpetition rent and the attorney fees incurred in collecting the rent claim. Movant is the owner of nonresidential real property located at _ _[*address*]_ _ (the Premises). On or about _ _[*date*]_ _, the Debtor entered into a written lease of the Premises (the Lease) for a term of _ _[*e.g., five (5)*]_ _ years. _ _[*Refer to supporting evidence, e.g., paragraph number of declaration of party or party witness*]_ _. A true and correct copy of the Lease is attached to the declaration of _ _[*name*]_ _ as Exhibit "A" and is hereby incorporated by reference.

On _ _[*date*]_ _, the Debtor filed its petition commencing the present case under Chapter 11.

On or about _ _[*date*]_ _, the Debtor filed a motion for an order authorizing rejection of the Lease. The Motion stated that the Debtor intended to vacate the Premises on _ _[*date*]_ _. Debtor, in fact, did vacate the Premises on that date. _ _[*Refer to supporting evidence*]_ _.

From the date of the bankruptcy filing until _ _[*date*]_ _, Debtor was in possession of and doing business at the Premises. Despite the provisions of 11 USC §365(d)(3), which required the Debtor, as a debtor in possession, to make timely payments of all amounts due under the Lease pending assumption or rejection, and despite written and oral requests that it do so, the Debtor failed to pay any rent or charges for the postpetition, prerejection period of _ _[*date of default on postpetition lease obligations*]_ _ through _ _[*date premises vacated*]_ _. _ _[*Refer to supporting evidence*]_ _. These charges are based on the testimony in _ _[*refer to supporting evidence, e.g., paragraph 6, declaration of party witness*]_ _, and are calculated as follows:

Rent	_ _[*applicable dates*]_ _	_ _[*dollar amount*]_ _
CAM	_ _[*applicable dates*]_ _	_ _[*dollar amount*]_ _
Taxes	_ _[*applicable dates*]_ _	_ _[*dollar amount*]_ _
Total Rent Claim	_ _[*applicable dates*]_ _	_ _[*add above dollar amounts*]_ _

The Lease also provides that Movant is entitled to reimbursement of attorney fees incurred in collecting unpaid rent and related charges. Movant expects to incur _ _[*dollar amount*]_ _ in attorney fees in bringing this Motion. _ _[*Refer to supporting evidence*]_ _. Thus, Movant has an administrative claim against the Debtor in the sum of _ _[*insert sum of total rent claim and attorney fees*]_ _.

II. ARGUMENT

Section 365(b)(3) of the Bankruptcy Code provides that a debtor-in-possession shall timely perform all obligations "arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." These provisions have not been changed by the Bankruptcy Abuse Prevention and Consumer Protection Act.

In *Towers v Chickering & Gregory (In re Pacific-Atlantic Trading Co.)* (9th Cir 1994) 27 F3d 401, the Ninth Circuit concluded that the trustee's failure to pay rent under a nonresidential real estate lease for the period prior to the rejection of the lease created an allowed administrative claim, regardless of the actual value conferred by the lease on the estate. Thus, it is clear that Movant is entitled to an administrative claim for the full contractual rent due and unpaid for the postpetition, prerejection period of _ _[*date of default on postpetition lease obligations*]_ _ through _ _[*date premises vacated*]_ _, the date the Lease was rejected and possession was returned to the Movant. It is also clear that Movant is entitled to immediate payment of the outstanding postpetition Rent.

In addition, insofar as the Debtor failed to comply with section 365(d)(3) by refusing to pay postpetition rent for the subject period, Movant is entitled to an administrative claim for attorney fees incurred in bringing this Motion and immediate payment thereof. *In re Pacific Sea Farms, Inc.* (Bankr D Haw 1991) 134 BR 11; *In re Narragansett Clothing Co.* (Bankr D RI 1990) 119 BR 388, 391; *In re Revco D.S., Inc.* (Bankr ND Ohio 1989) 109 BR 264, 272.

Movant is thus entitled to allowance and payment of an administrative claim in the amount of _ _[*enter sum of total rent claim and attorney fees*]_ _, the amount due and unpaid under the terms of the Lease for the postpetition, prerejection period of _ _[*date of default on postpetition lease obligations*]_ _ through _ _[*date premises vacated*]_ _, including attorney fees incurred in bringing this Motion.

III. CONCLUSION

For all the foregoing reasons, Movant respectfully requests that its administrative claim for compensation for Debtor's postpetition use of the Premises be allowed in the amount of _ _[*enter sum of total rent claim and attorney fees*]_ _ and that the Court order the Debtor to pay said administrative claim immediately.

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Movant, _ _[*name*]_ _

DECLARATION OF _ _[*Name of party witness*]_ _

I, _ _[*Name of party witness*]_ _**, declare:**

1. I am a principal of _ _[*name of entity*]_ _**, which is the property manager for** _ _[*name of landlord*]_ _ **(Movant), the owner of nonresidential real property located at** _ _[*address*]_ _ **(the Premises). I am over the age of the 18 years, and of competent mind. If called upon, I could and would testify competently thereto.**

2. On or about _ _[*date*]_ _**, the Debtor entered into a written lease of the Premises (the Lease) for a term of** _ _[*e.g., five (5)*]_ _ **years. A true and correct copy of the Lease is attached hereto as Exhibit "A" and incorporated herein by reference.**

3. The Debtor vacated the Premises on _ _[*date*]_ _**.**

4. From the date of the bankruptcy filing until _ _[*date premises vacated*]_ _**, Debtor was in possession of and doing business at the Premises.**

5. The total rent and charges ordinarily due on a monthly basis under the Lease is _ _[*total dollar amount*]_ _**, which is comprised of** _ _[*dollar amount*]_ _ **for base rent,** _ _[*dollar amount*]_ _ **for property taxes, and** _ _[*dollar amount*]_ _ **for common area maintenance (CAM) charges (collectively, the Rent).**

6. The Debtor failed to pay rent, CAM charges, and taxes for the period of _ _[*date of default on postpetition lease obligations*]_ _ **through** _ _[*date premises vacated*]_ _**. Thus, the total amount of unpaid rent and charges owing and prorated for that period under the Lease, all of which became due after the date of the bankruptcy filing, consists of:**

Rent	_ _[*applicable dates*]_ _	_ _[*dollar amount*]_ _
CAM	_ _[*applicable dates*]_ _	_ _[*dollar amount*]_ _
Taxes	_ _[*applicable dates*]_ _	_ _[*dollar amount*]_ _
Total Rent Claim	_ _[*applicable dates*]_ _	_ _[*add above dollar amounts*]_ _

7. The Lease provides that Movant is entitled to attorney fees incurred in collecting unpaid rent and related charges.

8. On _ _[*date*]_ _**, I spoke with** _ _[*name*]_ _**, a representative of the Debtor, who told me that the Debtor would not pay the above rent and charges without clearance from** _ _[*name*]_ _**, the Debtor's bankruptcy attorney.**

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

DECLARATION OF _ _[*Name of landlord's counsel*]_ _

I, _ _[*Name of landlord's counsel*]_ _**, declare:**

1. I am licensed to practice law before this Court. I am _ _[*an associate/a member/an employee*]_ _ **of** _ _[*name of firm*]_ _**, counsel of record for** _ _[*name of landlord*]_ _**, movant in the motion to which this Declaration is attached. I have personal knowledge of the facts set forth herein and, if sworn as a witness, could testify**

competently thereto.

2. On _ _[*date*]_ _, _ _[*name*]_ _, counsel for the Debtor, contacted me and _ _[*e.g., asked that my client _ _[name of landlord]_ _ stipulate to the rejection of its lease for the subject premises*]_ _. I told counsel for the Debtor that _ _[*e.g., my client would stipulate if the Debtor paid any and all postpetition amounts owing through the date of the rejection*]_ _.

3. On _ _[*date*]_ _, I sent a letter to _ _[*name of debtor's counsel*]_ _, by fax, outlining the postpetition amounts that were due under the lease. A true and correct copy of the letter is attached hereto as Exhibit B.

4. On _ _[*date*]_ _, I called _ _[*name of debtor's counsel*]_ _ to inquire about the rejection motion that I had received and the status of the postpetition rent payments that were still outstanding. I asked if the Debtor would pay the rent and charges through the date of rejection. Counsel told me _ _[*e.g., that she would have to check with her client and that she would get back to me the following week*]_ _.

5. On _ _[*date*]_ _, I again called _ _[*name of debtor's counsel*]_ _, who said that the Debtor would not pay rent currently because the lease was "being rejected," and that my client would have an administrative claim for that rent. When I protested that section 365(d) of the Bankruptcy Code required Debtor to pay postpetition lease obligations currently until the lease was rejected, counsel said _ _[*e.g., we would have to make a motion if we wanted to get paid*]_ _.

6. I have spent seven hours researching and drafting the attached Motion for Allowance and Payment of Administrative Rent Claim. I estimate that I will spend an additional _ _[*e.g., two*]_ _ hours traveling to and attending the hearing on said Motion. My usual hourly rate for services I provide on this type of motion is _ _[*dollar amount*]_ _ per hour. Accordingly, my client _ _[*name of landlord*]_ _ will incur fees of _ _[*total dollar amount*]_ _ with respect to this Motion.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on _ _[*date*]_ _, at _ _[*city*]_ _, California.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy.

Comment: This is a motion for the payment of an administrative priority claim for postpetition rent that became due before rejection of the lease either by debtor's motion of by operation of law. Note that the landlord cannot claim prepetition rent as an administrative claim (see Comment in §14.59). On the use of this form, see §§14.39-14.40, 14.45-14.46. If the formal request and motion is preceded by a demand letter for payment of postpetition rent (see sample in §14.60), a copy of the letter attached to the declaration of counsel may give additional support to the request for attorney fees. See also Warning at §14.58 regarding electronic filing requirements in some courts.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/ D. Sample Landlord Objections/§14.62 1. Form: Objection of Landlord to Debtor's Motion to Extend Date to Assume or Reject Nonresidential Lease

D. Sample Landlord Objections

§14.62 1. Form: Objection of Landlord to Debtor's Motion to Extend Date to Assume or Reject Nonresidential Lease

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Landlord, _ _[*Name of landlord*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*name(s)*]_ _, **Debtor(s)**	)	**Bk. No.** _ _ _ _ _ _
	)	**Chapter** _ _
	)	
	)	**OBJECTION OF LANDLORD**
	)	_ _[*Name*]_ _ **TO DEBTOR'S**
	)	**MOTION TO EXTEND DATE**
	)	**TO ASSUME OR REJECT**
	)	**NONRESIDENTIAL REAL**
	)	**PROPERTY LEASES [11 USC**
	)	**§365(d)]**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Courtroom:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*name*]_ _

TO THE HONORABLE _ _[*Name*]_ _, UNITED STATES BANKRUPTCY JUDGE, THE DEBTOR AND ITS COUNSEL OF RECORD, THE UNSECURED CREDITORS' COMMITTEE AND ITS COUNSEL OF RECORD, THE OFFICE OF THE UNITED STATES TRUSTEE, AND ALL OTHER PARTIES IN INTEREST:

PLEASE TAKE NOTICE that _ _[*name of landlord*]_ _ (Landlord), as creditor in this proceeding, and as owner of the premises located at _ _[*address*]_ _ (Premises), hereby objects to the debtor's motion for an additional 90-day extension of time to assume or reject its unexpired leases.

The objection is made on the grounds that no good cause has been shown for the extension sought, debtor has failed to meet its obligations to remain current on postpetition rent and charges owed to Landlord, and the extension requested materially prejudices Landlord. Accordingly, the motion should be denied and the debtor ordered to assume or reject the leases forthwith.

I. DEBTOR HAS NOT MET ITS BURDEN OF ESTABLISHING CAUSE FOR THE EXTENSION.

Bankruptcy Code §365(d)(4) limits a debtor's time to assume or reject its commercial leases to 120 days, unless the court "for cause" extends the time. The "cause" requirement is intended to protect commercial landlords "from delay and uncertainty by forcing a trustee or a debtor in possession to decide quickly whether to assume unexpired leases." *Sea Harvest Corp. v Riviera Land Co.* (9th Cir 1989) 868 F2d 1077, 1079. Moreover, the burden of persuasion on the issue of "cause" rests with the debtor. *In re Wedtech Corp.* (Bankr SD NY 1987) 72 BR 464, 471. No such cause is present here.

[*Add one of the following alternatives*]

[*Alternative 1: No evidence supporting motion*]

Despite the requirements of the Code, debtor's motion is unsupported by any evidence or declarations to justify prolonging the Landlord's uncertainty. This contravenes the policy of §365(d)(4). Absent an evidentiary showing of a need for more than the 120 days initially allowed under the Bankruptcy Abuse Prevention and

Consumer Protection Act, no extension should be granted.

[*Alternative 2: Insufficient evidence supporting motion*]

Debtor's motion is not supported by evidence that is sufficient to justify holding Landlord in a state of uncertainty. _ _[*State authority showing what is required and how debtor failed to make the showing. Add additional facts or arguments relevant to the objection, e.g., debtor has a mere 10 leases in the Premises, not the volume of leases that might justify a modest extension. Nor does debtor disclose any efforts it has made to make its decisions in a timely fashion*]**_ _.**

[*Continue*]

Granting an extension in these circumstances is contrary to the Code. Because debtor has failed to meet its burden of establishing cause for the extension requested, the motion should be denied.

[*If appropriate, add*]

II. NO EXTENSION SHOULD BE ALLOWED BECAUSE DEBTOR HAS FAILED TO REMAIN CURRENT ON ITS POSTPETITION OBLIGATIONS TO LANDLORD.

As a tenant of nonresidential real property, debtor is required to stay current on all postpetition lease obligations pending assumption or rejection. Bankruptcy Code §365(d)(3); *Feld v S & F Concession, Inc. (In re S & F Concession, Inc.)* (Bankr ED Pa 1985) 55 BR 689, 691. Failure to stay current on postpetition lease obligations is ground for deeming the lease rejected or, at a minimum, relief from stay. *Buffkin v Goodson (In re Goodson)* (Bankr SD Fla 1981) 12 BR 883, 885; *In re Future Growth Enters., Inc.* (Bankr ED Pa 1986) 61 BR 469. The debtor's obligations of §365(d)(3) have not changed under the Bankruptcy Abuse Prevention and Consumer Protection Act.

Here, debtor has failed to meet this most basic requirement for maintaining its rights under its leases. It has failed to pay rent or lease charges due for the Premises for the period of _ _[*date of default on postpetition lease obligations*]**_ _ through _ _**[*date payments resumed/the present date*]**_ _. _ _**[*Refer to supporting evidence, e.g., paragraph number of declaration of party or party witness*]**_ _. Indeed, debtor is now in arrears on its postpetition obligations to Landlord in the approximate sum of _ _**[*dollar amount*]**_ _.**

Debtor's failure to timely meet its postpetition obligations establishes that it is not entitled to the privilege of delaying assumption or rejection. Accordingly, its request for an extension of time as to its leases in the Premises should be denied. At a minimum, any extension should be conditioned on immediate cure of postpetition defaults, and full and timely compliance with §365(d)(3) in the future. *In re Tandem Group, Inc.* (Bankr CD Cal 1986) 60 BR 125, 127.

CONCLUSION

For all the foregoing reasons, Landlord respectfully submits that the debtor's motion should be denied. Alternatively, any extension should (1) be conditioned on immediate cure of postpetition defaults and (2) provide that the leases will be deemed rejected on failure to timely cure and perform postpetition obligations.

Date: _ _ _ _ _ _ **_ _**[*Name of firm*]**_ _**

By: __[*Signature*]**__**
_ _[*Typed name*]**_ _**
Attorney for Landlord, _ _[*name*]**_ _**

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy. See Warning at §14.58 re electronic filing requirements in some courts.

Comment: This form may be used to object to a debtor's (*i.e.,* tenant's) request for an extension of time to assume or reject the lease under the BAPCPA, as well as for cases filed before October 17, 2005. Because the BAPCPA (defined in §14.1A) made significant changes to the law and procedure on extensions of time to assume or reject leases, landlords have less need to object to such requests. See §§14.47-14.48.

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§14.62A 2. Form: Objection to Debtors' Motion on Proposed Going Out of Business Sale

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Landlord, _ _[*Name of landlord*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*name(s)*]_ _,	**Bk. No. _ _ _ _ _ _**
Debtor(s)	**Chapter _ _**
	OBJECTION OF LANDLORD
	_ _[*Name*]_ _ TO DEBTORS'
	MOTION FOR AN ORDER
	APPROVING AGENCY
	AGREEMENT, STORE
	CLOSING SALES, AND
	RELATED RELIEF; JOINDER
	IN OTHER LANDLORD
	OBJECTIONS
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Courtroom: _ _[*number*]_ _
	Hearing judge: _ _[*name*]_ _

TO THE HONORABLE _ _[*Name*]_ _, UNITED STATES BANKRUPTCY JUDGE, THE DEBTOR AND ITS COUNSEL OF RECORD, THE UNSECURED CREDITORS' COMMITTEE AND ITS COUNSEL OF RECORD, THE OFFICE OF THE UNITED STATES TRUSTEE, AND ALL OTHER PARTIES IN INTEREST:

PLEASE TAKE NOTICE that _ _[*name of landlord*]_ _ (Landlord), as creditor in this proceeding, and as owner of the premises located at _ _[*address*]_ _ (Premises), hereby objects to the Motion of Debtors and Debtors in Possession for an Order Approving Auction Procedures, Agency Agreement, Store Closing Sales, and Related Relief (the "Motion"), as follows:

Landlords are the owners of the following shopping centers as that term is used in Bankruptcy Code §365(b)(3), at each of which Debtors lease nonresidential real property pursuant to certain unexpired leases: _ _[*List centers and city/state of location*]_ _. Each of Debtors' premises in Landlord's centers is a large store, with significant impact on the centers. Debtors' store at _ _[*location*]_ _ is _ _[*number*]_ _ square feet and at _ _[*location*]_ _ is _ _[*number*]_ _square feet.

In the Motion, Debtors seek permission to conduct store closing sales at Landlord's centers under a proposed Agency Agreement containing proposed Store Closing Guidelines (the "Guidelines") attached as Exhibit _ _[*e.g., A*]_ _. On _ _[*date*]_ _, Debtors filed a Notice of Selection of "Stalking Horse" in Connection with the proposed sale and a proposed Agency Agreement. Several aspects of the Guidelines and proposed Agency Agreement are unfair and violate Landlord's rights as follows:

(a) The proposed Agency Agreement requires Agent to pay per diem rent without ensuring that Landlord will be paid full rent and charges in advance on the first of the month.

(b) Sales are proposed to start on _ _[*date*]_ _ and end on _ _[*date*]_ _, but they may be extended by "mutual written agreement between the Agent and the Merchant" (Proposed Agency Agreement ¶6.1), thus allowing potentially unlimited duration.

(c) The Guidelines do not prohibit augmentation of inventory from other sources, allowing Debtors or Agent to unfairly prolong the sales and potentially convert the use of the premises to a liquidation facility.

(d) The Guidelines unfairly allow outside advertising and banners the length of the storefront at Landlord's centers, in violation of Landlord's rights, and unfairly discriminating against Landlord, whose centers are not "enclosed," where such signage would be prohibited.

(e) The Guidelines allow sign-walkers on Landlord's property, without any legal right or basis for doing so, and in violation of Landlord's rights.

(f) The Guidelines give Landlord inadequate notice of when the sale will end, depriving Landlord of the time needed to plan for closing of a large store.

The proposed order states that notice of the termination of the sale "shall not serve" as a rejection of the lease, leaving open the prospect that Debtors could retain possession of stores indefinitely after they are dark and closed.

Landlord objects to the Motion to the extent that it seeks to alter the timing and amount of rental payments required by Bankruptcy Code §365(d)(3). That section requires debtors to timely perform all post petition obligations under their nonresidential real property leases until such leases are assumed or rejected. The leases require rent to be paid on the first day of each month. Per diem rental payments are not authorized under Landlord's leases or the Bankruptcy Code. Thus, regardless of any possible reimbursement right from Agent, the order should be clear that Debtors are required to pay full monthly rent and charges in advance on the first of the month, until the effective date of any rejection of a lease.

Because Bankruptcy Code §365(d)(3) imposes an affirmative duty to perform all obligations under an unexpired lease, the statute necessarily includes use and signage restrictions. Thus, courts have recognized the need for reasonable modifications to a debtor's proposed guidelines to protect a landlord's legitimate interests. See, *e.g., In re Ames Dep't Stores, Inc.* (Bankr SD NY 1992) 136 BR 357, 359 (time, place, and manner restrictions for closing sales are appropriate to safeguard landlords' rights).

Indeed, restrictions on the manner in which sales may be conducted are critical to preserving the character and quality of the shopping center experience. Because such sales tarnish the image of a shopping center, and all the individual merchants at the center, they must be limited in duration. Likewise, allowing augmentation from other sources could unfairly prolong such sales, and potentially transform Landlord's properties from first-class retail centers into liquidation outlets. No authority supports allowing a debtor to convert a shopping center to a liquidation facility. Thus, any closing sales should be limited to 90 days, and the merchandise should be limited to the inventory at each store, with no augmentation from other stores or warehouses.

Similarly, banners and sign-walkers tarnish the image of a center and all of its tenants. By detracting from the overall appearance of a shopping center, such advertising makes the center a less desirable location for customers and tenants alike, reducing revenue for tenants and percentage rent for landlords. Nor is there any rational basis for Debtors' discrimination against Landlord, by allowing oversized banners and exterior signage in its centers that would be prohibited in enclosed malls. Landlord has the same interest as landlords of enclosed malls in preserving the appearance of its centers. Thus, any sales should be advertised in conformity with Landlord's lease provisions on signage and last for no longer than the duration of the sale. Under no circumstances should sign-walkers be allowed on Landlord's properties.

The Guidelines propose that Landlord get only three days notice of when a closing sale will end, but three days is an unreasonably short time for Landlord to plan for the closing of such large stores. Nor does any good cause support allowing Debtors to hold these large stores dark, indefinitely, while generating no income to the bankruptcy estate. Accordingly, all parties would benefit from requiring Debtors to assume or reject the lease of any dark store promptly after the conclusion of the closing sale.

The modifications to the Guidelines requested above are reasonable, provide genuine protection of Landlord's interests, and are not burdensome to Debtors or Agent. They simply reflect a common-sense accommodation of Landlord's legitimate concerns.

Landlord joins in any and all objections to the Motion filed by other landlords to the extent that such objections are consistent with this objection. Moreover, because the Auction will not be held until _ _[*date*]_ _, Landlord may not be privy to the proposed sale order or proposed final sale procedures until shortly before the hearing on _ _[*date*]_ _, if at all. Landlord therefore reserves the right to supplement this objection or present additional objections at the hearing on the Motion.

Accordingly, and for all of the foregoing reasons, Landlord respectfully requests that the Court deny the Motion to approve store closing sales, unless such procedures are modified to:

(1) Require payment of full rent and charges on the first day of the month as required under Landlord's leases;

(2) Limit sales to no longer than 90 days and prohibit augmentation of inventory;

(3) Limit banners and signage to be in compliance with leases and prohibit sign-walkers on Landlord's property;

(4) Require at least 30 days' notice of when a sale will end, and prompt assumption or rejection of any lease at the conclusion of its sale; and

(5) Grant such other and further relief as is just and proper.

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Landlord, _ _[*name*]_ _

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§14.62B 3. Form: Objection to Proposed Expedited Procedures for Assumption and Rejection of Leases

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Landlord, _ _[*Name of landlord*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*name(s)*]_ _,	**Bk. No. _ _ _ _ _ _**
Debtor(s)	**Chapter _ _**
	OBJECTION OF LANDLORD
	_ _[*Name*]_ _ TO DEBTORS'
	MOTION FOR AN ORDER
	APPROVING EXPEDITED
	PROCEDURES FOR THE
	REJECTION OR ASSUMPTION
	AND ASSIGNMENT OF
	EXECUTORY CONTRACTS
	AND UNEXPIRED LEASES [11
	USC §365(a)]
_____	**Hearing:** _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Courtroom: _ _[*number*]_ _
	Hearing judge: _ _[*name*]_ _

TO THE HONORABLE _ _[*Name*]_ _, UNITED STATES BANKRUPTCY JUDGE, THE DEBTORS AND THEIR COUNSEL OF RECORD, THE UNSECURED CREDITORS' COMMITTEE AND ITS COUNSEL OF RECORD, THE OFFICE OF THE UNITED STATES TRUSTEE, AND ALL OTHER PARTIES IN INTEREST:

PLEASE TAKE NOTICE that _ _[*name of landlord*]_ _ (Landlord), as creditor in this proceeding, and as owner of the premises located at _ _[*address*]_ _ (Premises), hereby objects to the Debtors' Motion for an Order Approving Expedited Procedures for the Rejection or Assumption and Assignment of Executory Contracts and Unexpired Leases (the "Motion"), as follows:

Landlord is the owner of the following shopping centers as that term is used in Bankruptcy Code §365(b)(3), at each of which Debtors have leased nonresidential real property under certain unexpired leases:

_ _[*List centers and city/state of location*]_ _.

The Motion proposes expedited procedures not only for rejection of leases, but also assumption and assignment of leases. In both respects, the proposed procedures unfairly prejudice Landlord's rights.

OBJECTIONS TO PROPOSED EXPEDITED PROCEDURES FOR REJECTION OF LEASES

Debtors' proposed procedure allows Debtors to give a rejection notice to counterparties to the lease being rejected, but does not include counsel for Landlord in the list of those to whom notice must be given. Since counsel are typically included in expedited notice procedures, there is no cause for not serving counsel, and substantial prejudice could result from notices possibly going astray at the Landlord entity. The procedures should be modified to require service on counsel for Landlord, as well as Landlord itself.

Under the proposed procedure, the rejection is not effective until the later of (1) 10 days after the notice is served or (2) when Debtors "unequivocally relinquish control" of the premises by turning over the keys. While

10 days is certainly the minimum notice that should be provided to Landlord, the proposed procedure unfairly leaves the effective date open-ended and at Debtors' complete discretion. Because the procedures do not require Debtors to surrender possession by any particular date, Debtors could give the notice simply as a way to preserve their options to reject on *no notice at all*. It would not be effective until they surrendered possession, and they could do that at any time after the 10 days passed. The net result is that the proposed rejection notice gives Landlord no meaningful notice of rejection.

Of course, a landlord cannot relet until a rejection is effective. If Landlord does not have a *real notice* with some idea of the effective date, it cannot attempt to mitigate damages from the rejection. This issue is of particular importance with the critical back-to-school and holiday seasons looming. Without some certainty concerning the effective date of rejection, Landlord will not be able to fill the vacancy in time for the next big seasons, when the majority of sales are made. Thus, the procedures should be modified to require Debtors to surrender possession not later than 30 days after the rejection notice is given.

In ¶ _ _[*e.g., 3*]_ _, Debtors propose to be allowed to abandon personal property, and then unfairly limit Landlord's remedies for resulting damages. Indeed, the right to assert a claim for costs associated with this abandonment is expressly limited to claims filed "in accordance" with procedures for filing a claim based on rejection of the lease under ¶ ____. Paragraph _____ imposes a short deadline for filing rejection claims to as little as 30 days after the effective date of rejection. Yet the Motion offers nothing to support imposing such a short deadline for rejection claims, let alone for claims arising from the abandonment of personal property. Imposing such a deadline on the latter is especially unfair, since Landlord is unlikely to be able to quantify such claims within 30 days after the effective date of rejection.

Accordingly, the rejection procedures should be modified to:

(1) Require Debtors to serve counsel for Landlord, as well as Landlord, with any notice;

(2) Require Debtors to surrender possession within 30 days after giving the rejection notice (since Debtors control the notice date, they should be required to surrender possession not later than the date they specify in the notice; if they do not, Landlord should be entitled to change the locks without further order);

(3) Eliminate the time limit on claims for costs resulting from abandoned property; and

(4) Change the bar date for rejection claims to be at least 60 days from the effective date of any rejection.

OBJECTIONS TO PROPOSED EXPEDITED PROCEDURES FOR ASSUMPTION AND ASSIGNMENT

A debtor's decision to assume and assign a lease is subject to many more statutory restrictions than the decision to reject a lease. Assumption and assignment cannot be approved unless the debtor:

(i) Cures or provides adequate assurance of a prompt cure of existing lease defaults;

(ii) Compensates, or provides adequate assurance of prompt compensation, for "actual pecuniary loss" resulting from default; and

(iii) Provides "adequate assurance of future performance."

11 USC §365(b)(1). When the lease is for shopping center space, "adequate assurance of future performance" is specifically defined to mean that:

(a) The source of rent and financial condition of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, when the debtor became the lessee.

(b) The percentage rent due under the lease will not substantially decline.

(c) Assumption or assignment is subject to all the terms of the lease, including radius, use, location, and exclusivity provisions, and will not breach any such provisions.

(d) Assumption of assignment will not disrupt the tenant mix or balance in the shopping center.

11 USC §365(b)(3).

Against these stringent statutory requirements, the proposed "expedited" procedures are inadequate and unfair to Landlord. Analysis of the statutory factors of adequate assurance can be complex. Landlord's leases

with Debtors are for large spaces, over _ _[*number*]_ _ square feet each. As such, these premises play a much more important role in Landlord's centers than those of smaller retailers. These premises are often subject to a web of restrictions not only from the use clauses in each lease, but from master agreements that bind the development, and from existing exclusives provided to other tenants. Analysis of these issues can be complex; the consequences of error are serious. Allowing an assignment of such large premises that does not comply with the requirements of §365(b)(3) simply because a landlord did not have time to fully analyze the myriad of issues in less than 10 days could wreak havoc on the tenant mix at Landlord's properties and subject Landlord to substantial litigation risk for violating the many covenants that may restrict these premises. Ten days is simply not enough time to evaluate a transaction with such serious consequences.

The unfairly short 10-day notice is exacerbated by Debtors' failure to require that counsel for Landlord receive the complete packet of information concerning the proposed assignee, and by Debtors' proposal to start the 10 days running from service, instead of from receipt. As a matter of fundamental fairness, and to respect the rights of Landlord under the Code, Landlord and its counsel must be provided with complete information to meet all the requirements of §365(b)(3), and at least 30 days from receipt of such notice within which to respond to the proposed assumption and assignment. Nor should adequate assurance information be limited, as proposed in ¶_____ of the Motion, to whatever Debtors think §365(f) allows, because under current law since 2005, §365(f) is expressly subject to §365(b). Thus, the language in the proposed notice otherwise should be stricken.

Debtors' proposed procedures also unfairly prejudice Landlord's rights concerning cure amounts. Debtors propose to include a cure amount in their notice, but unfairly require Landlord to object to the cure amount within the same tight timeframe as it is provided to object to assumption and assignment itself. Ten days is simply not enough time to evaluate and respond to all these issues, nor is there any particular need for Debtors to impose this unfair deadline on Landlord, especially when their own deadlines have been extended.

The proposed procedures also conspicuously omit any requirement that Debtors promptly pay the cure amount. The proposed order approving any such assumption and assignment simply sets a cure amount and bars additional claims, but does not require payment of the cure amount at all, let alone require prompt payment, as required by the Code. Because the Code requires both a cure or prompt cure of defaults and a showing of adequate assurances of future performance, Debtors' procedures must be modified to require both, and to provide Landlord a fair and reasonable amount of time to respond to both.

Landlord joins in any and all objections to the Motion filed by other landlords to the extent that such objections are consistent with this objection.

Accordingly, and for all of the foregoing reasons, Landlord respectfully submits that the Motion be denied, or any relief be modified as set forth above, and for such further relief as the Court deems proper.

Date: _ _ _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Landlord, _ _[*name*]_ _

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/ E. Motion for Relief From Automatic Stay/§14.63 1. Form: Motion to Terminate or Modify Stay; Supporting Memorandum; Supporting Declaration

E. Motion for Relief From Automatic Stay

§14.63 1. Form: Motion to Terminate or Modify Stay; Supporting Memorandum; Supporting Declaration

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Movant, _ _[*Name*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*Name(s)*]_ _ ,	)	**Bk. No.** _ _ _ _ _ _
Debtor(s)	)	**Chapter** _ _
	)	**RS No.** _ _ _ _ _ _
_ _[*Name(s)*]_ _,	)	
Movant(s)	)	**NOTICE OF MOTION AND**
	)	**MOTION TO TERMINATE OR**
vs	)	**MODIFY STAY; SUPPORTING**
	)	**MEMORANDUM;**
_ _[*Name(s)*]_ _,	)	**SUPPORTING DECLARATION**
Respondent(s)	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Courtroom:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*name*]_ _

TO THE COURT, ALL PARTIES AND THEIR COUNSEL, THE TRUSTEES, AND THE DEBTOR:

1. PLEASE TAKE NOTICE that on the date and time set above, in Department _ _ of the United States Bankruptcy Court, located at _ _[*address*]_ _, the court will hold a hearing on the above-captioned motion by Movant _ _[*name*]_ _.

2. Movant _ _[*name*]_ _ hereby moves for an order from the court annulling, modifying, or terminating the automatic stay presently in effect in this case for the purpose of proceeding with an unlawful detainer action to recover possession of _ _[*residential/commercial*]_ _ real property, commonly known as _ _[*address*]_ _, California, from the debtor herein, pursuant to Title 11 United States Code §362(d), (e), and (f) on the grounds that: _ _[*state applicable grounds, e.g., cause exists because debtor's right to occupancy of the property has been duly terminated in conformance with state law/debtor has no executory or other lease with the movant/debtor has defaulted in its obligations under the lease postpetition/trustee or debtor in possession failed to assume lease in a timely manner/debtor has no equity or ownership interest of any kind in the property and the property is not necessary to an effective reorganization*]_ _**. Movant requests that the order be effective immediately on entry of the order.**

I. FACTUAL ALLEGATIONS IN SUPPORT OF MOTIONS

3. At all relevant times, movant was the owner of real property commonly known as _ _[*address*]_ _**, California, (the subject property).**

4. At all relevant times, debtor _ _[*name*]_ _ **was in possession of the subject property. Debtor filed a petition under Chapter** _ _**[*7/11/13*]**_ _ **of the Bankruptcy Code on** _ _[*date*]_ _**.** _ _[*Add additional relevant facts, e.g., that movant is informed and believes that at all relevant times debtor was an attorney licensed to practice law in California, filed bankruptcy petition in pro per, etc.*]_ _**.**

[*Add or modify paragraphs 5-11, as appropriate*]

5. On or about _ _[*date*]_ _**, movant entered into an** _ _[*oral/written*]_ _ **lease with the debtor for the subject**

property at a monthly rental of _ _[*dollar amount*]_ _. On or about _ _[*date*]_ _, debtor defaulted in the payment of rent. On _ _[*date*]_ _, movant served a 3-day notice to pay rent or quit on debtor. The notice expired without debtor either paying any rent or surrendering possession of the subject property. A true and correct copy of the notice is attached as Exhibit A to the unlawful detainer complaint attached hereto as Exhibit 1.

6. On _ _[*date*]_ _, movant filed an action in the _ _[*Municipal/Superior*]_ _ Court of the County of _ _[*name*]_ _, Action No. _ _[*number*]_ _, _ _[*title of action*]_ _, to recover possession of the subject property based on nonpayment of rent. A true and correct copy of the complaint is attached hereto as Exhibit 1.

7. After service of the complaint, debtor filed an answer to the complaint. A true and correct copy of the answer is attached hereto as Exhibit 2.

8. Debtor has failed to pay _ _[*prepetition/postpetition*]_ _ _ _[*rent/rental value*]_ _ for the period _ _[*date*]_ _ through _ _[*date*]_ _, and the lease was effectively terminated by the filing of the complaint for unlawful detainer.

9. _ _[*Describe additional facts and list supporting documents showing additional grounds for relief, bad faith acts of the debtor, or equities of the case favoring the petition to terminate or modify automatic stay, such as trustee or debtor in possession failed to assume residential lease in a timely manner, other occasions in which debtor has been subject to eviction for nonpayment of rent and has filed a bankruptcy proceeding to avoid eviction, etc.*]_ _.

10. Debtor has not filed a plan of reorganization.

11. Debtor is not in the armed forces of the United States or of any state, on active duty.

[*Continue*]

12. Based upon the foregoing, there is cause to terminate or modify the stay herein so as to allow movant to proceed with its state court action for recovery of possession of the subject property and to execute any resulting judgment for possession, including storage or disposal of abandoned personal property remaining on the subject property after repossession, according to state law.

13. Movant requests termination of the stay effective in this action, and any conversions to any other chapter of the United States Bankruptcy Code.

14. Movant requests that this court take judicial notice of the Exhibits hereto _ _[*and of the bankruptcy cases described in paragraph 11 above*]_ _.

15. The applicable relief from stay _ _[*cover/information*]_ _ sheet is attached hereto and made a part hereof.

II. ARGUMENTS IN SUPPORT OF MOTIONS

THE STAY SHOULD BE TERMINATED

In California, bankruptcy courts hold that once a lease is terminated such that the leasehold interest no longer exists, the reason for the stay no longer exists as to such property. Thus, the termination of a lease can be "cause" within the meaning of 11 USC §362(d) to terminate the stay. *Vanderpark Props. v Buchbinder (In re Windmill Farms, Inc.)* (9th Cir 1988) 841 F2d 1467, 1470; *Kearny Mesa Crossroads v Acorn Invs. (In re Acorn Invs.)* (Bankr SD Cal 1981) 8 BR 506, 509; *In re Eureka S. R.R., Inc.* (Bankr ND Cal 1987) 72 BR 813, 817.

[*With respect to a commercial lease, add*]

The filing of a complaint or unlawful detainer terminates the lease, preventing it from being an executory contract that can be assumed in bankruptcy. *In re Escondido W. Travelodge* (SD Cal 1985) 52 BR 376. Because the leasehold interest no longer exists, relief from stay should be granted to allow Movant to reclaim possession. *In re Escondido W. Travelodge,* 52 BR at 382.

CONCLUSION

Because of the existing unlawful detainer action, there is no leasehold interest to assume. This filing is simply a delaying tactic used by the debtor to remain in possession without any valid right to do so.

Based upon the foregoing, the stay should be terminated immediately to allow the eviction and other attendant remedies to proceed.

Date: _ _ _ _ _ _ _ _[*Name of Firm*]_ _

By: __[*Signature of Attorney*]__

_ _[*Name of Attorney*]_ _
Attorney for Movant,
_ _[*name*]_ _

TO THE DEBTOR: SHOULD YOU FAIL TO APPEAR AND OPPOSE THE MOTION, THE RELIEF PRAYED FOR MAY BE GRANTED. THIS MAY INCLUDE THE RESUMPTION OF FORECLOSURE, EVICTION, OR OTHER PROCEEDINGS AGAINST YOU, RESULTING IN THE INVOLUNTARY SALE, LIQUIDATION, OR REPOSSESSION OF YOUR PROPERTY. IF YOU FILE AN OPPOSITION IN WRITING WITH THE CLERK, YOU MUST ALSO SERVE IT ON THE MOVING PARTY OR APPEAR AT THE HEARING PERSONALLY OR BY COUNSEL TO OPPOSE THE MOTION.

VERIFICATION

I, _ _[*name*]_ _, declare:

I am the moving party in the above-mentioned action.

I have read the foregoing MOTION TO TERMINATE OR MODIFY STAY and know the contents thereof. I declare that the facts stated therein are true of my own personal knowledge, and if called as a witness I could competently testify thereto.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this was executed at _ _[*city and state*]_ _ on the date below.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name of declarant*]_ _

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy. Note Warning at §14.58 regarding electronic filing requirements in some courts.

Comment: Unless a preprinted form is prescribed by local rule, a landlord who wishes to proceed with an eviction may use this form in any bankruptcy court jurisdiction in which the bankruptcy petition is filed by the tenant before a default or expiration of a lease. It is also required by most jurisdictions when the petition is filed while an unlawful detainer action is pending. See §§14.17, 14.23.

NOTE: This form was developed for use in bankruptcy cases filed before October 17, 2005, but has been modified for use in bankruptcy cases governed by the BAPCPA (see §14.1A). Because the BAPCPA contains two exceptions to the automatic stay for residential tenancies if a judgment for possession has been entered before the bankruptcy, or if the landlord seeks possession based on the tenant's endangering the property or illegally using controlled substances on the premises, a motion for relief from stay in such circumstances will no longer be necessary. See 11 USC §362(b)(22)-(23), discussed in §§14.16, 14.16B. Specific forms may be required where such exceptions apply. See §§14.71-14.74. The form may be modified for other grounds set forth as options in paragraph 2 of the notice of motion. Attorneys should always investigate prescribed formats, notice periods, and other requirements, as these may vary among the court departments. All districts require some form of cover (or information) sheet for the motion; these may be obtained from the respective clerks' offices. Some districts have mandatory, preprinted forms for stay relief motions. See §§14.65-14.66A. Additional supporting declarations may be necessary if one person does not have sufficient personal knowledge of all the facts recited in the motion.

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§14.64 2. Form: Order Granting Motion to Terminate or Modify Automatic Stay

To download **Word** version, right click and choose *Save Target As*

To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Movant, _ _[*Name*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*Name(s)*]_ _,	)	**Bk. No.** _ _ _ _ _ _
Debtor(s)	)	**Chapter** _ _
	)	**RS No.** _ _ _ _ _ _
_ _[*Name(s)*]_ _,	)	
Movant(s)	)	**ORDER GRANTING MOTION**
	)	**TO TERMINATE STAY**
vs	)	
	)	**Hearing:** _ _[*date; time*]_ _
_ _[*Name(s)*]_ _,	)	**Dep't:** _ _[*number*]_ _
Respondent(s)	)	**Courtroom:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*name*]_ _

This matter came on regularly for hearing before the court on _ _[*date*]_ _**.** _ _[*Name of attorney*]_ _ **appeared on behalf of movant** _ _[*name*]_ _**.** _ _[*Name of attorney*]_ _ **appeared on behalf of** _ _[*e.g., trustee, debtor*]_ _ **in opposition to the motion. Having heard the arguments of counsel, considered the papers and pleadings on file herein, there being cause for termination of the stay,**

IT IS HEREBY ORDERED that the automatic stay in this case is terminated, such that movant is allowed to exercise any and all rights under state law to recover possession of the following real property, commonly known as _ _[*address*]_ _**, California, and to store or dispose of abandoned personal property remaining on the property after repossession. This order shall be effective as to this proceeding and any conversion of this action to another chapter of the Bankruptcy Code, and shall be effective without further stay immediately on entry of this order, notwithstanding Fed R Bankr P 4001(a)(3).**

Date: _ _ _ _ _ _

__[*Signature of Judge*]__
_ _[*Typed name of Judge*]_ _
UNITED STATES BANKRUPTCY JUDGE

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy. Note Warning at §14.58 regarding electronic filing requirements in some courts.

Comment: This form is used in conjunction with the motion form in §14.63. Federal Rules of Bankruptcy Procedure 4001(a)(3) provides that an order granting relief from stay is stayed for 14 days after entry of the order unless the bankruptcy court orders otherwise. Local rules may require that the proposed order be prepared in advance of the hearing and served with the moving papers.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/§14.65 3. Form: Motion for Relief From the Automatic Stay Under 11 USC §362 (Central District Form F 4001-1M.UD; Unlawful Detainer; Mandatory)

§14.65 3. Form: Motion for Relief From the Automatic Stay Under 11 USC §362 (Central District Form F 4001-1M.UD; Unlawful Detainer; Mandatory)

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number	FOR COURT USE ONLY
☐ *Individual appearing without counsel* ☐ *Attorney for:*	
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: Debtor(s).	CHAPTER: CASE NO.: DATE: TIME: CTRM: FLOOR:

NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY OR FOR ORDER CONFIRMING THAT THE AUTOMATIC STAY DOES NOT APPLY UNDER 11 U.S.C. § 362(l) (with supporting declarations)
(MOVANT: _____)
(Unlawful Detainer)

1. NOTICE IS HEREBY GIVEN to the Debtor(s), Debtor's(s') attorney, and other interested parties ("Responding Party") that on the above date and time and in the indicated courtroom, Movant in the above-captioned matter will move this Court for an Order granting relief from the automatic stay or for an order confirming that the automatic stay does not apply as to Debtor(s) and Debtor's(s') bankruptcy estate on the grounds set forth in the attached Motion.

   ☐ NOTICE IS ALSO GIVEN to the Trustee as an additional Responding Party, because the Motion relates to a nonresidential property.

2. **Hearing Location:** ☐ **255 East Temple Street, Los Angeles** ☐ **411 West Fourth Street, Santa Ana** ☐ **21041 Burbank Boulevard, Woodland Hills** ☐ **1415 State Street, Santa Barbara** ☐ **3420 Twelfth Street, Riverside**

3. a. ☐ This Motion is being heard on REGULAR NOTICE pursuant to Local Bankruptcy Rule 9013-1. If you wish to oppose this Motion, you must file a written response to this Motion with the Bankruptcy Court and serve a copy of it upon the Movant's attorney (or upon Movant, if the Motion was filed by an unrepresented individual) at the address set forth above no less than 14 days before the above hearing and appear at the hearing of the Motion.

   b. ☐ This Motion is being heard on SHORTENED TIME. If you wish to oppose this Motion, you must appear at the hearing. Any written response or evidence must be filed and served:

   ☐ at the hearing ☐ at least _____ court days before the hearing.

   (1) ☐ A Motion for Order Shortening Time was not required (according to the calendaring procedures of the assigned judge).

   (2) ☐ A Motion for Order Shortening Time was filed per Local Bankruptcy Rule 9075-1(b) and was granted by the Court and such motion and order have been or are being served upon the debtor and trustee, if any.

   (3) ☐ A Motion for Order Shortening Time has been filed and remains pending. Once the Court has ruled on that Motion, you will be served with another notice or an order that will specify the date, time and place of the hearing on the attached Motion and the deadline for filing and serving a written opposition to the Motion.

(Continued on next page)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

4. You may contact the Bankruptcy Clerk's Office to obtain a copy of an approved court form for use in preparing your response *(Optional Court Form F 4001-1M.RES)*, or you may prepare your response using the format required by Local Bankruptcy Rule 1002-1.

5. If you fail to file a written response to the Motion or fail to appear at the hearing, the Court may treat such failure as a waiver of your right to oppose the Motion and may grant the requested relief.

Dated:

_____
Print Law Firm Name (if applicable)

_____ _____
Print Name of Individual Movant or Attorney for Movant *Signature of Individual Movant or Attorney for Movant*

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

MOTION FOR RELIEF FROM THE AUTOMATIC STAY OR FOR ORDER CONFIRMING THAT THE AUTOMATIC STAY DOES NOT APPLY (Unlawful Detainer)

(MOVANT: _____)

1. **The Property at Issue:** Movant moves for relief from the automatic stay to obtain possession of the residential or nonresidential premises at the following address (the "Property"):

   Street Address:
   Apartment/Suite No.:
   City, State, Zip Code:

   The Property is: ☐ Residential ☐ Nonresidential

2. **Case History:**
   a. ☐ A voluntary ☐ An involuntary petition under Chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was filed on *(specify date)*:
   b. ☐ An Order of Conversion to Chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was entered on *(specify date)*:
   c. ☐ Plan was confirmed on *(specify date)*:
   d. ☐ Other bankruptcy cases of the Debtor were pending within the year ending on the petition date. See attached Declaration.
   e. ☐ Other bankruptcy cases affecting this Property have been pending within the two years ending on the petition date. See attached Declaration.

3. **Grounds for Relief from Stay:** (*Check all that apply)*
   a. ☐ Pursuant to 11 U.S.C. § 362(d)(1), cause exists because, as of petition date, Debtor(s) had no right to continued occupancy of the premises, as follows:
      (1) ☐ An unlawful detainer judgment in favor of Movant was entered prepetition.
         A. ☐ The debtor has not filed with the petition and served on the Movant the certification required under 11 U.S.C. § 362(l)(1).
         B. ☐ The debtor or adult dependent of debtor has not deposited with the Clerk any rent that would become due during the 30-day period after the filing of the petition.
         C. ☐ The debtor or adult dependent of debtor has not filed and served on the Movant the further certification required under 11 U.S.C. § 362(l)(2) that the entire monetary default that gave rise to the judgment has been cured.
         D. ☐ The Movant has filed and served an objection to the certification referenced in (a)(1)(A) and/or (a)(1)(C) above. A copy of the objection is attached hereto as Exhibit _____. A hearing on this objection is set for: _____.
      (2) ☐ An unlawful detainer proceeding was commenced prepetition.
      (3) ☐ Movant acquired title to the premises by foreclosure sale prepetition and recorded the deed within the period provided by state law for perfection.
      (4) ☐ Movant acquired title to the premises by foreclosure sale postpetition and recorded the deed within the period provided by state law for perfection.
      (5) ☐ The lease or other right of occupancy expired by its terms prepetition.
      (6) ☐ The lease has been rejected or deemed rejected by operation of law.
      (7) ☐ Lease payments have not been made since the filing of the petition.

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

(8) ☐ An eviction action has been filed to obtain possession of the subject residential property on grounds of endangerment of the property **or** because of illegal use of controlled substances on the property and Movant has filed and served upon Debtor a certification that ☐ such an action was filed or ☐ that within the 30 days preceding the certification Debtor has endangered the subject property or illegally allowed the use of controlled substances on the property. A copy of Movant's certification is attached as Exhibit _____. Debtor ☐ has ☐ has not filed an objection to Movant's certification. A copy of Debtor's objection, if any, is attached as Exhibit _____. A hearing on this objection is set for: _____.

b. ☐ Pursuant to 11 U.S.C. § 362(d)(2)(A), Debtor(s) has/have no equity in the Property; and pursuant to § 362(d)(2)(B), the Property is not necessary to an effective reorganization.

c. ☐ The bankruptcy case was filed in bad faith to delay, hinder or defraud Movant.

(1) ☐ Movant is the only creditor or one of very few creditors listed on the master mailing matrix.

(2) ☐ Other bankruptcy cases have been filed asserting an interest in the same property.

(3) ☐ The Debtor(s) filed what is commonly referred to as a "face sheet" filing of only a few pages consisting of the Petition and a few other documents. No Schedules or Statement of Affairs (or Chapter 13 Plan, if appropriate) has been filed.

4. **Evidence in Support of Motion:** ***(Important Note: Declaration(s) in support of the Motion MUST be attached hereto.)***

☐ Movant submits the attached Unlawful Detainer Declaration to provide evidence in support of this Motion pursuant to Local Bankruptcy Rules.

☐ Other Declaration(s) are also attached in support of this Motion.

WHEREFORE, Movant prays that this Court issue an Order granting the following *(specify forms of relief requested)*:

1. ☐ Termination of the stay to allow Movant (and any successors or assigns) to proceed under applicable non-bankruptcy law to enforce its remedies to obtain possession of the Property.

2. ☐ Annulment of the stay so that the filing of the bankruptcy petition does not affect postpetition acts, as set forth in the attached Declaration(s).

3. ☐ An order confirming that the automatic stay does not apply.

4. ☐ Alternatively, if immediate relief from stay is not granted with respect to the Property because the Property is the subject of a lease that may be assumable:

a. Establishment of a deadline for assumption or rejection of the lease.

b. Adequate protection in the form of regular payments at the lease rate from petition date until assumption or rejection of the lease.

(Continued on next page)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

5. Additional provisions requested:
   a. ☐ That the Order be binding and effective despite any conversion of this bankruptcy case to a case under any other chapter of Title 11 of the United States Code.
   b. ☐ Termination or modification of the Co-debtor Stay of 11 U.S.C. § 1201 or § 1301 as to the above-named co-debtor, on the same terms and conditions.
   c. ☐ That the 10-day stay prescribed by Bankruptcy Rule 4001(a)(3) be waived.
   d. ☐ That Extraordinary Relief be granted as set forth in the Attachment *(attach Optional Court Form F 4001-1M.ER)*.
   e. ☐ For other relief requested, see attached continuation page.

Dated:

Respectfully submitted,

_____
Movant Name

_____
Firm Name of Attorney for Movant (if applicable)

By: _____
Signature

Name: _____
Typed Name of Individual Movant or Attorney for Movant

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

UNLAWFUL DETAINER DECLARATION (MOVANT: _____)

I, _____, declare as follows:
(Print Name of Declarant)

1. I have personal knowledge of the matters set forth in this declaration and, if called upon to testify, I could and would competently testify thereto. I am over 18 years of age. I have knowledge regarding Movant's interest in the residential or nonresidental real property that is the subject of this Motion ("Property") because:
   - ☐ I am the Movant and owner of the Property.
   - ☐ I manage the Property as the authorized agent for the Movant.
   - ☐ I am employed by Movant as *(state title and capacity)*:
   - ☐ Other *(specify)*:

2. I am one of the custodians of the books, records and files of Movant as to those books, records and files that pertain to the rental of this Property. I have personally worked on books, records and files, and as to the following facts, I know them to be true of my own knowledge or I have gained knowledge of them from the business records of Movant on behalf of Movant, which were made at or about the time of the events recorded, and which are maintained in the ordinary course of Movant's business at or near the time of the acts, conditions or events to which they relate. Any such document was prepared in the ordinary course of business of Movant by a person who had personal knowledge of the event being recorded and had or has a business duty to record accurately such event. The business records are available for inspection and copies can be submitted to the Court if required.

3. The address of the Property that is the subject of this Motion is:

   Street Address:
   Apartment/Suite No.:
   City, State, Zip Code:

4. Movant is the legal owner of the Property, or the owner's legally authorized agent. A true and correct copy of the Trustee's Deed upon Sale, lease, rental agreement, or other document evidencing Movant's interest in the Property is attached as Exhibit _____. A true and correct copy of any applicable document establishing Movant's authority as agent for the owner is attached as Exhibit _____.

5. The Property is: ☐ residential property ☐ nonresidential property
   a. Debtor(s) occupies the Property
      - ☐ on a month-to-month tenancy
      - ☐ pursuant to a lease that is in default
      - ☐ after a foreclosure sale on: _____
      - ☐ other *(specify)*:
   b. ☐ Debtor(s) has/have failed to pay the monthly rent of $_____ since the following date *(specify date)*:
   c. ☐ In addition, Debtor(s) has/have failed to pay other obligations under the lease, including the following (*See attached continuation page for itemization)*:
      (1) ☐ Common area maintenance charges
      (2) ☐ Property taxes
      (3) ☐ For additional obligations, see attached continuation page.

(Continued on next page)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

6. Debtor's(s') bankruptcy petition in this case was filed on *(specify date)*:

7. Procedural status *(indicate all that apply, and provide dates for completed steps)*:
   a. ☐ Movant caused a Notice to Quit to be served upon the Debtor(s) on *(specify date)*: A true and correct copy of which is attached hereto as Exhibit _____
   b. ☐ Before the filing of the petition, Movant had commenced an unlawful detainer proceeding in state court and completed the following:
      (1) ☐ Movant filed a Complaint for Unlawful Detainer against the Debtor(s) on *(specify date)*: _____, a true and correct copy of which is attached as Exhibit _____.
      (2) ☐ Trial was held on *(specify date)*:
      (3) ☐ An Unlawful Detainer Judgment against the Debtor(s) was entered on the Complaint for Unlawful Detainer on *(specify date)*:_____, a true and correct copy of which is attached as Exhibit _____.
      (4) ☐ A Writ of Possession for the Property was issued by the state court on *(specify date)*:_____, a true and correct copy of which is attached as Exhibit _____.
      (5) ☐ The Debtor has not filed with the petition and served on the Movant the certification required under 11 U.S.C. § 362(l)(1).
      (6) ☐ The Debtor or adult dependent of Debtor has not deposited with the Clerk any rent that would become due during the 30-day period after the filing of the petition.
      (7) ☐ The debtor or adult dependent of debtor has not filed and served on the Movant the further certification required under 11 U.S.C. § 362(l)(2) that the entire monetary default that gave rise to the judgment has been cured.
      (8) ☐ Movant has filed and served an objection to Debtor's certification referenced in paragraph (5) and/or (7) above, a copy of which is attached hereto as Exhibit _____. A hearing on this objection is set for: _____.
      (9) ☐ An eviction action has been filed to obtain possession of the Property on grounds of endangerment of the Property or because of illegal use of controlled substances on the Property and Movant has filed a certification that ☐ such action was filed or ☐ that Debtor has endangered the subject property within 30 days preceding the certification or allowed the illegal use of controlled substances on the Property. A copy of Movant's certification is attached hereto as Exhibit ____. Debtor ☐ has ☐ has not filed an objection to Movant's certification. A copy of Debtor's objection, if filed, is attached hereto as Exhibit _____. A hearing on this objection is set for: _____.
   c. ☐ The lease was rejected on _____ *(date)*:
      (1) ☐ by operation of law.
      (2) ☐ by Order of the Court.
   d. ☐ The regular lease payments have not been made since the filing of the petition.

8. ☐ Debtor(s) has/have no equity in the Property because Debtor(s) does/do not have a lease interest that could be assumed or assigned under 11 U.S.C. § 365.

9. ☐ The Property is not necessary to an effective reorganization because *(specify)*:
   a. ☐ The Property is residential and is not producing income for the Debtor(s).
   b. ☐ The Property is commercial, but no reorganization is reasonably in prospect.
   c. ☐ Other *(specify)*:

(Continued on next page)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

10. ☐ The bankruptcy case was filed in bad faith to delay, hinder or defraud Movant.
    a. ☐ Movant is the only creditor or one of very few creditors listed on the master mailing matrix.
    b. ☐ Other bankruptcy cases have been filed asserting an interest in the same property.
    c. ☐ The Debtor(s) filed what is commonly referred to as a "face sheet" filing of only a few pages consisting of the Petition and a few other documents. No Schedules or Statement of Affairs (or Chapter 13 Plan, if appropriate) has been filed.
    d. ☐ Other *(specify)*:

11. ☐ Other bankruptcy cases that have prevented Movant from recovering possession of this Property include the following:
    a. Case Name:
       Case Number: Chapter:
       Date Filed: Date Dismissed:
       Relief from stay re this Property ☐ was ☐ was not granted.
    b. Case Name:
       Case Number: Chapter:
       Date Filed: Date Dismissed:
       Relief from stay re this Property ☐ was ☐ was not granted.
    c. ☐ See attached continuation page for more information about other cases.

12. ☐ Movant seeks annulment of the automatic stay so that the filing of the bankruptcy petition does not affect any and all of the actions set forth in paragraph 7 that were taken after the filing of the bankruptcy petition in this case.
    a. ☐ These actions were taken by Movant without knowledge of the bankruptcy filing, and Movant would have been entitled to relief from stay to proceed with these actions.
    b. ☐ Although Movant knew about the bankruptcy filing, Movant had previously obtained relief from stay to proceed with these enforcement actions in prior bankruptcy cases affecting this Property as set forth in paragraph 11 above.
    c. ☐ For other facts justifying annulment, see attached continuation page.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed on _____, _____, at _____ *(city, state)*.

_____ _____
Print Declarant's Name *Signature of Declarant*

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on a CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document described as _____ _____ will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d), and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On _____ I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

☐ Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):
On _____ I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follow. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method) by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date	*Type Name*	*Signature*

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

ADDITIONAL SERVICE INFORMATION (if needed):

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy. Note Warning at §14.58 regarding electronic filing requirements in some courts.

Comment: This form is for mandatory use in the Central District of California, unless the individual judge or department makes this motion form or any other preprinted form optional. Attorneys are cautioned to investigate prescribed formats, notice periods, and other requirements, as these may vary among the court departments. See §14.23. All districts require some form of cover (or information) sheet for the motion; these may be obtained from the

respective clerks' offices. See also Comment in §14.63.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/§14.66 4. Form: Order Granting Motion for Relief From Stay Under 11 USC §362 (Central District Form F 4001-1O.UD; Unlawful Detainer; Mandatory)

§14.66 4. Form: Order Granting Motion for Relief From Stay Under 11 USC §362 (Central District Form F 4001-1O.UD; Unlawful Detainer; Mandatory)

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number	FOR COURT USE ONLY
☐ *Individual appearing without counsel* ☐ *Attorney for:* Debtor	
UNITED STATES BANKRUPTCY COURT **CENTRAL DISTRICT OF CALIFORNIA**	
In re: Debtor(s).	CHAPTER: CASE NO.: DATE: TIME: CTRM: FLOOR:

ORDER GRANTING MOTION FOR RELIEF FROM STAY UNDER 11 U.S.C. § 362 (Unlawful Detainer)

(MOVANT: _____)

1. The Motion was: ☐ Contested ☐ Uncontested ☐ Settled by Stipulation

2. This Order applies to the following residential or nonresidential real property (the "Property"):

   Street Address:
   Apartment/Suite No.:
   City, State, Zip Code:

3. The Court orders that the Motion is granted under 11 U.S.C. § 362(d)(1) and (d)(2). The stay of 11 U.S.C. § 362(a) and the co-debtor stay of 11 U.S.C. § 1201(a) or § 1301(a), if applicable, (the "Stay") is/are terminated as to Debtor(s) and Debtor's(s') bankruptcy estate with respect to Movant, its successors, transferees and assigns ("Movant"). Movant may enforce its remedies to obtain possession of the Property in accordance with applicable non-bankruptcy law, but may not pursue any deficiency claim against the Debtor(s) or property of the estate, except by filing a Proof of Claim in this bankruptcy case pursuant to 11 U.S.C. § 501.

4. The Court further orders as follows:
   a. ☐ Movant shall not cause the Debtor(s) to be locked out before the following date *(specify)*:
   b. ☐ The Stay is annulled retroactive to the petition date. Any postpetition acts taken by Movant to enforce its remedies to obtain possession of the Property shall not constitute a violation of the Stay.
   c. ☐ This Order shall be binding and effective despite any conversion of this bankruptcy case to a case under any other chapter of Title 11 of the United States Code.
   d. ☐ All provisions of this Order also apply to relief from the co-debtor stay under 11 U.S.C. § 1201 or § 1301, as applicable to the above-named co-debtor.
   e. ☐ The 10-day stay provided by Bankruptcy Rule 4001(a)(3) is waived.
   f. ☐ The provisions set forth in the Extraordinary Relief Attachment shall also apply *(attach Optional Form F 4001-1O.ER)*.
   g. ☐ See attached continuation page for additional provisions.

Dated:

_____
UNITED STATES BANKRUPTCY JUDGE

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on a CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document described as _____ _____ will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d), and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On _____ I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

☐ Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):
On _____ I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follow. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method) by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date	*Type Name*	*Signature*

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

ADDITIONAL SERVICE INFORMATION (if needed):

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

NOTE TO USERS OF THIS FORM:
1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
3) Category I. below: The United States trustee and case trustee (if any) will always be in this category.
4) **Category II.** below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) _____ _____ was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of_____, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

☐ Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

☐ Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

☐ Service information continued on attached page

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

ADDITIONAL SERVICE INFORMATION (if needed):

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy. Note Warning at §14.58 regarding electronic filing requirements in some courts.

Comment: This form is for mandatory use in the Central District of California, unless the individual judge or department makes this form or any other preprinted order form optional. See §14.23. Attorneys are cautioned to investigate prescribed formats, notice periods, and other requirements, as these may vary among the court departments. This order form is used in conjunction with the motion form in §14.65. Federal Rules of Bankruptcy

Procedure 4001(a)(3) provides that an order granting relief from stay is stayed for 14 days after entry of the order unless the bankruptcy court orders otherwise. Local rules may require that the proposed order be prepared in advance of the hearing and served with the moving papers.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/§14.66A 5. Form: Order Denying Motion for Relief From the Automatic Stay Under 11 USC §362 (Central District Form F 4001-1O.DENY; Mandatory)

§14.66A 5. Form: Order Denying Motion for Relief From the Automatic Stay Under 11 USC §362 (Central District Form F 4001-1O.DENY; Mandatory)

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number	FOR COURT USE ONLY
☐ *Individual appearing without counsel* ☐ *Attorney for Movant*	
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: Debtor(s). Trustee.	CHAPTER: CASE NO.: DATE: TIME: CTRM: FLOOR:

ORDER DENYING MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362

(MOVANT: _____)

1. The Motion was: ☐ Contested ☐ Uncontested ☐ Not Prosecuted

2. The description of the property (the "Property") to which this Order applies is as follows *(specify common description or street address)*:

3. The Motion is denied: ☐ without prejudice ☐ with prejudice on the following grounds:

   ☐ Based upon the findings and conclusions made on the record at the hearing

   ☐ Unexcused non-appearance by Movant

   ☐ Lack of proper service

   ☐ Lack of good cause shown for relief from stay

   ☐ The automatic stay is no longer in effect under: ☐ 11 U.S.C. § 362(c)(2)(A) ☐ 11 U.S.C. § 362(c)(2)(B) ☐ 11 U.S.C. § 362(c)(3)(A) ☐ 11 U.S.C. § 362(c)(4)(A)

   ☐ Other *(specify)*:

4. ☐ Movant may not file another motion for relief from the stay in this case absent a court order authorizing re-filing.

Dated:

_____
UNITED STATES BANKRUPTCY JUDGE

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on a CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document described as _____ _____ will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d), and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On _____ I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

☐ Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):
On _____ I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follow. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method) by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date	*Type Name*	*Signature*

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

ADDITIONAL SERVICE INFORMATION (if needed):

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

NOTE TO USERS OF THIS FORM:

1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
3) Category I. below. The United States trustee and case trustee (if any) will always be in this category.
4) **Category II.** below. List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) _____
_____
_____ was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of_____, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

☐ Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

☐ Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

☐ Service information continued on attached page

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

ADDITIONAL SERVICE INFORMATION (if needed):

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy. Note Warning at §14.58 regarding electronic filing requirements in some courts.

Comment: This form is for mandatory use in the Central District of California, unless the individual judge or department makes this form or any other preprinted order form optional. See §14.23. Attorneys are cautioned to investigate prescribed formats, notice periods, and other requirements, as these may vary among the court departments. This order form is used when the court denies the motion brought using the form in §14.65. Local rules

may require that the proposed order be prepared in advance of the hearing and served with the opposing papers.

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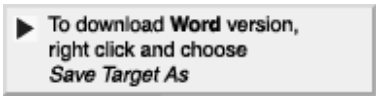
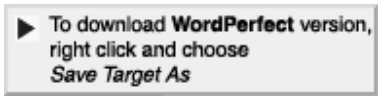
Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/§14.67 F. Form: Stipulation and Order for Relief From Automatic Stay

§14.67 F. Form: Stipulation and Order for Relief From Automatic Stay





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for _ _[*e.g., Creditor(s)*]_ _, _ _[*Name(s)*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*name(s)*]_ _,	)	**Bk. No.** _ _ _ _ _ _
Debtor(s)	)	**Chapter** _ _
	)	
	)	**STIPULATION FOR RELIEF**
	)	**FROM AUTOMATIC STAY;**
_____		**AND ORDER THEREON**

This Stipulation is entered into between the following parties and their respective counsel of record in the above proceeding:

Debtor(s) _ _[*name(s)*]_ _;

Creditor(s) _ _[*name(s)*]_ _;

[*Add if applicable*]

Trustee of the bankruptcy estate, _ _[*name*]_ _.

[*Continue*]

This Stipulation is made in reference to the following facts:

A. On _ _[*date*]_ _, **the** _ _[*Municipal/Superior*]_ _ **Court of California, County of** _ _ _ _ _, _ _[_ _ _ _ _ *Judicial District*]_ _, **entered a judgment after trial of the unlawful detainer action** _ _[*title of action*]_ _, **No.** _ _ _ _ _. **The judgment, among other things, decreed that the Creditor(s) as Plaintiff(s),** _ _[*name(s)*]_ _, **have and recover from Debtor(s),** _ _[*name(s)*]_ _, **and all Tenants, Subtenants, Named Claimants, and other occupants of the premises, the restitution and possession of the real property situated at** _ _[*address*]_ _, **California, a residence.**

B. Thereafter, the Sheriff's Department of the County of _ _[*name*]_ _ **served an eviction notice to said Debtor(s) requiring that** _ _[*he/she/they*]_ _ **vacate the property.**

C. A petition for relief under Chapter _ _[*7/11/13*]_ _ **of the Bankruptcy Act was thereafter filed by Debtor(s) herein on** _ _[*date*]_ _.

D. The parties hereto desire to enter into a Stipulation for relief from the automatic stay to permit Creditor(s) _ _[*name(s)*]_ _ **to execute the judgment only insofar as it concerns possession of the property, but this Stipulation will not affect Debtors' bankruptcy rights insofar as Debtor(s) seek(s) to** _ _[*discharge/reorganize*]_ _ **prepetition debts.**

Therefore, the parties hereto agree as follows:

1. Relief from stay is hereby given to Creditor(s) _ _[*name(s)*]_ _ **so as to allow said Creditor(s) to obtain possession of the real property described below by execution of judgment by writ of possession on the following terms and conditions: The automatic stay continues in effect through and including** _ _[*date*]_ _, **after which it absolutely terminates. Notices may be given as required by state law while the stay is still in effect, but the writ of possession may not be executed by eviction until at least the termination of the stay.** _ _[*add, if applicable, other conditions, e.g., agreement of Debtor(s) to pay postpetition rent or rental value for so long as stay remains in effect hereunder and that Creditor(s) may apply ex parte for an order requiring immediate surrender of the*

property on default, etc.]_ _.

2. It is understood and agreed and shall be ordered that relief from stay is granted only to the extent that said Creditor(s) shall execute upon the judgment only for restitution and possession of the real property situated at _ _[*address*]_ _, California (a residence), and that execution upon the judgment for collection of any monetary sums awarded by the state court is not permitted by this Stipulation and Order.

Date: _ _ _ _ _ _ __[*Signature of Creditor*]__
_ _[*Typed name*]_ _

APPROVED AS TO FORM _ _[*Name of Firm*]_ _
By: __[*Signature of Attorney*]__
_ _[*Name of Attorney*]_ _
Attorney for Creditor,
_ _[*name*]_ _

Date: _ _ _ _ _ _ __[*Signature of Debtor*]__
_ _[*Typed name*]_ _

APPROVED AS TO FORM _ _[*Name of Firm*]_ _
By: __[*Signature of Attorney*]__
_ _[*Name of Attorney*]_ _
Attorney for Debtor,
_ _[*name*]_ _

[*Add if applicable*]

Date: _ _ _ _ _ _ __[*Signature of Trustee*]__
_ _[*Typed name*]_ _

APPROVED AS TO FORM _ _[*Name of Firm*]_ _
By: __[*Signature of Attorney*]__
_ _[*Name of Attorney*]_ _
Attorney for Trustee,
_ _[*name*]_ _

[*Continue*]

ORDER GRANTING RELIEF FROM STAY PURSUANT TO STIPULATION

Having read and considered the Stipulation of the above-named parties in the above-titled proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT relief from automatic stay is granted to the extent and under the terms and conditions set forth in the above Stipulation, Paragraphs 1 and 2.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name of Judge*]_ _
UNITED STATES BANKRUPTCY JUDGE

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy. Note Warning at §14.58 regarding electronic filing requirements in some courts.

Comment: This form is to be used when all interested parties can agree on the terms for vacating the property, after a judgment for possession has been entered in a state court unlawful detainer action against a defendant who thereafter files a bankruptcy petition. See §14.30. Local bankruptcy court (and individual court department) rules and policies should be consulted for applicable notice procedures or additional form requirements. The permission of the trustee should be obtained when it appears that the possessory interest in the subject property belongs to the bankruptcy estate, and not the debtor. See §§14.11, 14.14, 14.16-14.17. This form may be modified to allow for relief from stay by stipulation in other situations, such as when a tenant files bankruptcy before judgment in the unlawful detainer action, but before or after the tenancy legally terminates by the expiration of a 3-day or other termination notice.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/§14.67A G. Form: Notice of Termination or Modification of Stay (Judicial Council Form CM-181; Mandatory)

§14.67A G. Form: Notice of Termination or Modification of Stay (Judicial Council Form CM-181; Mandatory)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER: DEPT.:
NOTICE OF TERMINATION OR MODIFICATION OF STAY	JUDICIAL OFFICER:

To the court and all parties:

1. A *Notice of Stay of Proceedings* was filed in this matter on *(date)*:
2. Declarant named below is
   a. ☐ the party ☐ the attorney for the party who requested or caused the stay.
   b. ☐ other *(describe)*:
3. ☐ The stay described in the above referenced *Notice of Stay of Proceedings*
   a. ☐ has been vacated by an order of another court. *(Attach a copy of the court order.)*
   b. ☐ is no longer in effect.
4. ☐ The stay has been modified *(describe)*:

5. The stay has been vacated, is no longer in effect, or has been modified
   a. ☐ with regard to all parties.
   b. ☐ with regard to the following parties *(specify by name and party designation)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF DECLARANT) ▶ (SIGNATURE OF DECLARANT)

Form Adopted for Mandatory Use
Judicial Council of California
CM-181 [Rev. January 1, 2007]

CEB
Cal. Rules of Court, rule 3.650
www.courtinfo.ca.gov

Print

PLAINTIFF:	CASE NUMBER:
DEFENDANT:	

PROOF OF SERVICE BY FIRST-CLASS MAIL
NOTICE OF TERMINATION OR MODIFICATION OF STAY

(NOTE: You cannot serve the* Notice of Termination or Modification of Stay *if you are a party in the action. The person who served the notice must complete this proof of service.)

1. I am at least 18 years old and **not a party to this action.** I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify)*:

2. I served a copy of the *Notice of Termination or Modification of Stay* by enclosing it in a sealed envelope with postage fully prepaid and *(check one)*:
   a. ☐ deposited the sealed envelope with the United States Postal Service.
   b. ☐ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. The *Notice of Termination or Modification of Stay* was mailed:
   a. on *(date)*:
   b. from *(city and state)*:

4. The envelope was addressed and mailed as follows:

   a. Name of person served:
      Street address:
      City:
      State and zip code:

   c. Name of person served:
      Street address:
      City:
      State and zip code:

   b. Name of person served:
      Street address:
      City:
      State and zip code:

   d. Name of person served:
      Street address:
      City:
      State and zip code:

☐ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF DECLARANT) ▶ (SIGNATURE OF DECLARANT)

Copies: Original (file in state court with original proof of service); copies for service (one for each attorney and unrepresented party and for eviction officer); office copy; client copy.

Comment: This form was adopted by the California Judicial Council for mandatory use in a state court action to advise other parties and the court of a termination or modification of the automatic stay. Under Cal Rules of Ct 3.650(d), the party that filed the notice of stay must immediately serve and file a notice that the stay is vacated, terminated, modified, or no longer in effect. See also §14.57.

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H. Application for Order to Vacate Premises

§14.68 1. Form: Ex Parte Application

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Movant, _ _[*Name*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*Name(s)*]_ _ ,	)	**Bk. No.** _ _ _ _ _ _
Debtor(s)	)	**Chapter** _ _
	)	**RS No.** _ _ _ _ _ _
_ _[*Name(s)*]_ _,	)	
Movant(s)	)	**EX PARTE APPLICATION FOR**
	)	**ORDER TO VACATE REAL**
vs	)	**PROPERTY AND TO**
	)	**TERMINATE AUTOMATIC**
_ _[*Name(s)*]_ _,	)	**STAY**
Respondent(s)	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Courtroom:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*name*]_ _

1. Movant is an individual residing in _ _[*city*]_ _**, California, and owns** _ _[*residential/commercial*]_ _ **real property at** _ _[*address*]_ _**, California. Debtors acquired possession of the property by virtue of a** _ _[*lease/rental agreement*]_ _ **entered into on** _ _[*date*]_ _**.**

2. On _ _[*date*]_ _**, debtor(s) filed a petition under Chapter** _ _[*7/11/13*]_ _ **in this court.**

[*Add one of the following alternatives*]

[*Alternative 1: If tenancy NOT terminated before bankruptcy filed and lease is for commercial property*]

3. Debtors, as a matter of law, cannot assume the nonresidential lease, which has _ _[*expired/been terminated or rejected by operation of law/been breached after the filing of the petition herein, and the breach was not cured within the time prescribed for assumption of the lease*]_ _**.**

[*Alternative 2: If tenancy terminated before bankruptcy filed; residential or commercial tenancies*]

3. Debtors' interest in the real property was effectively and finally terminated according to state law prior to the filing of the petition herein in that:

[*Add one or more of the following, (a)-(f), if applicable, under Alternative 2*]

a. On _ _[*date*]_ _**, movant served a termination notice under state law. The notice expired on** _ _[*date*]_ _**. A true and correct copy of the Notice is attached hereto as Exhibit A and made a part hereof.**

b. On _ _[*date*]_ _**, movant commenced an unlawful detainer action against debtors in the** _ _[*Superior/Municipal*]_ _ **Court of California, County of** _ _[*name of county*]_ _**, Action No.** _ _[*number*]_ _**, entitled** _ _[*title of action*]_ _**. A true and correct copy of the Complaint is attached hereto as Exhibit** _ _[*letter/number*]_ _ **and made a part hereof.**

c. After debtors appeared in the action, they entered into a stipulation for judgment which provided for forfeiture of the lease, termination of tenancy and possession, and stay of execution of the judgment until

_ _[*date*]_ _. It also provided for periodic payments from the debtors to movant, which payments, if continuously made, would preserve the stay of execution. A true and correct copy of the stipulation is attached hereto as Exhibit _ _[*letter/number*]_ _ and made a part hereof. Subsequent to the formation of the stipulation, debtors defaulted in the payments.

d. On _ _[*date*]_ _, the state court entered a judgment for possession after _ _[*a trial of the action/the debtors defaulted under the stipulation*]_ _. A true and correct copy of the judgment is attached hereto as Exhibit _ _[*letter/number*]_ _ and made a part hereof.

e. On _ _[*date*]_ _, the state court issued a writ of execution on the judgment. A true and correct copy of the writ is attached hereto as Exhibit _ _[*letter/number*]_ _ and made a part hereof. The county sheriff scheduled an eviction for _ _[*date*]_ _.

f. The _ _[*progress of the state court action/trial/enforcement of judgment/eviction*]_ _ was stayed by the filing of the petition herein _ _[*and the sheriff refused to evict debtors*]_ _.

[*Continue*]

4. Movant has not been paid any rent since _ _[*date*]_ _.

5. Debtors have not paid nor offered to pay any rent postpetition _ _[*except through the period ending _ _[date]_ _, after which rent payments ceased*]_ _.

6. Debtors have no ownership interest or equity in the real property.

[*Add if applicable, Chapter 11 or 13 cases*]

7. The real property is not necessary to debtor's reorganization. Debtors have not filed a plan of reorganization.

[*Continue*]

THEREFORE, movant prays for relief from this court as follows:

(a) for an Order requiring the debtors immediately to surrender possession of the real property at _ _[*address*]_ _, California, to movant;

(b) for an Order that a writ of execution be issued, directing the United States Marshal or the County Sheriff to take possession of the premises from debtors forthwith and restore possession to movant;

(c) for an Order terminating the stay in this action immediately, to be effective notwithstanding any conversion of this action to another chapter under the Bankruptcy Code; and

(d) for such further and other relief as the court deems proper.

Date: _ _ _ _ _ _

_ _[*Name of Firm*]_ _
By: __[*Signature*]__
_ _[*Name of attorney*]_ _
Attorney for Movant,
_ _[*name*]_ _

VERIFICATION

I, _ _[*name*]_ _**, declare:**

I am the _ _[*movant/attorney for movant*]_ _ in the above-mentioned action.

I have read the foregoing EX PARTE APPLICATION FOR SURRENDER OF REAL PROPERTY / TERMINATION OF STAY and know the contents thereof. I declare that the facts stated therein are true of my own personal knowledge, and if called as a witness I could competently testify thereto.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this was executed at _ _[*city and state*]_ _ on the date below.

Date: _ _ _ _ _ _

__[*Signature of declarant*]__
_ _[*Typed name of declarant*]_ _

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy. Note Warning at §14.58 regarding electronic filing requirements in some courts.

Comment: This form is primarily used in a case involving a nonresidential lease deemed rejected under 11 USC §365(d)(4), or terminated by its own terms or by operation of law. See §§14.14, 14.31, 14.54. Note that the BAPCPA (see §14.1A) contains two exceptions to the automatic stay for residential tenancies if a judgment for possession has been entered before the bankruptcy or if the landlord seeks possession based on the tenant's endangering the property or illegally using controlled substances on it. See 11 USC §362(b)(22)-(23), discussed in §§14.16, 14.16B. Those provisions dictate a different set of procedures to complete the eviction, and some courts have developed special forms for use in such circumstances. See §§14.71-14.74. Some court departments require a preprinted form to be used in unlawful detainer-related applications. Attorneys are cautioned to always investigate local court practices and interpretation of the conflicting opinions in reported cases. Additional declarations may be necessary if one person does not have sufficient personal knowledge of all the facts recited in the application. This application is not intended to be an exact parallel to the supporting memorandum form in §14.70, which contains additional factual recitations that may be incorporated into this form, if needed.

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§14.69 2. Form: Order to Vacate Real Property

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To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Movant, _ _[*Name*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*Name(s)*]_ _,	)	**Bk. No.** _ _ _ _ _ _
Debtor(s)	)	**Chapter** _ _
	)	**RS No.** _ _ _ _ _ _
_ _[*Name(s)*]_ _,	)	
Movant(s)	)	**[PROPOSED] EX PARTE**
	)	**ORDER TO VACATE REAL**
vs	)	**PROPERTY**
	)	
_ _[*Name(s)*]_ _,	)	**Hearing:** _ _[*date; time*]_ _
Respondent(s)	)	**Dep't:** _ _[*number*]_ _
	)	**Courtroom:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*name*]_ _

The court, having considered the ex parte application of _ _[*name*]_ _**, the owner of** _ _[*residential/commercial*]_ _ **property located at** _ _[*address*]_ _**, California, which had been** _ _[*rented/leased*]_ _ **to the debtors, for an order to compel debtors in this proceeding immediately to surrender possession of the real property and to authorize the United States Marshal, County Sheriff, or any law enforcement officer to enforce the Order, and, for good cause shown, the court finding that the** _ _[*rental agreement/lease*]_ _ **has been** _ _[*terminated in accordance with state law prior to the petition/rejected by operation of bankruptcy law after the petition*]_ _**, so that the debtors cannot assume the lease,**

IT IS HEREBY ORDERED that debtors _ _[*name(s)*]_ _ **forthwith vacate and surrender possession of the real property commonly known as** _ _[*address*]_ _**, California, to owner and movant,** _ _[*name*]_ _**.**

This order shall also serve as a writ of assistance and possession of real property, directing the United States Marshal, the County Sheriff, or any law enforcement officer to take possession of such real property under this Order and restore the same to _ _[*name*]_ _**.**

TO THE UNITED STATES MARSHAL OR COUNTY SHERIFF:

YOU ARE DIRECTED under the writ of execution in this Order to use reasonable force to enter and serve, and to place owner and movant, _ _[*name*]_ _**, and** _ _[*his/her/its*]_ _ **duly authorized agents, in possession of real property commonly known as** _ _[*address*]_ _**, California. This Order shall be enforced according to the procedures applicable to writs of possession for real property, upon payment of usual and customary fees for service and execution of such writs. No further writ or order from this Court is necessary to enforce this Order.**

Date: _ _ _ _ _ _ __[*Signature of judge*]__
_ _[*Typed name of judge*]_ _
UNITED STATES BANKRUPTCY JUDGE

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy. Note Warning at §14.58 regarding electronic filing requirements in some courts.

Comment: This form is to be used with the form in §14.68. See Comment in §14.68.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/§14.70 3. Form: Memorandum in Support of Application for Order to Surrender Property

§14.70 3. Form: Memorandum in Support of Application for Order to Surrender Property

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Movant, _ _[*Name*]_ _

United States Bankruptcy Court
_ _ _ _ _ _ _ _ District of California

In re _ _[*Name(s)*]_ _,	)	**Bk. No.** _ _ _ _ _ _
Debtor(s)	)	**Chapter** _ _
	)	**MC No.** _ _ _ _ _ _
_ _[*Name(s)*]_ _,	)	
Movant(s)	)	**MEMORANDUM IN SUPPORT**
	)	**OF EX PARTE APPLICATION**
vs	)	**FOR ORDER TO SURRENDER**
	)	**REAL PROPERTY**
_ _[*Name(s)*]_ _,	)	
Respondent(s)	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Courtroom:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*name*]_ _

1. <u>FACTS</u>.

Movant _ _[*name*]_ _ **is** _ _[*specify type of entity, e.g., an individual, a partnership, or a corporation*]_ _ _ _[*who/that*]_ _ **owns** _ _[*residential/commercial*]_ _ **real property located at** _ _[*address of premises*]_ _**, California.**

On _ _[*date*]_ _**, the above-named debtor, who is a tenant of the property pursuant to a lease, filed a petition under Chapter** _ _[*7/11/13*]_ _ **in this Court. (Request for Judicial Notice (RFJN) No. 1).** _ _[*Add additional facts if appropriate, e.g., debtor filed petition in pro per; movant was not listed as a creditor; debtor's statement of executory contracts/leases did not list any executory contracts (RFJN No. _); debtor's mailing matrix did not include movant (RFJN No. _); the court's computerized mailing list did not include movant (RFJN No. _)*]_ _**.**

[*Add if applicable*]

Debtor converted this matter from a Chapter _ _[*7/11/13*]_ _ **to a Chapter** _ _[*7/11/13*]_ _ **case. A conversion Order was entered on** _ _[*date*]_ _ **(RFJN No. _).**

[*Continue*]

More than 60 days have elapsed since the filing of the initial petition _ _[*and the conversion to Chapter* _ _[*7/11/13*]_ _]_ _**.** _ _[*In the Chapter* _ _[*7/11/13*]_ _ *proceeding, debtor's statement of executory contracts/leases, executed on* _ _[*date*]_ _*, again omitted any reference to the contract with movant (RFJN No. _)*]_ _**. From a review of the file, it appears that this case is still pending.**

[*Add, if applicable, one or more of the following*]

As of the date of preparation of this application, _ _[*debtor/trustee has neither accepted nor formally rejected the lease/the lease has expired by its own terms/debtor/trustee cannot assume the lease because of a breach of the lease, as set forth below*]_ _**.**

Movant has not received any notifications from this Court. Movant was never informed by the debtor that this case was pending. Nonetheless, debtor negotiated an extension, executed on _ _[*date*]_ _**, extending the term of the lease to** _ _[*date*]_ _**. The negotiations and extension were not disclosed to or approved by the Court (Declaration of** _ _[*e.g., movant/movant's attorney*]_ _**, paragraphs** _ _[*number*]_ _-_ _[*number*]_ _ **and Exhibit** _ _[*letter/number*]_ _**).**

During the months of _ _[*dates*]_ _ debtor was _ _[*e.g., late in paying the rent/made only partial payments of rent*]_ _ and had to be given numerous notices to comply with the lease.

On _ _[*date*]_ _, debtor breached the lease in that debtor _ _[*e.g., completely defaulted in payment of rent/made improvements without movant's permission/committed waste, etc.*]_ _.

On _ _[*date*]_ _, movant _ _[*after proper notice*]_ _ commenced an unlawful detainer action against debtor in the _ _[*Municipal/Superior*]_ _ Court of California, County of _ _ _ _ _, Action No. _ _ _ _ _, _ _[*title of action*]_ _ (Declaration of _ _[*e.g., movant/movant's attorney*]_ _, paragraphs _ _[*number*]_ _-_ _[*number*]_ _ and Exhibit _ _[*letter/number*]_ _; RFJN No. _).

On _ _[*date*]_ _, debtor filed and served in response to the unlawful detainer action _ _[*e.g., a motion to quash service of summons/a demurrer/an answer to the complaint/a notice of the bankruptcy action*]_ _. _ _[*Debtor did not notify the Municipal Court of the bankruptcy action*]_ _. (Declaration of _ _[*e.g., movant/movant's attorney*]_ _, paragraphs _ _[*number*]_ _-_ _[*number*]_ _ and Exhibit _ _[*letter/number*]_ _; RFJN No. _).

Subsequent to the commencement of the eviction action, debtor informally mentioned that movant would not be able to recover the property because he was "in bankruptcy." Thereafter, on _ _[*date*]_ _, movant sought bankruptcy counsel and requested a copy of the file in this case (Declaration of _ _[*e.g., movant/movant's attorney*]_ _, paragraphs _ _[*number*]_ _-_ _[*number*]_ _).

Movant has not been paid any rent for the period of _ _[*date*]_ _ to the present (Declaration of _ _[*e.g., movant/movant's attorney*]_ _, paragraphs _ _[*number*]_ _-_ _[*number*]_ _).

[*Continue*]

2. <u>THIS COURT CAN ORDER IMMEDIATE TURNOVER OF THE PROPERTY.</u>

A trustee in a Chapter 7 bankruptcy must assume an executory lease of residential real property within 60 days of the filing of the bankruptcy petition (11 USC §365(d)(1)), and in a bankruptcy under any chapter, must assume an executory lease of nonresidential real property within the same time period (11 USC §365(d)(4)). In the Ninth Circuit, a debtor in a Chapter 11 proceeding must also assume an executory lease of nonresidential real property within 60 days of the filing of the petition. 11 USC §365(d)(4); *Turgeon v Victoria Station, Inc. (In re Victoria Station, Inc.)* (9th Cir 1988) 840 F2d 682, 684.

[*Add brief summary of appropriate facts, such as*]

In this action, debtor never attempted to assume the lease with movant. Debtor also did not seek any extensions of time to assume the lease. In particular, there was a failure to assume the lease within _ _[*specify number, e.g., 60 for residential/120 for nonresidential*]_ _ days after the Chapter _ _[*7/11/13*]_ _ petition was filed on _ _[*date*]_ _, _ _[*and a failure to assume after the conversion of this case to a Chapter _ _[7/11/13]_ _ by an Order entered _ _[date]_ _]_ _.

[*Continue*]

The lease is now rejected or deemed rejected as a matter of law under 11 USC §365(d), _ _[*whether the court applies the _ _[60-day/120-day]_ _ period to the initial filing or to the entry of the conversion order*]_ _. *Southwest Aircraft Servs., Inc. v City of Long Beach (In re Southwest Aircraft Servs., Inc.)* (9th Cir 1987) 831 F2d 848, cert denied (1988) 487 US 1206, 101 L Ed 2d 885, 108 S Ct 2848.

Under 11 USC §365(d)(4), a debtor must immediately surrender possession of nonresidential real property to the lessor upon rejection of the lease. *George v City of Morro Bay (In re George)* (9th Cir 1999) 177 F3d 885; *Anderson v Elm Inn, Inc. (In re Elm Inn, Inc.)* (9th Cir 1991) 942 F2d 630, 633. Because the Debtor is now in possession of the real property, movant is entitled to relief in the form of a surrender order. Because the lease is terminated by operation of law, the debtor has no interest in the property of the estate; thus, there is no need for notice or hearing.

[*Add if applicable*]

Under 11 USC §365(d)(3), a trustee or debtor must timely perform all obligations of the lease from the date the bankruptcy petition is filed until the lease is assumed or rejected, except those obligations specified in 11 USC §365(b)(2). See also 11 USC §365(b)(1). In this case, such performance was not given in that _ _[*summarize facts from application showing default*]_ _. Therefore the lease cannot be assumed under 11 USC §365(b)(1) in any event.

[*Continue*]

3. <u>CONCLUSION</u>.

Under the above authorities, the Court is respectfully requested to enter an Order compelling the debtor, as lessee, to surrender immediately possession of the above-described premises to movant. The Court is requested to authorize movant to apply to the United States Marshal or the County Sheriff to enforce the Court's proposed Order accompanying this Application. See *Anderson v Elm Inn, Inc. (In re Elm Inn, Inc.)* (9th Cir 1991) 942 F2d 630, 634. A bankruptcy court may grant this type of relief in fairness to a landlord leasing to a bankrupt party who continues to enjoy possession of the property without compensation to the landlord.

Date: _ _ _ _ _ _

_ _[*Name of Firm*]_ _
By: __[*Signature*]__
_ _[*Name of attorney*]_ _
Attorney for Movant,
_ _[*name*]_ _

Copies: Original (file in bankruptcy court with original proof of service); copies for service (one for debtor, debtor's attorney, trustee of the bankruptcy estate, United States trustee, and other persons as required by rules); office copy; client copy. Note Warning at §14.58 regarding electronic filing requirements in some courts.

Comment: This form should accompany an application such as that in §14.68. This procedure is primarily used in a case involving a nonresidential lease deemed rejected under 11 USC §365(d)(4), or terminated by its own terms or by operation of law, in cases filed before October 17, 2005. See §§14.14, 14.31, 14.54. Bankruptcy cases filed on or after that date are governed by the BAPCPA (see §14.1A), which contains significant changes to the law concerning extensions of time to assume or reject leases. See §§14.47-14.48. Some court departments may require a preprinted form to be used in unlawful detainer related applications. Attorneys are cautioned to always investigate local court practices and interpretation of the conflicting opinions in reported cases. This brief is not intended to be an exact parallel to the application form in §14.68, which contains optional factual recitations that may be incorporated into this form, if needed.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/ I. BAPCPA Forms; Residential Evictions/§14.70A 1. Form: Debtor's Certification That Circumstances Exist Which Would Allow Cure of Monetary Default (Central District Form F 4001-1.1; Optional)

I. BAPCPA Forms; Residential Evictions

§14.70A 1. Form: Debtor's Certification That Circumstances Exist Which Would Allow Cure of Monetary Default (Central District Form F 4001-1.1; Optional)

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number	FOR COURT USE ONLY
☐ *Attorney for:* ☐ *Individual debtor appearing without counsel* (Pro Se Debtor)	
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: Debtor(s).	CHAPTER: _____ CASE NO : _____
	DEBTOR'S CERTIFICATION THAT CIRCUMSTANCES EXIST WHICH WOULD ALLOW CURE OF MONETARY DEFAULT UNDERLYING JUDGMENT FOR POSSESSION OF RESIDENTIAL PROPERTY AND PROOF OF DEPOSIT (11 U.S.C. § 362(l)(1))

NOTE: THIS CERTIFICATION MUST BE FILED WITH THE DEBTOR'S PETITION.

Debtor certifies: *(Check all that apply)*

1. ☐ Circumstances exist that would, under nonbankrutpcy law, allow Debtor to cure the entire monetary default that gave rise to that certain judgment for possession: _____ (Date of Entry of Judgment) in _____ (Court and Case No.) of the residential property commonly known as: _____ (Complete Address) ("The Property").

   Those circumstances are: _____

   _____

   _____

   _____ ☐ continuation page attached

2. ☐ The nonbankruptcy law that allows debtor to cure the monetary default that gave rise to the judgment is: *(Check all that apply)*
   - ☐ California Civil Code § 3275
   - ☐ California Code of Civil Procedure § 1174(c)
   - ☐ California Code of Civil Procedure § 1179
   - ☐ Other: _____

   ☐ supporting memorandum of points and authorities attached

3. ☐ Debtor, or ☐ _____ (an adult dependent of debtor), has deposited with the Clerk of the U.S. Bankruptcy Court the sum of $_____ which is the total rent which would become due under the lease of the property for the thirty day period beginning on the date this bankruptcy petition is being filed.

(Continued on next page)

Print

Debtor's Certification of Curing Monetary Default - *Page 2 of* _____ **F 4001-1.1**

In re (SHORT TITLE) Debtor(s)	CHAPTER: CASE NO.:

Declaration of Debtor

I, _____, am the debtor in these proceedings. I declare under penalty of perjury that I have read the foregoing, including all continuation pages, and that all statements therein are true and correct.

Executed this _____ day of _____ (Month), _____ (Year) at _____.

_____
Signature of Debtor

_____
Print Name of Debtor

_____
Print the Name of the Law Firm Representing the Debtor (if applicable)

_____
Signature of the Attorney Representing the Debtor (if applicable)

_____
Print the Name of the Attorney Representing the Debtor (if applicable)

This form is optional. It has been approved by the United States Bankruptcy Court for the Central District of California.

Revised October 2005 **F 4001-1.1**

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF _____

1. I am over the age of 18 and not a party to the within action. My business address is as follows:

2. **Regular Mail Service:** On _____, pursuant to Local Bankruptcy Rule 9013-1, I served the documents described as: DEBTOR'S CERTIFICATION THAT CIRCUMSTANCES EXIST WHICH WOULD ALLOW CURE OF MONETARY DEFAULT UNDERLYING JUDGMENT FOR POSSESSION OF RESIDENTIAL PROPERTY AND PROOF OF DEPOSIT (11 U.S.C. § 362(l)(1)) (with supporting declarations and memorandum of points and authorities, if any) on the Lessor and interested parties at their last known address by placing a true and correct copy thereof in a sealed envelope with postage thereon fully prepaid in the United States Mail at _____, California, addressed as set forth on the attached list.

3. **See attached list for names and addresses of all parties and counsel that have been served.** *(In the manner set forth in Local Bankruptcy Rule 7004-1(b), specify capacity in which service is made; e.g., Lessor, Lessor's(s') Attorney, Trustee, Trustee's Attorney, Creditors Committee, or 20 largest unsecured creditors, etc.)*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated:

_____ _____
Typed Name *Signature*

Print

Comment: See discussion in §14.16.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/§14.71 2. Form: Debtor's Further Certification of Cure of Monetary Default (Central District Form F 4001-1.2; Optional)

§14.71 2. Form: Debtor's Further Certification of Cure of Monetary Default (Central District Form F 4001-1.2; Optional)

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number	FOR COURT USE ONLY
☐ *Attorney for*: ☐ *Individual debtor appearing without counsel* (Pro Se Debtor)	
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: Debtor(s).	CHAPTER: CASE NO.: **DEBTOR'S FURTHER CERTIFICATION OF CURE OF MONETARY DEFAULT UNDERLYING JUDGMENT FOR POSSESSION OF RESIDENTIAL PROPERTY AND PROOF OF DEPOSIT (11 U.S.C. § 362(l)(2))**

NOTE: THIS FURTHER CERTIFICATION MUST BE FILED WITHIN 30 DAYS OF THE FILING OF DEBTOR'S PETITION.

Concerning the residential property commonly known as:_____.("Property")
(Complete Address)

Debtor(s) certifies: *(Check all that apply)*

1. ☐ Debtor(s) has filed and served the "Debtor's Certification that Circumstances Exist Which Would Allow Cure of Monetary Default Underlying Judgment for Possession of Residential Property and Proof of Deposit" ("Original Certification") on_____ (date Original Certification was filed and served) together with Debtor(s)' petition. A copy of the Original Certification is attached as Exhibit ____.

2. ☐ Debtor(s), or an adult dependent of Debtor, on the date of the petition, deposited the sum of $ 50,000.00 representing total rent which would have become due under the lease of the property for the 30-day period beginning on the date the petition in this bankruptcy was filed.

3. To Debtor's knowledge, Lessor ☐ has ☐ has not filed an Objection to the Original Certification.

4. ☐ Debtor(s) has cured, under nonbankruptcy law, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor.

5. ☐ Debtor(s) is entitled to relief from the judgment for possession of the property by reason of the following facts and nonbankrutpcy law. *(Check all that apply)*
   - ☐ California Civil Code § 3275
   - ☐ California Code of Civil Procedure § 1174(c)
   - ☐ California Code of Civil Procedure § 1179
   - ☐ Other: _____

   ☐ supporting memorandum of points and authorities attached

(Continued on next page)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

6. Debtor is entitled to relief from the judgment for possession of the property by reason of the following facts:_____
_____
_____
_____ ☐ continuation page attached.

7. Debtor ☐ has ☐ has not filed and served herewith further supporting declarations.

8. Debtor ☐ has ☐ has not filed and served herewith a supporting memorandum of points and authorities.

Declaration of Debtor

I, _____, am the debtor in these proceedings. I declare under penalty of perjury that I have read the foregoing, including all continuation pages, and that all statements therein are true and correct.

Executed this _____ day of _____, _____ at _____ .
(Month) (Year)

_____
Signature of Debtor

_____
Print Name of Debtor

_____
Print the Name of the Law Firm Representing the Debtor (if applicable)

_____
Signature of the Attorney Representing the Debtor (if applicable)

_____
Print the Name of the Attorney Representing the Debtor (if applicable)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on a CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document described as _____ _____ will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d), and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On _____ I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

☐ Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):
On _____ I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follow. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method) by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date	*Type Name*	*Signature*

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

ADDITIONAL SERVICE INFORMATION (if needed):

Comment: See discussion in §14.16.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/§14.72 3. Form: Lessor's Objection to Debtor's Certification and/or Debtor's Further Certification Concerning Residential Property (Central District Form F 4001-1.3; Optional)

§14.72 3. Form: Lessor's Objection to Debtor's Certification and/or Debtor's Further Certification Concerning Residential Property (Central District Form F 4001-1.3; Optional)

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number	FOR COURT USE ONLY
☐ *Attorney for*: ☐ *Individual lessor appearing without counsel* (Pro Se Lessor)	
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: Debtor(s).	CHAPTER: CASE NO.: **LESSOR'S OBJECTION TO DEBTOR'S CERTIFICATION AND/OR DEBTOR'S FURTHER CERTIFICATION CONCERNING RESIDENTIAL PROPERTY AND NOTICE OF HEARING (11 U.S.C. § 362 (l)(3)(A))** DATE: TIME: CTRM: FLOOR:

_____,("Lessor") is the lessor of the residential property commonly known as _____
_____("Property").
(Give Full Address of Subject Property)

1. Lessor objects to the following: *(Check all that apply)*

   a. ☐ "Debtor's Certification That Circumstances Exist Which Would Allow Cure of Monetary Default Underlying Judgment For Possession of Residential Property and Proof of Deposit" ("Certification") filed with the petition; 11 U.S.C. § 362 (l)(1)(A)&(B)

   b. ☐ "Further Certification of Cure of Monetary Default Underlying Judgment For Possession of Residential Property And Proof of Deposit" ("Further Certification") filed herein on_____; 11 U.S.C. § 362 (l)(2)

2. Lessor alleges that the ☐ Certification ☐ Further Certification is incorrect, improper, or ineffective for the following reasons:

_____
_____
_____
_____ ☐ continuation page attached.

3. Lessor ☐ has ☐ has not filed and served herewith a declaration(s) contesting the facts asserted in the Certification or the Further Certification.

4. Lessor ☐ has ☐ has not filed and served herewith a memorandum of points and authorities supporting this Objection.

(Continued on next page)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

5. Lessor further notifies Debtor and parties in interest that the Lessor has scheduled through the assigned judge's calendar clerk or, where applicable, the assigned judge's self-calendaring system, a hearing (within 10 days of the filing and service of this Objection) on Lessor's objection and the truth of Debtor's Certification and/or Further Certification, which hearing will be held on _____ at _____(am / pm) in courtroom _____ at:

Hearing Location:
- ☐ **255 East Temple Street, Los Angeles**
- ☐ **411 West Fourth Street, Santa Ana**
- ☐ **21041 Burbank Boulevard, Woodland Hills**
- ☐ **1415 State Street, Santa Barbara**
- ☐ **3420 Twelfth Street, Riverside**

Declaration of Lessor

I, _____, am the ☐ lessor, or ☐ an officer, partner, or authorized agent of the lessor. I declare under penalty of perjury that I have read the foregoing, including all continuation pages, and that all statements therein are true and correct.

Executed this _____ day of _____ (Month), _____ (Year) at _____ .

_____
Signature of the Lessor or Agent of the Lessor

_____
Print Name of the Lessor or Agent of the Lessor

_____
Print the Name of the Law Firm Representing the Lessor (if applicable)

_____
Signature of the Attorney Representing the Lessor (if applicable)

_____
Print the Name of the Attorney Representing the Lessor (if applicable)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on a CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document described as _____ _____ will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d), and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On _____ I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

☐ Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):
On _____ I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follow. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method) by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date	*Type Name*	*Signature*

This form is optional. It has been approved by the United States Bankruptcy Court for the Central District of California.

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

ADDITIONAL SERVICE INFORMATION (if needed):

Comment: See discussion in §14.16.

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Source: Real Property/California Landlord-Tenant Practice/14 Tenant Bankruptcies: Relief From Stay, Rent Claims, and Lease Issues/§14.73 4. Form: Lessor's Certification of Endangerment of the Property or Illegal Use of Controlled Substance (Central District Form F 4001-1.4; Optional)

§14.73 4. Form: Lessor's Certification of Endangerment of the Property or Illegal Use of Controlled Substance (Central District Form F 4001-1.4; Optional)

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number	FOR COURT USE ONLY
☐ *Attorney for:* Debtor ☐ *Individual lessor appearing without counsel* (Pro Se Lessor)	
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: Debtor(s).	CHAPTER: CASE NO.: **LESSOR'S CERTIFICATION OF** **(1) PREPETITION EVICTION ACTION SEEKING POSSESSION OF RESIDENTIAL PROPERTY BASED ON DEBTOR'S PREPETITION ENDANGERMENT OF PROPERTY OR ILLEGAL USE OF A CONTROLLED SUBSTANCE, OR** **(2) ENDANGERMENT OF THE PROPERTY OR ILLEGAL USE OF A CONTROLLED SUBSTANCE WITHIN THE LAST 30 DAYS (11 U.S.C. § 362 (b)(23))**

1. _____ ("Lessor") hereby certifies the following regarding that residential property commonly known as _____ ("Property"): *(Check all that apply)*
(Complete Address)

   a. ☐ The Property is the subject of an eviction action in which possession is sought, filed by the Lessor before the petition was filed in this case. The eviction action was filed on _____ in _____ _____ (Describe Court and Case No.) (the "Eviction Action"). A copy of the complaint filed in the Eviction Action is attached as Exhibit ____.

   b. ☐ Debtor has endangered the property, or used or allowed illegal use of controlled substances on the property, as shown by the following facts: _____ _____ _____ _____ ☐ continuation page(s) attached.

   c. ☐ The conduct described in paragraph (b):
      ☐ Is described in the eviction action referred to in paragraph (a); or
      ☐ Occurred during the 30-day period preceding the date this certification was filed and served.

2. Lessor ☐ has ☐ has not filed and served on Debtor and parties in interest a declaration(s) supporting this certification, and ☐ has ☐ has not filed and served on Debtor and parties in interest a memorandum of points and authorities supporting Lessor's rights under 11 U.S.C. § 362, subsections (m)(1), (m)(2)(D), and (b)(23).

(Continued on next page)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

Declaration of Lessor

I, _____, am the ☐ lessor, ☐ an officer or authorized agent of the lessor of the property described herein. I declare under the penalty of perjury that I have read the foregoing, including all continuation pages, and that all statements therein are true and correct.

Executed this _____ day of _____ (Month), _____ (Year) at _____ .

_____
Signature of the Lessor or Agent of the Lessor

_____
Print Name of the Lessor or Agent of the Lessor

_____
Print the Name of the Law Firm Representing the Lessor (if applicable)

_____
Signature of the Attorney Representing the Lessor (if applicable)

_____
Print the Name of the Attorney Representing the Lessor (if applicable)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on a CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document described as _____ _____ will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d), and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On _____ I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

☐ Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):
On _____ I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follow. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method) by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date	*Type Name*	*Signature*

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

ADDITIONAL SERVICE INFORMATION (if needed):

Comment: See discussion in §14.16B.

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§14.74 5. Form: Debtor's Objection to Lessor's Certification (Central District Form F 4001-1.5; Optional)

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number	FOR COURT USE ONLY
☐ *Attorney for*: ☐ *Individual debtor appearing without counsel* (Pro Se Debtor)	
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: Debtor(s).	CHAPTER: CASE NO.: **DEBTOR'S OBJECTION TO LESSOR'S CERTIFICATION AND NOTICE OF HEARING (11 U.S.C. § 362(m)(2)(A) and (B))** DATE: TIME: CTRM: FLOOR:

NOTE: THIS OBJECTION MUST BE FILED WITHIN 15 DAYS OF LESSOR'S CERTIFICATION.

1. In response to "Lessor's Certification of (1) Prepetition Eviction Action Seeking Possession of Residential Property Based on Debtor's Prepetition Endangerment of Property or Illegal Use of a Controlled Substance or (2) Endangerment of the Property or Illegal Use of a Controlled Substance within the Last 30 Days" filed herein on_____ ("Lessor's Certification"), concerning the residential property commonly known as _____, the Debtor objects and declares: *(Check all that apply)* (Complete Address)

   a. ☐ The Lessor's Certification is false in the following respects: _____
   _____
   _____
   _____ ☐ continuation page(s) attached.

   b. ☐ The Lessor's Certification lacks legal sufficiency in the following respects: _____
   _____
   _____
   _____ ☐ continuation page(s) attached.

   c. ☐ The conditions described in the Lessor's Certification have been remedied, as follows: _____
   _____
   _____
   _____ ☐ continuation (s) page attached.

2. Supporting declaration(s) ☐ are ☐ are not attached hereto and incorporated herein.

3. A memorandum of points and authorities supporting this Objection ☐ is ☐ is not attached hereto and incorporated herein.

(Continued on next page)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

4. Debtor requests that the truth or falsity of the Lessor's certification, and/or the sufficiency of the remedial action by Debtor described above within the meaning of 11 U.S.C. § 362 (m)(2)(C), be determined within ten days of the filing of this Objection, and Debtor has obtained from the Court through the assigned judge's calendar clerk, or where applicable, the assigned judge's self-calendering system the date of _____ at _____ (am / pm) which is within that 10 day period.

Hearing Location:
- ☐ **255 East Temple Street, Los Angeles**
- ☐ **21041 Burbank Boulevard, Woodland Hills**
- ☐ **3420 Twelfth Street, Riverside**
- ☐ **411 West Fourth Street, Santa Ana**
- ☐ **1415 State Street, Santa Barbara**

Declaration of Debtor

I, _____, am the debtor in these proceedings. I declare under penalty of perjury that I have read the foregoing, including all continuation pages, and that all statements therein are true and correct.

Executed this _____ day of _____ (Month), _____ (Year) at _____.

_____
Signature of Debtor

_____
Print Name of Debtor

_____
Print the Name of the Law Firm Representing the Debtor (if applicable)

_____
Signature of the Attorney Representing the Debtor (if applicable)

_____
Print the Name of the Attorney Representing the Debtor (if applicable)

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on a CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document described as _____ _____ will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d), and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On _____ I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

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☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date	*Type Name*	*Signature*

This form is optional. It has been approved by the United States Bankruptcy Court for the Central District of California.

Print

In re (SHORT TITLE) Debtor(s).	CHAPTER: CASE NO.:

ADDITIONAL SERVICE INFORMATION (if needed):

Comment: See discussion in §14.16B.

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Directory

§§1.32-1.36, 2.1, 2.34, 2.49, 3.19, 6.28

U.S. Department of Housing and Urban Development (HUD)
Office of Fair Housing and Equal Opportunity
451 7th Street SW, 5th floor
Washington, DC 20410-2000
(800) 669-9777 (Hotline)
(202) 708-1112
(202) 708-2313 (FAX)
http://www.hud.gov/offices/fheo

Office covering California, Arizona, Nevada, Hawaii, and U.S. Pacific Territories may be contacted at (800) 347-3739 x5.

600 Harrison Street, 3d floor
San Francisco, CA 94107-1300
(415) 489-6400
(415) 489-6524 (fair housing complaints)
(415) 489-6419 (FAX)
E-mail: Complaint_office_09@hud.gov

34 Civic Center Plaza, Room 7015
Santa Ana, CA 92701-4003
(714) 796-5577
(714) 796-5517 (FAX)

§§1.80, 4.37, 7.2

California Apartment Association (CAA)
980 Ninth Street, Suite 200
Sacramento, CA 95814-2741
(800) 967-4222 (916) 447-7881
(877) 999-7881 (FAX)
(916) 447-7903 (FAX)
http://www.caanet.org

§1.80

California Association of Realtors (CAR)
525 S. Virgil Avenue
Los Angeles, CA 90020
(213) 739-8200
(213) 480-7724 (FAX)
http://www.car.org

§§1.80, 7.19

National Housing Law Project
614 Grand Avenue, Suite 320
Oakland, CA 94610

(510) 251-9400
(510) 451-2300 (FAX)
http://www.nhlp.org

§2.1

California Department of Fair Employment and Housing (DFEH)
2000 "O" Street, Suite 120
Sacramento, CA 95814
(800) 884-1684
(916) 445-5523
(916) 323-6092 (FAX)
http://www.dfeh.ca.gov

1515 Clay Street, Suite 701
Oakland, CA 94612
(800) 233-3212
(510) 622-2941
(510) 622-2956

611 W. Sixth Street, Suite 1500
Los Angeles, CA 90017
(800) 884-1684
(213) 439-6799
(213) 439-6715 (FAX)

§§2.8, 2.23, 2.26, 2.27A, 2.27C

HUD ALJ decisions can be found at:
http://www.hud.gov/offices/oalj/cases/fha/aljalpha.cfm

Fair Housing Accessibility First
U.S. Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410
(888) 341-7781 (V/TTY)
http://www.fairhousingfirst.org

§§2.33, 2.48-2.49, 2.51-2.55, 2.60, 6.11, 6.78, 8.122

California Department of Fair Employment and Housing (DFEH)
2000 "O" Street, Suite 120
Sacramento, CA 95814
(800) 884-1684
(916) 445-5523
(916) 323-6092 (FAX)
http://www.dfeh.ca.gov

1515 Clay Street, Suite 701
Oakland, CA 94612
(800) 233-3212
(510) 622-2941
(510) 622-2956

611 W. Sixth Street, Suite 1500
Los Angeles, CA 90017
(800) 884-1684

(213) 439-6799
(213) 439-6715 (FAX)

Fair Employment and Housing Commission
1515 Clay Street, Suite 701
Oakland, CA 94612
(510) 622-2973
(510) 622-2951 (FAX)
http://www.dfeh.ca.gov

§2.58

California Department of Rehabilitation
Office of Civil Rights
P.O. Box 944222
Sacramento, CA 94244-2220
(916) 263-8662
http://www.rehab.cahwnet.gov

§3.11

International Code Council
5360 Workman Mill Road
Whittier, CA 90601
(800) 284-4406 or (888) 422-7233
(888) 329-4226 (FAX)
http://www.iccsafe.org

§§2.12, 3.11, 6.11, 6.28, 6.57, 6.77-6.78, 6.80, 6.143

California Department of Housing and Community
Development (HCD)
1800 Third Street
Sacramento, CA 95811-6942
(916) 445-4782
(916) 323-2815 (FAX)
http://www.hcd.ca.gov

Division of Codes and Standards Field Offices
Northern Area
9342 Tech Center Drive, Suite 550
Sacramento, CA 95826-2581
(916) 255-2532

Southern Area
3737 Main Street, Suite 400
Riverside, CA 92501-3337
(951) 782-4431

General Counsel
FTP Deputy Director for Legal Affairs
(916) 323-7288

§6.75

Manufactured Home Registration and Titling Program
California Department of Housing and Community Development

1800 Third Street
Sacramento, CA
95811-6942
(916) 445-4782
http://www.hcd.ca.gov/codes/rt

§6.143

Golden State Manufactured-Home Owners League, Inc. (GSMOL)
P.O. Box 876
11021 Magnolia Avenue
Garden Grove, CA 92841
(800) 888-1727
http://www.gsmol.org

California Mobilehome Resource and Action Association (CMRAA)
P.O. Box 7468
San Jose, CA 95150-7468
(408) 244-8134
(408) 246-2992 (FAX)
E-mail: cmraa1996@yahoo.com
http://www.cmraa.org/

Coalition of Mobilehome Owners-California (CoMoCal)
P.O. Box 4821
Chatsworth, CA 91313
(800) 929-6061
E-mail: comocal@yahoo.com
http://www.comocal.org

§6.144

Western Manufactured Housing Communities Association (WMA)
455 Capitol Mall, Suite 800
Sacramento, CA 95814
(916) 448-7002
http://www.wma.org

California Mobilehome Parkowners Alliance
1801 E. Edinger Avenue, Suite 230
Santa Ana, CA 92705
(714) 480-1120 Ext. 104
(714) 480-1137 (FAX)
http://www.mobilehome.net

Manufactured Housing Educational Trust
25241 Paseo de Alicia, Suite 120
Laguna Hills, CA 92653
(800) 616-0064
(949) 380-3310 (FAX)
http://www.mhet.com

Other Useful Resources

California Building Standards Commission
2525 Natomas Park Drive, Suite 130

Sacramento, CA 95833
(916) 263-0916
(916) 263-0959 (FAX)
http://www.bsc.ca.gov

California Department of Consumer Affairs
1625 North Market Blvd.
Sacramento, CA 95834
(800) 952-5210
(916) 445-1254
(has online brochures on residential tenants' rights)
http://www.dca.ca.gov
(click on "Publications")

Department of Housing and Urban Development
Direct Distribution Center
451 Seventh St., SW, Room B-100
Washington, DC 20410
(800) 767-7468
(202) 708-2313 (FAX)
http://www.hud.gov (general website)
(has on website federal regulations promulgated by HUD)
http://www.hudclips.org

Sargent Shriver National Center on Poverty Law
(publishes Clearinghouse Review, available by subscription online)
50 East Washington Street, Suite 500
Chicago, IL 60602
(312) 263-3830
(312) 263-3846 (FAX)
http://www.povertylaw.org

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Table of Statutes, Regulations, and Rules

CALIFORNIA

Constitution

Art I
§1: §2.8
§2: §5.37
§§2-3: §8.127
§9: §4.36
§16: §§1.30, 7.43, 7.77, 11.54
§19: §7.13
Art VI
§1: §§7.43, 7.77
§10: §9.32
Art XIIIA: §4.36
Art XV
§1: §13.20
§1(1): §13.20

Statutes

BUSINESS AND PROFESSIONS CODE

6077: §§9.20, 10.2
6148: §4.2
6148(a): §4.2
6148(c): §4.2
6149: §4.2
8538: §§1.29, 4.16E
10026: §4.11
11000: §6.24
11000-11200: §§6.24, 7.64, 7.64B, 7.64E, 7.64G
11004.5: §8.22A
11004.5(b): §7.16
11004.5(d): §7.16
11004.5(f): §7.16
11010: §7.16
12500-12548: §4.41E
12500.5: §4.41E
12501.1: §4.41E
16720-16770: §6.20
17200: §1.30
17200-17208: §6.16
17200-17209: §§3.42, 3.48A, 6.20, 6.86, 7.77, 9.33
17200-17210: §§2.27H, 6.20, 7.64E, 7.64G
19155: §1.63
20999.1: §8.136
21140.2: §8.128

CIVIL CODE

Title V: §§1.3B, 7.64G
Ch 2: §3.15
1.21: §4.38
6.14: §1.54
6.15A-6.15B: §1.54
6.15B: §1.54
6.15D: §1.54
7: §4.43
9: §4.43
46(5): §4.13
47(b): §§5.39, 6.17, 7.55
47(c): §4.13
51: §§2.2, 2.5, 2.9A, 2.9C, 2.10, 2.20-2.21, 2.23, 2.27B, 2.27H, 2.28, 2.48, 2.56-2.59, 2.69, 3.6, 4.14-4.15, 5.7, 5.16, 6.18, 6.20, 8.113, 8.118-8.122, 8.135-8.136, 9.2, 10.67-10.68, 13.25
51-51.3: §2.28
51(b): §§2.58, 8.118

51(e)(5): §§2.57-2.58, 4.14, 5.7, 8.118, 10.67
51(e)(6): §2.58
51(f): §§2.21, 5.7
51.1-51.6: §2.57
51.2: §§2.20, 2.25C, 2.57
51.2-51.4: §§2.25, 2.28, 8.119
51.2-51.12: §2.25B
51.2(a): §§2.25B-2.25C
51.2(c): §2.25B
51.2(d): §2.25B
51.3: §§2.25B-2.25C
51.3(b)(2): §2.25B
51.3(b)(3): §2.25B
51.3(b)(3)(A)-(B): §2.25B
51.3(b)(4): §§2.25B-2.25C
51.3(c): §2.25B
51.3(e): §2.25B
51.3(h): §2.25B
51.4(b): §2.25B
51.5: §§2.20, 2.28
51.6: §2.59
51.7: §§3.6, 3.70A
51.8-52: §2.57
51.9: §§2.58, 3.70A, 8.122, 8.124
51.9(a)(1): §3.70A
51.11(b)(4): §§2.25B-2.25C
51.13: §§2.21, 2.58
52: §§2.28, 2.55-2.56, 5.7
52(a): §§2.28, 2.59-2.60, 8.121, 13.25
52(b): §§2.59, 3.70A, 8.121
52(c): §§2.28, 2.59, 8.121
52(f): §2.55
52.2: §2.59
54: §§2.27B, 2.67, 10.68
54-54.2: §2.60
54-55.1: §9.2
54-55.2: §2.67
54.1: §§2.48, 2.60, 2.67
54.1-55: §2.20
54.1(b): §§1.62, 2.26
54.1(b)(1): §2.60
54.1(b)(2): §2.60
54.1(b)(3)(A): §2.27B
54.1(b)(3)(B): §§1.62, 2.4, 2.27
54.1(b)(6): §2.60
54.1(b)(6)(A): §4.38
54.1(b)(6)(B): §§1.62, 2.60
54.1(b)(7): §§2.9D, 2.60
54.1(d): §2.60
54.2: §2.60
54.2(b): §1.62
54.3: §§2.60, 2.67, 5.7
54.3(b): §2.60
55: §§2.60, 2.67
55-55.1: §2.60
290.4: §1.29
527.6: §5.37
715: §1.27
789: §§1.10, 8.79, 9.3
789-790: §8.79
789-793: §9.2
789.3: §§5.9, 5.20-5.23, 6.14, 6.43, 6.87, 8.137, 8.149, 8.153, 14.36
789.3(a): §§8.147, 8.149, 14.36
789.3(b): §§8.148-8.149
789.3(b)(2): §8.151
789.3(c): §§5.20, 8.149
789.3(c)-(d): §8.149
789.3(c)(2): §5.22
789.3(d): §§5.21, 5.23, 8.149, 13.25
791: §8.69
798-798.88: §6.11
798-799.8: §§6.2-6.3, 7.10, 7.12

798-799.10: §§6.1, 6.4-6.5, 6.9-6.14, 6.15A, 6.19, 6.21, 6.23, 6.33, 6.42, 6.44, 6.46, 6.50-6.51, 6.56, 6.59, 6.62, 6.74, 6.84, 6.86, 6.91, 6.104, 6.111-6.113, 6.135, 6.141, 13.25
798.1: §§6.3, 6.11
798.2-798.12: §6.2
798.3: §§6.2-6.4, 6.58, 6.62
798.3(a): §6.7
798.3(b): §§6.4-6.5, 6.10, 6.62
798.4: §§6.2, 6.9-6.11, 6.62
798.6: §§6.2, 6.9
798.7: §6.32
798.8: §§1.1, 6.2, 6.21
798.9: §§6.2, 6.12
798.10: §6.50
798.11: §§6.2, 6.12, 6.62, 6.91
798.12: §§6.2, 6.6, 6.9, 6.12
798.13: §6.10
798.15: §§1.13, 6.2, 6.16, 6.21, 6.47
798.15(a): §§6.23, 6.94-6.95, 6.105, 6.107
798.15(b): §6.112
798.15(b)-(c): §6.135
798.15(c): §6.112
798.15(d): §§6.47, 6.113
798.15(e): §6.97
798.15(f): §§6.96, 6.98
798.15(g): §§6.34, 6.113, 6.127, 6.142
798.16(a): §6.48
798.16(b): §6.21
798.17: §§6.15, 6.21, 6.29, 6.32, 6.122, 6.143
798.17-798.18: §6.20
798.17(a): §6.21
798.17(b): §6.21
798.17(g): §6.25
798.18: §§6.23, 6.29, 6.94, 6.105, 6.137
798.18(b): §6.31
798.18(c): §6.25
798.19: §§6.21, 6.115, 6.120
798.19.5: §§6.20, 6.54
798.20: §§6.14A, 6.20
798.20(a): §§6.14A, 6.20
798.21: §§6.15, 6.21, 6.32
798.22: §6.10
798.23(a): §§6.112, 6.141
798.23.5: §§6.12, 6.19, 6.59, 6.61, 6.117
798.23.5(a)(2): §6.117
798.23.5(b)(2): §6.117
798.24: §§6.54, 6.113, 6.123
798.25: §§6.45, 6.61, 6.112, 6.122, 6.141
798.25(d): §6.45
798.25(e): §§6.33, 6.41
798.25.5: §§6.46, 6.142
798.26: §§6.47, 6.114-6.115, 6.139
798.27: §§6.49, 6.51
798.27(a): §6.101
798.27(b): §§6.51, 6.101
798.28: §6.92
798.28.5: §6.88
798.28.5(b): §6.47
798.29: §6.143
798.29.6: §§6.48, 6.114
798.30: §§6.27, 6.30
798.30-798.44: §6.33
798.31: §§6.15, 6.29, 6.31, 6.33, 6.36, 6.42-6.43, 6.106
798.32: §§6.30, 6.35, 6.98
798.32(a): §6.33
798.32(b): §6.33
798.33: §§6.37, 6.142
798.33-798.34: §6.33
798.33(a): §6.20
798.34: §§1.21, 1.31, 1.46, 6.20, 6.38, 6.118, 6.142
798.34-798.35: §6.59
798.34(b): §6.38
798.34(c): §6.38

798.34(d): §6.38
798.35: §§6.38, 6.142
798.36: §6.41
798.36(b): §§6.33, 6.41, 6.113
798.37: §§6.20, 6.34, 6.39, 6.138
798.37.5: §§6.34, 6.47-6.48, 6.114
798.38: §6.78
798.39: §§6.14, 6.111
798.39(a): §6.44
798.39(b): §6.44
798.39(c): §6.44
798.39(c)-(d): §6.44
798.39(f): §6.44
798.39.5(a): §6.40
798.39.5(b): §6.40
798.40(a): §6.43
798.40(b): §6.43
798.41: §6.43
798.41(a): §6.30
798.42: §6.43
798.43.1: §6.43
798.44(a): §6.43
798.44(e): §6.43
798.45: §6.32
798.49: §6.35
798.49(d): §6.35
798.49(d)(4): §§6.15, 6.29
798.50: §6.31
798.51: §§6.31, 6.87, 6.143
798.51(a): §6.143
798.51(e): §6.46
798.52: §§6.87, 6.143
798.53: §§6.122, 6.143
798.53(d): §6.143
798.55: §§6.80-6.81
798.55-798.56: §§6.75, 6.77, 6.79, 8.136
798.55-798.60: §§6.2, 6.12, 6.62
798.55(a): §6.65
798.55(b): §§6.54, 6.73-6.74
798.55(b)(1): §§6.14, 6.58, 6.74, 6.121
798.55(b)(2): §6.74
798.55(d)-(e): §6.74
798.55(g): §6.70
798.56: §§3.68B, 6.5, 6.12, 6.14, 6.33, 6.49, 6.71, 6.73, 6.75, 6.80-6.81
798.56-798.57: §6.65
798.56(a): §6.64
798.56(a)-(g): §6.63
798.56(b): §§6.16, 6.65
798.56(c): §6.66
798.56(d): §§6.54, 6.67, 6.74, 6.141
798.56(e): §§6.14, 6.68, 6.74, 6.121
798.56(e)(1): §§6.68, 6.74
798.56(e)(3): §6.75
798.56(e)(4): §6.74
798.56(e)(5): §6.68
798.56(e)(6): §6.74
798.56(f): §6.69
798.56(g): §§6.51, 6.74
798.56(g)(1): §6.51
798.56(g)(2): §6.51
798.56a: §§6.4, 6.55, 6.75, 6.77, 6.80-6.82
798.56a(a): §§6.79, 6.82
798.56a(a)(1): §6.82
798.56a(a)(3): §6.82
798.56a(b)(1): §6.82
798.56a(b)(1)-(3): §6.82
798.56a(b)(1)(A): §6.118
798.56a(d): §6.118
798.56a(e): §§6.79-6.80, 6.83
798.57: §§6.74-6.75
798.58: §6.71
798.59: §6.14

798.60: §§6.14, 6.76
798.61: §§6.4, 6.14, 6.76-6.77, 6.79, 6.84
798.61(a)(2)(A): §6.84
798.70: §§6.19, 6.54, 6.112
798.70-798.79: §6.117
798.71(a)(1): §6.57
798.71(a)(2): §6.54
798.71(b)-(c): §6.57
798.71(c): §6.20
798.71(d): §6.57
798.72: §6.57
798.73: §§6.58, 6.74, 6.117
798.73(d): §§6.54, 6.58
798.73(e): §6.58
798.73.5: §6.54
798.74: §§6.20, 6.54-6.54A, 6.55, 6.59, 6.61
798.74(a): §6.54
798.74.4: §§6.24, 6.57A
798.74.5: §§6.24, 6.54
798.74.5(a): §§6.24, 6.54-6.54A
798.75: §§6.12, 6.54A, 6.56
798.75(b): §§6.20, 6.56
798.75(c): §6.56
798.75.5: §6.54
798.75.5(a): §6.24
798.75.5(b): §6.24
798.76: §§2.25, 6.18, 6.20, 6.54
798.77: §6.120
798.78: §§6.55, 6.74
798.79: §§6.55, 6.75, 6.82, 6.118
798.80: §6.53
798.80(e)(1)-(7): §6.53
798.82: §6.21
798.83: §6.54
798.84: §§6.16, 6.87
798.85: §§6.62, 6.89, 13.25, 13.27
798.85-798.87: §6.53
798.86: §§6.16, 6.42, 6.86, 6.89, 6.117
798.86(a): §§6.86, 6.89
798.87: §§6.16, 6.47, 6.85, 6.88
798.87(c): §6.85
798.88: §6.88
799: §6.9
799-799.8: §6.11
799-799.10: §6.20
799.1: §§6.9, 6.11
799.1.5: §§6.19, 6.54, 6.117
799.2: §6.115
799.5: §§6.18, 6.20, 6.54
799.7: §6.43
799.8: §6.21
799.9: §§6.20, 6.38
799.10: §6.46
799.11: §6.48
799.20-799.79: §§6.1, 6.4-6.5, 6.10, 6.15
799.28: §§6.1, 6.5
799.29: §6.4
799.30: §6.10
799.31: §6.1
799.32: §§6.1, 6.5
799.41: §6.1
799.43: §6.1
799.45: §6.1
799.55: §6.5
799.66: §6.5
799.70: §§6.5, 6.62
800.70: §10.20
821: §§8.68D, 9.34, 13.31
822: §3.52
823: §§3.52, 13.31
827: §§1.8-1.9, 1.42, 3.65A-3.65B, 3.66, 4.22, 4.34, 5.17, 6.61, 7.4, 7.16, 7.25, 7.33, 7.57, 8.115, 10.36A
827(a): §§3.65, 3.65B, 5.5, 5.8

827(b): §5.8
827(b)(1): §3.65A
827(b)(1)-(2): §3.65
827(b)(2): §5.5
827(b)(2)-(3): §8.37
827(b)(3): §§3.65A, 5.5, 10.57
827(c): §3.65
1013: §8.163
1013.5: §8.164
1013.5(a): §8.164
1013.5(b)-(d): §8.164
1013.5(c): §8.164
1019: §8.165
1091: §§1.13, 1.79
1095: §1.20
1102: §6.57A
1102-1102.3a: §6.24
1102(b): §6.57A
1102.1(b): §6.57A
1102.1(c): §6.57A
1102.2: §6.57A
1102.3a: §6.57A
1102.6d: §§6.24, 6.57A
1214: §§1.13, 8.68D-8.68E
1217: §1.13
1442: §§8.47, 8.50
1460-1471: §3.52
1462-1463: §3.52
1463: §3.52
1476: §4.33
1479: §§10.69, 12.35
1499: §12.35
1500: §§8.43-8.44
1504: §§8.44, 13.20
1542: §§9.18A, 9.19
1550(1): §1.16
1556: §1.16
1558: §1.16
1624: §§1.79, 3.9, 3.61, 10.61
1624(a)(3): §§1.8, 1.13, 1.15, 1.79, 3.9, 4.17, 8.17, 10.58, 10.61
1625: §1.78
1632: §8.68B
1632(a): §10.63
1632(b)(3): §§1.13, 10.63
1632(d): §1.13
1632(i): §1.13
1632(k): §§1.13, 10.63
1659-1660: §§1.7A, 5.30
1668: §§1.30, 1.56
1671: §§4.43A, 8.16, 8.40
1671(a): §4.43A
1671(b): §§4.43A, 8.16, 8.40
1671(c)-(d): §1.41
1671(d): §§4.43A, 8.40
1688: §3.43
1689: §1.10
1691(b): §3.43
1697: §3.65B
1698: §§3.65B, 10.61
1710.2: §1.29
1710.2(a): §1.29
1710.2(d): §1.29
1714: §§3.67, 3.71, 3.74, 6.16
1717: §§1.74, 3.41, 3.46, 4.42, 5.17, 5.22, 7.78, 8.146, 10.30, 10.35, 10.50, 13.25-13.28D, 13.31, 13.33A, 13.33C, 13.40
1717(a): §§1.14-1.15, 3.48A, 13.25-13.26, 13.33A
1717(b): §13.27
1717(b)(1): §§3.41, 13.26, 13.33A, 13.40
1717(b)(2): §§8.44, 10.50, 13.27, 13.28B
1717(c): §13.28D
1785.1-1785.35: §4.9
1785.11.2: §§4.9, 13.75
1785.11.6: §4.9

1785.13: §§2.9, 13.75
1785.14-1785.16: §4.9
1785.20-1785.26: §13.75
1785.20(a): §4.9
1785.26: §§1.29, 1.43, 1.84
1785.26(b)-(c): §1.43
1785.26(c): §§1.43, 4.9, 13.75
1786-1786.56: §4.9
1786.10-1786.30: §4.9
1786.16(a)(3): §4.9
1786.16(b)(1): §4.9
1786.18: §2.9
1786.22: §4.9
1786.40(a): §4.9
1799.90-1799.99: §13.74
1859-1864: §9.2
1860: §1.3C
1861: §§1.3D, 8.161
1861-1861a: §8.161
1861a: §§1.3D, 8.148, 8.161
1861.1(a): §8.161
1861.5-1861.13: §8.161
1861.8: §1.3D
1861.10: §1.3D
1861.16: §8.161
1861.21: §§1.3D, 8.161
1865: §1.3D
1866: §6.5
1866-1867: §§6.1, 6.5
1867: §6.5
1925: §§1.1-1.2, 7.64G
1927: §§1.3B, 3.5-3.6, 6.16
1928-1929: §3.73
1929: §§3.8, 3.12, 3.15A
1930: §1.28
1933(1): §§8.2, 8.82
1933(4): §8.5
1934: §§1.65, 5.29, 7.72, 8.4
1935: §8.17
1940: §§1.3, 1.7B, 3.15, 8.83
1940-1954: §3.15
1940-1954.1: §§1.3B-1.3C, 1.7B, 3.15, 8.83, 9.2, 12.38, 12.62-12.63
1940(a): §§1.3B, 1.3D, 3.15
1940(b): §§1.3-1.3D, 8.83, 8.142, 8.148
1940(b)(1): §1.3C
1940(b)(2): §1.3C
1940(d): §3.15
1940.1(a): §1.3C
1940.1(b): §13.25
1940.2: §§3.4, 3.7, 4.43, 5.17, 5.20, 8.150A, 8.151, 8.153
1940.2(a): §§1.66, 3.7, 8.150A
1940.2(a)(3): §3.6
1940.2(b): §§3.7, 8.150A
1940.2(c): §8.150A
1940.2(d): §8.150A
1940.3: §§2.12, 2.19-2.20, 2.28
1940.3(c)(2): §2.9
1940.5: §§1.63, 4.38
1940.5(f): §3.2
1940.6: §1.29
1940.7: §1.29
1940.7.5 (former): §1.29
1940.8: §1.29
1940.9: §§1.29, 4.41A
1941: §§3.11-3.12, 3.15, 3.32, 4.39, 10.61, 10.64
1941-1941.1: §§3.73, 12.36
1941-1941.4: §3.8
1941-1942: §§1.3B, 1.30, 1.60, 3.12, 3.43, 4.39
1941-1942.1: §§3.16, 3.21
1941-1942.4: §§3.11B, 12.46, 12.54-12.54A, 12.55
1941.1: §§1.52, 3.11-3.12, 3.15-3.15A, 3.24, 3.27, 3.48A, 4.16B, 12.53, 12.55
1941.1(b): §3.48A

1941.1(c): §3.48A
1941.2: §§1.57, 3.8, 3.12, 3.15A, 3.26, 3.73
1941.2(a)(5): §§1.28, 1.55
1941.2(b): §3.12
1941.3: §§3.11-3.11A, 3.12, 3.48A
1941.3(c): §3.11A
1941.3(f)-(g): §3.11A
1942: §§3.8, 3.10, 3.11A, 3.13-3.15, 3.24, 3.73, 5.12-5.13, 6.14, 6.87, 6.107, 6.127, 7.40, 8.111, 8.113, 8.125, 12.49
1942(a): §§1.60, 3.12-3.13, 3.43, 5.13, 8.19
1942(a)-(b): §1.60
1942(b): §§1.60, 3.13
1942(c): §3.12
1942(d): §3.12
1942.1: §§1.30, 1.61, 3.8-3.9, 3.14-3.15, 4.39, 6.15
1942.2: §8.149A
1942.3: §§12.36, 12.46, 12.54-12.54A, 12.55
1942.4: §§3.10, 3.11A, 3.15A, 3.18, 3.36, 3.38, 3.41, 3.46, 3.48-3.48A, 3.67, 7.78, 10.4, 10.43, 10.61, 10.64, 13.25, 13.27
1942.4(a): §§3.48A, 4.50
1942.4(a)-(b): §3.48A
1942.4(a)(1)-(4): §3.15A
1942.4(b): §§3.15A, 3.41, 13.25
1942.4(b)(1): §3.36
1942.4(c): §§3.15A, 3.48A
1942.4(e): §3.15A
1942.5: §§1.30, 3.11A, 6.14, 6.17, 6.87, 7.55, 8.109-8.112, 8.114-8.117, 8.129-8.130, 8.135, 9.24, 10.65, 11.55, 12.38, 12.61
1942.5(a): §§5.6, 7.64G, 8.72, 8.111-8.113, 8.115, 8.127, 8.129, 8.134, 12.38, 12.62-12.63
1942.5(a)-(b): §8.127
1942.5(a)(1): §8.111
1942.5(a)(1)-(5): §§8.111-8.112
1942.5(b): §§8.112, 8.127
1942.5(c): §§5.1, 5.6, 5.16-5.17, 7.64G, 8.113, 8.115, 8.125, 8.129-8.130, 12.38, 12.62-12.63
1942.5(d): §§1.30, 8.114-8.115
1942.5(d)-(e): §8.129
1942.5(e): §§7.64G, 8.80, 8.115, 8.129-8.132, 12.38
1942.5(f): §§8.116, 8.135
1942.5(f)-(g): §8.135
1942.5(g): §§8.116, 13.25
1942.5(h): §§8.117, 8.126, 8.135
1942.6: §§3.2, 5.33A, 5.37
1943: §§1.9, 1.27
1944: §§1.9, 1.27, 4.20
1945: §§1.8-1.11, 3.63-3.64, 4.20, 7.61, 8.82
1945.5: §§1.8, 1.29, 3.63, 4.20, 8.82
1946: §§1.1, 1.8-1.9, 1.44, 3.64-3.65, 4.20, 4.22, 4.34, 5.16-5.17, 5.24A, 5.27, 7.4, 7.16, 7.25, 8.2, 8.20, 8.22, 8.22B, 8.27, 8.30, 8.63, 8.65, 8.69-8.74, 8.77-8.78, 8.81, 8.115, 8.130, 8.173B, 8.173E-8.173F, 9.4, 9.14, 9.30, 9.37, 9.39, 10.40, 12.38, 13.56
1946.1: §§1.1, 1.8-1.9, 1.44, 3.64-3.65, 4.20, 4.22, 4.34, 5.16-5.17, 5.24A, 5.27, 7.4, 7.16, 7.25, 8.2, 8.20, 8.22-8.22B, 8.27, 8.30, 8.65, 8.69-8.74, 8.78, 8.81, 8.115, 8.130, 8.173B, 8.173E-8.173F, 9.4, 9.14, 9.30, 9.37, 9.39, 10.40, 13.56
1946.1(b): §§8.20, 8.22
1946.1(d): §8.22A
1946.1(e): §§8.20, 8.22
1946.1(f): §8.63
1946.1(g): §8.22
1946.5: §1.3
1946.7: §§2.27H, 6.14, 8.21B
1947: §§1.22, 1.40, 4.32
1947.3: §§1.21A, 1.30, 1.40, 1.42, 1.48, 3.65, 4.24, 4.30, 4.33, 6.108, 8.37, 8.168
1947.3(a)(1): §§4.30, 4.33
1947.3(a)(2): §§1.21A, 4.30, 4.33
1947.3(c): §8.168
1947.7: §§7.44, 7.56, 7.77
1947.7-1947.11: §§7.1, 7.45
1947.7(a): §9.16D
1947.7(b): §§7.45, 9.16D
1947.7(c): §9.16D
1947.7(e): §9.16D
1947.7(g): §7.44
1947.8: §§7.45, 7.77
1947.8(b): §7.45
1947.8(c): §7.45
1947.10: §§7.66-7.67
1947.10(a): §§7.66, 7.78

1947.10(b): §7.66
1947.11: §§7.45, 7.77
1947.11(a): §§7.45, 7.77
1947.11(b): §§7.45, 7.77
1947.11(c): §7.29
1947.15: §§7.36, 7.49
1947.15(b): §§7.36, 7.49
1947.15(j): §7.36
1947.15(k): §§7.36, 7.49
1950.5: §§1.30, 1.39, 1.48, 1.50, 4.23, 4.26-4.27, 4.28B, 4.29, 4.39, 4.51, 6.44, 6.87, 6.111, 8.167-8.168, 8.170, 8.173-8.175, 13.5
1950.5-1950.6: §§1.26A, 4.23
1950.5(a): §§4.26, 8.168
1950.5(b): §§1.56, 4.11, 4.23, 4.26, 8.168, 8.173A
1950.5(b)(1)-(4): §8.173A
1950.5(b)(3): §8.168
1950.5(c): §§1.48, 4.24, 4.27, 8.167, 8.169
1950.5(d): §8.171
1950.5(e): §§4.26, 8.168, 8.173A
1950.5(e)-(f): §4.26
1950.5(e)-(k): §§4.28B, 8.170
1950.5(f): §§1.24, 1.48, 1.66, 3.2, 4.26, 4.28A, 8.167, 8.172A
1950.5(f)(1): §§1.48, 4.28A, 4.51, 8.172A-8.172B
1950.5(f)(2): §§8.172A, 8.173B
1950.5(f)(3): §8.172A
1950.5(f)(4): §8.172A
1950.5(f)(5): §8.172A
1950.5(g): §§4.28B, 4.29, 4.39, 8.167, 8.172-8.172A, 8.173B
1950.5(g)(1): §§8.173B-8.173C
1950.5(g)(1)-(2): §8.173D
1950.5(g)(2): §§8.173C, 8.173E-8.173F
1950.5(g)(2)-(3): §8.173F
1950.5(g)(2)-(4): §§1.30, 1.48
1950.5(g)(3): §§4.28B, 8.173D-8.173F
1950.5(g)(4): §8.173E
1950.5(g)(5): §8.173E
1950.5(g)(6): §8.173C
1950.5(h): §§4.29, 8.172
1950.5(h)-(i): §8.167
1950.5(i): §8.172
1950.5(j): §§4.29, 8.172
1950.5(k): §§4.29, 8.172
1950.5(l): §§8.167, 8.174
1950.5(m): §§1.48, 4.23, 8.175
1950.5(n): §8.174
1950.5(q): §§4.28A, 4.51, 8.172A
1950.6: §§1.48, 1.51, 4.11, 4.23, 6.44, 8.168, 8.173, 8.175
1950.6(a): §§1.51, 4.11
1950.6(b): §4.11
1950.6(c): §4.11
1950.6(d): §4.11
1950.6(e): §4.11
1950.6(f): §4.11
1950.6(j): §4.11
1950.7: §§8.167, 8.169-8.170, 8.173A, 8.174-8.175, 14.12
1950.7-1950.8: §§1.26A, 4.23
1950.7(a): §8.168
1950.7(b): §8.171
1950.7(c): §§8.168, 8.170, 8.173A, 8.173C
1950.7(c)-(e): §4.28C
1950.7(d): §8.172
1950.7(d)-(e): §8.172
1950.7(f): §8.174
1950.8: §4.29A
1950.8(c): §4.29A
1950.8(d)-(f): §4.29A
1951-1952.2: §8.17
1951.2: §§4.28C, 8.10, 8.14-8.16, 8.18, 8.35, 8.52, 8.168, 8.173A, 13.17, 14.54
1951.2-1952.2: §8.9
1951.2(a): §8.14
1951.2(a)(1): §§5.19, 8.14
1951.2(a)(2): §§5.19, 8.14

1951.2(a)(2)-(3): §§5.19, 8.14
1951.2(a)(3): §§5.19, 8.14
1951.2(a)(4): §§5.19, 8.14
1951.2(b): §§8.14, 13.20
1951.2(c): §8.14
1951.2(c)(2): §5.19
1951.2(d): §8.14
1951.3: §§6.14, 6.84, 8.9-8.10, 8.12-8.13, 8.156, 9.45, 9.50
1951.3(a): §8.9
1951.3(b): §8.9
1951.3(c): §8.11
1951.3(d): §§8.10, 8.13
1951.3(e)(1): §8.12
1951.3(e)(2): §§8.9, 8.12
1951.3(e)(3): §8.12
1951.3(e)(4): §8.12
1951.3(f): §§8.9, 8.13
1951.3(g): §8.9
1951.4: §§1.14, 3.59, 4.40A, 8.14-8.16, 8.18
1951.4(a): §8.15
1951.4(a)-(b): §8.15
1951.4(b): §§5.19, 8.15
1951.4(b)(1)-(3): §§1.14, 3.59
1951.4(c): §8.15
1951.4(c)(2): §8.16
1951.5: §§4.43A, 8.16
1951.8: §8.16
1952: §§8.52, 11.62
1952(a): §8.16
1952(b): §§8.16, 13.17
1952.2: §8.16
1952.3: §§9.41, 10.74, 11.41
1952.3(a): §§10.74, 11.51
1952.3(a)(1): §11.51
1952.3(a)(2): §§10.74, 11.51
1952.3(b): §11.51
1952.3(c): §11.51
1953: §§1.1, 1.30, 4.39, 6.15
1953(a): §1.30
1953(a)(1): §§1.30, 1.48, 3.2, 4.43, 8.175
1953(a)(2): §§1.30, 1.56
1953(a)(3): §§1.30, 8.27, 8.70
1953(a)(4): §1.30
1953(a)(5): §§1.30, 1.56, 3.69
1953(b): §1.30
1953(c): §1.30
1954: §§1.30, 1.66, 3.2-3.3A, 3.4-3.5, 3.8, 3.12, 3.67, 3.68C, 3.72, 4.43, 5.17-5.18, 7.54, 7.60, 8.137, 8.150A
1954(a): §7.60
1954(c): §3.3
1954(d): §8.13
1954(d)(1): §3.3
1954(d)(2): §3.3
1954(d)(2)-(3): §4.43
1954(d)(3): §3.3
1954(e): §§3.3, 8.13
1954.25: §§6.15, 7.12, 8.22B
1954.50: §4.22
1954.50-1954.535: §§3.57, 3.58A, 3.65B, 3.66A, 4.22, 4.34, 4.40B, 5.29, 7.1, 7.4, 7.16, 7.18-7.19, 7.25, 7.36, 7.49, 8.22A, 13.19
1954.51(a): §7.25A
1954.51(c): §7.25A
1954.52: §§7.16, 8.22A
1954.52(a): §§7.25, 7.64D
1954.52(a)(1)-(2): §7.18
1954.52(a)(3)(A): §7.16
1954.52(a)(3)(B)(i): §7.16
1954.52(a)(3)(B)(ii): §7.16
1954.52(a)(3)(C): §7.16
1954.52(b): §7.16
1954.52(c): §7.16
1954.52(d): §§4.50, 7.16
1954.53: §§1.9, 7.25-7.25A

1954.53(a): §7.25
1954.53(a)(1): §§4.34, 7.4, 7.25
1954.53(a)(1)(A): §§4.34, 7.25
1954.53(a)(2): §§7.4, 7.25A
1954.53(c): §7.25A
1954.53(d): §§3.58A, 4.40B, 7.28, 7.62
1954.53(d)(4): §§3.57, 5.29
1954.53(e): §§7.25-7.25A
1954.53(f): §§4.50, 7.4, 7.25
1954.53(f)(3): §4.34
1954.535: §§1.36, 3.66A, 4.34, 7.19, 7.25
1961-1962.7: §§4.45, 9.34
1962: §§1.4, 1.12-1.13, 1.16, 1.21A, 1.22, 1.29, 5.12
1962(a): §5.12
1962(a)(1): §§1.21A, 1.37, 1.76
1962(a)(2)-(3): §1.21A
1962(a)(2)(A): §§1.21A, 1.40
1962(a)(2)(B): §§1.21A, 1.40
1962(a)(3): §1.40
1962(a)(4): §1.21A
1962(b): §1.21A
1962(c): §1.21A
1962(d): §1.21A
1962(f): §1.21A
1962.5: §§1.4, 1.16, 1.21A, 1.29, 1.76
1962.7: §4.45
1965: §§8.154, 8.157
1980-1991: §§1.3D, 1.71, 6.77, 8.154, 9.2
1980-1993.09: §8.154
1980(e): §8.154
1981(c): §6.77
1982: §8.154
1982(a): §8.154
1982(b): §8.154
1983: §§8.156, 8.158-8.159
1983-1984: §8.156
1983(a): §8.154
1983(b): §§1.71, 8.156
1983(c): §§8.156, 8.159
1984: §8.158
1984-1985: §8.156
1984(a): §8.159
1985: §8.160
1986: §8.155
1987(b): §8.158
1988: §§8.158-8.160
1988(a): §8.158
1988(b): §8.158
1988(c): §8.158
1989(c): §8.158
1991: §8.156
1993-1993.09: §§8.154, 8.159-8.160
1993(f): §8.154
1993.01: §§8.154, 8.158
1993.03: §§8.156, 8.158
1993.03-1993.04: §8.156
1993.03(a): §8.154
1993.03(b): §8.156
1993.03(c): §8.156
1993.04: §§8.158-8.159
1993.04-1993.05: §8.156
1993.05: §8.160
1993.06: §8.155
1993.07: §8.158
1993.07(a): §8.158
1993.07(b): §8.158
1993.07(c): §8.158
1993.08(c): §8.158
1993.09: §8.156
1995.010-1995.270: §7.62
1995.010-1995.340: §3.56
1995.210: §1.54

1995.210-1995.260: §4.40A
1995.210-1995.270: §3.58
1995.210(b): §3.49
1995.230: §§1.14, 1.54, 3.49
1995.240-1995.260: §3.58
1995.240-1995.270: §3.49
1995.250-1995.260: §7.28
1995.260: §§1.14, 1.54
1997.010-1997.270: §4.38
2079.10a: §1.29
2080-2080.9: §8.154
2295-2296: §1.20
2304-2305: §1.20
2305: §1.20
2338: §§2.68, 4.49
2339: §4.49
2351: §4.49
2860: §9.29
2924f(b): §8.68B
2924.8: §§8.68B-8.68C, 10.54
2924.8(a): §8.68B
2929.3: §3.72
2954.4: §4.43A
2954.4(a): §8.40
3275: §13.56
3287(a): §13.20
3289(b): §13.20
3294: §§2.28, 2.59, 3.40, 6.86, 6.89, 7.78, 10.42, 10.47A
3300: §3.7
3304: §3.7
3333: §§2.59, 7.78
3375: §1.5
3479: §§4.44, 8.58-8.59
3485: §§4.44, 8.59
3485-3486: §§3.7, 3.10, 4.44, 8.55
3485(a): §§3.7, 3.10, 4.44
3485(a)(1): §4.44
3485(c): §8.58
3485(g): §4.44
3485(h): §4.44
3486: §§4.44, 8.59
3486(a): §§3.7, 3.10, 4.44
3486(a)(1): §4.44
3486(c): §8.58
3486(g): §4.44
3486(h): §4.44
3517: §10.57
4000-5174 (former): §9.14
7060.2(d): §§7.25, 7.64D

CODE OF CIVIL PROCEDURE
Pt 2: §9.9
Pt 3: §9.9
2.100-2.119: §10.28A
3.1110: §10.28A
10: §§8.28, 8.42, 8.77, 12.48
12: §§8.28, 8.77, 9.44
12-12b: §9.44
12-13: §§9.44, 12.48
12a: §§8.28, 8.42, 8.77, 9.44, 13.2
12a-13: §8.77
12a-13b: §4.43
12b: §§8.28, 8.77
13: §§8.42, 9.44
71-77: §9.2
85-89: §9.2
86(a)(4): §9.32
86(a)(8): §5.21
86(b)(3): §§13.9, 13.16
88: §9.32
90-100: §11.4
90-107.65: §9.9

91(b): §§9.9, 10.70, 11.4
92(b): §10.70
116.220: §13.24
116.220(a): §8.174
116.220(a)(1): §§5.16, 13.24
116.220(a)(3): §9.32
116.220(b): §5.16
116.221: §§3.15A, 5.16, 8.174, 13.24
128: §11.6
128.5: §§13.16, 13.28-13.29
128.7: §§9.33, 10.2, 10.37, 10.38A, 10.75, 13.28-13.29
128.7(a): §10.37
128.7(b): §§10.2, 10.37
128.7(b)(1): §10.40
128.7(c): §§9.20, 10.37
135: §§8.28, 8.42, 8.77, 9.44
170: §12.2
170-170.1 (former): §12.4
170-170.5: §12.4
170.1: §§12.2-12.3
170.1-170.5: §12.8
170.1(a)(7): §12.3
170.2: §12.2
170.3: §12.9
170.3(a)(1): §12.2
170.3(c)(1): §12.3
170.3(c)(3): §12.3
170.3(c)(4): §12.3
170.3(c)(5): §12.3
170.3(d): §12.8A
170.6: §§12.5, 12.7-12.9
170.6(a)(1): §12.7
170.6(a)(2): §§12.5-12.7B, 12.8
170.6(a)(3): §§12.5, 12.9
170.6(a)(5): §12.6
170.6(a)(7): §12.8
170.8: §12.9
307-1062.10: §10.27
307-1062.20: §8.65
335.1: §§2.28, 2.44, 2.69, 3.35
337: §3.35
337.2: §13.37
338: §3.35
338(a): §§2.44, 2.69
339: §3.35
339(1): §13.37
340(1) (former): §2.69
340(a): §§2.28, 2.69, 7.66
367: §9.34
368.5: §9.34
369: §9.34
369.5: §5.39
392(a)(1): §9.33
392(b): §9.33
395(a): §9.33
396: §10.77
396a: §9.33
396a(a): §§9.33, 9.37, 10.77
396a(b): §§9.33, 10.77
396b: §§9.33, 10.77
398-399: §9.33
403: §§11.66, 11.69
403.020-403.030: §9.32
404: §§11.66, 11.69
404-404.8: §11.69
404.1: §11.66
405.20: §5.39
405.38: §5.39
410.50: §10.28A
410.50(a): §10.18
411.20-411.21: §10.1B
411.20(e): §10.1B

411.21(f): §10.1B
412.20: §9.45
412.20(a)(3): §§9.7, 10.20
413.10-417.40: §9.45
414.10: §§9.47, 10.19
415.10: §§9.45, 9.47, 10.28A
415.10-415.50: §§9.2, 10.28A
415.20: §§9.48, 10.19, 10.28A
415.20(a): §§9.45, 9.48
415.20(a)-(b): §9.48
415.20(b): §§9.45, 9.47-9.48, 13.2
415.21: §9.48
415.30: §§9.45, 10.19
415.45: §§9.45, 9.49, 10.19, 10.28A
415.45(a): §9.49
415.45(b): §9.49
415.45(c): §§9.49, 13.2
415.46: §§1.21, 5.27, 6.76, 9.3, 9.5, 9.26, 9.35A, 9.51, 9.54, 13.65-13.67, 13.70
415.46(a): §13.70
415.46(b): §9.51
415.46(c): §§9.52-9.53, 13.70
415.46(e): §13.70
415.46(f): §§9.54-9.55, 13.70
415.47: §§9.45, 9.50
415.47(b): §9.50
415.50: §§9.45, 9.49
415.50(e): §9.49
415.95: §9.45
416.90: §9.48
417.10: §10.19
417.10(a): §§9.45, 9.48, 13.3
418.10: §§10.18, 10.24, 10.28A, 10.48
418.10(a): §§10.18, 10.24, 10.27
418.10(a)(1): §10.18
418.10(b): §10.27
418.10(c): §10.27
418.10(d): §10.48
418.10(d)-(e): §10.18
418.10(e): §§10.1, 10.21, 10.28B, 10.30-10.32, 10.38, 10.50
418.10(e)(1)-(2): §10.18
418.10(e)(2): §10.27
418.10(e)(3): §10.18
418.11: §10.48
422.30: §9.33
422.30(b): §9.32
425.10: §10.76
425.10(a): §10.47A
425.12(a): §10.50
425.12(c): §9.30
425.16: §§5.11, 5.18A, 5.33A, 5.36, 7.78, 8.110, 10.38A, 13.40A
425.16(c): §§5.18A, 8.110, 10.38A, 13.40A
425.16(f): §7.78
425.18: §5.18A
426.30: §11.51
426.30(a): §10.74
428.10: §§10.73, 10.76
428.20: §10.76
428.30: §10.76
428.40: §10.76
428.50(a): §10.76
428.50(b): §10.76
428.50(c): §10.76
428.60: §10.76
430.10: §§10.29-10.30, 10.39-10.40
430.10-430.80: §10.29
430.10(a): §§9.32, 10.31, 10.77
430.10(a)-(c): §10.29
430.10(b): §§9.34, 10.31, 10.77
430.10(b)-(d): §10.33
430.10(c): §10.31
430.10(d): §10.31
430.10(e): §§10.29, 10.31, 10.36A, 10.77

430.10(f): §§9.34, 9.37, 10.31, 10.36A, 10.77
430.10(f)-(h): §10.33
430.10(g): §§9.37, 10.31
430.20: §10.29
430.30: §8.23
430.30(a): §10.33
430.30(b): §10.30
430.30(c): §10.32
430.40(b): §§10.18, 10.71, 11.2
430.60: §10.33
430.70: §10.33
430.80(a): §10.32
430.80(b): §11.2
431.30(c): §10.72
431.30(d): §10.52
431.40(a): §10.52
431.70: §§10.57, 10.73, 13.38
432.10: §10.76
435: §§10.46, 10.76
435(b): §11.2
435(b)(1): §§10.38, 10.47A
435(c)-(d): §10.38
435(d): §10.46
436: §§9.42, 10.38-10.40
436-437: §10.39
436(a): §§10.44, 10.47A
436(b): §§10.45, 10.47A
437: §10.39
437c: §§11.31-11.32, 11.38-11.39
437c(a): §§11.31, 11.36
437c(a)-(b): §11.38
437c(b): §11.39
437c(b)-(d): §11.38
437c(b)(1): §11.38
437c(b)(2): §11.37
437c(b)(7): §11.38
437c(c): §§11.31, 11.35
437c(c)-(d): §11.39
437c(c)-(e): §11.38
437c(d): §§11.38-11.39
437c(f)(1): §11.31
437c(g): §§11.31, 12.5, 12.7
437c(h): §§11.37, 11.39
437c(i): §§11.29, 11.39
437c(p)(1): §§11.32-11.33
437c(p)(1)-(2): §§11.38-11.39
437c(p)(2): §11.34
437c(q): §11.37
437c(r): §§11.36-11.38
438: §11.40
438(b)(2): §11.40
438(c): §11.40
438(d): §11.40
438(e): §11.40
438(g): §11.40
446: §§9.42, 10.23, 10.45, 10.47A, 10.70
453 (former): §10.44
455: §9.37
459: §§7.74, 9.16A, 9.16D
464(a): §12.40
469: §12.39
469-470: §12.39
470: §§12.39, 13.2
471: §12.39
471.5-473: §§9.32, 9.43
472: §§10.30, 10.35, 10.71
472a: §10.50
472a-472b: §10.32
472a(c): §§10.30, 10.35
472b: §10.34
472c(a): §10.35
472d: §10.35

473: §§9.18A, 10.48, 11.26, 11.35, 12.40, 13.7-13.9, 13.33C
473(a)(1): §§10.71, 13.2
473(b): §§10.48, 11.39, 12.69, 13.7-13.8, 13.10-13.14
473(c)(1): §13.8
473(c)(2): §13.8
473(d): §§13.2, 13.13, 13.47
473.5: §13.15
473.5(a): §13.15
473.5(b): §13.15
474: §§9.35, 9.45
525-534: §11.64
526(a): §§11.63-11.64
526(a)(6): §11.63B
526(b)(1): §11.63B
527: §§9.32, 11.64
527(a): §11.64
527.3: §5.37
527.6: §§5.17, 5.18A, 14.8
527.6(i): §13.25
529(a): §11.64
533: §11.64
572: §3.34
580: §12.32
581: §7.65
581(a)(6): §12.65
581(c): §13.27
581(i): §13.27
581c: §§9.16B, 12.35
585-586: §10.38
585(a)-(b): §13.4
585(b): §§10.18, 13.5
585(b)-(c): §10.38
585(d): §13.5
585.5: §13.3
586(a)(2): §10.34
587: §13.3
589: §10.29
591: §10.29
594: §§11.53, 12.21
594(a): §§11.43, 12.21
594(a)-(b): §11.43
594(b): §§9.7, 11.43, 12.21
607a: §12.43
613: §12.67
618: §12.67
619: §12.67
624: §12.67
625: §12.67
629: §13.45
630: §9.16B
631: §§1.30, 11.54
631(a): §11.54
631(b): §§11.53-11.54
631(c): §11.54
631(d): §11.54
631(e): §11.54
631.8: §§9.16B, 12.35
632: §§3.28, 11.67, 12.64-12.65
632 (former): §10.52
634: §12.66
651: §3.28
656: §13.44
657: §§12.66, 13.44
659: §13.44
660: §13.44
662: §13.44
663: §§12.66, 13.46
664: §12.68
664.5: §10.26
664.6: §§5.25, 9.18-9.19
683.020: §10.62
683.120(b): §10.62

684.120: §13.67
685.010(a): §13.20
687.020-687.030: §13.74
695.010-695.220: §13.74
697.710: §6.77
699.510: §6.77
700.010: §6.77
700.080: §6.4
700.080(a): §6.77
700.080(b): §6.77
700.080(c): §6.77
701.530(b): §6.77
701.630: §6.77
701.640: §6.77
701.650(a)(1): §6.77
703.510-703.610: §13.74
703.520: §13.74
703.550: §13.74
703.580: §13.74
704.010: §13.74
704.010-704.210: §13.74
704.020: §§1.3D, 8.161, 13.74
704.060: §§8.161, 13.74
704.070: §13.74
704.080: §13.74
704.110-704.130: §13.74
704.710: §6.4
704.710(a)(2): §13.74
706.010-706.154: §13.74
706.021: §13.74
706.050: §13.74
706.051: §13.74
706.051(c): §13.74
706.105: §13.74
708.120-708.205: §13.74
708.170: §13.74
708.510-708.560: §13.74
708.510(a)(1): §13.74
710(b)(3): §8.156
712.010: §13.65
712.020: §13.65
715.010: §§13.65, 13.69
715.010-715.040: §§9.2, 13.17, 13.48, 13.64
715.010(b)(2): §5.24A
715.010(b)(3): §8.156
715.010(c): §§13.65, 13.70
715.020: §13.66
715.020(a): §13.66
715.020(b): §13.66
715.020(c): §13.67
715.020(d): §§5.27, 9.54, 13.67, 13.70
715.050: §§5.21, 13.68, 14.9, 14.17
731: §§3.42, 3.48A
760.010-764.080: §9.12
799.31: §6.5
901-936.1: §13.58
904.1: §13.58
904.2: §13.58
907: §13.63
908: §13.61
911: §13.58
916: §§13.58, 13.60
916-936.1: §13.60
917.1(d): §13.60
917.4: §§13.53, 13.60
918: §§13.43, 13.52-13.55, 13.58
918(a): §13.52
918(b): §13.53
989: §13.74
998: §§2.59, 9.17A, 9.18A, 13.25
998(c)-(d): §9.17A
1003: §13.10

1003-1020: §9.44
1005: §§10.24, 10.32, 11.2, 11.10, 13.10
1005(a)(4): §10.24
1005(b): §§10.21, 10.24, 10.32, 10.46
1005(c): §§10.24, 10.32, 10.46, 11.37
1005.5: §10.24
1010: §§10.25, 13.10
1010-1020: §9.45
1010.6: §9.44
1011: §9.56
1013: §§3.32, 3.65-3.65A, 5.8, 8.29, 8.65, 8.77, 9.44, 10.21, 10.24, 10.34-10.35, 11.2, 11.8, 11.18, 11.20-11.21, 11.25, 11.43, 12.13, 12.16, 13.36, 13.41
1013(a): §§3.65A, 8.65, 8.77, 9.44, 11.17, 12.48, 13.44
1013(c): §§3.65, 11.2
1013(e): §11.2
1014: §§10.18, 10.29, 10.38
1021: §§1.14-1.15, 1.74, 13.25, 13.27
1021.5: §13.25
1021.8: §§13.25, 13.28A
1032-1034.5: §13.22
1032(a)(4): §§13.21, 13.27
1032(b): §§11.7, 13.21
1033: §13.28C
1033(a): §§9.32, 13.24
1033(b): §13.24
1033(b)(2): §13.24
1033.5(a)(1): §11.53
1033.5(a)(1)-(2): §13.22
1033.5(a)(3): §§11.7, 13.22
1033.5(a)(4): §13.22
1033.5(a)(7): §13.22
1033.5(a)(8): §13.22
1033.5(a)(9): §13.22
1033.5(a)(10): §§13.23, 13.33C
1033.5(a)(10)(A): §§13.3, 13.33A
1033.5(a)(10)(B): §13.33B
1033.5(a)(11): §13.22
1033.5(a)(12): §13.22
1033.5(b)(1): §13.22
1033.5(c)(5): §§13.3, 13.23, 13.33A-13.33C
1034: §13.24
1034(b): §§13.22, 13.32
1034.5: §§13.22-13.23
1048: §11.65
1048(a): §§11.65, 11.68
1054: §13.2
1054(a): §§10.48-10.49
1054(b): §10.48
1062.3: §3.44
1063-1822.59: §11.4
1084: §13.63
1085: §§7.45, 13.63
1086: §13.63
1094.5: §§3.66B, 7.51, 9.15
1094.5(b): §7.51
1094.5(e): §7.51
1094.5(f): §2.55
1094.6(b): §7.51
1094.6(d): §7.51
1094.6(f): §7.51
1097: §13.63
1132-1134: §9.18
1132(b): §9.22
1159: §§1.3B, 1.3D, 8.140, 8.142, 8.146, 8.152, 9.3, 9.5
1159-1160: §§1.11A, 5.21-5.22, 8.138, 8.145-8.146, 8.152, 10.73
1159-1179a: §§1.7B, 6.14, 6.19, 6.56, 6.62, 6.76, 7.64G, 9.2, 9.9, 9.12, 10.27, 11.4, 11.51, 13.58
1159(1): §§8.140, 8.142
1159(2): §§8.140-8.141
1160: §§8.141-8.142, 8.146, 8.152, 9.3, 9.5
1160(1): §8.141
1160(2): §8.141
1161: §§1.3B, 1.3D, 1.8, 1.58, 2.27H, 3.33, 3.56, 5.18, 5.24A, 8.22B, 8.26-8.28, 8.30-8.33, 8.56, 8.65, 8.67, 8.68A, 8.71-8.72,

8.76, 8.79, 8.83, 8.142, 8.173B, 8.173E-8.173F, 9.3-9.5, 9.14, 9.16A, 9.36-9.37, 10.73, 12.27, 13.17
1161-1161a: §§9.1, 9.3
1161-1161b: §§9.36-9.37
1161-1162: §§8.12, 11.51
1161-1179a: §§6.12, 8.9
1161(1): §§1.4, 1.6, 1.8, 1.11, 3.64, 4.48, 8.82, 8.84, 9.3-9.5, 9.30, 9.36-9.37, 9.39, 9.44, 10.47A, 12.19, 12.46-12.47
1161(1)-(2): §12.47
1161(1)-(5): §§9.4, 9.36, 12.38
1161(2): §§3.15A, 4.28A, 4.30, 4.51, 5.24A, 7.25A, 7.56, 8.26, 8.35-8.37B, 8.38-8.39, 8.41, 8.44, 9.4, 9.35A, 9.37, 9.39, 10.36A, 10.40, 10.47A, 10.69, 12.22-12.23, 12.35
1161(2)-(3): §9.35
1161(2)-(4): §§8.167, 8.172A, 9.30, 9.39
1161(2)-(5): §9.44
1161(3): §§1.56, 1.58, 4.28A, 4.51, 5.24A, 7.57, 8.26, 8.38-8.39, 8.46-8.47, 8.50-8.51, 8.56, 9.4, 9.35, 9.37, 10.20, 10.47A, 13.17
1161(3)-(4): §1.68
1161(3)-(5): §9.39
1161(4): §§1.54, 1.58, 4.28A, 4.38, 4.44, 4.51, 5.18, 6.14, 7.28A, 8.21B, 8.26, 8.50, 8.54-8.56, 8.58-8.59, 9.4
1161(5): §§8.17, 8.81, 9.4, 9.39, 12.38
1161a: §§1.13, 6.75, 7.69, 8.7, 8.68A, 8.68C-8.68E, 8.69, 9.3, 9.8, 9.30, 9.36-9.37, 10.31, 10.54-10.55, 10.65, 10.77, 11.62, 12.46-12.47, 14.21
1161a-1161b: §9.39
1161a(b)(1)-(5): §8.68A
1161a(b)(2): §12.19
1161a(c): §8.68C
1161b: §§8.7, 8.68C, 8.68E-8.68F, 8.69, 9.1, 9.3, 9.30, 9.36-9.37, 10.31, 10.54, 10.77, 12.46-12.47
1161.1: §§8.37A, 8.38, 10.69
1161.1(b): §8.45
1161.1(c): §§8.37A, 8.45, 10.60
1161.2: §§4.2B, 4.5, 5.4B, 5.25-5.25A
1161.2(c): §5.24A
1161.5: §§8.14, 8.44, 8.49
1162: §§1.10, 1.76, 3.65, 5.8, 6.74, 6.121, 8.11, 8.62-8.63, 8.65-8.66, 8.74, 8.79, 10.54, 12.20
1162(1): §8.65
1162(2): §§8.11, 8.29, 8.64-8.65, 9.44
1162(2)-(3): §9.44
1162(3): §§5.8, 8.29, 8.65, 8.77, 9.44
1164: §§9.35-9.35A
1165: §9.34
1166: §§3.33, 8.146, 12.31, 13.65
1166(a)(1): §§8.145-8.146, 9.42, 10.39, 10.45, 10.47A, 10.52, 10.70
1166(a)(2): §9.37
1166(a)(3): §§8.31, 9.37
1166(a)(4): §9.37
1166(a)(5): §§9.37, 10.31, 10.77
1166(b): §§8.146, 9.8, 9.40-9.41, 12.31
1166(c)(1)(A): §§9.37, 10.31, 10.77
1166(c)(1)(B): §§6.76, 9.37, 10.31, 10.77
1166a: §9.56
1166a(a): §9.56
1166a(a)-(b): §9.56
1166a(b): §9.56
1166a(c): §9.56
1167: §§5.24A, 8.145, 9.7, 9.45, 10.1, 10.18, 10.20, 10.32, 10.50, 10.73, 13.2
1167-1167.5: §5.21
1167.3: §§9.45, 10.1, 10.35, 10.46, 10.50, 10.71
1167.4: §§10.24, 10.27, 10.28A
1167.4(a): §§10.21, 10.24, 10.27
1167.4(b): §§10.18, 10.26-10.27, 10.50
1167.5: §§10.48-10.49
1169: §§13.2-13.4
1170: §§10.1, 10.29, 10.38, 10.46, 10.50
1170.5: §§5.24B, 9.7, 11.2, 11.42, 11.44-11.45, 11.57
1170.5(a): §§9.7, 11.6, 11.42, 11.56, 13.36
1170.5(b): §§9.7, 11.44-11.46, 11.56
1170.5(b)-(c): §§11.6, 11.56
1170.5(c): §§9.7, 11.6, 11.42, 11.44-11.49
1170.5(c)-(d): §§11.41, 11.56
1170.5(d): §11.50
1170.5(e): §11.49
1170.5(f): §11.49
1170.5(g): §11.49

1170.5(i): §§9.7, 11.42
1170.7: §§11.2, 11.31, 11.36, 11.38
1170.8: §§11.4-11.5, 11.18-11.19, 11.21, 11.24-11.25, 11.29-11.30
1170.9: §11.4
1171: §§9.9, 11.53
1172: §§8.139, 8.141, 8.143
1173: §§9.43, 12.40, 13.19
1174: §§8.41, 8.53-8.54, 8.146, 8.154, 9.1, 9.5, 9.8, 9.11, 9.32, 9.36-9.37, 10.37, 10.47A, 12.31, 12.33-12.34, 13.18, 13.41, 13.65
1174(a): §§8.136, 8.144, 9.37, 13.17, 13.48, 13.56, 13.64
1174(b): §§1.70, 5.20, 5.22, 5.27, 8.144, 8.146, 9.8, 9.38-9.41, 10.40, 10.42, 10.47A, 12.27, 12.31-12.34, 12.49, 12.52, 13.17-13.19, 13.34
1174(c): §§5.15, 5.38, 13.17, 13.20, 13.49-13.51, 13.56
1174(d): §§5.24A, 8.156, 13.64
1174(e): §8.154
1174(e)-(i): §1.3D
1174(e)-(l): §8.154
1174(e)-(m): §1.71
1174(f): §8.156
1174(g): §8.155
1174(h): §8.157
1174(j): §8.157
1174(k): §8.157
1174.2: §§3.27, 3.32, 12.28, 12.36-12.37, 12.54-12.54A, 13.21, 13.26, 13.35
1174.2(a): §§3.32, 11.63A, 13.36, 13.41
1174.2(a)(3): §12.37
1174.2(b): §§3.32, 13.36, 13.41
1174.3: §§1.45, 5.27, 9.26, 9.35A, 9.51, 9.54, 13.67, 13.69-13.70
1174.3(a): §§13.70-13.71
1174.3(b): §§13.71-13.72
1174.3(c)(1): §13.72
1174.3(c)(2): §13.72
1174.3(e): §13.72
1174.3(e)(1): §13.72
1174.3(f)-(g): §13.72
1174.3(g): §13.72
1174.3(h): §13.71
1174.21: §§3.15A, 3.41, 10.4, 10.43, 13.25
1174.25: §§1.45, 9.35A, 13.70
1174.25(a): §§9.54, 13.70
1174.25(b): §9.54
1176: §§13.58, 13.60, 13.62-13.63
1176(a): §§13.43, 13.60
1176(b): §13.42
1177: §§8.65, 9.9, 9.45, 10.27, 13.58
1179: §§1.15, 4.44, 5.15, 5.38, 8.45, 13.17, 13.52, 13.54-13.57, 14.16
1179a: §§5.21, 8.145, 9.7, 11.2, 11.41
1265.110: §8.6
1265.120: §8.6
1265.130: §8.6
1265.160: §8.6
1858-1859: §8.52
1917: §10.28A
1942.5(e): §12.38
1971: §§1.13, 1.79, 8.17
1985: §§3.28, 11.9, 11.22, 12.10
1985(a): §12.10
1985(b): §12.15
1985(c): §12.10
1985.1: §12.10
1985.3: §11.9
1985.3(c): §11.9
1985.3(e): §11.9
1985.6: §§11.9, 11.22, 12.15
1985.6(c): §11.9
1985.6(e): §11.9
1986: §12.10
1986.5: §11.8
1987(a): §§12.11, 12.15
1987(b): §§12.12-12.14
1987(c): §12.16
1987.1: §11.9

1987.5: §12.15
1991-1992: §12.18
1993-1994: §12.18
2009: §12.20
2015.5: §§10.47A, 12.15, 13.5, 13.55
2016.010-2036.050: §§11.4, 11.30
2016.020: §§9.9, 11.4, 11.20
2016.040: §§11.18-11.19
2016.060: §11.5
2017.010: §11.7
2017.010-2017.740: §11.13
2017.020: §11.30
2019.010-2019.210: §11.13
2019.030: §11.30
2019.030(a)(2): §11.30
2020.020: §11.9
2020.410: §11.22
2020.510: §11.4
2020.510(a)-(b): §11.9
2020.510(b): §11.22
2020.510(c)-(d): §11.9
2020.510(d): §11.22
2023.010: §11.28
2023.010-2023.040: §11.14
2023.020: §11.28
2023.030: §§11.25, 11.29
2023.030(a): §§11.25, 11.29
2023.030(b): §11.29
2023.030(c): §11.29
2023.030(d): §11.29
2023.030(e): §11.29
2024.020(a): §11.5
2024.040(b)(1): §11.5
2024.050: §11.5
2025.010: §11.7
2025.210: §§11.6, 11.8
2025.220(a)(5): §11.7
2025.240: §11.4
2025.240(b): §§11.9, 11.22
2025.250(a): §11.8
2025.270: §11.4
2025.270(b): §§11.5, 11.8
2025.270(c): §11.9
2025.270(d): §11.8
2025.280: §11.9
2025.280(a): §11.8
2025.310: §11.7
2025.320: §§11.7-11.8, 11.29
2025.320(f): §11.29
2025.330: §11.7
2025.330(b): §11.7
2025.330(c): §11.7
2025.330(d): §11.8
2025.340: §11.7
2025.420: §11.30
2025.420(b): §11.7
2025.610: §11.8
2025.620: §11.7
2028.010: §11.7
2028.010-2028.080: §11.12
2028.040-2028.080: §11.12
2030.010-2030.410: §§11.11-11.12
2030.010(a): §11.13
2030.020: §11.4
2030.020(a): §11.17
2030.020(c): §§11.5, 11.17
2030.030: §§11.13-11.14
2030.040: §11.14
2030.040-2030.050: §11.14
2030.060: §11.14
2030.060(g): §11.14
2030.070: §11.14

2030.090: §§11.19, 11.30
2030.210-2030.250: §11.18
2030.210-2030.310: §11.18
2030.230: §11.18
2030.250: §11.18
2030.250(b): §11.15
2030.260: §11.4
2030.260(a): §11.4
2030.260(b): §§11.5, 11.17-11.18
2030.270: §11.17
2030.280: §11.18
2030.300: §11.18
2030.410: §11.13
2031.010: §11.20
2031.020: §§11.4, 11.20
2031.020(c): §11.5
2031.030: §11.4
2031.030(c)(2): §§11.5, 11.20-11.21
2031.060: §11.30
2031.060(a): §11.21
2031.210: §11.21
2031.220: §11.21
2031.230: §11.21
2031.240: §11.21
2031.240(b): §11.21
2031.250: §11.21
2031.260: §11.4
2031.260(b): §§11.5, 11.21
2031.270: §11.21
2031.280(a): §11.21
2031.300: §11.21
2031.300(c): §11.21
2031.310: §11.21
2031.310(c): §11.21
2033.010: §11.23
2033.010-2033.420: §11.25
2033.020: §11.23
2033.020(c): §11.5
2033.030: §11.23
2033.050: §11.23
2033.060: §11.23
2033.060(g): §11.23
2033.080: §11.30
2033.080(a): §11.24
2033.080(b): §11.24
2033.210-2033.230: §11.25
2033.210(b): §11.24
2033.220: §§11.4, 11.24
2033.230(b): §11.24
2033.250: §11.4
2033.250(b): §§11.5, 11.24
2033.260: §11.24
2033.270: §11.24
2033.280: §11.26
2033.280(b): §11.25
2033.280(b)-(c): §11.25
2033.280(c): §11.25
2033.290: §11.25
2033.300: §11.26
2033.410: §§11.24, 11.26
2033.420: §§11.24-11.25
2033.710: §11.23
2033.710-2033.740: §§11.13-11.14
2034.250: §11.30
2035.010-2035.020: §11.10
2035.010-2035.060: §11.10
2035.030(a): §11.10
2035.030(b)-(c): §11.10
2035.040: §11.10
2035.050(a): §11.10
2064: §12.10
2065: §§11.8, 12.11, 12.14

9007(a): §7.57

COMMERCIAL CODE
7209-7210: §6.83
7210: §6.83
7210(a): §6.83
7210(b)(1): §6.83
7210(b)(2): §6.83
7210(b)(4): §6.83
7210(b)(5): §6.83
7210(c): §6.83
7210(d): §6.83
7210(e): §6.83
7210(f): §6.83
7210(i): §6.83
9334: §8.166

CORPORATIONS CODE
207: §1.19
207(g): §1.19
313: §1.19
5140: §1.19
5140(i): §1.19
7140(i): §1.19
9140(i): §1.19
15503: §1.19
16103: §1.19
16203: §1.19
16302: §1.19
16303: §1.19
17003(e): §1.19
17003(f): §1.19
17150-17151: §1.19
17157: §1.19
20001: §1.19
21200: §1.19

EDUCATION CODE
81360: §1.19

ELECTIONS CODE
9021: §8.124

EVIDENCE CODE
250: §§3.28, 11.20
260: §12.17
451(a): §3.28
452(b): §3.28
500: §§7.13, 7.54, 7.75, 8.130, 9.16C, 12.22
604: §12.22
624: §10.54
636: §12.22
641: §12.22
647: §12.20
752: §13.22
768(b): §12.25
771: §12.24
771(a): §12.24
771(b): §12.24
771(c): §12.24
773(a): §11.46
776(b)(1): §11.8
813: §§12.29, 12.49
813(a)(1): §12.29
1152: §9.18
1237: §12.25
1237(b): §12.25
1270-1272: §7.47
1271: §12.26
1280: §3.28
1400-1401: §3.28
1414: §11.23

1520: §12.17
1521: §§7.47-7.48, 12.17
1530: §3.28
1530(a)(2): §3.28
1560: §11.8
1563: §11.8

FAMILY CODE
1102: §1.17
1102(c)(2): §1.17
7000-7143: §1.16
7050(e)(3): §1.16

GOVERNMENT CODE
815: §3.68D
835: §3.68D
6066: §8.158
6253: §§3.28, 5.35
6253.9: §5.35
6254.7(c): §3.28
6255: §5.35
6255(b): §5.35
6700: §§8.28, 8.42, 8.77, 9.44
7060-7060.7: §§7.1, 7.64-7.64H, 7.76A, 8.22C, 8.109, 10.65, 12.38, 12.60
7060(a): §§7.64, 7.64B
7060(b): §7.64B
7060.1: §7.64B
7060.1(a): §7.64
7060.1(b): §7.64D
7060.1(b)-(c): §7.64H
7060.1(c): §§7.64, 7.64F, 7.64H, 7.76A
7060.1(c)(1)-(2): §7.64H
7060.1(d): §7.64G
7060.2: §§7.64, 7.64C
7060.2(b): §7.64C
7060.2(d): §7.64D
7060.3: §§7.64, 7.64F
7060.4: §§7.64, 7.64F
7060.4(a): §7.64F
7060.4(b): §§7.64F, 8.22C
7060.4(b)(2): §8.22C
7060.4(c)(5)(B)-(C): §8.22C
7060.6: §§7.64F-7.64G
7060.7: §7.64
7060.7(b): §§7.64A, 7.64D, 7.64H
7260: §6.70
11342.2: §7.42
12900-12996: §§2.5, 2.9B-2.9C, 2.10, 2.20, 2.23, 2.25, 2.25B, 2.28, 2.48-2.49, 2.67, 2.69, 4.3, 4.12, 4.14, 4.15A, 5.7, 8.113, 8.122, 10.68
12920-12921: §2.55
12921(b): §2.1
12926: §§2.26, 2.28, 2.49, 2.57
12926(h): §§2.57, 2.60
12926(i): §2.26
12926(k): §2.26
12926(k)(1)(B): §2.26
12926(l): §2.26
12926(m): §2.50
12926(p): §§2.1-2.2, 2.28, 2.48-2.49, 2.57, 2.59, 4.3, 4.12, 4.14, 6.14A, 6.20
12926(q): §§2.57-2.58
12926.1: §§2.26, 2.57
12926.1(c): §2.26
12926.1(d): §2.50
12927: §§1.62, 2.4, 2.27
12927(c): §2.50
12927(c)(1): §§2.27B, 2.50, 10.68
12927(c)(2)(A)-(B): §2.28
12927(c)(2)(B): §§2.28, 2.50, 4.3
12927(d): §2.50
12927(g): §2.67
12930: §8.122
12930-12955: §2.60

12930(f)(2): §2.28
12955: §§2.2, 2.9B-2.9C, 2.26, 2.48-2.50, 4.14, 4.15A, 8.122, 10.68
12955(a): §§2.9B, 2.28, 2.50, 8.122
12955(b): §4.12
12955(b)-(c): §2.50
12955(c): §4.3
12955(d): §2.59
12955(f): §§2.50, 8.122, 10.68
12955(k): §2.50
12955(l): §6.18
12955(n): §§2.9C, 4.15A
12955(o): §2.9A
12955(p)(1): §2.9B
12955(p)(2): §2.9B
12955.1: §2.50
12955.1-12955.6: §§2.2, 2.57
12955.1-12955.9: §2.22
12955.2: §§2.23, 2.49
12955.3: §§2.26, 2.49
12955.4: §§2.28, 2.50
12955.6: §§2.2, 2.21, 2.25
12955.8: §§2.1, 2.9A, 2.14, 2.24, 2.49, 2.57, 2.64
12955.8(b): §§2.5, 2.65
12955.8(b)(1): §§2.5, 2.65
12955.9: §§2.25, 2.28, 2.49, 6.18
12955.9(b)(1): §2.25B
12955.9(b)(2): §§2.25, 2.25C
12955.9(b)(3): §§2.25, 2.25B
12960: §2.54
12961: §2.54
12963: §2.53
12963.1-12963.4: §2.53
12963.5: §2.53
12963.7: §§2.53-2.54
12964: §2.54
12965: §§2.56, 13.29
12965(b): §§2.28, 2.56
12970: §2.28
12980: §§2.51, 2.54, 2.56
12980-12988: §8.122
12980-12989.3: §2.28
12980(a): §§2.28, 2.52, 2.55-2.56
12980(b): §§2.28, 2.52
12980(c): §2.53
12980(h): §2.28
12980(i): §2.54
12980(j): §2.54
12981(a): §2.55
12981(d): §2.55
12981(f): §2.55
12981.1: §2.53
12983: §§2.28, 2.53
12986: §2.53
12987: §§2.55-2.56
12987(a): §2.55
12987(a)(1): §§2.28, 2.55
12987(a)(2): §§2.28, 2.55
12987(a)(3): §§2.28, 2.55
12987(a)(4): §§2.28, 2.55
12987.1(a): §2.55
12987.1(b): §2.55
12989: §§2.28, 2.49, 2.55
12989-12989.3: §§2.2, 2.22, 2.57
12989(c)-(d): §2.55
12989.1: §§2.28, 2.51-2.52, 2.56
12989.2: §§2.28, 2.56
12993: §2.55
12993(c): §§2.19, 2.48
12995(a)(2): §2.50
12998(h): §2.28
26662: §§9.2, 12.20
26733.5: §§13.23, 13.69

65008: §6.18
65801: §9.14
65852.11: §6.21
65863.7: §6.13
65863.7(f)-(g): §6.70
65863.7(i): §6.70
65863.7(j): §§6.13, 6.50
65915: §4.34
66016: §3.10
66427.4: §§6.13, 6.51
66427.5: §6.51
68093: §§11.8, 12.14, 13.22
68097: §§12.14, 13.22
68097.1-68097.10: §11.9
68106: §§10.1, 10.50, 13.2
68511.3 (former): §10.13
68630: §10.13
68630-68641: §10.13
68631: §10.13
68632: §10.13
68632-68633: §10.13
68632(c): §10.13
68633: §10.13
68634(b): §10.13
68634(e): §10.13
68634.5: §10.13
68635: §10.13
68636: §10.13
68637-68638: §10.13
68637(b)(3)(A): §10.13
68639: §10.13
68640: §10.13
69953: §13.22
70614: §13.71
71265: §§9.2, 12.20

HEALTH AND SAFETY CODE
1500-1567.4: §7.20
1597.40: §§1.28, 1.55
1597.40(d): §1.28
1597.44: §1.28
1597.531: §1.28
11362.5: §2.27A
11570: §§3.25, 4.44
11570-11587: §§3.7, 3.10, 3.15A, 3.36, 3.42, 3.48-3.48A, 3.68, 4.44
11571: §4.44
11571.1: §4.44
11571.1(b): §13.56
11571.5: §4.44
11573: §4.44
11573.5: §4.44
11581: §4.44
17000-17062.5: §6.10
17021.6: §6.67
17031.5: §8.124
17062: §6.70
17910-17995.5: §3.28
17920.3: §§3.12, 3.15A, 4.16B, 12.55
17920.10: §§3.12, 3.15A, 4.16B, 12.55
17922: §2.24
17922(a)(1): §3.11C
17951(b)-(c): §3.10
17958: §3.11C
17958.3: §3.12
17958.5: §§2.24, 3.11C
17958.7: §3.11C
17960-17992: §3.10
17980.6: §§3.10, 5.39
17980.7: §§3.10, 5.39, 6.70
18000-18153: §§6.1, 6.13
18000-18199: §6.86
18000(b)(4): §6.4

18001.8: §§6.4, 6.7
18005.6: §1.1
18007: §§6.4-6.5
18007(b): §6.4
18008: §§6.3-6.5
18008(b): §6.4
18008.7: §§6.3, 6.8
18009.3: §6.5
18010: §§6.4-6.5
18014.5: §6.57
18015-18160: §6.1
18015.1: §6.4
18025: §6.57A
18027.3: §6.5
18029: §6.48
18029.6: §6.57A
18031.7(d): §6.57A
18031.7(e)-(g): §6.57A
18033: §6.5
18037.5: §§6.4, 8.68A
18045-18066.5: §6.57
18060.5(i): §6.57
18060.5(l): §6.57
18070-18070.7: §6.57
18100.5(d): §6.77
18106: §6.77
18150-18153: §6.143
18151: §6.1
18151(c): §6.143
18200-18700: §§6.1, 6.10-6.11, 6.13, 6.15-6.16, 6.18, 6.47-6.48, 6.86
18207: §6.58
18209: §1.1
18210.7: §6.9
18214: §§6.10-6.11
18214(a): §§6.12, 6.16
18214(b): §6.10
18215: §6.10
18253.5(a): §6.47
18300: §6.15
18300(b): §6.1
18300(g): §6.18
18402: §6.16
18420: §6.64
18500(b): §6.48
18506: §6.10
18510-18518: §§6.16, 6.50
18550: §6.57A
18551: §§6.3-6.4, 6.9
18551.1: §§6.4, 6.8-6.9
18603: §§6.47, 6.92
18611: §§6.4, 6.6, 6.8, 6.50
18613: §6.4
18652.39: §6.10
18691: §6.13
18860-18874: §§6.1, 6.13
18862.39: §6.1
19211(c): §§8.23, 8.72
19901: §1.62
19971: §§6.4, 6.6
25249.5-25249.13: §1.29
25249.6: §1.29
25400.10-25400.47: §§1.29, 3.10, 3.11B, 4.16C, 6.13
25400.16: §4.16C
25400.19-25400.47: §6.13
26100-26156: §3.11B
26142: §3.11B
26142-26145: §3.11B
26147-26148: §3.11B
33250 (former): §12.53
33334.2(e)(10): §6.15A
33334.3: §6.15A
33410-33418: §6.70

33413: §6.15A
34200-34380: §§1.33, 3.19
34328.1(c): §2.14
34332(a): §3.19
35700-35745 (former): §8.122
50199.4-50199.18: §6.67
50517.5: §6.67
50517.5-50517.11: §6.15A
50519: §1.3C
50675-50675.14: §6.15A
50735-50771.3: §6.15A
50780-50786.5: §6.15A
105251-105257: §4.16B

LABOR CODE
1140-1166.3: §8.129
1182.8: §§4.31, 4.47

MILITARY AND VETERANS CODE
409(b): §1.73

PENAL CODE
169: §5.37
290.46: §1.29
407-409: §5.37
418: §§5.20-5.21, 8.152
422.56: §§2.2, 2.28, 2.48, 2.59, 4.14, 6.14A, 6.20
422.56(c): §§2.1, 2.48-2.49, 2.57
484(a): §8.150A
518: §8.150A
591: §8.147
602.5: §§5.20-5.21, 8.152
646.91-646.91A: §5.37
647(j): §5.37
647c: §5.37
1050(a): §9.7

PROBATE CODE
2550: §1.16
2553-2554: §1.16
2553-2556: §1.16
2555: §1.16

PUBLIC RESOURCES CODE
21000-21178.1: §7.12

PUBLIC UTILITIES CODE
739: §6.15
739.5: §§1.56, 4.41A, 4.41C-4.41D, 5.5, 6.13, 6.29, 6.43, 6.106
739.5(a): §§4.41C, 6.43
739.5(g): §6.43
739.5(h): §6.43
777: §8.149A
777.1: §8.149A
1801-1812: §6.13
2791(c): §4.41A
10009: §8.149A
10009.1: §8.149A
12822: §8.149A
12822.1: §8.149A
16481: §8.149A
16481.1: §8.149A

REVENUE AND TAXATION CODE
5810: §6.3
7280: §§1.3C, 8.83, 8.142
17274: §§3.10, 4.50
24436.5: §4.50

VEHICLE CODE
21107.9: §§6.13, 6.121
22658: §6.88

35100: §6.4
35400: §6.4

ACTS BY POPULAR NAME
Administrative Procedures Act: §2.12
Bierman Amendment: §7.65
California Agricultural Labor Relations Act: §8.129
California Environmental Quality Act (CEQA): §7.12
California Fair Employment and Housing Act (FEHA): §§2.2, 2.5, 2.9B, 2.10, 2.20, 2.25B, 2.26, 2.28, 2.48-2.49, 2.57, 2.59, 2.67, 2.69, 4.3, 8.113, 8.122
California Mobilehome Residency Law: §7.52
California Work Opportunity and Responsibility to Kids Act (CalWORKS): §10.13
Cartwright Act: §6.20
Civil Discovery Act: §11.4
Compassionate Use Act: §2.27A
Consumer Credit Reporting Agencies Act (CCRAA): §4.9
Costa-Hawkins Rental Housing Act: §§3.57, 3.58A, 3.65B, 3.66A, 4.22, 4.34, 4.40B, 5.29, 7.1, 7.4, 7.16, 7.18-7.19, 7.25-7.25B, 7.26-7.28A, 7.33, 7.36, 7.49, 7.62, 7.64D, 7.65, 8.22A, 13.19
Disabled Persons Act: §§2.27B, 2.67, 5.7, 10.68
Ellis Act: §§5.18A, 7.1, 7.25, 7.55, 7.64-7.64H, 7.68, 7.72, 7.76A, 8.22C, 8.109, 10.65, 12.38, 12.60
Emancipation of Minors Law: §1.16
Employee Housing Act: §6.10
Fair Employment and Housing Act (FEHA): §§2.5, 2.9C, 2.10, 2.17, 2.21-2.23, 2.25-2.26, 2.27A, 2.29, 2.31, 2.48-2.52, 2.55-2.60, 4.12, 4.14, 4.15A, 5.7, 6.20, 8.122, 10.68
Family Law Act: §9.14
Government Code Planning and Zoning Law: §6.18
Investigative Consumer Reporting Agencies Act (ICRAA): §4.9
Manufactured Housing Act of 1980: §§6.1, 6.13, 6.86
Methamphetamine Contaminated Property Clean-Up Act of 2005: §6.13
Mobilehome Parks Act (MPA): §§6.1, 6.10-6.11, 6.13, 6.15-6.16, 6.18, 6.47-6.48, 6.86
Mobilehome Residency Law (MRL): §§3.6, 3.68B, 6.1-6.7, 6.9-6.15A, 6.16-6.21, 6.23, 6.33, 6.40, 6.42, 6.44-6.47, 6.50-6.51, 6.54-6.54A, 6.56, 6.59, 6.61-6.62, 6.71, 6.73-6.74, 6.76, 6.84, 6.86, 6.89, 6.91, 6.104, 6.111-6.114, 6.118, 6.120-6.121, 6.128, 6.135, 6.141-6.142, 7.10-7.11, 13.25, 13.27
- **Arts 1-8:** §6.11
- **Art 9:** §6.11

Narcotics Nuisance Abatement Act: §§3.7, 3.10, 3.15A, 3.36, 3.42, 3.48-3.48A, 3.68, 4.44
Proposition 13: §§4.36, 7.11
Proposition 65: §1.29
Ralph Civil Rights Act: §3.6
Recreational Vehicle Park Occupancy Law (RVPOL): §§6.1, 6.5, 6.10, 6.15
Rumford Fair Housing Act (former): §8.122
Safe Drinking Water and Toxic Enforcement Act of 1986: §1.29
Special Occupancy Parks Act: §§6.1, 6.13
Subdivided Lands Act: §§6.24, 7.64, 7.64B, 7.64E, 7.64G, 11.63B
Unfair Business Practices Act: §6.16
Unfair Competition Law (UCL): §§2.27H, 6.20, 7.64E, 7.64G
Unruh Civil Rights Act: §§2.2, 2.5, 2.9A, 2.9C, 2.10, 2.20-2.21, 2.23, 2.25B, 2.27A-2.27B, 2.27H, 2.28, 2.48, 2.55-2.60, 2.69, 3.6, 4.14-4.15, 5.7, 5.16, 6.18, 6.20, 8.113, 8.118-8.122, 8.135-8.136, 9.2, 10.67-10.68, 13.25
Wage Garnishment Law: §13.74

SESSION LAWS
- **Stats 2009, ch 586:** §6.13
- **Stats 2009, ch 347:** §8.22
- **Stats 2009, ch 244**
  - **§7:** §4.44
  - **§3:** §4.44
- **Stats 2009, ch 43:** §8.68B
- **Stats 2008, ch 69:** §8.68C
  - **§4:** §8.68B
- **Stats 2007, ch 113:** §11.4
- **Stats 2006, ch 254, §49:** §6.83
- **Stats 2005, ch 420:** §2.58
  - **§2:** §§2.21, 2.58, 4.14, 8.118, 10.67
- **Stats 2003, ch 576:** §8.172A
- **Stats 2003, ch 249, §4:** §6.46
- **Stats 2002, ch 1143, §§2-3:** §6.51
- **Stats 2002, ch 1061, §1:** §§4.11, 4.23, 4.26
- **Stats 2002, ch 69:** §10.27
- **Stats 2000, ch 680, §1:** §3.65A
- **Stats 1999, ch 323, §2:** §6.33
- **Stats 1996, ch 799, §15:** §12.53
- **Stats 1993, ch 1277:** §2.22

Stats 1992, ch 182: §2.22
Stats 1991, ch 57: §9.35A
Stats 1990, ch 1535: §9.35A
Stats 1990, ch 804, §2: §§13.33A, 13.33C
Stats 1982, ch 704: §10.39
Stats 1979, ch 958: §13.42
Stats 1970, ch 1280, §5: §8.129

PROPOSED LEGISLATION
SB 1137: §§8.68B-8.68C
SB 306: §8.68B

Regulations

CALIFORNIA CODE OF REGULATIONS
Title 4
10300-10358: §2.18A
Title 8
11050: §§4.31, 4.47
11050(1)(B)(1): §§4.31, 4.47
11050(1)(B)(2)(P)(3): §4.47
11050(2)(F): §4.31
11050(3)-(4): §4.46
11050(10)(C): §4.47
11050(10)(E): §§4.31, 4.47
Title 25: §6.1
32: §§2.24, 3.11C
32-46: §3.11C
42: §§1.4, 3.11C, 4.45
48-70: §3.10
50-70: §3.10
1000-1758: §§6.13, 6.47
1000-5668: §6.1
1020(a)(4)(B): §6.54
1031(c): §6.54
1032(b)-(c): §6.54
1322: §6.54
1426: §6.54
1600-1758: §6.64
4200-4216: §6.57A
6900-6999: §2.18
6935-6939.4: §2.12
6935.4: §2.12
6939(a): §2.12
10001-19400: §2.18
12001-12108: §2.12
12104(b): §2.12

Rules

CALIFORNIA RULES OF COURT
1.6(4): §11.52
1.30: §9.30
1.35, App A: §9.30
1.45(a): §10.50
1.200: §§10.1A, 10.28-10.28A, 10.36-10.36A, 10.47
2.20: §10.48
2.20(b): §10.48
2.100: §10.1A
2.100-2.119: §§10.36A, 10.47A, 12.44
2.100-2.306: §§10.28, 10.36, 10.47
2.101: §12.44
2.111(11): §9.32
2.112: §3.48A
2.250-2.261: §9.44
2.253: §9.44
2.260: §9.44
2.1050: §12.44
2.1050(a): §§12.42, 12.52
2.1050(e): §§12.42, 12.52
2.1055: §12.44
2.1055(a)(2): §12.44

2.1055(b): §12.44
2.1055(e): §12.44
3.1-3.10: §13.33C
3.10: §11.52
3.20(a): §10.1A
3.20(b): §10.1A
3.35-3.37: §§4.2A, 5.4A
3.35(a): §§4.2A, 5.4A, 9.23A, 10.3A
3.50-3.58: §10.13
3.61(9): §13.59
3.150(c): §11.38
3.151: §11.38
3.400: §11.69
3.400-3.403: §11.69
3.500: §11.66
3.500-3.550: §11.69
3.521: §11.69
3.650: §§9.6, 9.18D
3.650(a): §§14.5, 14.57
3.650(c): §14.57
3.650(d): §§14.5, 14.57, 14.67A
3.714-3.715: §11.69
3.720-3.735: §11.52
3.721: §11.52
3.735: §11.52
3.735(a): §11.52
3.735(b): §11.52
3.750-3.751: §11.69
3.1100-3.1362: §§10.28-10.28A, 10.36A, 10.47-10.47A, 11.36
3.1109: §10.34
3.1110: §§10.36A, 10.47A
3.1110(a): §10.25
3.1110(b): §§10.28, 10.36, 10.47
3.1112-3.1113: §§10.36A, 10.47A
3.1112(a): §§10.33, 10.36
3.1112(c): §10.33
3.1113: §§13.10, 13.54, 13.57, 13.62
3.1113(a): §§10.25, 10.33, 10.46
3.1114(a): §10.25
3.1114(b): §10.25
3.1150-3.1153: §11.64
3.1200-3.1207: §§10.49, 13.54
3.1202(c): §§10.48, 13.49, 13.54
3.1203: §§10.48, 13.49, 13.54
3.1203(b): §§9.7, 10.1A, 11.39, 11.41, 13.54
3.1300-3.1312: §10.36
3.1300(a): §10.46
3.1306(c): §10.33
3.1312: §§10.26, 10.34
3.1320: §10.36A
3.1320(a): §10.33
3.1320(c)-(d): §10.32
3.1320(e): §10.36
3.1320(f): §10.33
3.1320(g): §§10.30, 10.34-10.35, 10.50
3.1322(a): §§10.46-10.47
3.1322(b): §§10.38, 10.46
3.1332: §§11.41, 11.45
3.1332(b): §11.41
3.1332(c)-(d): §§11.41, 11.45
3.1335: §11.41
3.1347: §11.5
3.1350-3.1354: §11.36
3.1350(b): §11.38
3.1350(c): §11.38
3.1350(c)-(d): §11.38
3.1350(c)(4): §11.38
3.1350(d): §11.38
3.1350(e)-(f): §11.39
3.1350(e)(4): §11.39
3.1351: §11.37
3.1351(a): §11.38

3.1351(b): §§11.35, 11.37, 11.39
3.1351(c): §§11.37, 11.39
3.1352: §11.39
3.1354: §11.39
3.1380(a): §11.52
3.1380(b): §11.52
3.1380(c): §11.52
3.1385: §9.18D
3.1385(a)(2): §9.18D
3.1590: §12.64
3.1700: §13.33C
3.1700(a)(1): §13.23
3.1700(a)(2): §13.3
3.1700(b)(1): §13.23
3.1700(b)(3): §13.23
3.1702: §§13.23, 13.33C
3.1702(a): §§13.33A-13.33B
3.1702(b): §13.33C
3.1702(b)(1): §13.33C
3.1702(b)(2): §§13.32, 13.33C
3.1702(c): §13.32
3.1702(c)(2): §13.32
3.1702(d): §§13.32, 13.33C
3.1702(e): §§13.23, 13.33A-13.33C
3.1800: §§13.3, 13.5
3.2000: §13.23
8.4: §13.59
8.26: §10.13
8.100(a): §13.59
8.100(b): §13.59
8.100(d): §13.59
8.100(e): §13.59
8.100(g): §13.59
8.104: §13.33C
Advisory Committee Comment: §13.33C
8.104(a): §13.59
8.104(a)(1): §13.33C
8.108: §13.33C
8.108(b): §13.33C
8.108(c): §13.33C
8.108(d): §13.33C
8.108(e): §13.33C
8.112: §13.63
8.116: §13.63
8.120-8.163: §13.59
8.144: §13.59
8.144(b)(3): §13.59
8.200-8.224: §13.59
8.212(c): §13.59
8.276(a): §13.32
8.278: §13.32
8.278(c): §§13.32, 13.33C
8.500(a)(1): §13.58
8.500(a)(3): §13.58
8.800-8.843: §13.58
8.818: §10.13
8.821: §13.59
8.821(a): §13.59
8.821(d): §13.59
8.822-8.823: §§13.33C, 13.59
8.822(a): §13.59
8.823(b): §13.33C
8.823(c): §13.33C
8.823(d): §13.33C
8.823(e): §13.33C
8.824: §§13.54, 13.63
8.830-8.843: §13.59
8.838(b): §13.59
8.880-8.884: §13.59
8.880-8.891: §13.58
8.891: §13.32
8.891(c): §13.32

8.930-8.936: §13.58
8.1000-8.1018: §13.58
8.1002-8.1008: §13.63
8.1008(b)(4): §13.63
8.1115: §8.68E
62-64 (former): §13.63
222.1 (former): §11.54
1327: §10.24
Standards of Judicial Administration
2.2(i): §§9.7, 11.42
3.10: §11.69

CALIFORNIA RULES OF PROFESSIONAL CONDUCT
1-400: §10.3
1-600: §10.3
2-100: §9.21
3-200: §§5.27, 5.39, 10.2, 10.18
3-210: §5.37
3-310(B): §9.21
3-410: §§4.2C, 5.4A
4-200: §2.47
4-210: §10.4
5-200(B): §9.21
5-220: §9.21

LOCAL COURT RULES
Alameda
3.620: §11.41
3.630: §11.41
San Francisco
6.5: §11.41

Jury Instructions

CIVIL (CACI) APPROVED
200: §§12.42, 12.46, 12.62-12.63
1000-1005: §3.25
1006: §§3.68B-3.68C, 13.33D
3940: §§12.33, 12.52
4300: §12.46
4300-4302: §§12.42, 12.67
4300-4341: §12.42
4302: §12.47
4303: §12.48
4305: §12.48
4306: §12.47
4307: §12.48
4320: §§12.54-12.54A, 12.55, 12.57-12.59
4321-4322: §§12.61-12.63
4324: §12.63B
4326: §12.49
4327: §12.63D
4340: §§12.49-12.50, 12.57-12.59
4341: §§12.33, 12.52

CIVIL (BAJI)
2.60: §§12.42, 12.46, 12.62-12.63
7.34: §12.33
8.22: §3.25
11.73: §12.50
11.74: §§12.49-12.50
11.75: §12.50

Local Ordinances, Rules, and Statutes

GAS & ELECTRIC RULES
San Diego
19: §4.41A

MUNICIPAL CODES
Berkeley
21.28.050: §7.64

21.28.050(B): §7.68
Corte Madera
5.30.020: §2.9B
East Palo Alto
14.16.010: §2.9B
Glendale
Ch 9.30: §7.54
Oakland
8.22.080: §4.52
Santa Cruz
21.01.010: §2.48

POLICE CODES
San Francisco Art 33
3304: §2.48
3304(a)(5): §2.9B

RENT STABILIZATION / CONTROL ORDINANCES
Los Angeles
151.04(b): §2.9B
151.05.A: §7.56
151.06.C.2: §7.31
151.09: §7.56
151.09.G: §§7.63-7.65
151.09.A.2(b): §5.29
151.09.A.2(c): §7.57
151.25: §7.64C
151.30.D: §7.68
San Francisco
12.20(a): §5.14
37.2: §7.80
37.2(g): §4.40A
37.2(r): §§5.14, 7.54
37.2(t): §7.55A
37.3: §7.53
37.8(e)(7): §7.80
37.9: §7.53
37.9(a)(2): §§4.40A, 7.54, 7.55A, 7.57
37.9(a)(9): §4.52
37.9(b): §1.7B
37.9(j): §§4.52, 7.53, 7.55A
37.9C (Prop H): §§7.55A, 7.63-7.65, 7.76A
37.10A(i): §4.52
Prop G: §7.65
San Francisco Board Rules and Regulations
1.21: §§7.23A, 7.38A
6.13-6.14: §7.55A
6.15A-6.15C: §7.55A
6.15A-6.15D: §1.7
6.15C: §1.7
Santa Monica Board Rules and Regulations
1629: §7.64C
2005: §8.47
3030(c)(2): §7.23A
3304: §§4.38, 7.23A, 7.38A
8044: §7.32
9002(j): §7.68
West Hollywood
17.08.010(21): §7.55A
17.52.010(2)(e): §8.47
17.52.010(12)(g): §7.68
17.52.010(15)(c): §7.64C
West Hollywood Board Rules and Regulations
60014: §7.32

Miscellaneous

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT (HCD) ADMINISTRATIVE NOTICES
00-02 (Aug. 16, 2000): §2.12

PUBLIC UTILITIES COMMISSION (PUC)
Decisions

04-11-033: §6.13
04-04-043: §6.13
01-05-058: §1.56
Investigations
98-12-012 (Aug. 3, 2000): §§1.56, 4.41A

UNITED STATES

Constitution

Art I, §10: §4.36
Art VI, cl 2: §14.9
Amend I: §§5.37, 8.110, 8.113, 8.127, 10.67
Amend IV: §6.18
Amend V: §§6.15, 6.18, 7.10, 7.13, 7.14B, 7.58, 8.85
Amend XIII: §2.41
Amend XIV: §§5.37, 7.10, 8.85

Statutes

UNITED STATES CODE

Title 5
5520a: §13.74
Title 7
2041-2055 (former): §8.123
Title 8
1621: §2.12
Title 11
Ch 7: §§14.15, 14.16A, 14.19, 14.25, 14.30, 14.32, 14.34, 14.40, 14.42, 14.55-14.56, 14.63, 14.67-14.68, 14.70
Ch 9: §14.34
Ch 11: §§14.25, 14.32, 14.34, 14.37, 14.40, 14.52, 14.55, 14.61, 14.63, 14.67-14.68, 14.70
Ch 12: §14.32
Ch 13: §§14.4, 14.13, 14.16A, 14.17, 14.19, 14.25, 14.32, 14.34, 14.40, 14.42, 14.52, 14.55-14.56, 14.63, 14.67-14.68, 14.70
101(5): §14.9
101(8): §14.13
101(12): §14.9
105: §§14.21, 14.29, 14.38
105(a): §§14.6, 14.32
109(g)(1): §14.32
303(h): §§14.40, 14.45
341: §14.55
348(b): §14.40
349: §14.32
349(b)(3): §14.32
362: §§14.4, 14.16A, 14.21
362(a): §§14.4, 14.8-14.10, 14.13
362(a)(1): §§14.8-14.9
362(a)(2): §14.8
362(a)(3): §§14.8-14.9, 14.14
362(a)(6): §§14.8-14.9
362(a)(7): §14.12
362(b): §14.4
362(b)(10): §14.14
362(b)(22): §§14.8-14.9, 14.11, 14.16, 14.19, 14.23, 14.26, 14.31, 14.38, 14.56
362(b)(22)-(23): §§14.17, 14.19, 14.63, 14.68
362(b)(23): §§14.8, 14.16B
362(c)(1): §§14.4, 14.14
362(c)(2): §14.4
362(c)(3)-(4): §14.4
362(d): §§14.18-14.19, 14.22, 14.30, 14.32, 14.63
362(d)(1): §14.18
362(d)(2): §14.18
362(e): §14.63
362(f): §§14.17, 14.22, 14.63
362(g): §14.26
362(k): §14.6
362(k)(1): §14.6
362(k)(2): §14.6
362(l): §§14.16-14.17, 14.23, 14.26, 14.31, 14.38
362(l)(1): §14.16
362(l)(1)(A): §14.16
362(l)(1)(B): §14.16
362(l)(2): §14.16

362(l)(2)-(3): §14.16
362(l)(3): §14.16
362(l)(3)(A): §14.16
362(l)(3)(B): §14.16
362(l)(4): §14.16
362(l)(4)(B): §14.16
362(l)(5): §14.16
362(l)(5)(D): §14.16
362(m): §14.16B
362(m)(1): §14.16B
362(m)(2): §14.16B
362(m)(2)(B): §14.16B
362(m)(2)(C): §14.16B
362(m)(2)(D)(i): §14.16B
362(m)(2)(D)(ii): §14.16B
362(m)(3)(A): §14.16B
362(m)(3)(B): §14.16B
365: §§14.27, 14.43, 14.51
365(a): §§14.41, 14.62B
365(b): §§14.49-14.51, 14.62B
365(b)(1): §§14.3, 14.27, 14.50-14.52, 14.62B, 14.70
365(b)(1)(A): §§14.3, 14.36, 14.45A
365(b)(1)(B): §§14.30, 14.36, 14.51
365(b)(1)(C): §14.36
365(b)(2): §§14.45A, 14.70
365(b)(2)(D): §14.45A
365(b)(3): §§14.3, 14.50, 14.61, 14.62A-14.62B
365(b)(3)(C): §14.3
365(b)(4): §14.36
365(c): §14.19
365(d): §§14.61-14.62, 14.70
365(d)(1): §§14.34, 14.70
365(d)(2): §14.34
365(d)(3): §§14.37, 14.45-14.45A, 14.46, 14.48, 14.51, 14.60-14.62A, 14.70
365(d)(3)-(4): §14.40
365(d)(4): §§14.19, 14.31, 14.38, 14.44, 14.48-14.49, 14.53-14.54, 14.60, 14.62, 14.68, 14.70
365(d)(4)(A): §14.44
365(d)(4)(B): §§14.44, 14.47-14.48
365(d)(4)(B)(ii): §§14.44, 14.53
365(e): §14.7
365(f): §§14.3, 14.50, 14.62B
365(f)(1): §14.50
365(f)(2): §14.49
365(f)(3): §14.35
365(g)(1): §§14.38, 14.55
365(k): §14.52
502(a): §14.55
502(b): §14.51
502(b)(6): §§14.12, 14.32, 14.40, 14.52, 14.54-14.56
502(b)(6)(A): §14.55
502(b)(6)(B): §14.55
502(f): §14.40
503: §14.61
503(a): §14.61
503(b): §§14.39, 14.46, 14.52, 14.60
503(b)(1): §§14.40, 14.46, 14.61
503(b)(3): §14.45
503(b)(7): §§14.43, 14.52, 14.55
507: §§14.52, 14.55
507(a)(2): §14.40
521(i)(1): §14.32
523(c)(1): §14.15
525(a): §§14.27, 14.42
541: §§14.4, 14.16
541(a)(1): §§14.9, 14.11
541(b)(2): §14.14
547: §14.37
547(b): §14.37
547(c)(2): §14.37
547(c)(9): §14.37
707: §14.32
707(a): §14.32

707(b): §§14.13, 14.32
707(b) (former): §14.32
727(a): §14.15
727(c)(1): §14.15
727(d): §14.15
727(d)-(e): §14.15
1112: §14.32
1112(b): §14.32
1112(b)(4): §14.32
1208(c): §14.32
1301: §14.13
1307: §14.32
1307(c): §14.32
1327(b): §14.16A
1983: §2.19

Title 12
1701-1750g: §1.35
1715l(d)(3): §1.35
1715z-1: §1.35
4101-4147: §7.19
5220(a)(1): §8.68F
5220(a)(2): §8.68F
5220(b): §8.68F

Title 15
1673: §13.74
1681-1681t: §13.75
1681e: §13.75
1681i: §13.75
1681s-2: §13.75
1691: §2.9B
1692-1692o: §§8.26A, 9.45, 10.69A, 13.76
1692g: §§8.26A, 9.45
1692g(d): §§8.26A, 13.76
1692k(a): §8.26A

Title 18
1961-1968: §6.21

Title 28
158: §2.38
1343(a)(4): §2.28
1652: §2.44

Title 29
794: §§2.20, 2.26, 2.27B-2.27C, 2.29
1801-1872: §8.123

Title 42
221d: §2.18
236: §2.18
1210-12213): §5.7
1436a: §2.12
1437-1437aaa-8: §2.13
1437-1437z-7: §§1.33, 1.36
1437(f): §2.17
1437a(a): §2.16
1437c-1: §2.14
1437c-1(d)(13): §2.15A
1437d: §§1.33, 1.36
1437d(c)(3): §2.15A
1437d(c)(4): §2.14
1437d(l): §§1.33, 1.52
1437d(l)(6): §§1.33, 2.8, 2.15, 8.59
1437d(q): §2.15
1437d(q)(2): §2.15
1437d(q)(4): §2.15
1437d(q)(5): §2.15
1437d(r): §2.14
1437d(t)(3): §2.15
1437d(u): §2.15A
1437d(u)(2)(B): §2.15A
1437f: §§1.36, 2.13, 2.16, 7.19
1437f(b)(2): §2.18
1437f(c): §§2.16-2.17
1437f(c)(3): §§1.36, 2.16
1437f(d)(1): §2.17

1437f(d)(1)(B): §1.36
1437f(ee): §2.17
1437f(o): §1.36
1437f(o)(2): §2.16
1437f(o)(3): §2.16
1437f(t): §2.17
1437n(a)(3): §2.14
1437z-3: §2.14
1981: §§2.8, 2.23, 2.28, 2.41, 2.43-2.44
1981-1982: §§2.20, 2.28-2.30, 2.41-2.42, 2.44-2.47, 2.67, 4.14
1982: §§2.8, 2.23, 2.28-2.29, 2.41-2.44, 2.67, 4.14
1983: §§2.27H, 2.44, 3.10, 6.15, 7.14-7.14A, 8.123, 8.137
1988: §2.47
1988(b): §2.28
2000a-2000a-6: §2.23
2000a(e): §2.23
2000bb-3(a): §2.50
2000bb—2000bb-4: §2.50
2000d—2000d-6: §2.29
2000e—2000e-17: §2.56
2003-31 (HA) (11/26/03): §2.26
2006-13 (HA): §2.26
2607(b)(2)(C): §2.25A
3601: §4.15
3601-3619: §§2.27A, 2.29
3601-3631: §§2.5, 2.20, 2.23, 2.25A, 2.26-2.27, 2.27C, 2.28, 2.30, 2.32-2.33A, 2.42-2.43, 2.49, 2.67-2.68, 3.6, 4.3, 4.14, 5.7, 6.14A, 6.18, 6.141, 10.68
3602(b): §§2.28, 2.30, 6.20
3602(h): §2.26
3602(k): §2.23
3603(b)(1): §§2.28, 2.31
3603(b)(2): §§2.28, 2.31
3604: §§2.28, 2.30, 2.50, 4.14, 6.18, 6.54
3604(a): §§2.69, 4.15
3604(a)-(e): §2.30
3604(b)-(c): §6.18
3604(c): §§2.50, 2.69, 4.3
3604(f): §§2.26, 2.30
3604(f)(1): §2.27B
3604(f)(1)-(3): §2.27C
3604(f)(2): §2.27B
3604(f)(3)(A): §2.27B
3604(f)(3)(B): §§1.62, 2.4, 2.27-2.27A
3604(f)(3)(C): §§2.27B-2.27C
3604(f)(7): §§2.27B-2.27C
3604(f)(9): §§2.8, 2.26, 2.27D
3607: §§2.25B, 2.31, 2.41, 6.18, 6.38, 6.54
3607(a): §2.28
3607(b): §§2.28, 2.31
3607(b)(1): §2.24
3607(b)(2): §2.25
3607(b)(2)(A): §§2.25A-2.25B
3607(b)(2)(B): §2.25A
3607(b)(2)(C): §2.25C
3607(b)(5): §2.25A
3608(a): §2.33
3608(c)-(d): §2.33
3608(d): §2.67
3608(e)(5): §§2.14, 2.67
3610: §§2.28, 2.32
3610-3612: §2.2
3610(a): §§2.28, 2.33, 2.39
3610(a)-(c): §2.28
3610(a)(1)(A)(i): §§2.28, 2.33, 2.69
3610(a)(1)(B): §2.35
3610(a)(1)(B)-(C): §2.36
3610(b)(1): §2.36
3610(b)(5): §2.36
3610(c): §§2.28, 2.36, 2.40
3610(e): §§2.28, 2.36
3610(e)-(f): §2.28
3610(f): §2.28

3610(f)(1): §2.33
3610(f)(2): §§2.33, 2.37
3610(f)(3)-(5): §2.33
3610(g)(1): §2.37
3610(g)(2): §2.37
3610(g)(3): §2.37
3610(g)(4): §2.37
3610(h): §§2.37-2.38
3611: §2.38
3611(c)(1): §2.38
3611(c)(2): §2.38
3612: §§2.28, 2.37-2.38
3612(a): §§2.32, 2.37-2.38
3612(g): §2.38
3612(g)(3): §2.28
3612(g)(5): §2.38
3612(i): §2.38
3612(j): §§2.28, 2.38
3612(m): §2.38
3612(o): §2.28
3612(o)(1): §2.38
3612(o)(3): §§2.28, 2.38
3612(p): §§2.28, 2.38
3613: §§2.28, 2.32, 2.38-2.39, 2.59
3613(a): §2.28
3613(a)(1): §§2.28, 2.39
3613(a)(1)(A): §§2.28, 2.33, 2.69
3613(a)(2): §2.39
3613(a)(3): §2.39
3613(b): §§2.28, 2.39
3613(c): §2.39
3613(c)(1): §2.28
3613(c)(2): §2.28
3613(e): §2.39
3614: §§2.28, 2.32, 2.36-2.37, 2.40
3614(a): §2.28
3614(b): §2.28
3614(b)(1)(A): §2.28
3614(b)(1)(B): §2.40
3614(b)(2)(A): §2.28
3614(b)(2)(B): §2.40
3614(d): §2.40
3614(d)(1)(A): §2.28
3614(d)(1)(B): §2.28
3614(d)(1)(C): §2.28
3614(d)(2): §2.28
3614(e): §§2.39-2.40
3614a: §2.38
3615: §§2.2, 2.21, 2.24-2.25, 2.29
3631: §2.29
4851-4856: §§1.29, 4.37
4852d: §1.77
6101-6107: §2.29
12101-12213: §§2.2, 2.20-2.21, 2.27B, 2.57, 2.60, 2.68
12102(2): §2.26
12102(2)(A): §2.26
12102(3)(B): §2.26
12102(4)(D): §2.26
12102(4)(E): §2.26
12131-12134: §§2.26, 2.27C, 2.29
12182(a): §2.27C
12201(a): §2.26
12205: §2.27E
13661(a): §2.15
13661(b): §2.15
13661(c): §2.15
13661(c)(2): §2.15
13663: §2.15
Title 47
230-231: §5.7
Title 50
App §§501-596: §§1.73, 8.21A, 13.3

App §535: §§1.73, 8.21A

ACTS BY POPULAR NAME
ADA Amendments Act of 2008 (ADAAA): §2.26
Administrative Procedure Act: §2.38
Age Discrimination Act of 1975: §§2.29, 2.33A
Americans With Disabilities Act of 1990 (ADA): §§2.2, 2.20-2.21, 2.26, 2.27A-2.27C, 2.27E, 2.57, 2.60, 2.68, 5.7, 10.68
Title II, Subtitle A: §§2.14, 2.26, 2.27C, 2.29
Title III: §2.27C
Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA): §§14.1A, 14.3-14.4, 14.6, 14.8-14.9, 14.11, 14.13-14.16, 14.16B, 14.17, 14.19-14.20, 14.23, 14.26, 14.29, 14.31-14.32, 14.37, 14.43-14.45A, 14.47-14.50, 14.52, 14.55-14.56, 14.61-14.63, 14.68, 14.70
Civil Rights Act of 1866: §§2.8, 2.20, 2.23, 2.28-2.30, 2.41-2.42, 2.44-2.47, 2.67, 4.14
§1: §2.41
Civil Rights Act of 1870: §2.23
§16: §2.41
Civil Rights Act of 1871: §2.23
Civil Rights Act of 1964: §§2.23, 2.33A
Title II: §2.23
Title VI: §§2.14, 2.29
Title VII: §2.56, 2.69
Civil Rights Act of 1968
Title VIII: §§2.23, 2.29
Title VIII-IX: §2.30
Title IX: §2.29
Civil Rights Attorney's Fees Awards Act of 1976: §2.47
Communications Decency Act of 1996: §5.7
Equal Credit Opportunity Act (ECOA): §2.9B
Fair Credit Reporting Act: §13.75
Fair Debt Collection Practices Act (FDCPA): §§8.26A, 9.45, 10.69A, 13.76
Fair Housing Act of 1968 (FHA): §§2.5, 2.8, 2.9A-2.9B, 2.14-2.14A, 2.17-2.18, 2.20-2.24, 2.25-2.25B, 2.26-2.27E, 2.27G-2.27H, 2.28-2.33A, 2.38-2.44, 2.49-2.50, 2.56, 2.58-2.59, 2.66-2.69, 3.6, 4.3, 4.14-4.15, 5.7, 6.14A, 6.18, 6.20, 6.38, 6.54, 6.141
§3617: §2.27H
Fair Housing Amendments Act of 1988: §§2.2, 2.22, 2.25C, 2.26, 2.27A, 2.29, 6.18, 6.54, 10.68
Farm Labor Contractor Registration Act (former): §8.123
Financial Services Regulatory Relief Act of 2006: §13.76
Housing and Community Development Act of 1974: §§1.36, 2.13
Housing for Older Persons Act of 1995: §2.25A
Illegal Immigration Reform and Immigrant Responsibility Act of 1996
Title V, Subtitle E: §2.12
Low-Income Housing Preservation and Resident Homeownership Act of 1990: §7.19
Migrant and Seasonal Agricultural Worker Protection Act: §2.44
National Housing Act: §1.35
§221(d)(3): §1.35
§236: §1.35
Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA): §2.12
Protecting Tenants at Foreclosure Act of 2009: §§8.68C, 8.68F, 10.54
§704: §8.68F
Quality Housing and Work Responsibility Act of 1998 (QHWRA): §§1.36, 2.12, 2.14-2.15, 2.24
Racketeer Influenced and Corrupt Organizations Act (RICO): §6.21
Rehabilitation Act of 1973: §§2.26, 2.27B-2.27C
§504: §§2.14, 2.20, 2.26, 2.27A, 2.27C, 2.29, 2.33A
Religious Freedom Restoration Act of 1993: §2.50
Residential Lead-Based Paint Hazard Reduction Act of 1992: §§1.29, 4.37
Servicemembers Civil Relief Act (SCRA): §§1.73, 8.21A, 13.3
Soldiers' and Sailors' Civil Relief Act of 1940: §§1.73, 8.21A
United States Housing Act of 1937: §§1.33, 1.36
§8: §§1.32, 1.35-1.36, 2.5, 2.8, 2.9B, 2.13, 2.16-2.18A, 2.27A, 3.19, 3.65A, 3.66A-3.66B, 4.15A, 4.34, 6.15A, 6.67, 7.16, 7.19, 7.25-7.25B, 8.167, 10.66, 11.63B
§8(f): §2.17
Use of Assisted Housing by Aliens Act of 1996: §2.12
Violence Against Women Act (VAWA): §2.27H

SESSION LAWS
Pub L 111-22, §§701-704, 123 Stat 1660: §§8.68C, 8.68F, 10.54
Pub L 110-325, 122 Stat 3553: §2.26
§2: §2.26
§3(4)(E): §2.26
Pub L 109-351, 120 Stat 1966: §13.76
Pub L 109-162, 119 Stat 2960: §2.27H
Pub L 109-8, 119 Stat 23: §14.1A
Pub L 108-189, 117 Stat 2835: §§1.73, 8.21A, 13.3

Pub L 106-274, 114 Stat 806: §2.50
Pub L 105-276, 112 Stat 2461: §2.12
§514: §1.36
§549(a)(2): §1.36
§592: §2.12
Pub L 105-276, 112 Stat 2518: §§2.14-2.15
§554: §2.17
§589: §2.24
Pub L 104-208, §§571-577, 110 Stat 3009-684: §2.12
Pub L 104-193, 110 Stat 2104: §2.12
Pub L 104-99, §402(d), 110 Stat 41: §2.17
Pub L 104-76, 109 Stat 787: §§2.25A, 6.18, 6.54
Pub L 100-430, 102 Stat 1619: §§2.22, 2.25C, 2.26, 6.18, 6.54
Pub L 93-112, §504: §2.26
Pub L 90-284, 82 Stat 73: §2.29

CONGRESSIONAL REPORTS
S Rep No. 1011: §2.47
H Rep No. 100-711: §§2.8, 2.26

EXECUTIVE ORDERS
11063: §2.29
12259: §2.29
12892: §2.29

Regulations

CODE OF FEDERAL REGULATIONS
Title 4
966.4(l)(5): §2.8
Title 7
15d: §2.18
Title 24
1.4(b)(2)(i): §2.5
Pt 5: §1.33
Subpt E: §2.12
5.105(a): §2.14
5.309: §2.18
5.350-5.380: §2.14
5.410(i): §2.17
5.500: §2.12
5.850-5.861: §2.17
5.852(b): §2.17
5.854: §2.8
5.854(a): §2.17
5.854(b): §2.17
5.855(a): §2.17
5.856: §2.8
8: §2.20
8.3: §2.27B
8.4: §2.27B
8.20-8.33: §§2.27B-2.27C
8.22: §2.27B
8.23: §2.27B
8.23(b)(1): §2.27B
8.24: §2.27B
8.33: §2.27B
Pt 35: §§1.29, 4.37
35.80: §§1.29, 4.37
35.84(a): §4.37
35.84(b): §4.37
35.88: §1.29
35.88(a)(1): §1.29
35.92: §§1.29, 4.37
35.94: §1.29
100.50-100.90: §§2.23, 4.15
100.50-100.400: §2.29
100.60: §2.30
100.60(b)(5): §§2.23, 2.28, 2.67
100.65: §2.30
100.65(b)(4): §§2.23, 2.28, 2.67
100.65(b)(5): §2.27G

100.70: §2.30
100.70(a): §2.22
100.70(c)(4): §2.22
100.75: §2.30
100.80: §2.30
100.201: §2.26
100.201-100.205: §2.30
100.202: §2.27D
100.202(a): §2.30
100.202(b): §2.30
100.202(c): §2.26
100.202(c)(1)-(5): §2.26
100.203: §2.27B
100.204: §§1.62, 10.68
100.204(b): §2.27A
100.300-100.308: §2.31
100.302: §2.25A
100.303: §§2.25A-2.25B
100.304: §2.25A
100.305-100.307: §2.25A
100.308: §2.25A
100.400(c)(2: §2.27G
Pts 103-104: §2.38
103.1-103.515: §2.32
103.30: §2.33
103.35: §2.33
103.310: §2.36
103.315: §2.36
180.671: §2.38
180.700: §2.38
Pt 200: §1.33
Pt 221: §2.18
Pt 236: §2.18
236.750: §1.35
236.765: §2.12
Pt 246: §7.19
Pt 247: §1.33
Pt 401, subpt E: §2.12
Pt 880: §§1.33, 1.36
880.504: §2.12
880.601(b): §3.19
880.603: §2.12
Pt 881: §1.36
881.601(b): §3.19
Pt 882: §§1.33, 1.36, 3.19
882.401-882.516: §1.36
882.403(d): §1.36
882.414: §8.167
882.511: §1.36
882.514: §2.12
882.515: §2.12
882.808: §2.12
Pt 883: §1.36
Pt 884: §§1.33, 1.36
884.214: §2.12
884.223: §2.12
Pt 885: §1.36
Pt 886: §1.36
886.121: §2.12
886.124: §2.12
886.321: §2.12
Pt 891: §1.33
Pt 903: §2.14
Subpt A: §2.14
903.2: §2.14
903.2(d): §2.14
903.7: §2.14
903.7(o): §2.14
Pt 960: §1.33
960.202-960.208: §2.14
960.202(a)(2)(iii): §2.14
960.202(a)(2)(iv): §2.14

960.203(a): §2.14
960.203(c): §2.14
960.203(d): §2.14
960.204: §2.8
960.204(a)(3): §2.15
960.206(a): §2.14
960.206(b)(1)(iii): §§2.14-2.14A
960.206(b)(2): §2.14A
960.206(b)(3): §2.14
960.206(b)(4): §2.14
960.206(b)(5): §2.14
Pt 966: §1.33
966.4: §1.33
966.4(e): §§1.33, 3.19
966.4(f): §1.34
966.4(f)(12)(i)(B): §8.59
966.4(l)(5)(vii)(B): §1.33
966.6: §§1.33, 1.35
Pt 982: §§1.33, 2.27A
982.207(b): §2.17
982.307(a)(3)(iv): §2.8
982.308: §1.36
982.310(c)): §2.8
983.4: §2.12
Title 26
1.42-5(c)(1)(v): §2.18A
1.42-5(c)(2): §2.18A
1.42-5(xi): §2.18A
1.42-9(a): §2.18A
Title 28
35: §§2.20, 2.26
35.104: §2.27B
35.149-35.151: §§2.27B-2.27C
35.190: §2.27C
35.190(b)(4): §2.29
Title 29
1630.2(i): §2.26
Title 40
Pt 745: §1.29
Subpt F: §4.37
745.61-745.65: §1.29
745.80-745.88: §1.29
745.107(a): §1.29
Title 45
Pt 84, App A: §2.27A
84: §2.27A
84.3(k)(3): §2.27A

Regulatory Actions

FEDERAL REGISTER
68 Fed Reg 74233 (2003): §4.41B
66 Fed Reg 28776 (2001): §1.33
66 Fed Reg 1206: §1.29
65 Fed Reg 54858 (Sept. 15, 2000): §4.37
63 Fed Reg 70257 (1998): §2.24
59 Fed Reg 2939 (1994): §2.29
54 Fed Reg 3236-3237 (1988): §2.22
54 Fed Reg 3235-3236: §2.22
54 Fed Reg 134 (1988): §2.22
46 Fed Reg 1253 (1980): §2.29

Court Rules

BANKRUPTCY RULES
1002-2: §14.59
1017: §14.32
2002: §§14.25, 14.58
3001-3022: §14.59
3001(f): §14.55
3002(c): §14.55
3003-1: §14.59

3003(c)(3): §14.55
3004: §14.12
3007: §14.55
3007-1: §14.59
4001: §14.7
4001(a)(1): §14.25
4001(a)(2): §14.22
4001(a)(3): §§14.23, 14.29, 14.64, 14.66
4001(d): §14.30
4004: §14.15
4007: §14.15
9011: §14.56
9011(c)(1)(a): §14.56
9014: §14.25
9021: §14.32

FEDERAL RULES OF CIVIL PROCEDURE
8(a): §6.14A
11: §14.56
54(d): §2.28
54(d)(2): §2.28

LOCAL BANKRUPTCY COURT RULES
Central District of California Local Rules
9013-1(a)(5)(A): §14.25
Eastern District of California Local Rules
4001-1: §14.25
9014-1(c): §14.24
9014-1(m): §14.25
9014-1(m)(1): §14.25
9019-1: §14.30
Northern District of California Local Rules
4001-1: §§14.24-14.25
4001-2: §14.4
6006-1(b): §14.30
9013-3: §14.25
9013-3(b): §§14.25, 14.58
9014-1(b)(3): §14.30
Southern District of California Local Rules
4001-1: §14.25
4001-1(b)(1): §14.24
4001-2: §§14.23, 14.25

Rulings

INTERNAL REVENUE SERVICE (IRS) GENERAL LITIGATION BULLETINS
200127046: §14.16A

Ethics

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY
EC-1 (former): §10.2

ABA MODEL RULES OF PROFESSIONAL CONDUCT
1.5(a): §2.47

UNIFORM CODES AND ACTS

UNIFORM HOUSING CODE
100(f): §3.48A
503: §§2.24, 3.11D
504: §3.11D
505.3: §3.11D
505.4: §3.11D
505.5: §3.11D
505.7: §3.11D
701.1: §3.11D
701.2: §3.11D
801: §3.11D
901: §3.11D
1001.1: §3.11D
1001.2(5): §3.11D

1001.2(12): §3.11D
1001.5: §3.11D
1001.9: §3.11D
1001.12: §3.11D
1001.13: §3.11D
1101-1104: §3.10

Miscellaneous

FEDERAL COMMUNICATIONS COMMISSION (FCC) ORDERS
98-273: §1.31

HOUSING AND URBAN DEVELOMENT (HUD) NOTICES
PIH 2008-13 (HA): §2.27A
PIH 2005-5 (HA): §§2.14, 2.27A
PIH 2002-01: §2.27A
PIH 99-52: §2.27A

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Table of Cases

111 E. 88th Partners v Simon (Civ Ct 1980) 434 NYS2d 886, aff'd as modified (NY Sup 1985) 489 NYS2d 139: §3.27
152 Valparaiso Assocs. v City of Cotati (1997) 56 CA4th 378, 65 CR2d 551: §7.14
250 L.L.C. v Photopoint Corp. (2005) 131 CA4th 703, 32 CR3d 296: §§4.28C, 8.168, 8.173A, 8.175, 14.12
300 DeHaro St. Invs. v Department of Hous. & Community Dev. (2008) 161 CA4th 1240, 75 CR3d 98: §§3.66B, 7.14, 7.14B, 7.38
301 Ocean Ave. Corp. v Santa Monica Rent Control Bd. (1991) 228 CA3d 1548, 279 CR 636: §§1.38, 7.39, 7.51
301 Ocean Ave. Corp. v Santa Monica Rent Control Bd. (1985) 175 CA3d 149, 221 CR 610: §7.44
366-386 Geary St., LP v Superior Court (1990) 219 CA3d 1186, 268 CR 678: §13.56
447 Assocs. v Miranda (NJ 1989) 559 A2d 1362: §7.56
2495 Broadway Supermarket, Inc., In re (Bankr SD NY 1989) 97 BR 765: §14.51
7735 Hollywood Blvd. Venture v Superior Court (1981) 116 CA3d 901, 172 CR 528: §3.68B
11382 Beach Partnership v Libaw (1999) 70 CA4th 212, 82 CR2d 533: §§3.60, 8.5
$20,000 U.S. Currency, People v (1991) 235 CA3d 682, 286 CR 746: §8.29
40235 Washington St. Corp. v Lusardi (9th Cir 2003) 329 F3d 1076, cert denied (2003) 540 US 983: §14.4

A

A & M Produce Co. v FMC Corp. (1982) 135 CA3d 473, 186 CR 114: §13.40
AB Liquidating Corp., In re (9th Cir 2005) 416 F3d 961: §14.12
ADV Corp. v Wikman (1986) 178 CA3d 61, 223 CR 262: §3.62
AMB Prop., LP v Official Creditors for the Estate of AB Liquidating Corp. (In re AB Liquidating Corp.) (9th Cir 2005) 416 F3d 961: §14.55
APF Co., In re (Bankr Del 2001) 270 BR 363: §14.12
A. P. Green Fire Brick Co. v NLRB (8th Cir 1964) 326 F2d 910: §§8.129, 8.132
APRI Ins. Co. v Superior Court (1999) 76 CA4th 176, 90 CR2d 171: §10.26
ASP Props. Group v Fard (2005) 133 CA4th 1257, 35 CR3d 343: §3.73
A. Teichert & Son, Inc. v State (1965) 238 CA2d 736, 48 CR 225: §10.47A
Abandonato v Coldren (1995) 41 CA4th 264, 48 CR2d 429: §13.28
Abercrombie v Hayden Corp. (In re Abercrombie) (9th Cir 1998) 139 F3d 755: §14.51
Ablett v Clauson (1954) 43 C2d 280, 272 P2d 753: §§3.61-3.62, 4.41
Abrahamer v Parks (1956) 141 CA2d 82, 296 P2d 341: §10.54
Abramson v City of W. Hollywood (1992) 7 CA4th 1121, 9 CR2d 507: §7.42
Abstract Inv. Co. v Hutchinson (1962) 204 CA2d 242, 22 CR 309: §§9.8, 10.53, 10.68
Academy Spires, Inc. v Brown (NJ Dist Ct 1970) 268 A2d 556: §3.25
Acadia, Cal., Ltd. v Herbert (1960) 54 C2d 328, 5 CR 686: §3.37
Action Apartment Ass'n v City of Santa Monica (2007) 41 C4th 1232, 63 CR3d 398: §§7.55, 7.78
Action Apartment Ass'n v Santa Monica Rent Control Bd. (2001) 94 CA4th 587, 114 CR2d 412: §§1.48, 7.13, 8.170
Action Apartment Ass'n v Santa Monica Rent Control Opinion Bd. (9th Cir 2007) 509 F3d 1020: §§7.10, 7.14, 7.14B, 7.47
Adaimy v Ruhl (2008) 160 CA4th 583, 72 CR3d 926: §13.59
Adams v City of Modesto (1960) 53 C2d 833, 3 CR 561: §9.44
Adamson v City of Malibu (CD Cal 1994) 854 F Supp 1476: §7.11
Adler v Elphick (1986) 184 CA3d 642, 229 CR 254: §§7.65, 13.19
Advanced Ribbons v Interstate Distrib., Inc. (In re Advanced Ribbons & Office Prods.) (BAP 9th Cir 1991) 125 BR 259: §14.11
Agarwal v Johnson (1979) 25 C3d 932, 160 CR 141: §12.43
Agarwal v Pomona Valley Med. Group, Inc. (In re Pomona Valley Med. Group, Inc.) (9th Cir 2007) 476 F3d 665: §14.53
Aguilar v Atlantic Richfield Co. (2001) 25 C4th 826, 107 CR2d 841: §§11.31-11.34, 11.37-11.39
Aguirre v Lee (1993) 20 CA4th 1646, 25 CR2d 367: §7.63
Aheong v Mellon Mortgage Co. (In re Aheong) (BAP 9th Cir 2002) 276 BR 233: §14.56
Ahlers v Barrett (1906) 4 CA 158, 87 P 232: §12.19
Ahmadi-Kashani v Regents of Univ. of Cal. (2008) 159 CA4th 449, 71 CR3d 556: §2.56
Albertson's, Inc. v Kirkingburg (1999) 527 US 555, 144 L Ed 2d 518, 119 S Ct 2162: §2.26
Albertson's, Inc. v Young (2003) 107 CA4th 106, 131 CR2d 721: §5.37
Alcaraz v Vece (1997) 14 C4th 1149, 60 CR2d 448: §§3.67-3.67A
Alden v Mayfield (1912) 164 C 6, 127 P 45: §3.65B
Ali v City of Los Angeles (1999) 77 CA4th 246, 91 CR2d 458: §7.64D
Allegheny Intern., Inc., In re (Bankr WD Pa 1991) 136 BR 396: §14.55
Allstate Ins. Co. v Loo (1996) 46 CA4th 1794, 54 CR2d 541: §13.25
Almy v Terrace Land Dev., Ltd. (ND Cal 1983) 32 BR 390: §14.13
Alpha Epsilon Phi Tau Chapter Hous. Ass'n v City of Berkeley (9th Cir 1997) 114 F3d 840: §7.44

Alves v Rodrigues (1948) 84 CA2d 333, 190 P2d 649: §8.79
Amanuensis, Ltd. v Brown (Civ Ct 1971) 318 NYS2d 11: §3.25
Ambriz v Kelegian (2007) 146 CA4th 1519, 53 CR3d 700: §3.68B
Ambrose v Michelin N. Am., Inc. (2005) 134 CA4th 1350, 37 CR3d 1: §13.8
Ames Dep't Stores, Inc., In re (Bankr SD NY 1992) 136 BR 357: §§14.45A, 14.62A
Amos v Alpha Prop. Mgmt. (1999) 73 CA4th 895, 87 CR2d 34: §3.67A
AMTRAK v Morgan (2002) 536 US 101, 153 L Ed 2d 106, 122 S Ct 2061: §2.69
Anderson v Elm Inn, Inc. (In re Elm Inn, Inc.) (9th Cir 1991) 942 F2d 630: §§14.19, 14.29, 14.31, 14.38, 14.54, 14.70
Anderson v Metalclad Insulation Corp. (1999) 72 CA4th 284, 85 CR2d 331: §§11.31, 11.34
Andrew v KMR Corp. (In re Bullock) (BAP 9th Cir 1982) 17 BR 438: §14.51
Andrews v Joint Clerks Port Labor Relations Comm. (1966) 239 CA2d 285, 48 CR 646: §10.35
Andrews v Mobile Aire Estates (2005) 125 CA4th 578, 22 CR3d 832: §§3.5-3.7, 3.75, 6.16
Aneiro, In re (Bankr SD Cal 1987) 72 BR 424: §14.16A
Angelucci v Century Supper Club (2007) 41 C4th 160, 59 CR3d 142: §5.7
Ann M. v Pacific Plaza Shopping Ctr. (1993) 6 C4th 666, 25 CR2d 137: §§3.68, 3.68B-3.68C
Anniston Fed. Sav. & Loan Ass'n v E.K.P., Inc. (In re E.K.P., Inc.) (Bankr ND Ala 1984) 42 BR 19: §14.13
Apartment Ass'n v Santa Monica Rent Control Bd. (1994) 24 CA4th 1730, 30 CR2d 228: §7.31
Apartment Ass'n, Inc. v City of Los Angeles (2006) 136 CA4th 119, 38 CR3d 575: §§1.36, 3.66A, 7.14C, 7.19, 7.25, 7.25B
Apartment Ass'n of Greater Los Angeles v Santa Monica Rent Control Bd. (1994) 24 CA4th 1730, 30 CR2d 228: §§7.14, 7.30
Apartment Ass'n of Los Angeles County, Inc. v City of Los Angeles (2009) 173 CA4th 13, 92 CR3d 441: §§7.25, 7.64D
Appel v Beyer (1974) 39 CA3d Supp 7, 114 CR 336: §1.32
Appletree Markets, Inc., In re (Bankr SD Tex 1992) 139 BR 417: §14.45
Arden v Motel Partners (In re Arden) (9th Cir 1999) 176 F3d 1226: §14.55
Argaman v Ratan (1999) 73 CA4th 1173, 86 CR2d 917: §§11.29, 13.28
Armstrong v Optical Radiation Corp. (1996) 50 CA4th 580, 57 CR2d 763: §11.39
Armstrong v Superior Court (1956) 144 CA2d 420, 301 P2d 51: §§9.35, 9.45
Arnold v Krigbaum (1915) 169 C 143, 146 P 423: §§1.2, 3.9, 10.61, 10.73
Arnold Murray Constr. v Hicks (D SD 2001) 621 NW2d 171: §2.27D
Arrieta v Mahon (1982) 31 C3d 381, 182 CR 770: §§1.45, 9.35A, 13.70
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Associated Credit Servs., Inc. v Campion (In re Campion) (9th Cir 2003) 294 BR 313: §14.6
Asuncion v Superior Court (1980) 108 CA3d 141, 166 CR 306: §§10.54-10.55, 11.62-11.63, 11.63B, 11.64
Atkisson v Kern County Hous. Auth. (1976) 59 CA3d 89, 130 CR 375: §§2.9C, 2.50, 8.122, 8.134
Atlantic Container Corp., In re (Bankr ND Ill 1991) 133 BR 980: §14.55
Atlantic Oil Co. v County of Los Angeles (1968) 69 C2d 585, 72 CR 886: §1.18
Au-Yang v Barton (1999) 21 C4th 958, 90 CR2d 227: §§11.43, 12.21
Auburn Woods I Homeowners Ass'n v FEHC (2004) 121 CA4th 1578, 18 CR3d 669: §§1.62, 2.27A, 2.27D, 2.60, 10.68
Auer v Frank (1964) 227 CA2d 396, 38 CR 684: §§12.65-12.66
Autoland, Inc. v Superior Court (1988) 205 CA3d 857, 252 CR 662: §§12.6, 12.7A-12.7B
Aweeka v Bonds (1971) 20 CA3d 278, 97 CR 650: §§8.117, 8.134-8.135, 8.150, 11.63
Axis Petroleum Co. v Taylor (1941) 42 CA2d 389, 108 P2d 978: §8.30

B

BH S&B Holdings LLC, In re (Bankr SD NY 2009) 401 BR 96: §14.45A
B.N. Realty Assocs. v Lichtenstein (SD NY 1999) 238 BR 249: §§14.19, 14.38
Baba v Board of Supervisors of the City & County of San Francisco (2004) 124 CA4th 504, 21 CR3d 428: §§7.12, 7.55, 7.64F, 7.67
Babcock v Antis (1979) 94 CA3d 823, 156 CR 673: §§9.32, 12.39
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Bacciocco v Curtis (1938) 12 C2d 109, 82 P2d 385: §§8.176, 13.39
Bachenheimer v Palm Springs Mgmt. Corp. (1953) 116 CA2d 580, 254 P2d 153: §1.5
Bacon v Southern Cal. Edison Co. (1997) 53 CA4th 854, 62 CR2d 16: §11.34
Bacon, In re (Bankr ED Pa 1997) 212 BR 66: §§14.27, 14.41-14.42
Badgett, U.S. v (8th Cir 1992) 976 F2d 1176: §2.24
Bahl v Bank of America (2001) 89 CA4th 389, 107 CR2d 270: §11.39
Bakanauskas v Urdan (1988) 206 CA3d 621, 253 CR 764: §§7.65, 7.68
Baker v City of Santa Monica (1986) 181 CA3d 972, 226 CR 755: §7.13
Baker v Eilers Music Co. (1915) 26 CA 371, 146 P 1056: §8.17
Baker v F.F. Invs. (7th Cir 1970) 420 F2d 1191: §2.44
Baker v Manning's, Inc. (1953) 122 CA2d 390, 265 P2d 96: §13.45
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Balassy v Superior Court (1986) 181 CA3d 1148, 226 CR 817: §§12.27, 13.35
Baldwin v Kilpatrick (In re Baldwin) (9th Cir 2001) 249 F3d 912: §14.20
Balistrieri, U.S. v (7th Cir 1992) 981 F2d 916: §2.27G

Ball v City Council (1967) 252 CA2d 136, 60 CR 139: §12.8
Ball, In re (1934) 2 CA2d 578, 38 P2d 411: §§9.47, 10.19
Ballard, People v (1980) 104 CA3d 757, 164 CR 81: §§9.20, 10.2
Balmoral Hotel Tenants Ass'n v Lee (1990) 226 CA3d 686, 276 CR 640: §7.78
Bambula v Superior Court (1985) 174 CA3d 653, 220 CR 223: §12.7B
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Barajas v Bermudez (9th Cir 1994) 43 F3d 1251: §2.44
Baranov v Scudder (1918) 177 C 458, 170 P 1122: §1.23
Barber v Chang (2007) 151 CA4th 1456, 60 CR3d 760: §§2.8, 3.68B, 3.72
Bard v Kent (1942) 19 C2d 449, 122 P2d 8: §3.61
Barela v Superior Court (1981) 30 C3d 244, 178 CR 618: §§6.17, 6.72, 8.110, 8.113, 8.117, 8.125, 10.65, 11.55, 12.61
Barker v Lull Eng'g Co. (1978) 20 C3d 413, 143 CR 225: §12.55
Barkhaus v Producers Fruit Co. (1923) 192 C 200, 219 P 435: §3.51
Barnes v Black (1999) 71 CA4th 1473, 84 CR2d 634: §§3.67-3.67A
Barnett v Penske Truck Leasing (2001) 90 CA4th 494, 108 CR2d 821: §11.25
Barnett v US Air, Inc. (9th Cir 2000) 228 F3d 1105: §2.27D
Barquis v Merchants Collection Ass'n (1972) 7 C3d 94, 101 CR 745: §§3.48A, 9.33
Barrientos v 1801-1825 Morton LLC (9th Cir 2009) 583 F3d 1197: §§6.15A, 7.19, 11.63B
Basista v Weir (3d Cir 1965) 340 F2d 74: §2.45
Bastajian v Brown (1941) 19 C2d 209, 120 P2d 9: §13.47
Batchelor v Finn (1959) 169 CA2d 410, 341 P2d 803: §13.9
Bauer v Neuzil (1944) 66 CA2d Supp 1020, 152 P2d 47: §§8.70, 8.78
Baugh v Consumers Assocs. (1966) 241 CA2d 672, 50 CR 822: §§4.31, 8.24, 8.37, 9.6, 9.11, 10.36A, 10.47A
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Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd. (2008) 165 CA4th 1000, 81 CR3d 341: §§7.29, 7.40A, 7.44, 7.56, 7.77, 7.80, 10.57, 12.35
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Bayscene Resident Negotiators v Bayscene Mobilehome Park (1993) 15 CA4th 119, 18 CR2d 626: §7.52
Bazemore v Friday (1986) 478 US 385, 92 L Ed 2d 315, 106 S Ct 3000: §2.69
Beaumont Invs., Ltd., People v (2003) 111 CA4th 102, 3 CR3d 429: §§6.21, 6.57, 6.86, 7.77
Beaver St. Assocs. v Lady Liberty Tavern Corp. (In re Lady Liberty Tavern Corp.) (Bankr SD NY 1988) 94 BR 812: §14.20
Beck v Ransome-Crummey Co. (1919) 42 CA 674, 184 P 431: §9.45
Becker v IRM Corp. (1985) 38 C3d 454, 213 CR 213: §§3.67, 3.70
Becker v Submarine Oil Co. (1921) 55 CA 698, 204 P 245: §3.61
Beckett v City of Paris Dry Goods Co. (1939) 14 C2d 633, 96 P2d 122: §§1.1, 1.6, 1.13, 1.22-1.23
Beckjord v Slusher (1937) 22 CA2d 559, 71 P2d 820: §3.53
Bedford Inv. Co. v Folb (1947) 79 CA2d 363, 180 P2d 361: §3.58
Bedi v McMullan (1984) 160 CA3d 272, 206 CR 578: §§8.137-8.138, 8.140-8.141, 8.150, 9.1, 13.67
Beeman v Burling (1990) 216 CA3d 1586, 265 CR 719: §§7.75, 7.78
Beeston v Lampasona (1960) 182 CA2d 519, 6 CR 531: §3.71
Behrman v Barto (1880) 54 C 131: §3.62
Bein v Brechtel-Jochim Group, Inc. (1992) 6 CA4th 1387, 8 CR2d 351: §9.48
Bekins Moving & Storage Co. v Prudential Ins. Co. (1985) 176 CA3d 245, 221 CR 738: §3.62
Beliveau v Caras (CD Cal 1995) 873 F Supp 1393: §3.6
Bell v Fowler (8th Cir 1996) 99 F3d 262: §2.69
Bell v Tower Mgmt. Servs. (D NJ, July 15, 2008, No. 07-CV-5305) 2008 US Dist Lexis 53514: §§2.9D, 2.27A
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Benedict v Danner Press (2001) 87 CA4th 923, 104 CR2d 896: §§13.7-13.8
Benz v DTRIC Ins. Co. (In re Benz) (BAP 9th Cir 2007) 368 BR 861: §14.8
BEPCO, LP v 15375 Mem. Corp. (In re 15375 Mem. Corp.) (D Del 2009) 400 BR 420: §14.32
Berger, H.N. & Frances C., Found. v City of Escondido (2005) 127 CA4th 1, 25 CR3d 19: §§6.15, 7.12-7.13, 7.42, 7.47
Bergt, In re (Bankr D Alaska 1999) 241 BR 17: §§14.43, 14.54A
Berman v City of W. Hollywood Rent Stabilization Dep't (1988) 197 CA3d 837, 243 CR 144: §7.40
Berman v Downing (1986) 184 CA3d Supp 1, 229 CR 660: §7.6
Berryman v Gibson (1908) 7 CA 679, 95 P 671: §8.33
Berzito v Gambino (NJ 1973) 308 A2d 17: §§3.27, 3.43, 13.38
Best Prods. Co., In re (Bankr ED Va 1998) 229 BR 673: §14.55
Betsey v Turtle Creek Assocs. (4th Cir 1984) 736 F2d 983: §§2.5, 2.65
Beverly Hills Nat'l Bank v Glynn (1968) 267 CA2d 859, 73 CR 808: §13.32
Beverly Hills Props. v Marcolino (1990) 221 CA3d Supp 7, 270 CR 605: §13.40

Bevill v Zoura (1994) 27 CA4th 694, 32 CR2d 635: §10.69
Bhandari v First Nat'l Bank (5th Cir 1987) 829 F2d 1343: §§2.28, 2.43
Bills v Hodges (4th Cir 1980) 628 F2d 844: §2.23
Birke v Oakwood Worldwide (2009) 169 CA4th 1540, 87 CR3d 602: §§2.21, 2.27C, 3.15C, 3.42, 3.48A, 3.67A
Birkenfeld v City of Berkeley (1976) 17 C3d 129, 130 CR 465: §§7.6, 7.8, 7.10, 7.12, 7.30-7.31, 7.53, 7.74, 8.126, 9.2, 9.14
Birkner v Lam (2007) 156 CA4th 275, 67 CR3d 190: §7.78
Bishop v Pecsok (ND Ohio 1976) 431 F Supp 34: §2.5
Bisno v Douglas Emmett Realty Fund 1988 (2009) 174 CA4th 1534, 95 CR3d 492: §§7.55, 7.78
Bisno v Santa Monica Rent Control Bd. (2005) 130 CA4th 816, 30 CR3d 441: §§7.23A, 7.24, 7.38A
Bithoney, In re (1st Cir 1973) 486 F2d 319: §10.2
Bittleston, H.G., Law & Collection Agency v Howard (1916) 172 C 357, 156 P 515: §10.47A
Black Jack, U.S. v (8th Cir 1974) 508 F2d 1179: §2.5
Blackman v Dalton's Auto & Furniture Loans (1942) 51 CA2d 14, 124 P2d 123: §1.22
Blickman Turkus, LP v MF Downtown Sunnyvale, LLC (2008) 162 CA4th 858, 76 CR3d 325: §13.27
Bliler v Covenant Control Comm. (1988) 205 CA3d 18, 252 CR 50: §2.25C
Block v Hirsh (1921) 256 US 135, 65 L Ed 865, 41 S Ct 458: §7.7
Blockman v Sandalwood Apartments (7th Cir 1980) 613 F2d 169: §2.66
Blum v Robertson (1864) 24 C 127: §1.10
Blumenberg v Myres (1867) 32 C 93: §3.64
Board of Pub. Serv. Comm'rs v Spear (1924) 65 CA 214, 223 P 423: §12.34
Bob's Sea Ray Boats, Inc., In re (Bankr D ND 1992) 143 BR 229: §14.55
Bohbot v Santa Monica Rent Control Bd. (2005) 133 CA4th 456, 34 CR3d 827: §§4.52, 7.65, 7.68
Boll Weevil, Inc., In re (Bankr SD Cal 1996) 202 BR 762: §14.40
Bond v Pitzer (1958) 163 CA2d 1, 328 P2d 1009: §4.49
Boness v Richardson Mineral Springs (1956) 141 CA2d 251, 296 P2d 581: §14.7
Bonetti v Treat (1891) 91 C 223, 27 P 612: §§3.51, 8.17
Bonilla v Trebol Motors Corp. (1st Cir 1998) 150 F3d 77: §14.10
Borello, S.G., & Sons v City of Hayward (ND Cal, Nov. 20, 2006, No. C03-0891) 2006 US Dist Lexis 86293: §§7.10-7.11, 7.13
Borten v Santa Monica Rent Control Bd. (2006) 141 CA4th 1485, 47 CR3d 178: §§7.23A, 7.24
Boston Hous. Auth. v Bridgewaters (Mass 2009) 898 NE2d 848: §2.27D
Boston Hous. Auth. v Hemingway (Mass 1973) 293 NE2d 831: §§3.25-3.26, 3.28
Botosan v Paul McNally Realty (9th Cir 2000) 216 F3d 827: §2.68
Bouley v Young-Sabourin (D Vt 2005) 394 F Supp 2d 675: §2.27H
Bradley v Carydale Enters. (ED Va 1989) 730 F Supp 709: §§2.8, 2.69
Bradley v Carydale Enters. (ED Va 1989) 707 F Supp 217: §§2.27H, 2.69
Bragdon v Abbott (1998) 524 US 624, 141 L Ed 2d 540, 118 S Ct 2196: §2.26
Branche v Hetzel (1966) 241 CA2d 801, 51 CR 188: §12.66
Brandenburger v Thompson (9th Cir 1974) 494 F2d 885: §2.47
Braun v Leo G. McLaughlin Co. (1928) 93 CA 116, 269 P 191: §3.61
Brawley v Risdon Iron Works (1869) 38 C 676: §8.144
Brennan v Cockrell Invs., Inc. (1973) 35 CA3d 796, 111 CR 122: §§3.67-3.67A, 3.71
Brennick, In re (Bankr D Mass 1995) 178 BR 305: §14.46
Brewer v Second Baptist Church (1948) 32 C2d 791, 197 P2d 713: §12.52
Briggs v Electronic Memories & Magnetics Corp. (1975) 53 CA3d 900, 126 CR 34: §§8.24, 8.45, 8.67, 9.5, 9.35-9.36, 12.34
Briggs v Superior Court (2001) 87 CA4th 312, 104 CR2d 445: §12.7B
Briseno v City of Santa Ana (1992) 6 CA4th 1378, 8 CR2d 486: §3.11C
Bronk v Ineichen (7th Cir 1995) 54 F3d 425: §10.68
Bronson v Crestwood Lake Section 1 Holding Corp. (SD NY 1989) 724 F Supp 148: §§2.5, 2.9A
Brooks v Eugene Burger Mgmt. Corp. (1989) 215 CA3d 1611, 264 CR 756: §3.67
Brooks v Nelson (1928) 95 CA 144, 272 P 610: §13.2
Brosnan v Kramer (1901) 135 C 36, 66 P 979: §3.55
Brousseau v Jarrett (1977) 73 CA3d 864, 141 CR 200: §10.47A
Brown v Ballas (ND Tex 1971) 331 F Supp 1033: §2.45
Brown v Danning (In re Frederick Meats, Inc.) (9th Cir 1973) 483 F2d 951: §14.39
Brown v Felsen (1979) 442 US 127, 60 L Ed 2d 767, 99 S Ct 2205: §14.20
Brown v Green (1994) 8 C4th 812, 35 CR2d 598: §3.9
Brown v Philadelphia Hous. Auth. (ED Pa 2002) 237 F Supp 2d 567: §1.33
Brown v Philadelphia Hous. Auth. (ED Pa 2002) 237 F Supp 2d 567, rev'd (3d Cir 2003) 350 F3d 338: §2.15
Brown v Smith (1997) 55 CA4th 767, 64 CR2d 301: §§2.50, 2.58, 8.122
Brown, In re (Bankr WD Va 2009) 399 BR 162: §14.52
Brown, In re (Bankr ND Ohio 2008) 398 BR 215: §14.55
Brownstein v Edison (Sup Ct 1980) 425 NYS2d 773: §3.27
Buchanan v Banta (1928) 204 C 73, 266 P 547: §3.57
Buck v Cardwell (1958) 161 CA2d 830, 327 P2d 223: §§3.56, 3.61
Buck v Morrossis (1952) 114 CA2d 461, 250 P2d 270: §§10.39, 12.33

Buckhart v San Francisco Residential Rent Bd. (1988) 197 CA3d 1032, 243 CR 298: §7.51
Budaeff v Huber (1961) 194 CA2d 12, 14 CR 729: §§8.49, 10.60
Buffandeau v Edmondson (1861) 17 C 436: §13.52
Buffkin v Goodson (In re Goodson) (Bankr SD Fla 1981) 12 BR 883: §§14.45, 14.62
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Bullard v San Francisco Residential Rent Stabilization Bd. (2003) 106 CA4th 488, 130 CR2d 819: §§7.25, 7.25B, 7.65, 7.67
Bullock v City & County of San Francisco (1990) 221 CA3d 1072, 271 CR 44: §§7.64, 7.64B, 7.64H
Bumgarner v Orton (1944) 63 CA2d Supp 841, 146 P2d 67: §7.55
Burival v Creditor Comm. (In re Burival) (BAP 8th Cir 2009) 406 BR 548: §14.45
Burke v Superior Court (1969) 71 C2d 276, 78 CR 481: §§11.3, 11.6
Burkhart v Coleman (In re Tippett) (9th Cir 2008) 542 F3d 684: §14.4
Burks v Poppy Constr. Co. (1962) 57 C2d 463, 20 CR 609: §§2.28, 2.59
Burnett v Chimney Sweep, LLC (2004) 123 CA4th 1057, 20 CR3d 562: §3.69
Burris v Wilkins (5th Cir 1977) 544 F2d 891: §2.61
Burroughs v Ben's Auto Park, Inc. (1945) 27 C2d 449, 164 P2d 897: §3.60
Bush v Kaim (ND Ohio 1969) 297 F Supp 151: §§2.6, 2.9-2.10, 2.66
Bushling v Fremont Med. Ctr. (2004) 117 CA4th 493, 11 CR3d 653: §11.39
Buss v Superior Court (1997) 16 C4th 35, 65 CR2d 366: §9.29
Butler v Adoption Media, LLC (ND Cal 2007) 486 F Supp 2d 1022: §§2.21, 2.58
Butler-Rupp v Lourdeaux (2005) 134 CA4th 1220, 36 CR3d 685: §§3.9, 3.67, 5.22
Butt v Bertola (1952) 110 CA2d 128, 242 P2d 32: §3.15B
Byrne v Baker (1963) 221 CA2d 1, 34 CR 178: §8.134

C

CCI Wireless, LLC, In re (Bankr D Colo 2002) 279 BR 590: §14.45
Cacho v Boudreau (2007) 40 C4th 341, 53 CR3d 43: §§6.15, 6.29-6.30
Cada v Baxter Healthcare Corp. (7th Cir 1990) 920 F2d 446: §2.69
Cal-American Income Prop. Fund IV v Ho (1984) 161 CA3d 583, 207 CR 532: §§8.38, 10.36A, 10.69
Caldwell v Farley (1955) 134 CA2d 84, 285 P2d 294: §2.68
California Farm & Fruit Co. v Schiappa-Pietra (1907) 151 C 732, 91 P 593: §9.43
California Fed. Sav. & Loan Ass'n v Superior Court (1987) 189 CA3d 267, 234 CR 413: §12.7B
California Livestock Prod. Credit Ass'n v Sutfin (1985) 165 CA3d 136, 211 CR 152: §10.65
California Med. Ass'n v Shalala (9th Cir 2000) 207 F3d 575: §13.32
California Mobile Home Park Mgmt. Co., U.S. v (9th Cir 1997) 107 F3d 1374: §§2.2, 2.27A, 6.14A, 6.38, 6.141
California Mobile Home Park Mgmt. Co., U.S. v (9th Cir 1994) 29 F3d 1413: §§6.38, 6.46, 6.141
California Recreation Indus. v Kierstead (1988) 199 CA3d 203, 244 CR 632: §13.33C
California Safe Deposit & Trust Co., People v (1919) 41 CA 727, 183 P 289: §14.7
California Sec. Mgmt. Corp. v Kennedy (In re Kennedy) (Bankr CD Cal 1984) 39 BR 995: §§14.19, 14.21, 14.28-14.29
Camacho v Schaefer (1987) 193 CA3d 718, 238 CR 609: §8.149
Cambridge v Webb (1952) 109 CA2d Supp 936, 244 P2d 505: §8.45
Camp v Matich (1948) 87 CA2d 660, 197 P2d 345: §§1.8-1.9
Campbell v Verizon Wireless S-CA (In re Campbell) (BAP 9th Cir 2005) 336 BR 430: §14.55
Canal-Randolph Anaheim, Inc. v Wilkoski (1978) 78 CA3d 477, 144 CR 474: §§1.41, 8.25, 8.37, 8.39, 13.31, 13.40
Cannery Row Co. v Leisure Corp. (In re Leisure Corp.) (BAP 9th Cir 1999) 234 BR 916: §14.45
Canning v Fibush (1888) 77 C 196, 19 P 376: §§3.64, 3.66, 8.2
Capelouto v Kaiser Found. Hosp. (1972) 7 C3d 889, 103 CR 856: §2.59
Captain Blythers, Inc. v Thompson (In re Captain Blythers, Inc.) (BAP 9th Cir 2004) 311 BR 530, aff'd (9th Cir 2006) 182 Fed App 708: §14.16A
Cardenas v Noren (1991) 235 CA3d 1344, 1 CR2d 367: §§9.35A, 13.70
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Carey v Brown (1980) 447 US 455, 65 L Ed 2d 263, 100 S Ct 2286: §5.37
Carl v Thomas (1931) 116 CA 294, 300,2 P2d 872: §12.22
Carma Developers (Cal.), Inc. v Marathon Dev. Cal., Inc. (1992) 2 C4th 342, 6 CR2d 467: §§3.56, 3.75
Carson Gardens, LLC v City of Carson Mobilehome Park Rental Review Bd. (2006) 135 CA4th 856, 37 CR3d 768: §7.51
Carson Harbor Village, Ltd. v City of Carson (9th Cir 2004) 353 F3d 824: §§6.15, 7.11, 7.14
Carson Harbor Village, Ltd. v City of Carson (9th Cir 1994) 37 F3d 468: §7.11
Carson Harbor Village, Ltd. v City of Carson Mobilehome Park Rental Review Bd. (1999) 70 CA4th 281, 82 CR2d 569: §§6.29, 7.11
Carson Mobilehome Park Owners' Ass'n v City of Carson (1983) 35 C3d 184, 197 CR 284: §§7.11-7.12
Carteri v Roberts (1903) 140 C 164, 73 P 818: §1.10
Carty v Blauth (1915) 169 C 713, 147 P 949: §3.5
Casden v Superior Court (2006) 140 CA4th 417, 44 CR3d 474: §12.5
Cashman v City of Cotati (9th Cir 2005) 415 F3d 1027: §§6.15, 7.11
Cashman v City of Cotati (9th Cir 2004) 374 F3d 887: §§6.15, 7.11
Cason v Rochester Hous. Auth. (WD NY 1990) 748 F Supp 1002: §2.26
Castagnoli v Castagnoli (1954) 124 CA2d 39, 268 P2d 37: §13.11

Castaneda v Olsher (2007) 41 C4th 1205, 63 CR3d 99: §§2.8, 3.68, 3.68B, 6.16, 6.20, 6.55, 6.65
Castillo v Friedman (1987) 197 CA3d Supp 6, 243 CR 206: §§7.67, 7.78
Castle Park No. 5 v Katherine (1979) 91 CA3d Supp 6, 154 CR 498: §§9.39, 10.22, 10.41, 10.47A, 12.27, 13.18
Castro v Tewksbury (1886) 69 C 562, 11 P 339: §8.145
Caswell v Gardner (1936) 12 CA2d 597, 55 P2d 1222: §8.2
Catherman v First State Bank (Tex 1990) 796 SW2d 299: §8.26A
Cavanaugh v High (1960) 182 CA2d 714, 6 CR 525: §§8.30, 8.37, 10.40, 12.30, 13.19
Cazares v Ortiz (1980) 109 CA3d Supp 23, 168 CR 108: §§3.37-3.38, 12.56-12.57, 12.59
Centerpoint Props. v Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.) (3d Cir 2001) 268 F3d 205: §14.45
Central Alabama Fair Hous. Ctr. v Lowder Realty Co. (11th Cir 2000) 236 F3d 629: §2.67
Chakonas v City of Chicago (7th Cir 1994) 42 F3d 1132: §2.69
Chambers v Security Commercial & Sav. Bank (1920) 46 CA 32, 188 P 818: §13.20
Chan v Antepenko (1988) 203 CA3d Supp 21, 250 CR 851: §§1.4, 4.48, 7.70, 8.84, 9.5
Chandler v Hart (1911) 161 C 405, 119 P 516: §§1.14, 1.54, 3.5, 3.49, 4.17
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Channing Props. v City of Berkeley (1992) 11 CA4th 88, 14 CR2d 32: §§7.64H, 8.22C
Chaplin v Superior Court (1927) 81 CA 367, 253 P 954: §10.28A
Chapman v Great W. Gypsum Co. (1932) 216 C 420, 14 P2d 758: §3.56
Chapman v Silber (2001) 734 NYS2d 541, 760 NE2d 329: §3.67
Chapman Inv. Assocs. v American Healthcare Mgmt. (In re American Healthcare Mgmt., Inc.) (5th Cir 1990) 900 F2d 827: §14.48
Charles v Lundgren & Assocs. (9th Cir 1997) 119 F3d 739: §8.26A
Chase v Kosmala (In re Loyd) (BAP 9th Cir 2003) 304 BR 372: §14.56
Chase v Peters (1918) 37 CA 358, 174 P 116: §§8.145, 9.35, 12.27
Cheney v Trauzettel (1937) 9 C2d 158, 69 P2d 832: §§8.68A-8.68B, 9.34, 9.36-9.37, 10.54, 12.46-12.47
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Childs v Eltinge (1973) 29 CA3d 843, 105 CR 864: §§9.32-9.33, 11.62
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Cisneros v Vueve (1995) 37 CA4th 906, 44 CR2d 682: §13.7
City & County of San Francisco v Ang (1979) 97 CA3d 673, 159 CR 56: §9.15
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City of Hayward, U.S. v (9th Cir 1994) 36 F3d 832: §§2.28, 6.18
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City of Oceanside v McKenna (1989) 215 CA3d 1420, 264 CR 275: §6.15A
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City of San Jose v Superior Court (1995) 32 CA4th 330, 38 CR2d 205: §5.37
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City of Santa Cruz v MacGregor (1960) 178 CA2d 45, 2 CR 727: §§1.1, 1.27
City of Santa Monica v Gonzalez (2008) 43 C4th 905, 76 CR3d 483: §§3.10, 3.15C, 4.50
City of Santa Monica v Yarmark (1988) 203 CA3d 153, 249 CR 732: §7.64A
City of Santa Paula v Narula (2003) 114 CA4th 485, 8 CR3d 75: §§4.50, 13.25
City of Sausalito v County of Marin (1970) 12 CA3d 550, 90 CR 843: §9.14
City of Stockton v Ellingwood (1929) 96 CA 708, 275 P 228: §§12.29, 12.51
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City of W. Hollywood v 1112 Invs. Co. (2003) 105 CA4th 1134, 130 CR2d 168: §7.16
Civic Ctr. Square, Inc. v Ford (In re Roxford Foods, Inc.) (9th Cir 1993) 12 F3d 875: §14.15
Clarion Corp. v American Home Prods. Corp. (7th Cir 1974) 494 F2d 860: §9.17
Clark v Mazgani (2009) 170 CA4th 1281, 89 CR3d 24: §§5.18A, 7.78
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Clore v Fredman (Ill 1974) 319 NE2d 18: §11.65
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Coalition Advocating Legal Hous. Options v City of Santa Monica (2001) 88 CA4th 451, 105 CR2d 802: §7.55A
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Cobb v San Francisco Residential Rent Stabilization & Arbitration Bd. (2002) 98 CA4th 345, 119 CR2d 741: §§3.57, 3.58A, 4.40B, 7.25, 7.28
Coburn v Goodall (1887) 72 C 498, 14 P 190: §3.60
Cohen v Herbert (1960) 186 CA2d 488, 8 CR 922: §11.45
Cohen v Superior Court (1967) 248 CA2d 551, 56 CR 813: §§11.41, 12.19
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Colby v Colby (1954) 127 CA2d 602, 274 P2d 417: §13.52
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Collingwood Grains, Inc. v Coast Trading Co. (In re Coast Trading Co.) (9th Cir 1984) 744 F2d 686: §14.51
Colmenares v Braemar Country Club, Inc. (2003) 29 C4th 1019, 130 CR2d 662: §2.26
Colony Cove Assocs. v Brown (1990) 220 CA3d 195, 269 CR 234: §6.18
Colony Hill v Ghamaty (2006) 142 CA4th 1408, 48 CR3d 798: §13.59
Columbus Country Club, U.S. v (3d Cir 1990) 915 F2d 877: §§2.30-2.31
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Commission on Human Rights & Opportunities v Sullivan (Conn 2008) 939 A2d 541: §2.9B
Commodore Home Sys., Inc. v Superior Court (1982) 32 C3d 211, 185 CR 270: §2.28
Commonwealth Mem., Inc. v Telophase Soc'y (1976) 63 CA3d 867, 134 CR 58: §13.31
Community House, Inc. v City of Boise (9th Cir 2007) 490 F3d 1041: §§2.5, 2.28, 2.30, 2.63
ComputerXpress, Inc. v Jackson (2001) 93 CA4th 993, 113 CR2d 625: §§5.18A, 13.40A
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Concord Communities, LP v City of Concord (2001) 91 CA4th 1407, 111 CR2d 511: §§6.28, 7.11
Congdon v Strine (ED Pa 1994) 854 F Supp 355: §§2.27A, 2.27C
Conille v Secretary of HUD (1st Cir 1988) 840 F2d 105: §3.19
Connectix Corp., In re (Bankr ND Cal 2007) 372 BR 488: §§14.12, 14.55
Conover v Hall (1974) 11 C3d 842, 114 CR 642: §11.64
Continental Baking Co. v Katz (1968) 68 C2d 512, 67 CR 761: §11.64
Contreras v Anderson (1997) 59 CA4th 188, 69 CR2d 69: §3.67
Cook v City of Buena Park (2005) 126 CA4th 1, 23 CR3d 700: §§4.44, 8.59
Cook v Klenk (1904) 142 C 416, 76 P 57: §§1.4, 8.84
Cooper v Board of Med. Exam'rs (1975) 49 CA3d 931, 123 CR 563: §9.44
Cope v Anderson (1947) 331 US 461, 91 L Ed 1602, 67 S Ct 1340: §2.69
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County of Santa Cruz v Waterhouse (2005) 127 CA4th 1483, 26 CR3d 543: §§6.13, 6.15
Court House Plaza Co. v Goodenough (2003) 106 CA4th 832, 131 CR2d 193: §1.14
Covey v Hollydale Mobilehome Estates (9th Cir 1997) 116 F3d 830, modified (9th Cir 1997) 125 F3d 1281: §6.18
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Cowell v Snyder (1911) 15 CA 634, 115 P 961: §1.11
Cowlin v Pringle (1941) 46 CA2d 472, 116 P2d 109: §11.54
Cox v Hollywood Film Enters. (1952) 109 CA2d 320, 240 P2d 713: §1.22
Cox, In re (1970) 3 C3d 205, 90 CR 24: §§2.10, 2.27H, 2.28, 2.58, 4.14, 5.7, 8.118-8.119, 10.67
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Crescent Park Tenants Ass'n v Realty Equities Corp. (NJ 1971) 275 A2d 433: §5.39
Crevier v Welfare & Pension Fund for Local 701 (In re Crevier) (9th Cir 1987) 820 F2d 1553: §14.21
Cross v Bouck (1917) 175 C 253, 165 P 702: §3.56
Crowell v City of Riverside (1938) 26 CA2d 566, 80 P2d 120: §§3.56, 8.50
Cruce v Stein (1956) 146 CA2d 688, 304 P2d 118: §14.21
Crumble v Blumthal (7th Cir 1977) 549 F2d 462: §§2.28, 2.67
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Cukierman v Mechanics Bank (In re J. F. Hink & Son) (9th Cir 1987) 815 F2d 1314: §14.35
Cukierman v Uecker (In re Cukierman) (9th Cir 2001) 265 F3d 846: §§14.37, 14.46, 14.51

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Curry v Metropolitan Dade County (In re Curry) (Bankr SD Fla 1992) 148 BR 966: §14.27
Curtis v Conly (1921) 257 US 260, 42 S Ct 100, 66 L Ed 222: §2.69
Custom Parking, Inc. v Superior Court (1982) 138 CA3d 90, 187 CR 674: §§8.128, 10.65, 13.60, 13.63
Cwynar v City & County of San Francisco (2001) 90 CA4th 637, 109 CR2d 233: §7.65
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D

DCT, Inc., In re (Bankr ED Mich 2002) 283 BR 442: §14.44
DFEH v Superior Court (2002) 99 CA4th 896, 121 CR2d 615: §2.53
DRG/Beverly Hills, Ltd. v Chopstix Dim Sum Cafe & Takeout III, Ltd. (1994) 30 CA4th 54, 35 CR2d 515: §§10.60, 12.63B-12.63C
Da Vinci Group v San Francisco Residential Rent Stabilization & Arbitration Bd. (1992) 5 CA4th 24, 6 CR2d 461: §7.42
Dahlberg v Girsch (1910) 157 C 324, 107 P 616: §13.46
Daisy/Cadnetix, Inc., In re (Bankr ND Cal 1991) 126 BR 87: §14.46
Daluiso v Boone (1969) 71 C2d 484, 78 CR 707: §§8.137-8.138, 8.143-8.145, 8.150, 8.152
Damian v Tamondong (1998) 65 CA4th 1115, 77 CR2d 262: §13.27
D'Amico v Riedel (1949) 95 CA2d 6, 212 P2d 52: §§10.53, 10.55
Dana Commercial Credit Corp. v Ferns & Ferns (2001) 90 CA4th 142, 108 CR2d 278: §13.58
Danekas v San Francisco Residential Rent Stabilization & Arbitration Bd. (2001) 95 CA4th 638, 115 CR2d 694: §§7.53, 7.62
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Dargel v Barr (Emer Ct App 1953) 204 F2d 697: §7.63
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Datig v Dove Books, Inc. (1999) 73 CA4th 964, 87 CR2d 719: §10.35
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Davidson v Goldstein (1943) 58 CA2d Supp 909, 136 P2d 665: §1.28
Davidson v Quinn (1982) 138 CA3d Supp 9, 188 CR 421: §§8.29, 8.63, 8.65, 9.44, 12.48
Davis v Courington (In re Davis) (BAP 9th Cir 1995) 177 BR 907: §14.21
Davis v KGO-TV (1998) 17 C4th 436, 71 CR2d 452: §2.56
Davis v New York City Hous. Auth. (2d Cir 2002) 278 F3d 64: §2.14A
Davis v Schweikert (1900) 130 C 143, 62 P 411: §8.7
Davis v Stark (1914) 25 CA 519, 144 P 315: §8.139
Davis v The Mansards (ND Ind 1984) 597 F Supp 334: §2.66
Davis, In re (Bankr ND Ohio 2007) 378 BR 539: §14.13
Dawson v Washington Mut. Bank, F.A. (In re Dawson) (9th Cir 2004) 390 F3d 1139: §14.6
Day, In re (Bankr ED Pa 1997) 208 BR 358: §14.42
De Anza Santa Cruz Mobile Estates Homeowners Ass'n v De Anza Santa Cruz Mobile Estates (2001) 94 CA4th 890, 114 CR2d 708: §§2.59, 6.86, 8.117, 8.135
De Hart v Allen (1945) 26 C2d 829, 161 P2d 453: §3.53
De La Vara v Municipal Court (1979) 98 CA3d 638, 159 CR 648: §§3.33, 12.36, 12.53
De Malherbe v International Union of Elevator Constructors (ND Cal 1977) 438 F Supp 1121: §2.43
Deal v Municipal Court (1984) 157 CA3d 991, 204 CR 79: §§10.18, 13.2
Dearie v Hunter (1998) 676 NYS2d 896: §§8.26A, 10.69A, 13.76
DeBartolo Props. Mgmt., Inc. v Devan (In re Merry-Go-Round Enters.) (D Md 1996) 194 BR 46: §14.44
DeCamp v First Kensington Corp. (1978) 83 CA3d 268, 147 CR 869: §§9.42, 10.47A
Decker v Kadjevich (In re Kadjevich) (9th Cir 2000) 220 F3d 1016: §14.51
Decker, In re (Bankr D Mont 2008) 2008 Bankr Lexis 982: §14.51
Deevy v Tassi (1942) 21 C2d 109, 130 P2d 389: §2.59
Del Cerro Mobile Estates v Proffer (2001) 87 CA4th 943, 105 CR2d 5: §13.27
Del Taco, Inc. v University Real Estate Partnership V (2003) 111 CA4th 16, 3 CR3d 311: §3.9
DeLaura v Beckett (2006) 137 CA4th 542, 40 CR3d 253: §7.14C
Delaware State College v Ricks (1980) 449 US 250, 66 L Ed 2d 431, 101 S Ct 498: §2.69
Delaware Valley Broadcasters Ltd. Partnership, In re (Bankr Del 1994) 166 BR 36: §14.52
Delgado v Trax Bar & Grill (2005) 36 C4th 224, 30 CR3d 145: §§3.68, 3.68C
Dellway Villa Apartments v Goodloe (In re Goodloe) (Bankr MD Tenn 1986) 61 BR 1016: §14.33
Delois v Barrett Block Partners (2009) 177 CA4th 940, 99 CR3d 609: §§5.18A, 7.78
Delpit v Commissioner (9th Cir 1994) 18 F3d 768: §14.4
Delta Imports, Inc. v Municipal Court (1983) 146 CA3d 1033, 194 CR 685: §§8.23, 8.62, 10.20-10.21, 10.27, 10.29, 10.31, 10.40
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Demos v Brown (In re Graves) (BAP 9th Cir 2002) 279 BR 266: §14.56
Dennis v BEH-1, LLC (9th Cir 2007) 504 F3d 892: §§5.25A, 13.75
Dennis v Chang (9th Cir 1980) 611 F2d 1302: §2.47
Dennis v Overholtzer (1957) 149 CA2d 101, 307 P2d 1012: §8.134
Denny v Hutchinson Sales Corp. (10th Cir 1981) 649 F2d 816: §§2.28, 2.67

Department of Fair Employment & Hous. v Superior Court (2002) 99 CA4th 896, 121 CR2d 615: §5.7
Department of Pub. Works, People ex rel v McCullough (1950) 100 CA2d 101, 223 P2d 37: §12.2
Department of Transp. v Kerrigan (1984) 153 CA3d Supp 41, 200 CR 865: §11.55
Department of Transp., People ex rel v Superior Court (1992) 5 CA4th 1480, 7 CR2d 498: §10.29
Dertiman v Almey (1949) 92 CA2d 724, 207 P2d 615: §§8.37, 9.13
Desert Plaza Partnership v Waddell (1986) 180 CA3d 805, 225 CR 775: §8.14
Designer Doors, Inc., In re (Bankr D Ariz 2008) 389 BR 832: §§14.45-14.45A, 14.46
Devonshire v Langstaff (1935) 10 CA2d 369, 51 P2d 902: §§8.68, 8.75
DeZerega v Meggs (2000) 83 CA4th 28, 99 CR2d 366: §§1.7B, 4.40B, 5.29, 7.28-7.28A, 7.55A, 13.59
Di Giorgio v Lee (In re Di Giorgio) (Bankr CD Cal 1996) 200 BR 664, judgment vacated as moot, remanded with instructions to dismiss (9th Cir 1998) 134 F3d 971: §§14.9, 14.17
Di Napoli v Superior Court (1967) 252 CA2d 202, 60 CR 394: §11.8
Diamond v Kolcum (In re Diamond) (9th Cir 2002) 285 F3d 822: §§14.15, 14.20
DiCenso v Cisneros (7th Cir 1996) 96 F3d 1004: §2.27G
Dickinson v Maguire (1858) 9 C 46: §8.141
Dicta Realty Assocs. v Shaw (Sup Ct 1966) 270 NYS2d 342: §5.37
Dietrich v Litton Indus., Inc. (1970) 12 CA3d 704, 90 CR 856: §12.52
DiLiddo v Oxford St. Realty, Inc. (Mass 2007) 876 NE2d 421: §2.9B
Dills v Redwoods Assocs. (1994) 28 CA4th 888, 33 CR2d 838: §6.29
Do v Superior Court (2003) 109 CA4th 1210, 135 CR2d 855: §§11.29, 13.28A
Dodd v Pasch (1907) 5 CA 686, 91 P 166: §1.16
Dolan v City of Tigard (1994) 512 US 374, 129 L Ed 2d 304, 114 S Ct 2309: §7.14
Don Wilson Builders v Superior Court (1963) 220 CA2d 77, 33 CR 621: §2.59
Donchin v Guerrero (1995) 34 CA4th 1832, 41 CR2d 192: §§3.68B, 3.72
Donnell v California W. Sch. of Law (1988) 200 CA3d 715, 246 CR 199: §3.71
Doran v Embassy Suites Hotel (ND Cal 2002) 2002 US Dist Lexis 16116: §§2.28, 2.59
Doran v North State Grocery (2006) 137 CA4th 484, 39 CR3d 922: §2.59
Dorcich v Time Oil Co. (1951) 103 CA2d 677, 230 P2d 10: §§3.54, 8.8, 8.17-8.18
Dorfmann v Boozer (DC Cir 1969) 414 F2d 1168: §5.38
Dorman v DWLC Corp. (1995) 35 CA4th 1808, 42 CR2d 459: §13.28C
Dorswitt v Wilson (1942) 51 CA2d 623, 125 P2d 626: §3.71
Dothard v Rawlinson (1977) 433 US 321, 53 L Ed 2d 786, 97 S Ct 2720: §2.5
Douglas v Kriegsfeld Corp. (DC 2005) 884 A2d 1109: §2.27D
Douglas v Schindler (1930) 209 C 616, 289 P 625: §3.53
Dowling v Zimmerman (2001) 85 CA4th 1400, 103 CR2d 174: §§5.18A, 13.40A
Downing v Cutting Packing Co. (1920) 183 C 91, 190 P 455: §§8.28, 8.35, 8.68, 8.75, 9.44
Drenik v Ohanesian (ED Cal, Aug. 15, 2006, No. 05-209) 2006 US Dist Lexis 60870: §2.22
Dressler v Seeley (In re Silberkraus) (9th Cir 2003) 336 F3d 864: §14.56
Drouet v Superior Court (2003) 31 C4th 583, 3 CR3d 205: §§7.64G, 8.109, 8.129, 10.65, 12.38, 12.60
Drybread v Chipain Chiropractic Corp. (2007) 151 CA4th 1063, 60 CR3d 580: §13.27
Duane v GEICO (4th Cir 1994) 37 F3d 1036: §§2.28, 2.43
Dugand v Magnus (1930) 107 CA 243, 290 P 309: §8.4
Duke Realty Ltd. Partnership v North Metro Mill Work Distribs., Inc. (In re Manis Lumber Co.) (Bankr ND Ga, Feb. 6, 2009, No. 08-40398) 2009 Bankr Lexis 506: §14.53
Duquesne Light Co. v Barasch (1989) 488 US 299, 102 L Ed 2d 646, 109 S Ct 609: §7.13
Dussin Inv. Co. v Bloxham (1979) 96 CA3d 308, 157 CR 646: §3.7
Dwyer v Carroll (1890) 86 C 298, 24 P 1015: §3.5
Dynamic Concepts, Inc. v Truck Ins. Exch. (1998) 61 CA4th 999, 71 CR2d 882: §9.29

E

ECPG (Peoria) Assocs. Ltd. Partnership v Building Block Child Care Ctrs. (In re Building Block Child Care Ctrs.) (BAP 9th Cir 1999) 234 BR 762: §14.36
EDC Assocs., Ltd. v Gutierrez (1984) 153 CA3d 167, 200 CR 333: §§8.45, 8.49, 8.75, 8.113, 10.60
EEOC v United Parcel Serv. (9th Cir 2005) 424 F3d 1060: §2.56
EOP-Colonnade of Dallas Ltd. Partnership v Faulkner (In re Stonebridge Technols., Inc.) (5th Cir. 2005) 430 F3d 260: §14.12
E. S. Bills, Inc. v Tzucanow (1985) 38 C3d 824, 215 CR 278: §8.136
Eagle Ins. Co. v Bankvest Capital Corp. (In re Bankvest Capital Corp.) (1st Cir 2004) 360 F3d 291: §14.45A
Earl Orchard Co. v Fava (1902) 138 C 76, 70 P 1073: §§8.30, 9.37
Earp v Nobmann (1981) 122 CA3d 270, 175 CR 767: §§9.43, 12.40
Eastman v Piper (1924) 68 CA 554, 229 P 1002: §1.6
Edamerica, Inc. v Superior Court (2003) 114 CA4th 819, 7 CR3d 921: §4.29A
Edmond's v MacDonald Group, Ltd. (1985) 171 CA3d 598, 217 CR 375: §3.75
Edwards v Bodkin (1919) 43 CA 405, 185 P 423: §8.144
Edwards v Habib (DC Cir 1968) 397 F2d 687: §§8.110, 8.124, 8.127
Edwards v Marin Park, Inc. (9th Cir 2004) 356 F3d 1058: §§2.30, 6.14A, 6.17

Edwards Theatres Circuit, Inc., In re (Bankr CD Cal 2002) 281 BR 675: §14.55
Eichhorn v De La Cantera (1953) 117 CA2d 50, 255 P2d 70: §§1.4, 4.48, 8.84, 8.142-8.143, 8.154
Eina Realty v Calixte (1998) 679 NYS2d 796: §§8.26A, 10.69A, 13.76
Einstein/Noah Bagel Corp. v Smith (In re BCE W., Ltd. Partnership) (9th Cir 2003) 319 F3d 1166: §14.46
El Dorado Palm Springs, Ltd. v City of Palm Springs (2002) 96 CA4th 1153, 118 CR2d 15: §6.51
Electrical Workers v Robbins & Myers, Inc. (1976) 429 US 229, 50 L Ed 2d 427, 97 S Ct 441: §2.69
Elias, In re (1962) 209 CA2d 262, 25 CR 739: §3.34
Eliot v Four Seasons Props. (In re Frontier Props.) (9th Cir 1992) 979 F2d 1358: §14.52
Ellard v Conway (2001) 94 CA4th 540, 114 CR2d 399: §9.48
Ellingson v Walsh, O'Connor & Barneson (1940) 15 C2d 673, 104 P2d 507: §1.2
Elliot v Sherwood Manor Mobile Home Park (MD Fla 1996) 947 F Supp 1574: §2.27C
Elnekave v Via Dolce Homeowners Ass'n (2006) 142 CA4th 1193, 48 CR3d 663: §9.18
Eltinge & Graziado Dev. Co. v Childs (1975) 49 CA3d 294, 122 CR 369: §1.28
Emden v Vitz (1948) 88 CA2d 313, 198 P2d 696: §8.150
Endres v Moran (2006) 135 CA4th 952, 37 CR3d 786: §§5.18A, 13.40A
Engel v Worthington (1997) 60 CA4th 628, 70 CR2d 526: §2.59
English v IKON Bus. Solutions, Inc. (2001) 94 CA4th 130, 114 CR2d 93: §§11.39, 13.8
Enriquez v Honeywell, Inc. (WD Okla 1977) 431 F Supp 901: §2.43
Entertainment, Inc., In re (Bankr ND Ill 1998) 223 BR 141: §14.51
Equity Lifestyle Props., Inc. v County of San Luis Obispo (9th Cir 2008) 548 F3d 1184: §6.15
Equity Lifestyle Props., Inc. v County of San Luis Obispo (9th Cir 2007) 505 F3d 860: §§6.15, 6.21
Erbe Corp. v W & B Realty Co. (1967) 255 CA2d 773, 63 CR 462: §§10.74, 12.33, 13.32
Ericksen v Rhee (1919) 181 C 562, 185 P 847: §§3.50, 3.52
Erickson v Boothe (1947) 79 CA2d 266, 179 P2d 611: §3.61
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Evans v CenterStone Dev. Co. (2005) 134 CA4th 151, 35 CR3d 745: §13.58
Evans v City of Berkeley (2006) 38 C4th 1, 40 CR3d 205: §5.7
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F

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Farber v 405 N. Bedford Dr. Corp. (In re 405 N. Bedford Dr. Corp.) (9th Cir 1985) 778 F2d 1374: §§14.18, 14.32
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Fobian v Western Farm Credit Bank (In re Fobian) (9th Cir 1991) 951 F2d 1149: §14.51
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Frey v Corbin (1948) 84 CA2d 536, 191 P2d 21: §§1.1, 1.13
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Friendy Village Community Ass'n v Silva & Hill Constr. Co. (1973) 31 CA3d 220, 107 CR 123: §9.34
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Fuss v City of Los Angeles (1958) 162 CA2d 643, 328 P2d 831: §9.35
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G

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Gage v Bates (1870) 40 C 384: §8.37
Galan v Wolfriver Holding Corp. (2000) 80 CA4th 1124, 96 CR2d 112: §§3.41, 13.27
Galland v City of Clovis (2001) 24 C4th 1003, 103 CR2d 711: §§6.15, 7.14-7.14B
Galvan, In re (Bankr SD Cal 1986) 57 BR 732: §14.45
Gantos, Inc., In re (Bankr WD Mich 1995) 181 BR 903: §14.55

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Garber v Levit (2006) 141 CA4th Supp 1, 46 CR3d 348: §§7.17, 7.65
Garcia v Roberts (2009) 173 CA4th 900, 93 CR3d 286: §12.39
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Garland v Estate of Maloney (In re Garland) (BAP 9th Cir 2003) 295 BR 347: §14.4
Garret v City of Escondido (SD Cal 2006) 465 F Supp 2d 1043: §2.19
Garrett v Coast & S. Fed. Sav. & Loan Ass'n (1973) 9 C3d 731, 108 CR 845: §8.40
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Gatto v County of Sonoma (2002) 98 CA4th 744, 120 CR2d 550: §§2.21, 2.58, 2.69
Gatton v T-Mobile USA, Inc. (2007) 152 CA4th 571, 61 CR3d 344: §5.16
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Geddes v Superior Court (2005) 126 CA4th 417, 23 CR3d 857: §§12.5, 12.7
Genis v Krasne (1956) 47 C2d 241, 302 P2d 289: §13.32
Gentry v Citron (1918) 36 CA 288, 171 P 1079: §8.67
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George v County of San Luis Obispo (2000) 78 CA4th 1048, 93 CR2d 595: §13.67
Georgeous v Lewis (1912) 20 CA 255, 128 P 768: §3.5
German-American Sav. Bank v Gollmer (1909) 155 C 683, 102 P 932: §3.57
Getz v City of W. Hollywood (1991) 233 CA3d 625, 284 CR 631: §§7.27-7.28
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Gibson v County of Riverside (CD Cal 2002) 181 F Supp 2d 1057: §§2.25-2.25A, 6.18
Giebeler v M & B Assocs. (9th Cir 2003) 343 F3d 1143: §§2.2, 2.9D, 2.27A, 10.68
Gilbert v Peck (1912) 162 C 54, 121 P 315: §8.154
Gilbert v Sherrod (1925) 75 CA 437, 243 P 30: §10.39
Gill Petroleum, Inc. v Hayer (2006) 137 CA4th 826, 40 CR3d 648: §13.56
Gillette v Anderson (Ill App Ct 1972) 282 NE2d 149: §3.27
Gilligan v Jamco Dev. Corp. (9th Cir 1997) 108 F3d 246: §§2.9B, 2.58
Gilman v Nemetz (1962) 203 CA2d 81, 21 CR 317: §3.51
Ginsberg v Austin (Fed Cir 1992) 968 F2d 1198: §9.34
Giraud v Milovich (1938) 29 CA2d 543, 85 P2d 182: §3.7
Giselman v Starr (1895) 106 C 651, 40 P 8: §9.34
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Glass v Najafi (2000) 78 CA4th 45, 92 CR2d 606: §§5.21, 8.138, 8.140-8.141, 13.67
Glendale Fed. Bank v Hadden (1999) 73 CA4th 1150, 87 CR2d 102: §9.35B
Glenn v Bacon (1927) 86 CA 58, 260 P 559: §3.61
Glenn R. Sewell Sheet Metal, Inc. v Loverde (1969) 70 C2d 666, 75 CR 889: §3.73
Glouberman v Coffey (1955) 138 CA2d Supp 906, 292 P2d 681: §§9.39, 10.47A, 12.49
Goat Hill Tavern v City of Costa Mesa (1992) 6 CA4th 1519, 8 CR2d 385: §7.51
Goddard v Pollock (1974) 37 CA3d 137, 112 CR 215: §13.2
Goddard, Marriage of (2004) 33 C4th 49, 14 CR3d 50: §12.21
Golden v Conway (1976) 55 CA3d 948, 128 CR 69: §4.49
Golden Eagle Ins. Corp. v Cen-Fed Ltd. (2007) 148 CA4th 976, 56 CR3d 279: §§3.9, 3.47
Golden Gateway Ctr. v Golden Gateway Tenants Ass'n (2001) 26 C4th 1013, 111 CR2d 336: §5.37
Golden Gateway Ctr. v San Francisco Residential Rent Stabilization & Arbitration Bd. (1999) 73 CA4th 1204, 87 CR2d 332: §§3.38, 5.11, 5.14, 7.39-7.40, 12.37, 12.54A
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Goldie's Bookstore, Inc. v Superior Court (9th Cir 1984) 739 F2d 466: §13.60
Goldman v Cohen (2d Cir 2006) 445 F3d 152: §13.76
Goldman v House (1949) 93 CA2d 572, 209 P2d 639: §§3.6, 8.150
Gombiner v Swartz (2008) 167 CA4th 1365, 85 CR3d 83: §§7.1, 7.24, 7.54-7.55, 7.64F, 10.65, 13.39
Gonzales v Gem Props. (1974) 37 CA3d 1029, 112 CR 884: §§11.62, 13.39
Gonzalez v Stanford Applied Eng'g (9th Cir 1979) 597 F2d 1298: §2.43
Gonzalez v Toews (2003) 111 CA4th 977, 4 CR3d 434: §13.39
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Goodman v Harris (1953) 40 C2d 254, 253 P2d 447: §3.71
Goodson v The Bogerts, Inc. (1967) 252 CA2d 32, 60 CR 146: §13.14
Goodwin v Grosse (1922) 56 CA 615, 206 P 138: §3.57
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Gordon v City of Cartersville (ND Ga 1981) 522 F Supp 753: §2.67
Gordon, People v (1951) 105 CA2d 711, 234 P2d 287: §9.16A
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Gorski v Troy (7th Cir 1991) 929 F2d 1183: §2.23
Grafton Partners LP v Superior Court (2005) 36 C4th 944, 32 CR3d 5: §§1.30, 11.54
Graham v DaimlerChrysler (2004) 34 C4th 553, 21 CR3d 331: §§2.28, 2.56
Granberry v Islay Invs. (1995) 9 C4th 738, 38 CR2d 650: §§4.28B, 8.174, 8.177, 10.3
Granberry v Islay Invs. (1984) 161 CA3d 382, 207 CR 652: §§4.23, 8.168
Grant v Aerodraulics Co. (1949) 91 CA2d 68, 204 P2d 683: §3.65B
Grant v Clampitt (1997) 56 CA4th 586, 65 CR2d 727: §14.8
Grant v Smith (5th Cir 1978) 574 F2d 252: §2.67
Grant v Superior Court (2001) 90 CA4th 518, 108 CR2d 825: §12.7A
Gray v Maier & Zobelein Brewery (1906) 2 CA 653, 84 P 280: §10.58
Gray v Whitmore (1971) 17 CA3d 1, 94 CR 904: §§1.71, 8.157, 13.26, 13.35, 13.74
Great W. Sav. Bank v Orvco, Inc. (In re Orvco, Inc.) (BAP 9th Cir 1989) 95 BR 724: §14.46
Green v Superior Court (1974) 10 C3d 616, 111 CR 704: §§1.1-1.2, 1.30, 1.60, 3.6, 3.8-3.9, 3.11B, 3.12, 3.16-3.17, 3.21-3.25, 3.27, 3.29-3.30, 3.33-3.35, 3.37, 4.39, 5.9, 5.12, 6.16, 6.72, 6.107, 8.19, 8.70, 8.114, 9.8, 10.53, 10.55-10.56, 10.61, 10.64, 11.48, 11.58, 12.36, 12.54-12.54A, 12.55-12.58, 13.36, 13.38, 13.61, 13.63
Green v Watson (1964) 224 CA2d 184, 36 CR 362: §1.3A
Green, A. P., Fire Brick Co. v NLRB (8th Cir 1964) 326 F2d 910: §§8.129, 8.132
Greenberg v Western Turf Ass'n (1903) 140 C 357, 73 P 1050: §2.59
Greene v Dillingham Constr. (2002) 101 CA4th 418, 124 CR2d 250: §2.56
Greene v Municipal Court (1975) 51 CA3d 446, 124 CR 139: §§1.5, 9.3, 9.8, 9.36, 9.41, 10.20, 10.28A, 10.36A, 10.47A
Greener v WCAB (1993) 6 C4th 1028, 25 CR2d 539: §10.29
Greenhut v Wooden (1982) 129 CA3d 64, 180 CR 786: §§9.5, 9.8, 10.54, 10.73, 11.51, 11.62-11.63, 11.65
Greening v Johnson (1997) 53 CA4th 1223, 62 CR2d 214: §§6.33, 6.43
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Gregory v City of San Juan Capistrano (1983) 142 CA3d 72, 191 CR 47, overruled on other grounds in Fisher v City of Berkeley (1984) 37 C3d 644, 209 CR 682: §§6.14, 6.61, 7.12-7.13
Gresham v Windrush Partners (7th Cir 1984) 730 F2d 1417: §2.66
Greyhound Corp. v Superior Court (1961) 56 C2d 355, 15 CR 90: §11.3
Griffin v Wardrobe (In re Wardrobe) (9th Cir 2009) 559 F3d 932: §14.29
Griffith v County of Santa Cruz (2000) 79 CA4th 1318, 94 CR2d 801: §§6.15, 6.32, 7.12, 8.22B
Grinnell v Fire Protection Sys. Co. (1986) 183 CA3d 352, 228 CR 292: §9.35
Grishman, U.S. v (D Me 1993) 818 F Supp 21: §2.22
Grisingher v Shaeffer (1938) 25 CA2d 5, 76 P2d 149: §10.40
Groh v Kover's Bull Pen, Inc. (1963) 221 CA2d 611, 34 CR 637: §§1.2, 3.15B, 3.25, 10.61
Groner v Golden Gate Garden Apartments (6th Cir 2001) 250 F3d 1039: §2.27D
Grooms, U.S. v (MD Fla 1972) 348 F Supp 1130: §§2.30, 6.20
Gross v Superior Court (1985) 171 CA3d 265, 217 CR 284: §§7.55, 7.69, 7.74, 8.68C, 10.54
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Gruber v Pacific States Sav. & Loan Co. (1939) 13 C2d 144, 88 P2d 137: §8.154
Grundy Nat'l Bank v Looney (In re Looney) (4th Cir 1987) 823 F2d 788: §14.21
Gruzen v Henry (1978) 84 CA3d 515, 148 CR 573: §§3.11E, 8.37, 10.62, 12.22
Guardianship of Levy (1955) 137 CA2d 237, 290 P2d 320: §13.9
Gudarov v Hadjieff (1952) 38 C2d 412, 240 P2d 621: §12.32
Guggenheim v City of Goleta (9th Cir 2009) 582 F3d 996: §§6.15, 7.11
Gullo v Hirst (4th Cir 1964) 332 F2d 178: §10.2
Gunlock Corp. v Walk on Water, Inc. (1993) 15 CA4th 1301, 19 CR2d 197: §13.33C
Guntert v City of Stockton (1976) 55 CA3d 131, 126 CR 690: §§3.6-3.7, 8.19, 10.56
Guntert v City of Stockton (1974) 43 CA3d 203, 117 CR 601: §§5.7, 8.119, 11.63
Gunther v Lin (2006) 144 CA4th 223, 50 CR3d 317: §2.21
Gustin v Williams (1967) 255 CA2d Supp 929, 62 CR 838: §3.67
Guttman v Berry (1948) 83 CA2d 507, 189 P2d 41: §1.23
Gwinn v Goldman (1943) 57 CA2d 393, 134 P2d 915: §12.34

H

H.G. Bittleston Law & Collection Agency v Howard (1916) 172 C 357, 156 P 515: §10.47A
H.N. & Frances C. Berger Found. v City of Escondido (2005) 127 CA4th 1, 25 CR3d 19: §§6.15, 7.12-7.13, 7.42, 7.47
Hacienda Valley Mobile Estates v City of Morgan Hill (9th Cir 2003) 353 F3d 651: §§6.15, 7.11, 7.14
Haddad v McDowell (1933) 131 CA 565, 21 P2d 616: §3.55
Hadian v Schwartz (1994) 8 C4th 836, 35 CR2d 589: §3.9
Hadley v Krepel (1985) 167 CA3d 677, 214 CR 461: §13.29
Haggerty v City of Oakland (1958) 161 CA2d 407, 326 P2d 957: §1.27
Haig v Hogan (1947) 82 CA2d 876, 187 P2d 426: §§8.59, 12.49
Haire v Stevenson (1987) 196 CA3d 1249, 242 CR 433: §§13.26, 13.40
Hale v Morgan (1978) 22 C3d 388, 149 CR 375: §§5.22, 7.78, 8.149
Halet v Wend Inv. Co. (9th Cir 1982) 672 F2d 1305: §§2.67, 8.123

Hall v Berkell (1955) 130 CA2d 800, 279 P2d 832: §12.32
Hall v Freitas (ND Cal 1972) 343 F Supp 1099: §§2.9A, 2.41
Hall v Municipal Court (1974) 10 C3d 641, 111 CR 721: §10.52
Hall v Wallace (1891) 88 C 434, 26 P 360: §1.10
Halprin v The Prairie Single Family Homes of Dearborn Park Ass'n (7th Cir 2004) 388 F3d 327: §2.50
Halsey v Robinson (1942) 19 C2d 476, 122 P2d 11: §1.18
Hamer v Ellis (1919) 40 CA 57, 180 P 30: §8.5
Hamilton v Miller (10th Cir 1973) 477 F2d 908: §2.66
Handy Andy Home Improvement Ctrs., Inc., In re (7th Cir 1998) 144 F3d 1125: §14.45
Harbor Island Holdings, LLC v Kim (2003) 107 CA4th 790, 132 CR2d 406: §8.16
Harlan v Department of Transp. (2005) 132 CA4th 868, 33 CR3d 912: §13.8
Harman v City & County of San Francisco (1972) 7 C3d 150, 101 CR 880: §10.35
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Harris v Bissell (1921) 54 CA 307, 202 P 453: §§10.47A, 12.27-12.28, 12.49, 13.18-13.19
Harris v Capital Growth Investors XIV (1991) 52 C3d 1142, 278 CR 614: §§2.5, 2.9A, 2.21, 2.48, 2.57-2.58, 4.15A, 6.20, 10.67
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Harris v Rudin, Richman & Appel (2002) 95 CA4th 1332, 116 CR2d 552 (Harris II): §9.18
Harris v Rudin, Richman & Appel (1999) 74 CA4th 299, 87 CR2d 822 (Harris I): §§9.18, 9.31
Hartman Ranch Co. v Associated Oil Co. (1937) 10 C2d 232, 73 P2d 1163: §§3.50-3.52, 3.54-3.55
Haupt v La Brea Heating & Air Conditioning Co. (1955) 133 CA2d Supp 784, 284 P2d 985: §3.73
Havens Realty Corp. v Coleman (1982) 455 US 363, 71 L Ed 2d 214, 102 S Ct 1114: §§2.28, 2.66-2.67, 2.69
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Hayes v Richfield Oil Corp. (1952) 38 C2d 375, 240 P2d 580: §3.71
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Hazon-Iny Dev. v Unkefer (1980) 116 CA3d Supp 1, 172 CR 191: §9.15
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Heintz v Jenkins (1995) 514 US 291, 131 L Ed 2d 395, 115 S Ct 1489: §8.26A
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Helms Constr. & Dev. Co., In re (9th Cir 1998) 139 F3d 702: §14.54A
Helmsley v Borough of Fort Lee (NJ 1978) 394 A2d 65: §7.13
Henderson, In re (Bankr SD NY 2000) 245 BR 449: §14.38
Henigan v Ervin (1895) 110 C 37, 42 P 457: §9.32
Hennessy v Gleason (1947) 81 CA2d 616, 184 P2d 913: §8.69
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Hernandez v Stabach (1983) 145 CA3d 309, 193 CR 350: §§8.134, 11.62, 11.63B
Hershenson v Hershenson (1962) 205 CA2d 382, 23 CR 185: §9.45
Hess v FEHC (1982) 138 CA3d 232, 187 CR 712: §§2.9C, 2.50, 8.122
Hessians Motorcycle Club v J.C. Flanagans (2001) 86 CA4th 833, 103 CR2d 552: §§2.21, 2.58
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Hillsboro Props. v PUC (2003) 108 CA4th 246, 133 CR2d 343: §§5.5, 6.13, 6.15, 6.43
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Hoban v Ryan (1900) 130 C 96, 62 P 296: §9.32
Hock, Marriage of (2000) 80 CA4th 1438, 96 CR2d 546: §§12.69, 13.8
Hodorowski v Bell (ED Wis 1978) 455 F Supp 432: §2.31
Hoffman v Halden (9th Cir 1959) 268 F2d 280, overruled on other grounds in Cohen v Norris (9th Cir 1962) 300 F2d 24: §2.44
Holder v California Paralyzed Veterans Ass'n (1980) 114 CA3d 155, 170 CR 455: §9.15

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Horton-Howard v Payton (1919) 44 CA 108, 186 P 167: §§8.32, 8.50, 9.6
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Housing Auth. v Caldwell (In re Caldwell) (Bankr ND Ga 1994) 174 BR 650: §14.27
Housing Auth. v Collins (In re Collins) (Bankr WD Pa 1996) 199 BR 561: §§14.27, 14.42
Howell v City of Hamburg Co. (1913) 165 C 172, 131 P 130: §§3.61-3.62
Howerton v Gabica (9th Cir 1983) 708 F2d 380: §8.137
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HUD v Bucha (HUD ALJ 1993) 09-91-1384-1: §2.22
HUD v Country Manor Apartments (HUD ALJ 2001) 05-98-1649-8: §2.26
HUD v Davis (HUD ALJ 1992) 10-90-0023-1: §2.22
HUD v Dedham Hous. Auth. (HUD ALJ 1992) 01-90-0424-1: §2.26
HUD v Denton (HUD ALJ 1992) 05-90-0012-1: §2.64
HUD v Dutra (HUD ALJ 1996) 09-93-1753-8: §2.27A
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Huens v Tatum (1997) 52 CA4th 259, 60 CR2d 438: §9.18A
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I

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In re _____ (*see* name of party)
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Interstate Marina Dev. Co. v County of Los Angeles (1984) 155 CA3d 435, 202 CR 377: §7.12
Investors Capital Mgmt. v Reiff (1979) 96 CA3d Supp 26, 158 CR 272: §13.27
Iron-Oak Supply Corp., In re (Bankr ED Cal 1994) 169 BR 414: §14.55

J

J. A. Jones Constr. Co. v Superior Court (1994) 27 CA4th 1568, 33 CR2d 206: §8.52
J. B. Hill Co. v Pinque (1919) 179 C 759, 178 P 952: §8.37
Jabarin, In re (Bankr ED Pa 2008) 395 BR 330: §14.56
Jack v Sinsheimer (1899) 125 C 563, 58 P 130: §§4.43A, 8.39-8.40
Jack Spring, Inc. v Little (Ill 1972) 280 NE2d 208: §13.38
Jackson v Chicago Hous. Auth. (ND Ill, Oct. 7, 2008, No. 08 CV 278) 2008 US Dist Lexis 79655: §§2.27G-2.27H
Jackson v Homeowners Ass'n Monte Vista Estates-East (2001) 93 CA4th 773, 113 CR2d 363: §§9.18A, 13.27
Jackson v Rivera (Civ Ct 1971) 318 NYS2d 7: §3.27
Jacobs v Clark County Sch. Dist. (9th Cir 2008) 526 F3d 419: §5.37
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James v Superior Court (1968) 261 CA2d 415, 67 CR 783: §10.33
Jamesway Corp., In re (Bankr SD NY 1996) 202 BR 697: §14.52
Janise v Bryan (1948) 89 CA2d Supp 933, 201 P2d 466: §§7.55, 7.67, 9.16C
Jankey v Poop Deck (9th Cir 2008) 537 F3d 1122: §2.27E
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Janssen v Luu (1997) 57 CA4th 272, 66 CR2d 838: §13.5
Janush v Charities Hous. Dev. Corp. (ND Cal 2000) 169 F Supp 2d 1133: §2.60
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Jeanty v McKay & Poague, Inc. (7th Cir 1974) 496 F2d 1119: §2.68
Jenkins v Tuneup Masters (1987) 190 CA3d 1, 235 CR 214: §3.62
Jerry's Shell v Equilon Enters., LLC (2005) 134 CA4th 1058, 36 CR3d 637: §13.8
Jewett v Shabahangi (In re Jewett) (BAP 9th Cir 1992) 146 BR 250: §§14.21, 14.23
John Hogan Enters. v Kellogg (1986) 187 CA3d 589, 231 CR 711: §3.75
Johns-Manville Corp., In re (Bankr SD NY 1984) 36 BR 727: §14.32
Johnson v Chester Hous. Auth. (In re Johnson) (Bankr ED Pa 2000) 250 BR 521: §14.27
Johnson v City & County of San Francisco (2006) 137 CA4th 7, 40 CR3d 8: §§7.64, 7.64F, 7.64H
Johnson v City of Loma Linda (2000) 24 C4th 61, 99 CR2d 316: §2.56
Johnson v Couch (1961) 189 CA2d 687, 11 CR 645: §3.51
Johnson v Department of Corrections (1995) 38 CA4th 1700, 45 CR2d 740: §9.18
Johnson v Hapke (1960) 183 CA2d 255, 6 CR 603: §8.68A
Johnson v Jerry Pals Real Estate (7th Cir 1973) 485 F2d 528: §2.67
Johnson v Snyder (1950) 99 CA2d 86, 221 P2d 164: §8.150
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Johnson v TRE Holdings (In re Johnson) (BAP 9th Cir 2006) 346 BR 190: §§14.4, 14.7
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Johnston v Dakan (1908) 9 CA 522, 99 P 729: §12.4
Johnston v De La Guerra Props., Inc. (1946) 28 C2d 394, 170 P2d 5: §3.71
Jomicra, Inc. v California Mobile Home Dealers Ass'n (1970) 12 CA3d 396, 90 CR 696: §6.20
Jones v Alfred H. Mayer Co. (1968) 392 US 409, 20 L Ed 2d 1189, 88 S Ct 2186: §§2.28, 2.41-2.43
Jones v Kelly (1929) 208 C 251, 280 P 942: §8.149
Jones v Sciacia (ED Mo 1969) 297 F Supp 165, aff'd (2d Cir 1970) 422 F2d 393: §2.41
Jones, J. A., Constr. Co. v Superior Court (1994) 27 CA4th 1568, 33 CR2d 206: §8.52
Joost v Castel (1939) 33 CA2d 138, 91 P2d 172: §8.4
Jordan v Scott (1918) 38 CA 739, 177 P 504: §§3.50, 3.52
Jordan v Talbot (1961) 55 C2d 597, 12 CR 488: §§1.30, 5.20-5.21, 8.65, 8.137, 8.140-8.141, 8.143-8.145
Joseph C. Spiess Co., In re (Bankr ND Ill 1992) 145 BR 597: §14.53
Joy v McKay (1886) 70 C 445, 11 P 763: §8.4
Julien v Gossner (1951) 103 CA2d 338, 229 P2d 786: §§8.49, 8.51, 10.60

K

K & M, Inc. v LeCuyer (1951) 107 CA2d 710, 238 P2d 28: §§3.51-3.52
K-4, Inc. v Midway Engineered Wood Prods., Inc. (In re Treesource Indus.) (9th Cir 2004) 363 F3d 994: §§14.46, 14.55
Kaiser Co. v Reid (1947) 30 C2d 610, 184 P2d 879: §1.6
Kalian v People Acting Through Community Effort, Inc. (RI 1979) 408 A2d 608: §5.37
Kalmanovitz v Rempp (1952) 111 CA2d 242, 244 P2d 457: §10.55
Kanner v Globe Bottling Co. (1969) 273 CA2d 559, 78 CR 25: §12.66
Kaplan v Sanders (Ga 1976) 227 SE2d 38: §10.73
Karas v Floyd (Ohio Ct App 1981) 440 NE2d 563: §8.131
Karbelnig v Brothwell (1966) 244 CA2d 333, 53 CR 335: §§3.56-3.57, 8.49, 10.60
Karp v Margolis (1958) 159 CA2d 69, 323 P2d 557: §§8.139, 8.142-8.144
Karrin v Ocean-Aire Mobile Home Estates (1991) 1 CA4th 1066, 2 CR2d 581: §§6.15, 6.29
Karz v Mecham (1981) 120 CA3d Supp 1, 174 CR 310: §§1.4, 4.48, 7.70, 8.84, 11.41
Kassan v Stout (1973) 9 C3d 39, 106 CR 783: §§1.14, 1.54, 3.49, 4.17, 8.9, 8.13, 8.137, 8.143
Kaufman & Broad Communities, Inc. v Performance Plastering, Inc. (2005) 133 CA4th 26, 34 CR3d 520: §10.33
Kavanau v Santa Monica Rent Control Bd. (1997) 16 C4th 761, 66 CR2d 672: §§6.15, 7.14-7.14B, 7.30, 7.38
Kavanau v Santa Monica Rent Control Bd. (1993) 19 CA4th 730, 23 CR2d 724: §§7.14, 7.37
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Kearny Mesa Crossroads v Acorn Invs. (In re Acorn Invs.) (Bankr SD Cal 1981) 8 BR 506: §§14.19, 14.63
Keating v Preston (1940) 42 CA2d 110, 108 P2d 479: §§1.28, 1.56, 4.17, 8.47-8.48
Keh v Walters (1997) 55 CA4th 1522, 65 CR2d 42: §§6.50-6.51, 6.70
Keith v Volpe (9th Cir 1988) 858 F2d 467: §2.5
Kekllas v Saddy (Dist Ct 1976) 389 NYS2d 756: §3.27
Kelley v Boettcher (8th Cir 1898) 85 F 55: §2.69
Kelley v Bredelis (1996) 45 CA4th 1819, 53 CR2d 536: §13.27
Kellstrom Indus., Inc., In re (Bankr D Del 2002) 286 BR 833: §14.54A
Kelly v Yee (1989) 213 CA3d 336, 261 CR 568: §7.78
Kelo v City of New London (2005) 545 US 469, 162 L Ed 2d 439, 125 S Ct 2655: §6.15
Kemp v Schultz (1981) 121 CA3d Supp 13, 175 CR 412: §§8.111-8.112
Kemppainen v Aransas County Detention Ctr. (SD Tex, June 23, 2009, No. C-08-194) 2009 US Dist Lexis 52914): §2.26
Kendall v Ernest Pestana, Inc. (1985) 40 C3d 488, 220 CR 818: §§1.54, 3.49, 3.56, 3.58
Kendall-Jackson Winery, Ltd. v Superior Court (1999) 76 CA4th 970, 90 CR2d 743: §10.58
Kendis v Cohn (1928) 90 CA 41, 265 P 844: §§3.50, 3.56
Kennedy v City of Seattle (Wash 1980) 617 P2d 713: §7.68
Kentucky Fried Chicken, Inc. v Superior Court (1997) 14 C4th 814, 59 CR2d 756: §3.68C
Kern Sunset Oil Co. v Good Roads Oil Co. (1931) 214 C 435, 6 P2d 71: §§5.29, 8.49, 10.60
Kertesz v Ostrovsky (2004) 115 CA4th 369, 8 CR3d 907: §14.4
Kessler v Bridge (1958) 161 CA2d Supp 837, 327 P2d 241: §8.68A
Ketchum v Moses (2001) 24 C4th 1122, 104 CR2d 377: §§2.56, 5.18A, 8.110, 10.38A, 13.40A
King v Connolly (1872) 44 C 236: §8.31
King v Menachem (Sup Ct 1981) 450 NYS2d 933: §8.47
King v Mobile Home Rent Review Bd. (1989) 216 CA3d 1532, 265 CR 624: §7.47
King v Moorehead (Mo Ct App 1973) 495 SW2d 65: §3.26
Kingston v Colburn (1956) 139 CA2d 623, 293 P2d 805: §§8.20, 8.73
Kinney v Vaccari (1980) 27 C3d 348, 165 CR 787: §§8.147, 8.149
Kir Temecula, Ltd. Partnership v LPM Corp. (In re LPM Corp.) (9th Cir 2002) 300 F3d 1134: §14.46
Kirby v Southern Cal. Edison Co. (2000) 78 CA4th 840, 93 CR2d 223: §9.18
Klarfeld v Berg (1981) 29 C3d 893, 176 CR 539: §7.20
Klein v Loeffler (1929) 96 CA 383, 274 P 373: §9.36
Klein v San Diego County (9th Cir 2006) 463 F3d 1029: §5.37
Klim v Jones (ND Cal 1970) 315 F Supp 109: §8.161
Kline v 1500 Mass. Ave. Apartment Corp. (DC Cir 1970) 439 F2d 477: §3.25
Knight v Black (1912) 19 CA 518, 126 P 512: §§8.48, 10.58, 13.38
Knight v Hallsthammar (1981) 29 C3d 46, 171 CR 707: §§1.60, 3.11, 3.21, 3.23-3.25, 3.27, 3.29-3.31, 3.48A, 4.39, 6.16, 10.64, 12.53, 12.55
Knowles v Crocker Estate Co. (1899) 125 C 264, 57 P 998: §8.139
Knowles v Murphy (1895) 107 C 107, 40 P 111: §12.19
Knowles v Robinson (1963) 60 C2d 620, 36 CR 33: §§9.5, 9.8, 10.55, 10.73, 11.30
Knox v Wolfe (1946) 73 CA2d 494, 167 P2d 3: §1.9
Knupfer v Lindblade (In re Dyer) (9th Cir 2003) 322 F3d 1178: §14.6
Koebke v Bernardo Heights Country Club (2005) 36 C4th 824, 31 CR3d 565: §§2.9C, 2.21, 2.58, 10.67
Koenig Sporting Goods, Inc., In re (6th Cir 2000) 203 F3d 986: §14.45
Konig v FEHC (2002) 28 C4th 743, 123 CR2d 1: §§2.55, 5.7
Korens v R.W. Zukin Corp. (1989) 212 CA3d 1054, 261 CR 137: §§4.25, 8.170
Kotev v First Colony Life Ins. Co. (CD Cal 1996) 927 F Supp 1316: §2.58
Kraus v Trinity Mgmt. Servs. (2000) 23 C4th 116, 96 CR2d 485: §§4.23, 4.26, 4.43A, 6.86, 8.169

Kravitz v Superior Court (2001) 91 CA4th 1015, 111 CR2d 385: §13.28
Krawitz v Rusch (1989) 209 CA3d 957, 257 CR 610: §10.35
Kriz v Taylor (1979) 92 CA3d 302, 154 CR 824: §§8.112, 8.131, 8.133, 10.36A, 13.61
Kuan v Lund (In re Lund) (BAP 9th Cir 1996) 202 BR 127: §14.15
Kuchmas v Towson Univ. (D Md 2008) 553 F Supp 2d 556: §2.27C
Kulawitz v Pacific Woodenware & Paper Co. (1944) 25 C2d 664, 155 P2d 24: §§3.15B, 3.22, 8.13, 8.19
Kurihara v City Market of Los Angeles (1928) 90 CA 374, 265 P 987: §8.2
Kushner v Home Serv. Co. (1928) 91 CA 692, 267 P 555: §3.5
Kuske v McSheridan (In re McSheridan) (BAP 9th Cir 1995) 184 BR 91: §14.55
Kwaitkowski v Superior Trading Co. (1981) 123 CA3d 324, 176 CR 494: §3.68B
Kwok v Bergren (1982) 130 CA3d 596, 181 CR 795: §8.24

L

L & H Land Corp., U.S. v (SD Fla 1976) 407 F Supp 576: §§2.23, 2.28, 2.67
La Cava v Breedlove (1946) 77 CA2d 129, 174 P2d 880: §8.69
La Mesa-Spring Valley Sch. Dist. v Otsuka (1962) 57 C2d 309, 19 CR 479: §§13.29-13.30
La Seigneurie U.S. Holdings v Superior Court (1994) 29 CA4th 1500, 35 CR2d 175: §12.7B
Lacey v Westside Print Works, Inc. (In re Westside Print Works, Inc.) (BAP 9th Cir 1995) 180 BR 557: §14.51
Lacrabere v Wise (1904) 141 C 554, 75 P 185: §12.20
Laffan v Naglee (1858) 9 C 662: §3.52
LaFlamme v New Horizons, Inc. (D Conn 2009) 605 F Supp 2d 378: §2.26
LaFrance v Kashishian (1928) 204 C 643, 269 P 655: §3.6
Laguna Royale Owners Ass'n v Darger (1981) 119 CA3d 670, 174 CR 136: §9.34
Lakeside Park Ass'n v Keithly (1941) 43 CA2d 418, 110 P2d 1055: §§10.73, 10.75
Lamanna v Vognar (1993) 17 CA4th Supp 4, 22 CR2d 501: §§8.28, 9.44
Lamey v Masciotra (1969) 273 CA2d 709, 78 CR 344: §§8.24, 8.62, 8.140, 9.6
Landeros v Pankey (1995) 39 CA4th 1167, 46 CR2d 165: §§3.35, 5.25, 9.18A-9.18B, 10.64, 11.63B, 12.36, 13.39
Lane v Cole (ED Pa 2000) 88 F Supp 2d 402: §2.23
Lane v Hughes Aircraft Co. (2000) 22 C4th 405, 93 CR2d 60: §13.44
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Lehr v Crosby (1981) 123 CA3d Supp 1, 177 CR 96: §§8.64, 8.66, 9.31, 12.28-12.30, 13.19
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Lowe v City of Commerce (1997) 59 CA4th 1075, 69 CR2d 356: §2.8
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Lyke v Pursley (1959) 171 CA2d 417, 340 P2d 709: §3.11E
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MS Freight Distrib., In re (Bankr WD Wash 1994) 172 BR 976: §14.46
M. Westland Co., U.S. v (HUD ALJ 1994) CV 93-4141, Fair Housing-Fair Lending ¶15,941: §2.22
MacKinnon v Truck Ins. Exch. (2003) 31 C4th 635, 3 CR3d 228: §3.47
Mackie v Mackie (1960) 186 CA2d 825, 9 CR 173: §12.7
Madhani v Cooper (2003) 106 CA4th 412, 130 CR2d 778: §§2.8, 3.68B, 3.72
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Madsen v Women's Health Ctr., Inc. (1994) 512 US 753, 129 L Ed 2d 593, 114 S Ct 2516: §5.37
Magee v Boston Land Co. (2d Cir 2004) 90 Fed Appx 560 (unpublished opinion): §2.26
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Malkasian v Irwin (1964) 61 C2d 738, 40 CR 78: §13.44
Manier v Anaheim Bus. Ctr. Co. (1984) 161 CA3d 503, 207 CR 508: §13.40
Manis Lumber Co., In re (Bankr ND Ga, Feb. 6, 2009, No. 08-40398) 2009 Bankr Lexis 506: §14.45

Mann v Quality Old Time Serv., Inc. (2006) 139 CA4th 328, 42 CR3d 607: §§5.18A, 13.40A
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Marcus Brown Holding Co. v Feldman (1921) 256 US 170, 65 L Ed 877, 41 S Ct 465: §7.7
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Markham v Fralick (1934) 2 C2d 221, 39 P2d 804: §§9.5, 9.35-9.36, 10.47A
Markowitz v Ikemoto (1958) 159 CA2d 242, 323 P2d 513: §3.73
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Marrama v Citizens Bank of Massachusetts (2007) 549 US 365, 166 L Ed 2d 956, 127 S Ct 1105: §14.56
Marriage of Goddard (2004) 33 C4th 49, 14 CR3d 50: §12.21
Marriage of Hock (2000) 80 CA4th 1438, 96 CR2d 546: §§12.69, 13.8
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Marsch v Marsch (In re Marsch) (9th Cir 1994) 36 F3d 825: §14.32
Marshall House, Inc. v Rent Control Bd. (Mass 1971) 266 NE2d 876: §7.15
Martens v Winder (1961) 191 CA2d 143, 12 CR 413: §11.31
Martin v Cassidy (1957) 149 CA2d 106, 307 P2d 981: §§8.8, 8.13, 8.137, 8.139
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Marya v Slakey (D Mass 2001) 190 F Supp 2d 95: §2.68
Maryland Cas. Co. v Reeder (1990) 221 CA3d 961, 270 CR 719: §11.38
Mason, In re (D Ore 1985) 51 BR 548: §14.16A
Mata v Mata (2003) 105 CA4th 1121, 130 CR2d 141: §3.68B
Matera v McLeod (2006) 145 CA4th 44, 51 CR3d 331: §13.8
Matter of Swanton Corp. (Bankr SD NY 1986) 58 BR 474: §14.45
Matter of Yancey v New York City Hous. Auth. (Sup Ct 2009) 879 NYS2d 661: §2.15
Mau v Hollywood Commercial Bldgs. (1961) 194 CA2d 459, 15 CR 181: §8.44
Maya, In re (Bankr SD Cal 2007) 374 BR 750: §14.13
Mayer v Hazzard (1935) 10 CA2d 1, 51 P2d 189: §1.23
McAlester v Landers (1886) 70 C 79, 11 P 505: §§3.5, 3.15B
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McArthur v Bugna (In re Bugna) (Bankr CD Cal 1992) 137 BR 785, aff'd (9th Cir 1994) 33 F3d 1054: §14.20
McArthur v Pennington (ED Tenn 1963) 253 F Supp 420: §2.45
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McCarthy v Tally (1956) 46 C2d 577, 297 P2d 981: §8.40
McCarty v Raso (1951) 102 CA2d 909, 228 P2d 577: §8.46
McChristian v Popkin (1946) 75 CA2d 249, 171 P2d 85: §2.68
McClure v Donovan (1949) 33 C2d 717, 205 P2d 17: §§11.65, 11.68
McCulloch v M & C Beauty Colleges, Inc. (1987) 194 CA3d 1338, 240 CR 189: §13.28D
McDonald v Santa Fe Trail Transp. Co. (1976) 427 US 273, 49 L Ed 2d 493, 96 S Ct 2574: §2.43
McDowell v Hyman (1897) 117 C 67, 48 P 984: §3.5
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McLaughlin v Walnut Props., Inc. (2004) 119 CA4th 293, 14 CR3d 369: §14.54
McLeran v Benton (1887) 73 C 329, 14 P 879: §1.10
McMillan v Shadow Ridge at Oak Park Homeowner's Ass'n (2008) 165 CA4th 960, 81 CR3d 550: §9.21
McNairy v C.K. Realty (2007) 150 CA4th 1500, 59 CR3d 429: §§3.15A, 3.36, 3.38, 3.67, 5.9, 5.16, 7.78
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Mease v Fox (Iowa 1972) 200 NW2d 791: §3.26

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Mehdi v Superior Court (1989) 213 CA3d 1198, 261 CR 919: §13.59
Mehr v Superior Court (1983) 139 CA3d 1044, 189 CR 138: §§10.54, 13.60, 13.62
Meissner v Paulson (1989) 212 CA3d 785, 260 CR 826: §9.17A
Mel Mack Co., People v (1975) 53 CA3d 621, 126 CR 505: §6.57
Melnyk v Robledo (1976) 64 CA3d 618, 134 CR 602: §13.29
Mendoza v Small Claims Court (1958) 49 C2d 668, 321 P2d 9: §13.60
Menefee v Ostawari (1991) 228 CA3d 239, 278 CR 805: §7.66
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Mercy Charities v Department of Hous. & Community Dev. (SF Super Ct, Aug. 9, 1999, No. 305541): §2.12
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Metro. Hous. Dev. Corp. v Village of Arlington Heights (7th Cir 1977) 558 F2d 1283: §2.5
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Mihans v Municipal Court (1970) 7 CA3d 479, 87 CR 17: §§8.161, 9.56
Miller v Cardinale (In re Deville) (9th Cir 2004) 361 F3d 539: §14.56
Miller v Hartwood Apartments, Ltd. (5th Cir 1982) 689 F2d 1239: §8.127
Miller v Smith (1960) 179 CA2d 114, 3 CR 492: §1.10
Miller v Stults (1956) 143 CA2d 592, 300 P2d 312: §8.82
Miller & Desatnik Mgmt. Co. v Bullock (1990) 221 CA3d Supp 13, 270 CR 600: §§1.65, 5.29, 7.72, 8.4, 8.21
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Minelian v Manzella (1989) 215 CA3d 457, 263 CR 597: §§7.29, 7.40A, 7.44, 7.56, 7.80, 10.57-10.58, 12.35
Miner v Tustin Ave. Investors, LLC (2004) 116 CA4th 264, 10 CR3d 178: §§4.41, 5.9
Minoletti v Sabini (1972) 27 CA3d 321, 103 CR 528: §§3.67, 3.71
Miramar Hotel Corp. v Frank B. Hall & Co. (1985) 163 CA3d 1126, 210 CR 114: §12.65
Mitchell v Ceazan Tires (1944) 25 C2d 45, 153 P2d 53: §8.5
Mitchell v Davis (1862) 20 C 45: §1.4
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Mitchell v Sung (ND Cal 1993) 816 F Supp 597: §2.69
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Mizel v City of Santa Monica (2001) 93 CA4th 1059, 113 CR2d 649: §12.67
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Mobil Oil Corp. v Superior Court (1978) 79 CA3d 486, 145 CR 17: §§9.32, 10.73, 11.51, 11.62-11.63, 11.65
Mobile Magic Sales, People v (1979) 96 CA3d 1, 157 CR 749: §6.20
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Monahan Ford Corp., In re (Bankr ED NY 2008) 390 BR 493: §14.44
Moneymaker v CoBen (In re Eisen) (9th Cir 1994) 31 F3d 1447.: §14.56
Monge v Superior Court (1986) 176 CA3d 503, 222 CR 64: §10.42
Montclair Parkowners Ass'n v City of Montclair (1999) 76 CA4th 784, 90 CR2d 598: §§7.11, 7.14
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Moon v Marker (1938) 26 CA2d 33, 78 P2d 460: §3.64
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Morris v De La Torre (2005) 36 C4th 260, 30 CR3d 173: §3.68C
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Morris v Peralta (In re Peralta) (BAP 9th Cir 2004) 317 BR 381: §14.6
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Moseke v Miller & Smith, Inc. (ED Va 2002) 202 F Supp 2d 492: §2.69
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Muegler v Bening (9th Cir 2005) 413 F3d 980: §§14.15, 14.20
Muir Training Technols., Inc., In re (Bankr SD Cal 1990) 120 BR 154: §14.48
Mukthar v Latin Am. Sec. Serv. (2006) 139 CA4th 284, 42 CR3d 563: §3.68C
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Munoz v Purdy (1979) 91 CA3d 942, 154 CR 472: §9.35
Munson v Del Taco, Inc. (2009) 46 C4th 661, 94 CR3d 685: §§2.21, 2.57, 5.7
Munzinger v Caffrey (1942) 49 CA2d 180, 121 P2d 13: §3.53
Murillo v Rite Stuff Foods, Inc. (1998) 65 CA4th 833, 77 CR2d 12: §3.23
Murray, Arnold, Constr. v Hicks (D SD 2001) 621 NW2d 171: §2.27D
Musaelian v Adams (2009) 45 C4th 512, 87 CR3d 475: §13.28
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NLRB v Howe Scale Co. (7th Cir 1963) 311 F2d 502: §8.129
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NLRB v Whitin Mach. Works (1st Cir 1953) 204 F2d 883: §8.129
NMSBPCSLDHB, LP v Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.) (3d Cir 2004) 384 F3d 108: §§14.32, 14.56
Nahas v Local 95 Retail Clerks Int'l Ass'n (1956) 144 CA2d 808, 301 P2d 932: §1.6
Nance v Petty, Livingston, Dawson, & Devening (WD Va 1994) 881 F Supp 223: §8.26A
Narragansett Clothing Co., In re (Bankr D RI 1990) 119 BR 388: §§14.60-14.61
Nash v City of Santa Monica (1984) 37 C3d 97, 207 CR 285: §7.64
Nasser v Superior Court (1984) 156 CA3d 52, 202 CR 552: §13.26
Nathanson v Hecker (2002) 99 CA4th 1158, 121 CR2d 773: §§14.32, 14.40
National Envt'l Waste Corp. v City of Riverside (In re National Envt'l Waste Corp.) (9th Cir 1997) 129 F3d 1052: §§14.10, 14.21, 14.23
National Home Equity Corp. v Villareal (In re Villareal) (Bankr CD Cal 1984) 46 BR 284: §14.56
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North Coast Women's Care Med. Group, Inc. v Superior Court (2008) 44 C4th 1145, 81 CR3d 708: §10.67
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O

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Oceanside Mobilehome Park Owners' Ass'n v City of Oceanside (1984) 157 CA3d 887, 204 CR 239: §§7.11, 7.13
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Oettinger v Stewart (1944) 24 C2d 133, 148 P2d 19: §3.71
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Official Creditors Comm. v Metzger (In re Dominelli) (9th Cir 1986) 788 F2d 584: §14.21
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Oren Royal Oaks Venture v Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 C3d 1157, 232 CR 567: §5.39
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P

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Pelzer Realty Co., U.S. v (5th Cir 1973) 484 F2d 438: §§2.40, 2.69
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Peracchi v Superior Court (2003) 30 C4th 1245, 135 CR2d 639: §12.5
Perdue v Crocker Nat'l Bank (1985) 38 C3d 913, 216 CR 345: §§1.42, 8.40
Perfectlite Co., In re (Bankr ND Ohio 1990) 116 BR 84: §14.45
Perkins v Superior Court (1981) 117 CA3d 1, 172 CR 427: §10.42
Perry v Perry (1969) 270 CA2d 769, 76 CR 212: §12.64
Peterson v Superior Court (1995) 10 C4th 1185, 43 CR2d 836: §§2.8, 3.67, 3.70
Petroleum Collections, Inc. v Swords (1975) 48 CA3d 841, 122 CR 114: §§3.5-3.7, 8.19, 10.56, 11.63
Petruccelli, In re (Bankr SD Cal 1990) 113 BR 5: §14.16A
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Pieri v City & County of San Francisco (2006) 137 CA4th 886, 40 CR3d 629: §7.64H
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Pineda v Ennabe (1998) 61 CA4th 1403, 72 CR2d 206: §§3.67-3.67A, 3.72
Pines v Perssion (Wis 1961) 111 NW2d 409: §3.27
Pitzen v Superior Court (2004) 120 CA4th 1374, 16 CR3d 628: §§5.16, 5.39
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Polster, Inc. v Swing (1985) 164 CA3d 427, 210 CR 567: §3.73
Portillo v Aiassa (1994) 27 CA4th 1128, 32 CR2d 755: §3.72
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Prudential Ins. Co. v L.A. Mart (9th Cir 1995) 68 F3d 370: §3.9
Psihozios v Humberg (1947) 80 CA2d 215, 181 P2d 699: §1.10
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Pullin v Superior Court (2000) 81 CA4th 1161, 97 CR2d 447: §11.20
Puttrich v Smith (NJ Super Ct 1979) 407 A2d 842: §7.68
Pyxsys Corp., In re (Bankr D Mass 2003) 288 BR 309: §§14.12, 14.46, 14.54-14.55

Q

Q-Masters, Inc., In re (Bankr SD Fla 1991) 135 BR 157: §14.55
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Quarles & Butler, In re (1895) 158 US 532, 39 L Ed 1080, 15 S Ct 959: §8.110
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R

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Radecki v Joura (8th Cir 1997) 114 F3d 115: §2.69
Radivojevic v Granville Terrace Mutual Ownership Trust (7th Cir 2001) 2001 US App Lexis 21797: §2.39
Rafolin Constr. Corp. v Lippman (Civ Ct 1982) 457 NYS2d 712: §8.49
Ragin v Harry Macklowe Real Estate Co. (2d Cir 1993) 6 F3d 898: §2.67
Rainbow Disposal Co. v Escondido Mobilehome Rent Review Bd. (1998) 64 CA4th 1159, 75 CR2d 746: §§6.13, 6.29, 6.43
Raleigh v Illinois Dep't of Revenue (2000) 530 US 15, 147 L Ed 2d 13, 120 S Ct 1951: §14.9
Rancho Santa Paula Mobilehome Park v Evans (1994) 26 CA4th 1139, 32 CR2d 464: §§6.19, 6.45, 6.61, 6.88
Randol v Scott (1895) 110 C 590, 42 P 976: §§8.47-8.48, 8.50
Randol v Tatum (1893) 98 C 390, 33 P 433: §§3.57, 8.44, 8.49
Rathbun Co. v Simmons (1928) 90 CA 692, 266 P 369: §3.73
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Real Prop. Servs. Corp. v City of Pasadena (1994) 25 CA4th 375, 30 CR2d 536: §§13.26, 13.31
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Reddoch, U.S. v (5th Cir 1972) 467 F2d 897: §2.9A
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Reidy v City & County of San Francisco (2004) 123 CA4th 580, 19 CR3d 894: §7.64
Renner v Huntington-Hawthorne Oil & Gas Co. (1952) 39 C2d 93, 244 P2d 895: §§3.64, 4.20, 8.82
Rental Hous. Ass'n of N. Alameda County v City of Oakland (2009) 171 CA4th 741, 90 CR3d 181: §§7.54, 7.66, 7.75
Reserve Oil & Gas Co. v Metzenbaum (1948) 84 CA2d 769, 191 P2d 796: §8.66
Resolution Trust Corp. v Rossmoor Corp. (1995) 34 CA4th 93, 40 CR2d 328: §3.71
Ressler v Pierce (9th Cir 1982) 692 F2d 1212: §2.14
Rett v White Motor Sales Co. (ND Cal 1989) 99 BR 12: §14.8
Reuling v Sergeant (1949) 93 CA2d 241, 208 P2d 1046: §3.58
Revco D.S., Inc., In re (Bankr ND Ohio 1989) 109 BR 264: §14.61
Rexnord Holdings, Inc. v Bidermann (2d Cir 1994) 21 F3d 522: §14.10
Reycraft v Lee (2009) 177 CA4th 1211, 99 CR3d 746: §§2.67, 5.7
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Reynolds Metals Co. v Alperson (1979) 25 C3d 124, 158 CR 1: §§13.31, 13.40
Rhodes, In re (Bankr D Idaho, Mar. 2, 1995, No. 93-02411) 1995 Bankr Lexis 2175: §14.16A
Rich v Schwab (1998) 63 CA4th 803, 75 CR2d 170: §§6.14, 6.17, 6.72
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Richman v Santa Monica Rent Control Bd. (1992) 7 CA4th 1457, 9 CR2d 690: §§5.14, 7.39, 7.77
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Rickel Home Ctrs., In re (D Del 1998) 240 BR 826, appeal dismissed as moot (3d Cir 2000) 209 F3d 291: §14.50
Riddle, In re (Bankr SD Fla 2006) 344 BR 702: §14.32
Ridgley v Topa Thrift & Loan Ass'n (1998) 17 C4th 970, 73 CR2d 378: §§4.43A, 8.40
Riley v Marcus (1981) 125 CA3d 103, 177 CR 827: §3.68B
Rinaldi v Goller (1957) 48 C2d 276, 309 P2d 451: §8.165
Rinehart v Boys & Girls Club (2005) 133 CA4th 419, 34 CR3d 677: §3.68C
Riner v Vernon (1933) 132 CA 178, 22 P2d 255: §§1.22, 8.13
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Rivcom Corp. v ALRB (1983) 34 C3d 743, 195 CR 651: §8.131
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Robinson v Chicago Hous. Auth. (In re Robinson) (Bankr ND Ill 1994) 169 BR 171: §14.27
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Roble Vista Assocs. v Bacon (2002) 97 CA4th 335, 118 CR2d 295: §§1.9, 1.27, 1.44, 3.65A
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Rodriguez, In re (1964) 60 C2d 822, 36 CR 609: §9.44
Rodriquez v 551 W. 157th St. Owners Corp. (SD NY 1998) 992 F Supp 385: §2.27A
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Rohr v Johnson (1944) 65 CA2d 208, 150 P2d 5: §12.4
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Rose's Stores, Inc., In re (4th Cir 1998) 155 F3d 560: §14.45
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Rosenkranz v Pellin (1950) 99 CA2d 650, 222 P2d 249: §§3.52, 8.7, 8.68A, 8.68D, 13.31
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Rue-Ell Enters., Inc. v City of Berkeley (1983) 147 CA3d 81, 194 CR 919: §§4.36, 7.6, 7.12
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SJP, LP v City of Los Angeles (2006) 136 CA4th 511, 39 CR3d 55: §13.8
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Salazar v Maradeaga (1992) 10 CA4th Supp 1, 12 CR2d 676: §3.11E
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Samuels v Ottinger (1915) 169 C 209, 146 P 638: §§1.1, 1.13, 3.51, 3.53
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Sanchez v Bay Shores Med. Group (1999) 75 CA4th 946, 89 CR2d 634: §13.22
Sand v Queen City Packing Co. (ND 1961) 108 NW2d 448: §8.129
Sandoval v Mazer (D NM 1997) FH-FL ¶16,197: §2.67
Sandpiper Mobile Village v City of Carpinteria (1992) 10 CA4th 542, 12 CR2d 623: §7.11
Santa Monica Beach, Ltd. v Superior Court (1999) 19 C4th 952, 81 CR2d 93: §7.14
Santa Monica Rent Control Bd. v Bluvshtein (1991) 230 CA3d 308, 281 CR 298: §7.64E
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Sasson v Katash (1983) 146 CA3d 119, 194 CR 46: §12.33
Savett v Davis (1994) 29 CA4th Supp 13, 34 CR2d 550: §1.36
Schader v White (1916) 173 C 441, 160 P 557: §9.34
Scheerer v Cuddy (1890) 85 C 270, 24 P 713: §§1.13, 8.68D-8.68E
Scheerer v Goodwin (1899) 125 C 154, 57 P 789: §3.52
Schehr v Berkey (1913) 166 C 157, 135 P 41: §§3.51, 3.53
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Schwartz v U.S. (In re Schwartz) (9th Cir 1992) 954 F2d 569: §14.23
Schweiger v Superior Court (1970) 3 C3d 507, 90 CR 729: §§8.124-8.125, 9.8, 10.53, 11.55, 12.61, 13.60, 13.63
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Scott v Mullins (1962) 211 CA2d 51, 27 CR 269: §§8.8, 8.17
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Sea Winds of Marco, Inc., U.S. v (MD Fla 1995) 893 F Supp 1051: §2.36
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Secretary of HUD v Layfield (1978) 88 CA3d Supp 28, 152 CR 342: §§3.25, 6.16, 10.61
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Security Bank of Marshalltown v Neiman (8th Cir 1993) 1 F3d 687: §14.16A
Sego v Santa Monica Rent Control Bd. (1997) 57 CA4th 250, 67 CR2d 68: §7.45
Seidner v 1331 Greenfield Owners Ass'n (1980) 108 CA3d 895, 166 CR 803: §5.39
Selma Auto Mall II v Superior Court (1996) 44 CA4th 1672, 52 CR2d 599: §13.60
Sequoia Park Assocs. v County of Sonoma (2009) 176 CA4th 1270, 98 CR3d 669: §§6.13, 6.51, 6.70
Ser-Bye Corp. v C.P. & G. Markets (1947) 78 CA2d 915, 179 P2d 342: §3.56
Serrano v Priest (1977) 20 C3d 25, 141 CR 315: §2.56
Servais v Klein (1931) 112 CA 26, 296 P 123: §10.75
Sewell, Glenn R., Sheet Metal, Inc. v Loverde (1969) 70 C2d 666, 75 CR 889: §3.73
Sexton v Nelson (1964) 228 CA2d 248, 39 CR 407: §13.17
Shapiro v Cadman Towers, Inc. (2d Cir 1995) 51 F3d 328: §2.27A
Sharon P. v Arman, Ltd. (1999) 21 C4th 1181, 91 CR2d 35: §§3.68, 3.68C
Shaver v Clanton (1994) 26 CA4th 568, 31 CR2d 595: §3.61
Shearman v Jorgensen (1895) 106 C 483, 39 P 863: §8.66
Sheldon Appel Co. v Albert & Oliker (1989) 47 C3d 863, 254 CR 336: §5.39
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Simons v Young (1979) 93 CA3d 170, 155 CR 460: §3.62
Simpson v Applegate (1888) 75 C 342, 17 P 237: §1.10
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Sites v Superior Court (review dismissed Nov. 20, and remanded to court of appeal due to repeal and adoption of former Cal Rules of Ct 62-64, effective January 1, 2003; former opinion at 86 CA4th 504, 103 CR2d 432): §13.63
Skaggs v Elkus (1872) 45 C 154: §3.64
Small v Hall's Furniture Defined Benefit Pension Plan (2000) 79 CA4th 648, 94 CR2d 313: §13.58
Small Prop. Owners v City & County of San Francisco (2006) 141 CA4th 1388, 47 CR3d 121: §§1.48, 7.13, 8.170
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Smith v City of Elyria (ND Ohio 1994) 857 F Supp 1203: §2.27H
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Smith v David (1981) 120 CA3d 101, 176 CR 112: §§3.11, 3.23-3.24, 3.27, 3.35, 3.37, 3.48A, 12.53, 12.54A, 12.55, 12.57-12.58
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Smith v Jones (1917) 174 C 513, 163 P 890: §10.28A
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Smith v Pacific Props. (9th Cir 2004) 358 F3d 1097: §2.67
Smith v Sol D. Adler Realty Co. (7th Cir 1970) 436 F2d 344: §2.46
Smith v United Crude Oil Co. (1919) 179 C 570, 178 P 141: §3.55
Smith v Whyers (1923) 64 CA 193, 221 P 387: §10.55
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Smyrnos v Padilla (In re Padilla) (BAP 9th Cir 1997) 213 BR 349: §14.32
Snukal v Flightways Mfg. (2000) 23 C4th 754, 98 CR2d 1: §1.19
Snyder v Barry Realty, Inc. (ND Ill 1996) 953 F Supp 217: §2.24
Snyder v State Bar (1976) 18 C3d 286, 133 CR 864: §§9.17, 10.2
Sockett v Gottlieb (1960) 187 CA2d 760, 9 CR 831: §3.71
Solberg v Superior Court (1977) 19 C3d 182, 137 CR 460: §12.5
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Soules v HUD (2d Cir 1992) 967 F2d 817: §2.63
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South Shore Land Co. v Peterson (1964) 226 CA2d 725, 38 CR 392: §9.12
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Southern Mgmt. Corp., U.S. v (4th Cir 1992) 955 F2d 914: §2.26
Southwest Aircraft Servs., Inc. v City of Long Beach (In re Southwest Aircraft Servs., Inc.) (9th Cir 1987) 831 F2d 848: §14.45
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Spence v Omnibus Indus. (1975) 44 CA3d 970, 119 CR 171: §1.12
Spencer v Hibernia Bank (1960) 186 CA2d 702, 9 CR 867: §11.35
Spiess, Joseph C., Co., In re (Bankr ND Ill 1992) 145 BR 597: §14.53
Spinks v Equity Residential Briarwood Apartments (2009) 171 CA4th 1004, 90 CR3d 453: §§1.4, 3.7, 4.3A, 6.61, 8.137, 8.148-8.150
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St. Clair v Joos (1924) 66 CA 398, 226 P 623: §13.60
Stamboulos v McKee (NJ Super Ct 1975) 342 A2d 529: §7.68
Stamps v Superior Court (2006) 136 CA4th 1441, 39 CR3d 706: §2.57
Standard Furniture Co., In re (Bankr SD Cal 1980) 3 BR 527: §14.12
Standard Oil Co. v Slye (1913) 164 C 435, 129 P 589: §3.62
Staples v Hoefke (1987) 189 CA3d 1397, 235 CR 165: §1.11A
Stardust Mobile Estates, LLC v City of San Buenaventura (2007) 147 CA4th 1170, 55 CR3d 218: §§6.15, 7.10-7.11, 7.13, 7.14B, 7.30-7.31
Start v Heinzerling (1915) 27 CA 145, 149 P 50: §10.48
State Farm Mut. Auto. Ins. Co. v Superior Court (2004) 121 CA4th 490, 17 CR3d 146: §12.5
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Stein v City of Santa Monica (1980) 110 CA3d 458, 168 CR 39: §7.12
Sterling v Santa Monica Rent Control Bd. (1985) 168 CA3d 176, 214 CR 71: §§5.14, 7.39
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Stewart Title Guar. Co. v Old Republic Nat'l Title Ins. Co. (5th Cir 1996) 83 F3d 735: §§14.3, 14.35
Sticka v Lambert (In re Lambert) (BAP 9th Cir 2002) 283 BR 16: §14.45
Stiener v Apple Computer, Inc. (ND Cal 2008) 556 F Supp 2d 1016, action stayed pending appeal (ND Cal, Apr. 28, 2008, No. C-07-04486 SBA) 2008 US Dist Lexis 90335: §5.16
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Stockton Theatres, Inc. v Palermo (1954) 124 CA2d 353, 268 P2d 799: §§3.5, 10.43
Stoiber v Honeychuck (1980) 101 CA3d 903, 162 CR 194: §§3.6, 3.15C, 3.21, 3.25, 3.35, 3.38-3.40, 3.42, 3.46, 3.48A, 3.67, 7.66, 8.144, 11.63B, 12.56, 12.59
Stokus v Marsh (1990) 217 CA3d 647, 266 CR 90: §§9.32, 10.38, 13.29-13.30
Stoltenberg v Harveston (1934) 1 C2d 264, 34 P2d 472: §8.42
Stoltz v Brattleboro Hous. Auth. (In re Stoltz) (2d Cir 2002) 315 F3d 80: §§14.27, 14.42
Stone v Center Trust Retail Props., Inc. (2008) 163 CA4th 608, 77 CR3d 556: §§3.68C, 3.72, 8.137, 13.33D
Stone v City of Los Angeles (1931) 114 CA 192, 299 P 838: §1.1
Stone Barn Manhattan LLC, In re (Bankr SD NY 2008) 398 BR 359: §14.45
Stonebridge Technols., Inc., In re (5th Cir. 2005) 430 F3d 260: §14.55
Stoner v Zucker (1906) 148 C 516, 83 P 808: §1.6
Stoppelkamp v Mangeot (1871) 42 C 316: §§1.8, 3.65, 8.2, 8.69
Story v Richardson (1921) 186 C 162: §4.41A
Stoumen v Reilly (1951) 37 C2d 713, 234 P2d 969: §§2.58, 8.119
Stowe v Fritzie Hotels (1955) 44 C2d 416, 282 P2d 890: §1.3A
Strecker v Barnard (1952) 109 CA2d 149, 240 P2d 345: §3.9
Streicher v Heimburge (1928) 205 C 675, 272 P 290: §3.62
Strickland v Becks (1979) 95 CA3d Supp 18, 157 CR 656: §§13.35, 13.40
Strom v Union Oil Co. (1948) 88 CA2d 78, 198 P2d 347: §§8.44, 10.58
Stubblefield Constr. Co. v Superior Court (2000) 81 CA4th 762, 97 CR2d 121: §§12.5, 12.7
Stull v Sparrow (2001) 92 CA4th 860, 112 CR2d 239: §§11.24-11.25
Sturgeon v Curnutt (1994) 29 CA4th 301, 34 CR2d 498: §3.72
Sudler, In re (Bankr ED Pa 1987) 71 BR 780: §14.42
Sullivan v Little Hunting Park, Inc. (1969) 396 US 229, 24 L Ed 2d 386, 90 S Ct 400: §§2.28, 2.41, 2.44, 2.67
Summers v McClanhan (2006) 140 CA4th 403, 44 CR3d 338: §9.48
Sun Terrace Manor v Municipal Court (1973) 33 CA3d 739, 108 CR 307: §9.34
Superior Court, People v (Maloy) (2001) 91 CA4th 391, 109 CR2d 897: §12.5
Superior Motels, Inc. v Rinn Motor Hotels, Inc. (1987) 195 CA3d 1032, 241 CR 487: §§8.137, 9.41, 10.58, 13.19-13.20, 13.56
Surf & Sands, LLC v City of Capitola (ND Cal, Feb. 13, 2008, No. 07-05043) 2008 US Dist Lexis 14640: §6.51
Sutton v Freedom Square, Ltd. (ED Mich, Oct. 15, 2008, No. 07-14897) 2008 US Dist Lexis 81600: §2.9D
Sutton v United Air Lines, Inc. (1999) 527 US 471, 144 L Ed 2d 450, 119 S Ct 2139: §2.26
Swain v California Cas. Ins. Co. (2002) 99 CA4th 1, 120 CR2d 808: §§5.12, 8.150
Swan v Board of Ed. (2d Cir 1963) 319 F2d 56: §2.69
Swann v Burkett (1962) 209 CA2d 685, 26 CR 286: §8.118
Swanton Corp., Matter of (Bankr SD NY 1986) 58 BR 474: §14.45
Swartzbaugh v Sampson (1936) 11 CA2d 451, 54 P2d 73: §1.18
Swartzendruber v City of San Diego (1992) 3 CA4th 896, 5 CR2d 64: §2.56
Swift v Occidental Mining & Petroleum Co. (1903) 141 C 161, 74 P 700: §3.62
Swift v Superior Court (2009) 172 CA4th 878, 91 CR3d 504: §12.7A
Swithenbank v Wood (1929) 99 CA 341, 278 P 496: §3.64
Sylve v Riley (1993) 15 CA4th 23, 18 CR2d 608: §7.65
Syufy Enters. Ltd. Partnership v City of Oakland (2002) 104 CA4th 869, 128 CR2d 808: §14.54A

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TG Oceanside, LP v City of Oceanside (2007) 156 CA4th 1355, 68 CR3d 320: §§6.15, 7.10, 7.13, 7.38, 7.47, 7.75
Takahashi v Fish & Game Comm'n (1948) 334 US 410, 92 L Ed 1478, 68 S Ct 1138: §2.43
Taliaferro v Hoogs (1963) 219 CA2d 559, 33 CR 415: §8.66
Tan v Arnel Mgmt. Co. (2009) 170 CA4th 1087, 88 CR3d 754: §3.68B
Tandem Group, Inc., In re (Bankr CD Cal 1986) 60 BR 125: §14.62
Tannenbaum, People v (1994) 23 CA4th Supp 6, 29 CR2d 534: §1.50
Tapp v Lieberman (1983) 145 CA3d Supp 19, 193 CR 514: §4.48

Taylor v Odell (1942) 50 CA2d 115, 122 P2d 919: §3.57
Taylor v Rancho Santa Barbara (9th Cir 2000) 206 F3d 932: §§2.28, 6.18
Taylor v Terry (1886) 71 C 46, 11 P 813: §1.27
Taylor v Union Pac. R.R. Corp. (1976) 16 C3d 893, 130 CR 23: §11.54
Teichert, A., & Son, Inc. v State (1965) 238 CA2d 736, 48 CR 225: §10.47A
Telesphere Communications, Inc., In re (Bankr ND Ill 1992), 148 BR 525: §14.46
Tenants Ass'n of Park Santa Anita v Southers (1990) 222 CA3d 1293, 272 CR 361: §6.143
Tenhet v Boswell (1976) 18 C3d 150, 133 CR 10: §1.18
Terry v Elmwood Cemetery (ND Ala 1969) 307 F Supp 369: §2.41
Tewksbury v Magraff (1867) 33 C 237: §§9.5, 9.8, 10.54
Texas Dep't of Community Affairs v Burdine (1981) 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089: §2.63
Thatcher v Lucky Stores, Inc. (2000) 79 CA4th 1081, 94 CR2d 575: §§11.38-11.39
The City v Hart (1985) 175 CA3d 92, 220 CR 349: §3.64
Thinking Machs. Corp. v Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.) (1st Cir 1995) 67 F3d 1021: §14.53
Thomas v Anchorage Equal Rights Comm'n (9th Cir 1999) 165 F3d 692, vacated (9th Cir 2000) 220 F3d 1134: §2.50
Thomas v Quintero (2005) 126 CA4th 635, 24 CR3d 619: §§5.18A, 5.37
Thomas, People v (1977) 19 C3d 630, 139 CR 594: §12.52
Thompson v IFG Leasing Co. (In re Thompson) (9th Cir 1986) 788 F2d 560: §§14.39-14.40
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Thompson v Westboro Condominium Ass'n (WD Wash, Aug. 25, 2006, No. C05-1893) 2006 US Dist Lexis 60328: §2.27C
Thorpe v Housing Auth. (1969) 393 US 268, 21 L Ed 2d 474, 89 S Ct 518: §1.33
Thriftimart, Inc. v Me & Tex (1981) 123 CA3d 751, 177 CR 24: §§5.29, 8.49, 10.60
Tide Water Assoc. Oil Co. v Superior Court (1955) 43 C2d 815, 279 P2d 35: §9.9
Tieberg v Unemployment Ins. Appeals Bd. (1970) 2 C3d 943, 88 CR 175: §4.46
Tillman v Wheaton-Haven Recreation Ass'n (1973) 410 US 431, 35 L Ed 2d 403, 93 S Ct 1090: §§2.23, 2.41
Timber Ridge Town House v Dietz (NJ Super Ct 1975) 338 A2d 21: §3.25
Timkovsky v 56 Bennett, LLC (Sup Ct 2009) 881 NYS2d 823: §2.17
Timm v Brown (1947) 78 CA2d 609, 178 P2d 10: §§1.13, 3.52
Tingley v Times Mirror Co. (1907) 151 C 1, 89 P 1097: §10.71
Tipton-Whittingham v City of Los Angeles (2004) 34 C4th 604, 21 CR3d 371: §2.56
Title Ins. & Trust Co. v King Land & Improvement Co. (1912) 162 C 44, 120 P 1066: §13.11
Today's Woman of Florida, Inc., In re (Bankr MD Fla 1996) 195 BR 506: §14.55
Todd v May (Conn Cir Ct 1973) 316 A2d 793: §3.25
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Torrez, In re (Bankr ED Cal 1991) 132 BR 924: §14.19
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Treo @ Kettner Homeowners Ass'n v Superior Court (2008) 166 CA4th 1055, 83 CR3d 318: §11.54
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Triest & Co. v Goldstone (1916) 173 C 240, 159 P 715: §3.53
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Trope v Katz (1995) 11 C4th 274, 45 CR2d 241: §§11.29, 13.28
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Trubowitch v Riverbank Canning Co. (1947) 30 C2d 335, 182 P2d 182: §3.57
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Tsemetzin v Coast Fed. Sav. & Loan Ass'n (1997) 57 CA4th 1334, 67 CR2d 726: §8.38
Tubular Technols. LLC, In re (Bankr D SC 2006) 362 BR 243: §14.44
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U

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U.D. Registry, Inc. v State (2006) 144 CA4th 405, 50 CR3d 647: §§2.9, 5.25A, 13.75
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U.S. v _____ (*see* name of defendant)
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Uccello v Laudenslayer (1975) 44 CA3d 504, 118 CR 741: §§2.8, 2.27H, 3.68B, 3.72
Underwood v Corsino (2005) 133 CA4th 132, 34 CR3d 542: §§3.15A, 3.18, 10.58, 12.28
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Union Oil Co. v Reconstruction Oil Co. (1937) 20 CA2d 170, 66 P2d 1215: §3.28
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V

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Valov v Tank (1985) 168 CA3d 867, 214 CR 546: §§5.8, 8.37, 8.66
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Vella v Hudgins (1977) 20 C3d 251, 142 CR 414: §§5.23, 8.68A-8.68B, 9.8, 11.62, 13.39, 14.21
Vella v Hudgins (1984) 151 CA3d 515, 198 CR 725: §13.29
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Vesely v Sager (1971) 5 C3d 153, 95 CR 623: §11.39
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W

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Walker v Dorn (1966) 240 CA2d 118, 49 CR 362: §1.13
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Walt v Superior Court (1992) 8 CA4th 1667, 11 CR2d 278: §8.14
Walters v Meyers (1990) 226 CA3d Supp 15, 277 CR 316: §§8.29, 8.65, 9.44, 12.48
Walters, Estate of (1949) 89 CA2d 797, 202 P2d 89: §10.39
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Ware v Stafford (1962) 206 CA2d 232, 24 CR 153: §10.47A
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Watkins v McCartney (1922) 57 CA 643, 207 P 909: §8.70
Weaver v Superior Court (1979) 95 CA3d 166, 156 CR 745: §5.39
Webb v Jones (1927) 88 CA 20, 263 P 538: §§3.51, 3.54, 8.43, 13.20
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Weiner v Mullaney (1943) 59 CA2d 620, 140 P2d 704: §1.79
Weingand v Atlantic Sav. & Loan (1970) 1 C3d 806, 83 CR 650: §11.63B
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Weitz v Yankosky (1966) 63 C2d 849, 48 CR 620: §13.13
Wekell v U.S. (9th Cir 1994) 14 F3d 32: §14.4
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Wells v Marina City Props. (1981) 29 C3d 781, 176 CR 104: §13.27
Wennerholm v Stanford Univ. Sch. of Medicine (1942) 20 C2d 713, 128 P2d 522: §10.30
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Westwinds Mobile Home Park v Mobilehome Park Rental Review Bd. (1994) 30 CA4th 84, 35 CR2d 315: §7.14
Westworld Community Healthcare, Inc., In re (Bankr CD Cal 1989) 95 BR 730: §14.51
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Wheeler v West (1886) 71 C 126, 11 P 871: §1.6
Whipple v Haberle (1963) 223 CA2d 477, 36 CR 9: §3.73
Whispering Pines Mobile Home Park, Ltd. v City of Scotts Valley (1986) 180 CA3d 152, 225 CR 364: §7.47
White v Pfieffer (1913) 165 C 740, 134 P 321: §8.141
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Wiese v Steinauer (1962) 201 CA2d 651, 20 CR 295: §8.13
Wilcox v Anderson (1978) 84 CA3d 593, 148 CR 773: §§1.59, 5.8
Willden v Washington Nat'l Ins. Co. (1976) 18 C3d 631, 135 CR 69: §12.43
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Williams v Hanover Hous. Auth. (D Mass 1994) 871 F Supp 527: §1.36
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Williams v Horvath (1976) 16 C3d 834, 129 CR 453: §2.28
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Williamson County Reg'l Planning Comm'n v Hamilton Bank (1985) 473 US 172, 87 L Ed 2d 126, 105 S Ct 3108: §6.15
Willis v Soda Shoppes (1982) 134 CA3d 899, 184 CR 761: §§8.14-8.15
Wills v Trans World Airlines (SD Cal 1961) 200 F Supp 360: §2.45
Willys of Marin Co. v Pierce (1956) 140 CA2d 826, 296 P2d 25: §8.176
Wilmerton v Morton (1946) 74 CA2d 891, 169 P2d 992: §8.163
Wilson v Garcia (1985) 471 US 261, 85 L Ed 2d 254, 105 S Ct 1938: §§2.28, 2.44
Wilson v Sadleir (1915) 26 CA 357, 146 P 1061: §9.37
Wilson v San Francisco Sav. & Loan Ass'n (1976) 62 CA3d 1, 132 CR 903: §1.12
Winchell v English (1976) 62 CA3d 125, 133 CR 20: §§8.119, 10.67
Winchester v Becker (1906) 4 CA 382, 88 P 296: §8.140

Windward Partners v Delos Santos (Haw 1978) 577 P2d 326: §8.128
Wirtz Realty Corp. v Freund (Ill App 1999) 721 NE2d 589: §2.27D
Witchell v DeKorne (1986) 179 CA3d 965, 225 CR 176: §11.39
Wong v DiGrazia (1963) 60 C2d 525, 35 CR 241: §1.27
Wong v Thrifty Corp. (2002) 97 CA4th 261, 118 CR2d 276: §§9.17A, 9.18A, 13.25
Wood v Herson (1974) 39 CA3d 737, 114 CR 365: §13.39
Woodcourt II Ltd. v McDonald Co. (1981) 119 CA3d 245, 173 CR 836: §5.39
Woodman Partners v Sofa U Love (2001) 94 CA4th 766, 114 CR2d 566: §§8.37A, 10.60
Woods v Cloyd W. Miller Co. (1948) 333 US 138, 92 L Ed 596, 68 S Ct 421: §7.7
Woods-Drake v Lundy (5th Cir 1982) 667 F2d 1198: §§2.23, 2.28, 2.30, 2.43, 2.45, 2.47, 8.119
Woods-Drury, Inc. v Superior Court (1936) 18 CA2d 340, 63 P2d 1184: §13.42
Worthington v GMC (In re Claremont Acquisition Corp.) (9th Cir 1997) 113 F3d 1029: §14.45A
Worths Stores Corp., In re (Bankr ED Mo 1991) 130 BR 531: §14.53
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Wright v Turner (In re Turner) (BAP 9th Cir 1997) 204 BR 988: §14.10
Wukaloff v Malibou Lake Mountain Club (1950) 96 CA2d 147, 214 P2d 832: §§1.4, 1.6
Wylie v Gresch (1987) 191 CA3d 412, 236 CR 552: §3.68B

Y

Yancey, Matter of v New York City Hous. Auth. (Sup Ct 2009) 879 NYS2d 661: §2.15
Yazzolino v Jones (1957) 153 CA2d 626, 315 P2d 107: §3.71
Yee v City of Escondido (1992) 503 US 519, 118 L Ed 2d 153, 112 S Ct 1522: §7.10
Yee v City of Escondido (1990) 224 CA3d 1349, 274 CR 551: §7.10
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Yee v Mobilehome Park Rental Review Bd. (1993) 17 CA4th 1097, 23 CR2d 1: §7.13
Young v Superior Court (1986) 179 CA3d 28, 224 CR 405: §11.31
Young Apartments v Town of Juniper (11th Cir 2008) 529 F3d 1027: §2.19
Youritan Constr. Co., U.S. v (ND Cal 1973) 370 F Supp 643, remanded on other grounds (9th Cir 1975) 509 F2d 623: §§2.66, 2.68
Yuba River Sand Co. v City of Marysville (1947) 78 CA2d 421, 177 P2d 642: §§9.5, 9.8, 10.54
Yucaipa Mobilehome Residents' Ass'n v Knollwood Mobilehome Estate, Ltd. (CPUC Decision 04-05-056, Oct. 28: §6.13
Yuzon v Collins (2004) 116 CA4th 149, 10 CR3d 18: §3.72

Z

Zamora v Clayborn Contracting Group (2002) 28 C4th 249, 121 CR2d 187: §9.18A
Zelig v County of Los Angeles (2002) 27 C4th 1112, 119 CR2d 709: §§3.68A, 3.68D
ZiLog, Inc. v Corning (In re ZiLog, Inc.) (9th Cir 2006) 450 F3d 996: §§14.6, 14.56
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Zuniga v Housing Auth. (1995) 41 CA4th 82, 48 CR2d 353: §§3.68A, 3.68D

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89 Ops Cal Atty Gen 85 (2006): §§2.57, 10.67
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Table of Forms

Bankruptcy
- Application for order to surrender premises
  - Ex parte application, 14.68
  - Memorandum in support of application for order to surrender property, 14.70
  - Order to vacate real property, 14.69
- Certifications regarding residential evictions
  - Debtor's certification that circumstances exist which would allow cure of monetary default, 14.70A
  - Debtor's further certification of cure of monetary default, 14.71
  - Debtor's objection to lessor's certification, 14.74
  - Lessor's certification of endangerment of the property or illegal use of controlled substance, 14.73
  - Lessor's objection to debtor's certification and/or debtor's further certification concerning residential property, 14.72
- Debtors' motion on proposed going out of business sale, landlord's objection to, 14.62A
- Debtor's motion to extend date to assume or reject nonresidential lease, landlord's objection to, 14.62
- Landlord's claim forms
  - Motion for allowance and payment of administrative rent claim; supporting memorandum; supporting declarations, 14.61
  - Proof of claim, 14.59
  - Request for payment of postpetition administrative rent; sample letter to debtor's counsel, 14.60
- Notice of stay of proceedings (Judicial Council Form), 14.57
- Proposed expedited procedures for assumption and rejection of leases, landlord's objection to, 14.62B
- Relief from automatic stay
  - Motion for relief from automatic stay under 11 USC §362 (unlawful detainer), 14.65
  - Motion to terminate or modify stay; supporting memorandum; supporting declaration, 14.63
  - Notice of termination or modification of stay (Judicial Council Form), 14.67A
  - Order denying motion for relief from automatic stay under 11 USC §362, 14.66A
  - Order granting motion for relief from automatic stay under 11 USC §362 (unlawful detainer), 14.66
  - Order granting motion to terminate or modify automatic stay, 14.64
  - Stipulation and order for relief from automatic stay, 14.67
- Request for special notice and proof of service, 14.58

Check in/check out list, 1.25
Collective bargaining agreement between landlord and tenant organization (sample agreement), 5.42
Complaint for damages, specific performance and injunctive relief for habitability breaches, 3.48A
Complaint for forcible entry and forcible detainer, 8.146
Furniture inventory (California Apartment Association Form), 1.26
Housing discrimination complaint (HUD 903), 2.34
Lease
- Assignment and subletting, 1.54
- Attorney fees, 1.74
- Breach of covenant
  - Consequences of tenant's breach, service of notice, 1.68
  - Covenants are material and reasonable, 1.67
  - No waiver, 1.75
- Condition of premises
  - Landlord's duty to maintain, 1.52
  - Statement of condition of premises, 1.53
- Death or disability of tenant, 1.65
- Deposit on execution of agreement, 1.39
- Description of premises, 1.38
- Disclosure of information on lead-based paint and lead-based paint hazards (California Apartment Association Form), 1.82A
- Entire agreement, 1.78
- Fixed-term lease (California Apartment Association Form), 1.82
- Indemnification of landlord, 1.47
- Landlord's entry on premises, notice, 1.66
- Lead disclosure, 1.77
- Malicious holding over, statutory damages, 1.70
- Misrepresentation in tenant's application, 1.69
- Month-to-month lease and lease/rent commission agreement (California Association of Realtors Form), 1.83
- Month-to-month or fixed-term lease (National Housing Law Project Form), 1.85

Month-to-month rental agreement (California Apartment Association Form), 1.81
Nonrefundable applicant screening fee, 1.51
Occupants
Guests, borders, lodgers, and roommates, 1.46
Identification, joint liability of tenants, 1.45
Parties, 1.37
Personal property remaining on premises, 1.71
Possession of premises, 1.72
Professional Publishing Corporation Form, sample rental agreement, 1.84
Rent
Late charges, 1.41
Monthly amount, manner of payment, 1.40
Notice that failure to pay rent on time may be reported to credit record agencies, 1.43
Rent check returned for insufficient funds, 1.42
Security deposits
Amount and terms of security deposit, 1.48
Maintaining security deposit by multiple tenants, 1.49
Replenishment and increase of deposit, 1.50
Service of notices, 1.76
Signatures, 1.79
Tenant obligations and restrictions
Complying with rules and regulations, 1.59
Conditions governing tenant repairs and alterations, 1.60
Maintain and protect landlord's property, 1.57
No automobile repair, 1.64
Pets, 1.62
Refrain from disturbance, unlawful conduct, and waste, 1.58
Tenant agreement to maintain premises as consideration for rental, 1.61
Waterbeds, 1.63
Tenant's termination for cause under fixed-term lease, 1.73
Term, 1.44
Use of premises, 1.55
Utilities, 1.56
Mobilehomes
Acknowledgments
Acceptance of commercial goods or services not required, 6.138
Charges for month-to-month agreement, 6.136
Charges for term agreement, 6.137
Consent to entry, acknowledgment of, 6.139
Inspections made to corroborate management's representation of space and facilities, 6.134
Receipt and understanding of Mobilehome Residency Law, 6.135
Voluntary acknowledgment, 6.133
Agreement to lease, 6.104
Alterations or amendments, 6.132
Amount of rent, 6.95
Attachments to agreement, 6.139A
Attorney fees, 6.128
Changes in zoning, use permits, or master lease, 6.116
Consultation with homeowner, 6.122
Deposit
Amount, 6.99
Payment of deposit amounts, 6.100
Enforcement of agreement, 6.127
Entirety of agreement, 6.131
Execution, 6.140
Facilities, 6.97
Fees, service charges, and utilities, 6.110
Fixtures, ownership, maintenance, and liability, 6.114
General prohibitions (residential use, guests, abandonment, subletting, and assignments or encumbrances), 6.118
Identity of homeowner and residents, 6.91
Identity of park owner and management, 6.92
Information for prospective homeowners, 6.54A
Interpretation and severability, 6.130
Liability indemnification, 6.123
Management's right to make payments, 6.124

Miscellaneous information, 6.103
Mobilehome ownership information, 6.102
Multiple mobilehome ownership, 6.126
Notices, 6.121
Ownership of mobilehome, 6.125
Park management responsibilities for physical facilities, services, utilities, and compliance with law, 6.113
Park name/address and space number/address, 6.90
Rent and rent increases
Charges of late payment of rent, 6.109
Due date of rent payments, notice of increase, 6.107
Indexed rent increases (long-term rental agreement), 6.106
Tender of rent, 6.108
Right of entry, 6.115
Sale or subletting of mobilehome, 6.117
Security and default deposits, 6.111
Services, 6.96
State law and park rules, procedure for amending park rules, 6.112
Term
Beginning of term, 6.93
Length of term, 6.94
Termination and eviction, 6.119
Term of agreement, 6.105
Time of the essence, 6.129
Waivers, 6.120
Zoning and land use disclosures, 6.101
Notice of landlord's intention to enter dwelling unit, 3.3A
Rental application (California Apartment Association Form), 4.10
Termination of tenancy
Notice of belief of abandonment pursuant to CC §1951.3(d), 8.10
Notice of right to request inspection of premises and to cure deficiency, 8.172B
Notice to owner other than tenant of right to reclaim abandoned property (CC §1985), 8.160
Notice to tenant of right to reclaim abandoned property (CC §1984), 8.159
30-day or 60-day termination notice, 8.80
3-day notice to pay rent or quit, 8.41
3-day notice to perform covenant of lease or quit (curable breach), 8.53
3-day notice to quit for breach of covenant (noncurable breach), 8.54
Waiver of right to receive documents with security deposit refund, 8.173F
Unlawful detainer
Answer to unlawful detainer complaint (Judicial Council Form), 10.51
Application for order extending time to respond, 10.49
Declaration supporting motion to quash service of summons, 10.28B
Default, request for entry of (Judicial Council Form), 13.6
Demurrer to complaint, 10.36
Discovery
Interrogatories (Judicial Council Form), 11.16
Request for admissions (Judicial Council Form), 11.27
Eviction questionnaire (sample), 9.27
Forfeiture, application for relief from, 13.57
Judgment (attachment)(Judicial Council Form), 13.40C
Judgment for plaintiff, 13.34
Judgment (Judicial Council Form), 13.40B
Jury instructions
Breach of implied covenant of quiet enjoyment by landlord, 12.63A
Breach of warranty of habitability, 12.55
Burden of proof, preponderance of evidence, 12.46
Calculation of reasonable rent, difference-in-value method, 12.58
Calculation of reasonable rent, factoring in tenant's discomfort and annoyance, 12.59
Calculation of reasonable rent, percentage-reduction-in-use method, 12.57
Calculation of rent and damages, 12.49
Computing reasonable rent owed when warranty of habitability breached, 12.56
Definition of fair rental value for assessing damages, 12.50
Definition of habitability (landlord's instruction), 12.54
Definition of habitability (tenant's instruction), 12.54A
Estoppel of landlord's right to terminate tenancy, 12.63C
Facts plaintiff must establish, 12.47

Landlord's refusal to rent, sample instructions on, 12.63D
Retaliatory eviction, elements of in month-to-month tenancy, 12.61
Retaliatory eviction, landlord bears burden of disproving tenant, 12.63
Retaliatory eviction, tenant bears entire burden of proof on defense, 12.62
Service of notices, computation of time, 12.48
Statutory damages, definition of malice, 12.52
Waiver of right by landlord to terminate tenancy, 12.63B
Witnesses' opinions concerning fair rental value, 12.51
Memorandum supporting demurrer (defective 3-day notice case), 10.36A
Memorandum supporting motion to quash service of summons (improper service case), 10.28A
Memorandum supporting motion to strike allegations of improper damages, 10.47A
Notice of motion to quash service of summons, 10.28
Notice of motion to strike, 10.47
Order for judgment for defendant (warranty of habitability), 13.41
Possession
Postjudgment claim of right to possession and notice of hearing, 13.73
Writ of possession of real property (Judicial Council Form), 13.69
Prejudgment claim right to possession (Judicial Council Form), 9.55
Request/counter-request to set case for trial (Judicial Council Form), 11.41A
Stay of execution
Appeal, notice of motion for stay of execution pending, 13.62
Ex parte application for stay of execution, 13.54
Tenant's declaration of hardship, 13.55
Stipulation for entry of judgment (Judicial Council Form), 9.19A
Stipulation for entry of judgment or dismissal, 9.19
Summons (Judicial Council Form), 9.46
Unlawful detainer complaint (Judicial Council Form), 9.31

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Index

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

The symbol "" after a section number indicates that a form appears in the section.

Abandonment
Entry by landlord after, 4.43
Forcible entry and detainer, abandonment by tenant as defense to charge of, 8.143
Mobilehomes abandoned, disposition of. See **Mobilehomes**
Notice of belief of abandonment (see Termination of tenancy by abandonment, below)
Personal property of tenant, disposition of. See **Personal Property**
Remedies for tenant's abandonment
Continuation of lease, 8.15
Liquidated damages and equitable relief, landlord's entitlement to, 8.16
Termination of lease (CC §1951.2), 8.14
Service of papers
Notice of abandonment, service of, 8.11
Notice of abandonment, service of unlawful detainer summons by certified mail after tenant's response to, 9.50
Surrender distinguished, 8.8
Termination of tenancy by abandonment
CC §§1951.2-1951.3, establishing abandonment under, 8.9-8.12
Common law, proving abandonment under, 8.13
Countering notice of abandonment, 8.12
Definition of abandonment, 8.8, 8.13
Notice of belief of abandonment pursuant to CC §1951.3(d), 8.10
Remedies (see Remedies for tenant's abandonment, above)
Service of notice, 8.11
Unlawful detainer action, continuation after tenant's abandonment of premises, 11.51

Acquired Immune Deficiency Syndrome (AIDS)
Landlord's nondisclosure of AIDS-related death on premises, 1.29

ADA. See **Americans with Disabilities Act (ADA)**

Addresses
California Association of Realtors, 1.80
Mobilehome tenant and park owner, addresses of. See **Mobilehomes**

Admissibility of Evidence
Forcible entry and detainer action, admissibility of evidence regarding landlord's title, 8.144
Hearsay evidence. See **Hearsay**
Judicial review of rent control board decision, admissibility of new evidence in administrative mandamus proceedings for, 7.51
Reasonable rental value of property, admissibility of landlord's opinion, 12.29
Rent control administrative decision, admissibility of new evidence at review hearing, 7.51
Trial of unlawful detainer action, admissibility of evidence in. See **Trial of Unlawful Detainer Action**

Admissions in Unlawful Detainer Action, Request for
See also **Unlawful Detainer**
Generally, 11.23
Declarations
Numerical limit on requests, declaration for exceeding, 11.23
Protective order against request for admissions, declaration in support of motion for, 11.24
Judicial Council Form for request for admissions, 11.27
Responding to request
Generally, 11.24
Consequences of failing to respond to request for admissions, 11.25

Summary judgment motion, admissions supporting, 11.38
Withdrawal of admission, court's permission required for, 11.26

Adults-Only Policy. See **Mobilehomes**

Advertising Vacancies. See **Fair Employment and Housing Act (FEHA)**

Affidavits and Declarations
Admissions. See **Admissions in Unlawful Detainer Action, Request for**
Attorney fees, declaration in support of request for, 13.29
Bankruptcy
Motion for allowance and payment of administrative rent claim, supporting declarations, 14.61
Motion for relief from stay, declarations supporting, 14.23, 14.63
Default. See **Default and Default Judgment in Unlawful Detainer Actions**
Filing unlawful detainer action in proper court, affidavit regarding, 9.33
Inspection of documents, declaration for protective order against demand for, 11.21
Interrogatories, declaration for exceeding numerical limit on, 11.14
Peremptory challenge of judge, conclusory declaration that judge biased against party or attorney, 12.5
Quashing service of summons, declarations supporting motion for, 10.28B
Stay of execution of unlawful detainer judgment. See **Stay of Execution of Unlawful Detainer Judgment**
Subpoena duces tecum, service of affidavit or declaration with, 12.15
Summary judgment motion in unlawful detainer action, supporting or opposing affidavits or declarations for, 11.34, 11.38-11.39
Writ of possession for real property, declaration stating daily rental value of property, 13.65

Affirmative Defenses
Complaint in unlawful detainer action. See **Complaint in Unlawful Detainer Action**
Eviction case, violation of Fair Debt Collection Practices Act as affirmative defense in, 8.26A
Forcible entry or detainer, affirmative defense by landlord to charge of, 8.143

Age
See also **Senior Housing**
Antidiscrimination laws, 2.20, 2.29
Mobilehome tenancy
Adults-only restrictions. See **Mobilehomes**
Prohibition against charging senior homeowner occupancy fee for relative's live-in care, 6.38
Service of summons, age requirement for, 9.47
Unruh Civil Rights Act. See **Unruh Civil Rights Act**

Agents and Agency
See also **Brokers**
Defective premises, allegations against landlord's agent, 3.48A
Execution of lease by agent, 1.20
Mobilehome park management prohibited from requiring homeowner replacing mobilehome to use specific agent for purchase or installation of mobilehome, 6.57
Owner's responsibility for discriminatory acts committed by agent, 2.68
Service of process, agent for. See **Service of Process and Papers**
Sexual harassment by agent, employer's vicarious liability for, 2.27G
Unlawful detainer
Recovery of possession of real property, action against agent for, 9.5
Service of summons by agent, 9.48

Agreements. See **Contracts**

Agricultural Property
Eviction of farmworkers in grower-supplied housing, 8.84
Firing employee for union activities, determining employer's motive, 8.129
Presumption of 1 year lease for, 1.27

AIDS. See **Acquired Immune Deficiency Syndrome (AIDS)**

Alcohol. See **Drugs and Alcohol**

Alterations
See also **Improvements and Repairs**
Consent of landlord required before making alterations, 1.60

Ambiguities
Renewal of lease, construction of ambiguous terms against author of renewal language, 3.61
Statement of decision in unlawful detainer action ambiguous, counsel's role regarding, 12.66
Summary judgment in unlawful detainer action, ambiguities in statutory amendment affecting, 11.33

Amendments and Modifications
Admission, amendment of, 11.26
Americans with Disabilities Act (ADA), amendment of, 2.26
Bankruptcy stay, modification of. See **Bankruptcy and Insolvency**
Conforming pleadings to proof, amendments for. See **Conforming Pleadings to Proof**
Judgment for restitution of premises, amendment of, 13.2
Mobilehomes. See **Mobilehomes**
Notice requirements, lease provision modifying as void, 8.27
Periodic tenancy, modifying terms of. See **Periodic Tenancy**
Rent, modification of. See **Rent**
Terms of tenancy, modification of. See **Term of Tenancy**
30-day or 60-day notice period for termination of month-to-month tenancy, parties' modification of, 8.70
Unlawful detainer complaint, amendment of. See **Complaint in Unlawful Detainer Action**

Americans with Disabilities Act (ADA)
Accessibility requirements under, 2.27C
Amendment of, 2.26
Attorney fees, recovery by prevailing plaintiff, 2.27E
Construction of, 2.26
Housing discrimination prohibited under, 2.29, 2.60
Intent to discriminate, no requirement that plaintiff prove, 2.21, 5.7
Liability of realty office landlord for noncompliance with ADA despite lease provision shifting responsibility to tenant-realty office, 2.68
Major life activities under ADA regulations, 2.26
Mitigation measures, effect on disabled status, 2.26
Privately owned facilities, applicability of ADA's public accommodations accessibility requirements to, 2.27C
Unruh Act, tenant seeking damages under, 5.7
Unruh Civil Rights Act, violation of ADA as violation of, 2.21, 5.7

Animals. See **Pets**

Answers
See also **Complaints**
Demurrer to answer. See **Demurrer to Answer**
Frivolous answer, filing summary judgment motion in response to, 11.32
Housing discrimination complaint, time limit for filing answer to, 2.35
Unlawful detainer complaint, answer to. See **Complaint in Unlawful Detainer Action**

Antidiscrimination Laws. See **Discrimination**

Apartment Buildings. See **Management of Property**

Appeals
Attorney fee award in unlawful detainer action
Abuse of discretion by court, appeal based on, 13.29
Litigating appeal, award of fees for, 13.32
Separate appeal for postjudgment fee award, 13.59
Rent control board decisions, judicial review of. See **Rent Control**
Time
Limited jurisdiction matter, time limit for filing appeal in, 13.33C
Unlawful detainer action, time limit for appeals, 13.59
Unlawful detainer action
Generally, 13.58
Attorney fees (see Attorney fee award in unlawful detainer action, above)
Demurrer sustained without leave to amend, appeal of order, 10.35
Dismissal of nonmeritorious appeal to avoid imposition of costs, 13.58
Notice of appeal, 13.59
Notice of motion for stay of execution pending appeal, 13.62
Objections to evidence, preserving records for appeal, 11.39
Procedure and time limit for appeals, 13.59

Reconsideration motion, effect of, 13.59
Stay of execution of judgment pending appeal, 13.58, 13.60, 13.62
Successive unlawful detainer actions not barred by pending appeal of earlier action, 13.42
Superior court, appeal to appellate department of, 13.58
Tenant vacating premises pending appeal, effect of, 13.61

Applications
See also **Screening Prospective Tenants**
Evaluating prospective tenant's application, state and federal laws prohibiting discrimination, 4.13
Misrepresentation in tenant's rental application, effect of, 1.10, 1.69
Retaining applications, advantages of, 4.16
Written application criteria, benefits of maintaining, 4.12

Apportionment of Rent
30-day or 60-day notice served in middle of term, apportionment of last month's rent if, 8.73

Arbitration
Housing dispute, conciliation or mediation of. See **Conciliation or Mediation of Housing Dispute**
Mandatory arbitration clause in lease limiting landlord's personal injury liability, validity of, 5.16
Mobilehomes park rules, prohibition against including mandated binding arbitration in, 6.15, 6.46, 6.142
Rent control ordinances providing for arbitration of disputes, 7.52

Armed Services. See **Military**

Assignment and Subletting
Generally, 4.40A-4.40B
Assignment, rights and liabilities after
Assignee and landlord, relationship between, 3.52
Assignor's liability to landlord, 3.53
Bankruptcy
Assignment of lease by trustee, 14.35
Court's disregard of lease assignment restrictions, 3.56
Preemption of contractual and state law provisions by Bankruptcy Code, 3.59A
Consent to assignment or subletting
Lease provision, landlord's consent required for assignment by tenant, 1.54-2
Rent increase, tenant's unapproved sublease as grounds for, 3.66
Withholding consent, requirements for landlord, 3.58
Covenants
Assignee, enforcement of covenants against, 3.52
Sublessee and landlord, enforcement of covenants against each other, 3.54
Transfer of leasehold interest, restrictions on, 3.56
Waiver of covenant, 3.57
Death or disability of tenant
Consent to transfer, requirements for landlord withholding, 3.58
Unit not subject to vacancy control, effect of tenant's death or disability, 1.65-1
Unit subject to vacancy control, effect of tenant's death or disability, 1.65-2
Designating occupant as subtenant, 4.3A
Disability (see Death or disability of tenant, above)
Distinguishing between assignment and subletting, 3.50
Eviction
Damages for sublessee's improper use of premises or landlord's wrongful eviction of sublessee, 3.55
Just cause required for eviction of subtenant, 7.55A
Unapproved subtenant, eviction of, 7.62
Lease provisions
Covenants (see Covenants, above)
Landlord's consent required for assignment by tenant, 1.54-2
Prohibition against assignment by tenant, 1.54-1
Right of tenant to assign or sublet absent prohibition in lease, 1.14
Mobilehomes, sublessees of. See **Mobilehomes**
Renewal of lease by assignee of tenant, 3.62
Rent control. See **Rent Control**
Restricting transfer of leasehold interests
CC §1951.4 remedy, effect of, 3.59
Covenants in lease (see Covenants, above)
Rights and obligations of all parties, effect of transfer on, 3.51

Subletting
Eviction of subtenant (see Eviction, above)
Former law, 7.27
Rent control, subleasing in jurisdiction with, 3.58A
Sublessee and landlord, enforcement of covenants against each other, 3.54
Sublessor and landlord, mutual obligations of, 3.55
3-day notice for breach of covenant against subletting or assignment. See **3-Day Notice**
Unlawful detainer action
Naming subtenant as defendant in, 9.35-9.35A
Tenant's unlawful detainer action against subtenant, 9.35

Associations
Mobilehome organizations, 6.143-6.144
Tenant organizations. See **Tenant Organizations**

Assumption of Lease by Bankruptcy Trustee. See **Bankruptcy and Insolvency**

Attorney-Client Relationship
Department of Fair Employment and Housing (DFEH) attorney, relationship with party filing housing discrimination complaint, 2.55
Limited scope representation (unbundling)
Landlords, representing, 4.2A-4.2B, 9.23A
Tenants, representing, 5.4A-5.4B, 10.3A
Professional liability insurance, attorney's duty to disclose absence of, 4.2C, 5.4A

Attorney General
Equal access law for disabled persons, Attorney General bringing suit for violation of, 2.60
Housing discrimination
Civil action for housing discrimination, intervention by US Attorney General in, 2.39
Fair Employment and Housing Act (FEHA), state Attorney General filing complaint under, 2.52
Pattern or practice housing discrimination, preventive relief action brought by U.S. Attorney General, 2.32, 2.40
Private parties intervening in civil actions brought by Attorney General, 2.40
State or local land use ordinance, referral to Attorney General of housing discrimination practice involving, 2.37
Unruh Civil Rights Act, civil action brought by Attorney General under, 2.59

Attorneys
Bankruptcy. See **Bankruptcy and Insolvency**
Counseling landlords. See **Counseling Landlords**
Counseling tenants. See **Counseling Tenants**
Default, attorney's affidavit of fault in motion for relief from, 13.8
Disciplinary action against attorneys. See **Disciplinary Action Against Attorneys**
Ethics. See **Ethics**
Fair housing laws. See **Fair Housing Laws**
Fees. See **Attorneys' Fees**
Habitability, attorney's advice on breach of implied warranty of. See **Habitability, Implied Warranty of**
Independent counsel, insurer's reservation of rights triggering need for, 9.29
Indigent party, court declining to award fees against, 10.13
Litigation privilege, attorney's communications with mobilehome park residents about anticipated lawsuit protected under, 5.39, 6.17
Rent control boards, practicing before. See **Rent Control**
Responsive pleadings. See **Responsive Pleadings in Unlawful Detainer Action**
Rules of Professional Conduct, 9.20
Self-help evictions, legal strategies for dealing with, 8.153
Statement of decision in unlawful detainer action ambiguous, counsel's role regarding, 12.66
Substitution of counsel of record under full service agreement, 5.4B
3-day notice prepared by landlord, attorney's review of, 8.46
Unlawful detainer. See **Unlawful Detainer**

Attorneys' Fees
Americans with Disabilities Act (ADA), prevailing plaintiff's recovery of fees under, 2.27E
Anti-SLAPP statute, award of fees under, 5.18A, 10.38A, 13.40A
Appeals. See **Appeals**
Bankruptcy proceedings, recovery of attorney fees during, 14.6, 14.51
Contractual basis for fee award, 13.25
Denial of tenant's access or use of premises, award of fees in action involving, 8.149

Extension of time for filing motion for award of, 13.33C
Forcible entry and detainer action, recovery of fees in, 5.22
Forfeiture, payment of attorney fees as condition for granting relief from, 13.56
Fraudulent eviction of tenant based on landlord's intention to occupy premises, recovery of attorney fees, 7.66
Habitability, recovery of fees in action based on landlord's breach of implied warranty of, 3.15A, 3.41, 3.46, 3.48A, 10.4, 13.25
Housing discrimination
Attorney General's civil housing discrimination action, award of fees in, 2.40
Civil action for housing discrimination, award of fees in, 2.39
Civil Rights Act of 1866, award of fees under, 2.47
Fair Employment and Housing Commission (FEHC), fees awarded by, 2.56
Fair Housing Act, recovery of fees under, 2.38
Fair housing laws, recovery of fees under, 2.2
FEHA, award of fees under, 2.56
Lodestar and multiplier, inclusion of, 2.56
Unruh Civil Rights Act, award of fees under, 2.59
Housing or building codes, attorney fees for landlord's failure to comply with, 4.50
Judgment in unlawful detainer action, award of fees. See **Judgment in Unlawful Detainer Action**
Jurisdiction, amount of fees not included in aggregate amount claimed when determining, 9.32
Lease provision for recovery of attorney fees, interpretation of. See **Construction and Interpretation**
Mobilehomes, recovery of fees in disputes involving. See **Mobilehomes**
Motion to strike prayer for attorney fees in unlawful detainer complaint based on complaint's failure to allege lease provision for fees, 10.43
Rent control ordinances, effect of. See **Rent Control**
Retainer agreement with landlords, 4.2-4.2B, 9.23A
Retainer agreement with tenants, 5.4A-5.4B, 10.3A
Retaliatory eviction action, landlord's liability for fees in, 8.116
Statutory basis for award of fees, 13.25
Unruh Civil Rights Act, recovery of fees in action for violation of, 8.121
Venue, award of fees in motion regarding, 9.33

Auctions
Personal property left on premises after termination of tenancy, auction sale of, 8.158

Audiorecording. See **Video- or Audiorecording**

Automobiles. See **Motor Vehicles**

Back Rent. See **Rent**

Bankruptcy and Insolvency
Generally, 14.1-14.1A
Application for order to surrender premises
Generally, 14.31
Ex parte application, 14.68
Order to vacate real property, 14.69
Points and authorities in support of application for order to surrender property, 14.70
Assignment. See **Assignment and Subletting**
Attorneys
Bad faith and willful misconduct, bankruptcy court's authority to suspend attorney from practicing in court, 14.56
Letter to debtor's counsel (sample), 14.60
Automatic stay affecting lease rights
Acts of landlord, stay prohibiting, 14.9
Avoiding effects of automatic stay (see Avoiding effects of automatic stay, below)
Declaratory relief and dischargeability actions exempt from stay, 14.15
Discretion of court to annul automatic stay retroactively, 14.21
Exception to stay (see Exception to stay, below)
Filing of bankruptcy petition, stay as result of, 13.68, 14.2, 14.4
Foreclosure (see Foreclosure, below)
Litigation, administrative procedures, and informal actions against debtor, applicability of stay to, 14.8
Motion for relief from stay (see Motion for relief from stay, below)
Notice of stay of proceedings, 14.57
Notice of stay of state court proceedings, filing of, 14.2, 14.5
Notice of termination or modification of stay, 14.67A
Order granting relief from stay, 10-day stay of, 14.23, 14.29

Persons shielded by stay, 14.13
Property protected by stay (see Property protected by stay, below)
Relief from stay to complete eviction for nonpayment of rent, 14.27
Retroactive annulment of stay, 14.10, 14.21
Scope of automatic stay, 14.8
Violation of automatic stay (see Violation of automatic stay, below)
Waiver in advance of automatic stay, prohibition against, 14.7
Avoiding effects of automatic stay
Application for order to surrender premises (see Application for order to surrender premises, above)
Dismissal of bankruptcy, motion for, 14.32
Motion for relief from stay (see Motion for relief from stay, below)
Order for relief from stay, circumstances requiring, 14.17
Stipulation for relief from stay, 14.6, 14.30, 14.67
Bankruptcy Abuse Prevention and Consumer Protection Act (2005 BAPCPA), table of effective dates for, 14.1B
Breach of nonmonetary default, effect of, 14.45A
Certifications regarding residential evictions
Debtor's certification that circumstances exist allowing cure of monetary default, 14.70A
Debtor's further certification of cure of monetary default, 14.71
Debtor's objection to lessor's certification, 14.74
Lessor's certification of endangerment of property or illegal use of controlled substance, 14.73
Lessor's objection to debtor's certification and/or debtor's further certification concerning residential property, 14.72
Chapter 13 plan confirmation, effect on automatic stay, 14.16A
Commercial lease, assumption or rejection of (see Nonresidential lease, assumption or rejection of, below)
Dismissal of bankruptcy action, 14.32, 14.52
Electronic filing requirements, 14.24, 14.58
Ethical considerations in bankruptcy proceedings, 14.56
Exception to stay
Eviction for endangerment of property or illegal use of controlled substances on it, 14.16B, 14.17, 14.68
Judgment for possession entered before bankruptcy petition filed, 14.8-14.9, 14.16, 14.17
Extension of time to assume or reject nonresidential lease, 14.47-14.48
Foreclosure
Defense to motion for relief from stay, foreclosure sale issues as, 14.28
Eviction after foreclosure, effect on stay, 14.21
Fraudulent collection of rents, nondischargeability of damage award for, 7.77
Government-subsidized housing. See **Government-Subsidized Housing**
Landlord's proof of claim
Generally, 14.29
Form of proof of claim, 14.59
Letter to debtor's counsel (sample), 14.60
Motion for allowance and payment of administrative rent claim, 14.61
Postpetition rent, priority claim for, 14.40, 14.46
Rejection damages, claim for, 14.55
Request for payment of postpetition administrative rent, 14.60
Unpaid prepetition rent and damages from rejection of lease, 14.40
Memorandum of points and authorities. See **Memorandum of Points and Authorities**
Modification of stay (see Motion for relief from stay, below)
Motion for relief from stay
Generally, 14.6
Collateral estoppel effect of state judgment for possession, 14.20
Conditional relief from stay, 14.29
Defenses to motion, 14.27-14.28
Eviction after foreclosure, effect of, 14.21
Filing motion for relief, 14.24
Format of motion and supporting documents, 14.23
Grounds for relief from stay, 14.18-14.21
Hearing on motion, scheduling and attending, 14.26
Notice of termination or modification of stay, 14.67A
Optional preprinted form for use in opposing stay relief motion, 14.28A
Order denying motion for relief from stay, 14.66A
Order granting motion to terminate or modify automatic stay, 14.64
Procedure for motion for relief, 14.22-14.26
Serving motion for relief from stay, 14.25
Termination of lease as grounds for termination of stay, 14.19
Termination or modification of automatic stay, notice of motion for, 14.63
Unlawful detainer action, motion and order on motion for, 14.65-14.66

Nonresidential lease, assumption or rejection of
Generally, 14.43
Administrative claim from rejection of assumed lease, cap on, 14.43, 14.52
Assumed lease, conversion of obligation to general unsecured claim by re-filing second Chapter 11 bankruptcy, 14.52
Attorney fees to enforce lease, recovery of, 14.51
Automatic rejection or noticed motion, 14.53
Debtors' motion on proposed going out of business sale, objection to, 14.62A
Default, debtor's duty to cure, 14.50, 14.52
Extension of time to assume or reject lease, 14.47-14.48, 14.53
Landlord's proof of claim (see Landlord's proof of claim, above)
Motion for extension of time, objection to, 14.48, 14.62
Motion required, 14.49
Non-rent obligations due under lease, 14.45A
Obligations of assuming debtor, 14.45-14.46, 14.50, 14.52
Performance of all nonmonetary obligations required before assumption or rejection, 14.45A
Prejudice to landlord as grounds for objection to extending lease, 14.48
Prepetition default, debtor's duty to cure, 14.50, 14.52
Priority claim for postpetition rent, 14.46
Procedures, 14.49-14.52
Proposed expedited procedures for assumption and rejection of leases, objection to, 14.62B
Proration rule, 14.45
Rights held by non-debtor parties, effect on, 14.54A
Surrendering property to landlord, 14.54
Time limit for assumption or rejection, 14.44, 14.49
Notices
Automatic stay (see Automatic stay affecting lease rights, above)
Commencement of case, notice of, 14.40
Request for special notice and proof of service, 14.2, 14.58
Stay of proceedings, notice of, 14.57
Objection of landlord to assignment of nonresidential lease, 14.50
Penalties. See **Penalties**
Points and authorities. See **Memorandum of Points and Authorities**
Preference issues, 14.37
Proof of claim (see Landlord's proof of claim, above)
Property protected by stay
Commercial leases, 14.3, 14.14
Lease rights, 14.11
Possessory interest of debtor in property, 14.19
Prepetition obligations, 14.16A
Security deposits, 14.12
Termination of lease or entry of judgment, possessory rights after, 14.16
Prorated post-petition rent for month in which bankruptcy petition filed, 14.45
Public housing. See **Public Housing**
Rejection of lease by trustee (see Residential lease, assumption or rejection of, below)
Relief from stay (see Motion for relief from stay, above)
Residential evictions, certifications regarding (see Certifications regarding residential evictions, above)
Residential lease, assumption or rejection of
Generally, 14.33
Assignors and subtenants. See **Assignment and Subleasing**
Chapter 7 trustee's rejection of lease with 24 hours notice, 14.30
Default, trustee's duty to cure, 14.36
Expired or terminated lease, prohibition against assumption of, 14.41
Obligations of assuming trustee or debtor, 14.36-14.37
Postpetition payment of rent in event of lease rejection, 14.39
Prepetition default, trustee's duty to cure before assuming lease with landlord's successor, 14.36
Prepetition rent workouts, effect of, 14.37
Priority claim for postpetition rent, 14.40
Rights of assuming trustee or debtor, 14.35
Termination of tenancy. See **Termination of Tenancy**
Time limit for assumption or rejection, 14.34
Rules of court
Filing of stay of state court proceedings due to bankruptcy petition, 14.2, 14.5
Service of motion for relief from stay, local rules requiring, 14.25
Sanctions. See **Penalties**
Service of papers

Proof of service, request for, 14.58
Stay, service of motion for relief from, 14.25
Stay of proceedings (see Automatic stay affecting lease rights, above)
Surrender of premises (see Application for order to surrender premises, above)
Termination of stay (see Motion for relief from stay, above)
Termination of tenancy. See **Termination of Tenancy**
Violation of automatic stay
Amendment of pleadings as, 14.29
Negotiation in violation of automatic stay, enforceability of, 14.8
Penalties for, 14.4, 14.6
State court judgments as violation of stay, 14.10
Writ of possession after unlawful detainer judgment, effect of tenant filing bankruptcy petition on, 13.68, 14.9, 14.17

Base Rent. See **Rent Control**

Bias. See **Disqualification of Judge in Unlawful Detainer Action**

Blind Persons
Guide dog, prohibition against refusing to rent to blind person with, 1.62, 4.38

Boarders. See **Guests; Lodgers; Roommates**

Boarding Houses. See **Hotels and Motels**

Bonds and Undertakings
Injunctive relief in unlawful detainer action, requirement of bond for, 11.64
Stay of execution of unlawful detainer judgment pending appeal, posting undertaking for, 13.60

Breach of Contract
Habitability, claim for breach of warranty of, 3.46
Leases. See **Leases**

Breach of Covenant. See **Covenants**

Breach of Implied Warranty of Habitability. See **Habitability, Implied Warranty of**

Brokers
See also **Agents and Agency**
Mobilehome park management prohibited from requiring homeowner replacing mobilehome to use specific broker for purchase or installation of mobilehome, 6.57
Obtaining information about landlord from real estate broker, 5.35

Building Codes. See **Housing Codes**

Building Rules and Regulations. See **Rules and Regulations**

Buildings, Management of. See **Management of Property**

Burden of Proof
See also **Evidence; Proof**
ADA, no requirement that plaintiff prove landlord's intent to discriminate, 2.60
Bankruptcy stay, burden of proof in motion for relief from, 14.26
Discriminatory housing action, burden of proof in. See **Fair Housing Laws**
Habitability, preponderance of evidence for proving breach of implied warranty of, 12.53
Jury instructions regarding burden of proof. See **Jury Instructions in Unlawful Detainer Action**
Mobilehome owner's burden of proof to show park management charging fees for fines or penalties awarded against management, 6.40
Possession of premises, burden of proof on landlord to prove good faith reason for recovery of, 8.115
Rent control. See **Rent Control**
Retaliatory eviction
Jury instructions regarding burden of proof. See **Jury Instructions in Unlawful Detainer Action**
Landlord's motive in evicting tenant, burden of proof on tenant to show, 8.130, 12.38
Unruh Civil Rights Act as affirmative defense in unlawful detainer action, burden of proof on tenant raising, 8.120
Sexual harassment action against landlord, tenant's burden of proof, 3.70A
Unlawful detainer action

Jury instructions regarding burden of proof and preponderance of evidence, 12.46
Nonpayment of rent, landlord's burden of proof, 12.22
Summary judgment in unlawful detainer action, burden of proof in. See **Summary Judgment in Unlawful Detainer Action**
Waiver of breach by landlord, clear and convincing evidence required to prove, 10.60

California Environmental Quality Control Act (CEQA)
Rent control ordinances, inapplicability of Act to, 7.12

Capacity
Party to lease, capacity of, 1.16, 1.19
Unlawful detainer action, landlord's capacity to file, 9.34, 9.37

Capital Improvements. See **Improvements and Repairs**

Carcinogens
Disclosure by landlord of, 1.29

CEQA. See **California Environmental Quality Control Act (CEQA)**

Certificates and Certification
Bankruptcy proceedings, certifications regarding residential evictions. See **Bankruptcy and Insolvency**
Habitability, effect of estoppel certificate stating premises in good repair on claim for breach of warranty of, 5.9
Occupancy, certificate of
Eviction of tenant based on lack of, 12.22
Illegality of lease, lack of certificate of occupancy resulting in, 10.62
Unlawful detainer complaint, lack of certificate of occupancy as affirmative defense to, 10.62
Section 8 housing. See **Section 8 Housing**

Certiorari, Writ of
Unlawful detainer action, 13.63

Charitable Organizations
Renting to immigrants, charitable organizations' exemption from state regulations, 2.12

Charts, Checklists, Questionnaires, and Tables
Antidiscrimination laws, guide to, 2.28
Bankruptcy Abuse Prevention and Consumer Protection Act (2005 BAPCPA), table of effective dates for, 14.1B
Common defects in unlawful detainer complaints, 10.77
Demurrable defects in complaint, 10.31
Fair housing laws, relief under, 2.28
Information requested of prospective tenant, 4.8
Landlord fee agreement checklist, 4.2B
Mobilehomes
Common park rules and regulations, 6.142
Fees for utilities and services, 6.98
Sample eviction questionnaire, 9.27
Tenant fee agreement checklist, 5.4B

Children and Minors
Adults-only policy. See **Mobilehomes**
Capacity to enter into lease, minor lacking, 1.16
Common areas, landlord's duty of care to maintain for safety of children, 3.67A
Daycare business, tenant's right to operate on leased premises, 1.28
Excluding and evicting families with children, prohibition against, 8.119
Execution of lease on minor's behalf by guardian or conservator, 1.16
Occupancy limits as discrimination against families with children, 4.15
Occupants' identities, listing names of children in lease as method of determining, 1.21
Screening prospective tenants with children. See **Screening Prospective Tenants**
Unruh Act, discrimination against families with children prohibited, 2.58
Unsafe housing, landlord prohibited from refusing to rent to family with children on grounds of, 2.22

Cities and Counties
Implied warranty of habitability
Applicability to municipalities, 3.19

Inspection of property by city or county housing code-enforcement official, 3.10, 3.28
Uniform Housing Code, adoption of, 3.11D
Unlawful detainer action in court outside county where premises located, sanctions for filing, 9.33

Civil Rights
See also **Fair Housing Act; Unruh Civil Rights Act**
Generally, 2.29
Enforcement of Act
Private litigants, claims for relief filed by, 2.44
Remedies (see Remedies, below)
Housing discrimination based on race
Generally, 2.41, 4.14
Citizenship, prohibition against housing discrimination based on, 2.43
Private citizens, prohibition against racial discrimination in selling or renting of housing by, 2.42
Protected classes under Act, 2.43
Remedies
Attorney fees, 2.47
Damages, 2.45
Injunctive relief, 2.46

Class Action
Security deposit fees, class action over unlawful, 8.169
Unlawful detainer action, representing group of tenants in, 10.3

Clubs. See **Private Clubs**

Collateral Estoppel
See also **Estoppel**
Bankruptcy stay, state judgment for possession of premises as grounds for relief from, 14.20
DFEH ruling against party in administrative action, party collaterally estopped from bringing subsequent FEHA action, 2.56

Commercial Tenancies
Assignment and subletting. See **Assignment and Subletting**
Bankruptcy stay, effect of, 14.3, 14.14
Implied covenant of good faith and fair dealing in commercial leases, 3.75
Implied warranty of habitability, applicability to commercial tenancies, 3.18, 10.64
Inspection of property by landlord for dangerous conditions at time of execution of lease, 10.61
Key money, 4.29A
Notice requirements, lease provision modifying as void, 8.27
Repair-and-deduct remedy, availability in commercial tenancies, 3.15
Retaliatory conduct by landlord, protection against, 8.128
Security deposits. See **Security Deposits**
3-day notice to quit, stating amount of rent due in, 10.69

Common Areas
Habitability, applicability of implied warranty to common areas, 3.20, 6.16
Mobilehome parks. See **Mobilehomes**
Nuisance action based on secondhand smoke, 3.48A
Personal injuries. See **Personal Injuries**

Common Law
Abandonment under common law, proof of, 8.13
Ejectment. See **Ejectment**
Retaliatory eviction, defense against, 8.125
Utility service, common law cause of action against landlord for discontinuing, 8.149

Community Property
Execution of community real property lease, requirement that both spouses participate in, 1.17

Compensation. See **Salaries and Compensation**

Complaint in Unlawful Detainer Action
See also **Responsive Pleadings in Unlawful Detainer Action; Trial of Unlawful Detainer Action; Unlawful Detainer**
Affirmative defenses
Generally, 10.53

Certificate of occupancy, lack of, 10.62
Equitable defenses, 10.58
Fair Employment and Housing Act (FEHA), discriminatory acts prohibited under, 10.68
Fraud in execution of lease, defense based on, 10.55
Government housing, lack of good cause to evict from, 10.66
Habitability, breach of implied warranty of, 3.9, 10.64, 12.53
Improper foreclosure, 8.68A, 10.54
Improper notice following foreclosure, 10.54
Quiet enjoyment, breach of covenant for, 10.56
Rent control ordinance, violation of, 9.16A, 10.59
Repair, breach of express promise to, 10.61
Required language, rental agreement not translated into, 10.63
Retaliatory eviction of tenant as defense, 8.133, 10.65, 12.38
Setoff for rent overcharge, 10.57
3-day notice to pay rent or quit served more than 1 year after rent due, 10.69
Title to property, dispute over, 8.68A, 10.54
Unruh Civil Rights Act, discriminatory eviction under, 10.67
Waiver or estoppel, 10.60
Affirmative relief sought by tenant. See **Cross-Complaints**
Amendment of complaint
Generally, 9.43
Conforming complaint to proof. See **Conforming Pleadings to Proof**
Demurrer by tenant, amendment of complaint as result of, 10.30, 10.35
Malice, amendment of complaint to recover damages based on, 12.32
Motion to strike, effect on time to answer complaint, 10.38
Service of summons, effect of amending complaint after, 9.45
Supplemental complaint and amendment to complaint distinguished, 12.40
Answer to complaint
Generally, 10.50
Affirmative defenses (see Affirmative defenses, above)
Amendment of answer, 10.71
Conforming answer to proof. See **Conforming Pleadings to Proof**
Default entered against defendant, effect on subsequent filing of answer, 13.10
Demurrer to answer. See **Demurrer to Answer**
Discovery initiated by tenant before answering complaint, advantages of, 11.42
General denials in answer to verified complaint, restrictions on, 10.52
Judicial Council Form for answer, 10.51
Motion to strike answer, 10.38, 11.2
Verification of answer, 10.70
Checklist, common defects in unlawful detainer complaints, 10.77
Cross-complaint by tenant. See **Cross-Complaints**
Damages
Failing to request damages, effect of, 12.30, 13.19
Request for relief other than damages, 9.41
Defects in complaint, motion to strike on grounds of. See **Striking Unlawful Detainer Complaint, Motion for**
Defendant in unlawful detainer action, 9.35
Defenses
Affirmative defenses (see Affirmative defenses, above)
Trial, defenses at. See **Trial of Unlawful Detainer Action**
Demurrer to complaint. See **Demurrer to Complaint in Unlawful Detainer Action**
Dismissal of action. See **Dismissal of Action**
Documents required for, 9.37
Essential allegations in complaint, summary of, 9.37
Fees. See **Fees**
Fraud
Affirmative defense to complaint, fraud in execution of lease as, 10.55
Allegations of fraud in complaint, 9.8, 9.40
Habitability, no requirement that unlawful detainer complaint allege compliance with implied warranty of, 3.33
Judicial Council Forms
Answer to complaint, 10.51
Summons for unlawful detainer, 9.46
Unlawful detainer complaint, 9.31
Landlord-tenant relationship as prerequisite to unlawful detainer action, 9.36-9.37
Lender holding security interest in lease as necessary party, 9.35B
Limited versus unlimited civil case, 9.32

Memorandum in opposition to summary judgment motion, 11.39
Memorandum in support of motion. **Memorandum in Support of Motion**
New owner, substitution of plaintiff as, 9.34
Occupants not named in complaint, service on
Generally, 9.51
Eviction under writ of possession, 9.35A
Filing prejudgment claim, time limit for, 9.54
Investigation of unnamed occupants by process server, 9.52
Judicial Council Form, prejudgment claim of right to possession, 9.55
Manner of serving unnamed occupants, 9.53
Unknown tenants, serving prejudgment right of claim to possession on, 9.26
Optional forms of complaint available to attorney, Judicial Council form or original drafted complaint, 9.30
Plaintiff, landlord's legal capacity to sue as, 9.34, 9.37
Possession and damages, request for relief other than, 9.41
Prayer for relief, 9.41
Prejudgment claim of right to possession (see Occupants not named in complaint, service on, above)
Service of summons and complaint
Generally, 9.45
Constructive service by mail, 9.49, 13.2
Errors in summons, effect of, 9.45
Judicial Council Form, summons for unlawful detainer, 9.46
Notice of trial, service of, 9.7, 9.37, 11.43
Occupants not named in complaint (see Occupants not named in complaint, service on, above)
Personal delivery, service by, 9.47
Quashing service of summons. See **Quashing Service of Unlawful Detainer Summons**
Reasonable diligence in service of summons, requirement of, 9.47
Response by tenant to notice of abandonment, service by certified mail after, 9.50
Substituted service, requirements for, 9.48
Striking complaint, motion for. See **Striking Unlawful Detainer Complaint, Motion for**
Subject matter jurisdiction of superior court, 9.32
Successor in interest as proper plaintiff despite lack of privity with tenant, 9.34
Summons
Default, filing original unlawful detainer summons with request for entry of, 13.3
Service of (see Service of summons and complaint, above)
Time
Extension of time to plead. See **Extension of Time**
Filing complaint, time for, 9.44
Filing prejudgment claim, time limit for, 9.54
Holidays. See **Holidays**
Venue for unlawful detainer action, 9.33, 9.37
Verification of complaint
Generally, 9.42
Answer to complaint, verification of, 10.70
Attorney's verification of, 9.42, 10.23
Motion to strike unverified complaint, 10.45
Service of summons, effect of verifying complaint after, 9.45
Writ of immediate possession filed with complaint, 9.56

Complaints
See also **Answers; Cross-Complaints**
Eviction control ordinance, requirement of alleging compliance with ordinance in complaint, 7.74
Fair Employment and Housing Act, housing complaints under. See **Fair Employment and Housing, Department of (DFEH)**
Forcible entry and forcible detainer, complaint for, 8.146
Housing discrimination complaints. See **Fair Housing Act**
Unlawful detainer complaint. See **Complaint in Unlawful Detainer Action**

Conciliation or Mediation of Housing Dispute
Department of Fair Employment and Housing (DFEH), resolution of housing discrimination complaint through conciliation or mediation, 2.54-2.55
Fair Housing Act. See **Fair Housing Act**

Condemnation, 6.69

Condition of Premises
See also **Dangerous Conditions of Property**

Damage to property. See **Damage to Property**
Habitability, implied warranty of. See **Habitability, Implied Warranty of**
Lease provisions
Joint inspection of premises by landlord and tenant, statement on, 1.53-1
Landlord's duty to maintain premises, 1.52
Landlord's itemization of fixtures, furnishings, and appliances, 1.53-2
Repairs. See **Improvements and Repairs**
Strict liability of landlord for defective condition on premises, overturning of, 3.67, 3.70

Condominium Conversions
Eviction of tenants under Ellis Act. See **Eviction**
Owner-occupancy, rent-board restrictions on, 7.68
Pre-sale and development issues, 4.52

Condominiums
Conversions to condominiums. See **Condominium Conversions**
Rent control by local entities, 7.16

Confidentiality
Department of Fair Employment and Housing (DFEH), resolution of housing discrimination complaint through confidential conciliation process, 2.54
Rent control board, confidentiality of tenant information furnished to, 7.44

Conforming Pleadings to Proof
Generally, 9.43
Liberality in granting amendments for, 12.39
Scope of amendments, 12.40

Consent
Alterations, landlord's consent required to make, 1.60
Assignment. See **Assignment and Subletting**
Entry by landlord, tenant's consent to, 3.2
Locks, landlord's consent required for changing or adding, 1.66-2
Mobilehome owner's consent to entry by management, 6.139
Month-to-month tenancy, landlord's consent required for creation of, 8.82
Pets, landlord's consent required for, 1.62
Repairs or improvements made without landlord's consent, no right to reimbursement for, 3.73
Roommates, lease requiring landlord's consent for, 5.29
Surrender of premises. See **Surrender of Premises**
Tenancy at will, landlord's consent required for creation of, 1.10
30-day or 60-day notice, tenant's consent required for withdrawal of, 8.75

Conservatorships. See **Guardianships and Conservatorships**

Consideration
Mutual consideration requirement for valid lease, 1.22
Tenant's agreement to maintain premises as consideration for rental, 1.61

Consolidation of Actions. See **Trial of Unlawful Detainer Action**

Constitutional Law
Due process
Denial of landlord's right to cross-examine witnesses as denial of due process, 7.11, 7.13
Government-subsidized housing. See **Government-Subsidized Housing**
Mobilehomes. See **Mobilehomes**
Rent control ordinance as violation of due process, 7.14
Evictions
Due process in eviction (see Due process, above)
Ellis Act prohibiting local ordinances preventing landlords from going out of business, constitutionality of, 7.64-7.64A
Owner occupancy, constitutional right of owner to evict on grounds of, 7.68
Retaliatory eviction (see Retaliatory eviction, below)
Picketing in front of residences, constitutionality of injunctions prohibiting, 5.37
Privacy, constitutional right to, 2.8
Rent control. See **Rent Control**
Retaliatory eviction

Generally, 8.127
Exercise of constitutional rights, prohibition against evicting tenant for, 8.113
Reporting housing code violations, prohibition against evicting tenant for, 8.110
Security deposit law, constitutionality of, 8.168
Senior housing provisions under Federal Fair Housing Act, constitutionality of, 2.25
Unlawful detainer action
Statute providing shorter time period to respond in unlawful detainer action, constitutionality of, 13.2
Tenant screening report containing unlawful detainer information, constitutionality of Investigative Consumer Reporting Agencies Act (ICRAA) as applied to, 4.9

Construction and Interpretation
See also **Definitions**
Accommodations under Ellis Act, 7.64B
Ambiguities. See **Ambiguities**
Americans with Disabilities Act (ADA), 2.26
Area of land, 6.11
Attorney fee provision in lease
Reciprocity of lease provision, 1.74
Strict construction of fee clause, 14.51
Breach of covenant, strict construction against landlord in actions involving, 8.47
Civil Rights Act of 1866, construction of, 2.41
Contracts, applicability of rules of construction to leases, 3.9
Cost-Hawkins Rental Housing act, interpretation of, 7.25, 7.25B
Covenants in lease, mutual dependency of, 1.2
Expired lease, 14.41
Fair rate of return, 7.14
Federal price control regulations during World War II, interpretation of, 9.16C
Futile gesture doctrine, 2.69
Grace period in lease for payment of rent, interpretation of, 8.42
Historic interpretation of lease, 1.2
Landlord's consent required for assignment of lease, prohibition against unreasonably withholding consent, 1.54
Military clause, 1.73
Mobilehomes
Mobilehome Residency Law, liberal construction of, 6.14, 6.89
Rental agreement, interpretation of, 6.130
Normal business hours, 4.43
Options to renew lease, 4.41
Plain text, construing statute according to, 8.52
Ratio utility bill-back system (RUBS), 1.56, 4.41A-4.41B, 4.41E
Renewal or extension of lease, construction of lease provision for, 3.61
Rent control ordinances, construction of, 7.42, 9.14
Security deposit law, ambiguities in, 4.26
Senior housing laws, 2.25
Service of process, strict construction of, 10.19
Sexual harassment action against landlord, broad construction of FEHA to encompass, 8.122
Summary judgment motion, construction of party's declarations, 11.39
3-day notice stating incorrect amount of rent due, effect of, 8.37
Unlawful detainer and forcible entry and detainer statutes, strict construction of, 8.145
Unruh Civil Rights Act, arbitrary discrimination prohibited under, 2.21

Constructive Eviction. See **Eviction**

Continuance
Conforming pleadings to proof, restrictions on continuance requested based on, 12.40
Demurrer, continuance of hearing on, 10.33
Trial date, continuance of. See **Setting Unlawful Detainer Case for Trial**

Contractors. See **Independent Contractors**

Contracts
Breach of contract. See **Breach of Contract**
Leases. See **Leases**
Mobilehome rental agreement. See **Mobilehomes**
Privity of contract
Lease, privity of contract created by, 1.2

Surrender of premises, effect of landlord's acceptance of tenant's offer concerning, 8.8
Unlawful detainer action, landlord's successor in interest as proper plaintiff despite lack of privity with tenant, 9.34

Conversion
Personal property of tenant, landlord's wrongful entry onto premises and wrongfully holding, 8.154

Conversion to Condominiums. See **Condominium Conversions**

Coordination of Actions, 11.69

Corporations
Execution of lease by, 1.19
Officers' liability for corporation's noncompliance with Fair Housing Act, 2.68
Operational officer defined, 1.19

Costa-Hawkins Rental Housing Act. See **Rent Control**

Costs
See also **Expenses and Expenditures; Fees**
Defaults. See **Default and Default Judgment in Unlawful Detainer Action**
Deposition costs awarded to prevailing party, 11.7
Dismissal of non-meritorious appeal to avoid imposition of costs, 13.58
FEHA, award of costs under, 2.56
Forfeiture, payment of costs as condition for granting relief from, 13.56
Fraudulent eviction of tenant based on landlord's intention to occupy premises, recovery of costs, 7.66
Habitability, recovery of costs in action based on landlord's breach of implied warranty of, 3.41, 3.46, 10.4, 13.25
Housing discrimination
Attorney General's civil housing discrimination action, award of costs in, 2.40
Chart, availability of costs under fair housing laws, 2.28
Civil action for housing discrimination, award of costs in, 2.39
Fair Employment and Housing Commission (FEHC), costs awarded by, 2.55
Fair Housing Act, recovery of costs under, 2.38
Waiver of costs for party in, 2.39
Judgment in unlawful detainer action, award of costs to prevailing party. See **Judgment in Unlawful Detainer Action**
Jury fees as taxable costs, 11.53
Limited civil case, amount of costs not included in aggregate amount claimed in, 9.32
Mobilehomes. See **Mobilehomes**
Rent control, recovery of costs. See **Rent Control**
Strike, award of costs against party filing frivolous motion to, 10.38A
Unlawful detainer action, recovery of costs from landlord, 3.15A
Utilities, submetering discount for landlords to cover costs associated with providing, 4.41C
Waiver of costs and fees. See **Fees**

Counseling Landlords
See also **Counseling Tenants**
Generally, 4.1
Conversion of property, pre-sale and development issues associated with, 4.52
Drug-related activity on premises, 4.44
Fixed-term tenancy. See **Fixed-Term Tenancy**
Leases. See **Leases**
Management of property. See **Management of Property**
Periodic tenancy. See **Periodic Tenancy**
Rent. See **Rent**
Retainer agreements, 4.2-4.2B, 9.23A
Security deposits. See **Security Deposits**
Soliciting and choosing tenants
Advertising vacant units, 4.3
Identification of tenant, 4.3A
Screening prospective tenants. See **Screening Prospective Tenants**
Tenant's attorney, caution in providing legal advice to landlord, 5.12

Counseling Tenants
See also **Counseling Landlords**
Generally, 5.1
Retainer agreements, 5.4A-5.4B, 10.3A

Rights of tenants
Breaking lease by tenant, 5.19
Illegal entry by landlord. See **Entry, Right of**
Legal eviction procedures. See **Eviction**
Rent increases, defeating. See **Rent**
Roommates. See **Roommates**
Self-help evictions by landlord, remedies for. See **Self-Help Eviction**
Uninhabitable conditions. See **Habitability, Implied Warranty of**
Strategies for resolving tenant's problems
Generally, 5.2
Litigation as option, 5.3
Settlement as option, 5.4
Tenant organizations. See **Tenant Organizations**

Counties. See **Cities and Counties**

County Recorder
Obtaining information about landlord from, 5.35

Covenants
Assignment and subletting. See **Assignment and Subletting**
Breach of covenant
Breaking of lease by tenant, 5.19
Consequences of tenant's breach, service of notice to tenant, 1.68
Eviction of tenant for, 4.17, 7.57
Material and reasonable covenants provision, 1.67
Termination of tenancy by tenant after landlord's breach of lease covenant, 8.19
3-day notice. See **3-Day Notice**
Waiver of breach, effect on subsequent breaches, 1.56-11, 1.75
Eviction for failure to cure breach of covenant, 4.17, 7.57
Good faith and fair dealing, implied covenant of, 3.75
Independent covenants, doctrine of, 1.2, 3.9, 10.61
Quiet enjoyment. See **Quiet Enjoyment, Implied Covenant of**
Renewal or extension of lease. See **Renewal or Extension of Lease**
Repairs, lease covenant to make, 3.9

Credit Reports and Agencies
Disclosure by landlord of intent to report tenant's negative credit to credit reporting agency, 1.29
Information disputed by consumer, requirements for landlord supplying credit bureau with, 13.75
Landlords, credit check requirements imposed on, 4.9
Lease provision, notice that failure to pay rent on time may be reported to credit record agencies, 1.43
Nonrefundable applicant screening fee, 1.51, 4.11, 4.23
Notice to tenant before reporting tenant to credit reporting agency, 4.9
Prospective tenant's credit history, landlord's review of, 2.9
Security freeze placed on credit report by consumer, 4.9

Criminal Law
Drugs. See **Drugs and Alcohol**
Eviction of tenant for criminal activities. See **Eviction**
Forcible entry and detainer, criminal penalties for, 5.20, 8.152
Gang violence, mobilehome park owner's duty to protect residents from, 6.16
Government subsidized housing owner's inquiry into applicant's criminal conduct, 2.8
Habitability, landlord's failure to provide security against crimes as breach of implied warranty of, 3.25
Nuisance. See **Nuisance**
Screening prospective applicants, public housing authority's right to check criminal background of applicants when, 2.15
Security precaution, landlord's failure to take (see Third parties, landlord's liability for criminal acts performed by, below)
Substandard mobilehome, illegality of selling, 6.57A
Termination of tenancy based on tenant's criminal activity, 1.33
Third parties, landlord's liability for criminal acts performed by
Generally, 3.68
Prior similar incidents, landlord's duty of care based on, 3.68B
Public buildings, limited liability of public entity for third party criminal actions in, 3.68D
Withholding rent if landlord fails to keep premises safe from third parties, 3.9
3-day notice to quit premises due to unlawful purpose, landlord's service of, 8.59
Utilities, landlord's liability for interfering with, 8.147

Cross-Complaints
See also **Complaints**
Ejectment action, right of tenant to file cross-complaint in, 9.11
Unlawful detainer action, tenant's cross-complaint in
Generally, 9.8, 10.72-10.73
California, prohibition against cross-complaints in, 10.73
Continuance of trial in order to file cross-complaint, 11.51
Forcible entry or detainer, cross-complaint against landlord for, 10.73
Procedure for filing cross-complaint, 10.76
Statutes governing cross-complaints, 10.76
Vacated premises, exception to ban on cross-complaints if tenant has, 10.74
Waiver of objection to cross-complaint, 10.75

Cross-Examination of Witness
See also **Examination of Witness**
Deposition, cross-examination of witness at, 11.8
Evidentiary hearing before rent control board, landlord's right to cross-examine witnesses at, 7.11

Damages
See also **Punitive Damages**
Abandonment of premises by tenant, recovery of liquidated damages by landlord, 8.16
Actual damages, recovery of, 2.55
Breaking of lease by tenant, actions by tenant to mitigate landlord's damages, 5.19
Complaint in unlawful detainer action. See **Complaint in Unlawful Detainer Action**
Demurrer, statutory damages for filing frivolous, 10.37
Disabled person, damages for denying equal access in housing to, 2.60
Drug dealing on premises, recovery of damages by neighbors, 4.44
Emotional distress. See **Emotional Distress**
Enforcement of judgment for, 13.74
Eviction, damages for. See **Eviction**
Extension of trial date, damages resulting from. See **Setting Unlawful Detainer Case for Trial**
Fixture, tenant's liability for removal of, 8.163
Forcible entry and detainer, damages in action for, 8.144
Habitability, damages for breach of implied warranty of. See **Habitability, Implied Warranty of**
Holding over. See **Holding Over**
Housing discrimination
Generally, 2.2
Chart, availability of damages under fair housing laws, 2.28
Civil action, award of damages in, 2.39
Civil Rights Act of 1866, award of damages under, 2.45
Fair Housing Act, recovery of damages under, 2.38
FEHA, award of damages in civil action brought under, 2.56
Unruh Civil Rights Act, award of damages under, 2.59, 8.121
Implied covenant, damages for breach of, 8.47
Judgment in unlawful detainer action. See **Judgment in Unlawful Detainer Action**
Late payment of rent, liquidated damages clause in lease governing, 4.43A
Measure of damages
Estimated cost of repair as measure of damages for tenant's failure to exercise ordinary care, 3.73
Judgment in unlawful detainer action, 13.19
Rent control ordinance, measure of damages for breaching, 7.78
Mitigation of damages by reletting premises after tenant's abandonment, 8.14
Penalties. See **Penalties**
Presumptions regarding. See **Presumptions and Inferences**
Reentry by landlord without filing notice of belief of abandonment, landlord's liability for damages, 8.9
Rent control ordinances, damages for violating. See **Rent Control**
Repairs. See **Improvements and Repairs**
Security deposit, damages for landlord's improper retention of, 8.174
Sexual harassment action against landlord, damages available in, 3.70A
Sublessee's improper use of premises, sublessor's liability for damages, 3.55
Subpoena duces tecum, liability for disobeying, 12.18
Tenant organization, recovery of damages by, 5.39
Trial for nonpayment of rent. See **Trial of Unlawful Detainer Action**
Unfair business practices by landlord, restitution of unreasonable liquidated damages, 8.169

Unlawful detainer. See **Unlawful Detainer**
Unruh Civil Rights Act, liability for damages for violating, 2.59, 8.121
Wrongful eviction, recovery of damages for, 8.150

Damage to Property
Landlord's liability to third parties. See **Personal Injuries**
Tenant's liability for property damage, duty to repair, 3.73
Unlawful detainer action, prohibition against seeking recovery for damage to property in, 9.8

Dangerous Conditions of Property
See also **Condition of Premises**
Animals or off-premises conditions, lack of duty on landlord to warn tenants about, 3.68B, 3.72
Inspection of property
Commercial tenancy, landlord's inspection of property for dangerous condition at time of lease's execution, 10.61
Mold conditions, 4.16D, 5.10
No duty on landlord to inspect premises for dangerous conditions, 3.72

Daycare
Tenant's right to operate small daycare business on leased premises, 1.28

Death
Disclosures by landlord regarding deaths on premises, 1.29
Lease provisions regarding tenant's death. See **Assignment and Subletting**
Surviving tenant, protection from eviction in event of tenant's death, 5.29
Termination of tenancy
Generally, 7.72
Month-to-month tenancy, termination of tenancy on death of tenant, 1.65, 8.21
Tenancy at will or at sufferance, termination after death of landlord or tenant, 8.4

Declarations. See **Affidavits and Declarations**

Declaratory Relief
Bankruptcy stay, declaratory relief action exempt from, 14.15
Habitability, declaratory relief for landlord's breach of implied warranty of, 3.44
Retaliatory action by landlord, declaratory relief against pending, 8.134

Default and Default Judgment in Unlawful Detainer Action
See also **Unlawful Detainer**
Generally, 13.2
Admission, withdrawal under default statute, 11.26
Affidavits and declarations
Attorney's affidavit of fault in motion for relief from default, 13.8
Motion for relief from default, affidavit or declaration in support of, 13.10, 13.15
Personal testimony, effect of using affidavits in lieu of, 13.5
Answer to complaint, effect of default on filing, 13.10
Collateral estoppel effect of default judgment, 14.20
Costs
Attorney's affidavit of fault in motion for relief from default, court order for costs to opposing counsel or parties, 13.8
Itemizing costs on Request to Enter Default, 13.3
Declarations (see Affidavits and declaration, above)
Discovery sanction, entering default judgment as, 11.29
Grounds for relief from default
Attorney's mistake, inadvertence, surprise, or neglect, requirement that court vacate default, 12.69, 13.8
Defendant's mistake, inadvertence, surprise or excusable neglect, court's discretion to vacate default on grounds of, 13.7
Fraud, relief from default obtained by, 13.9, 13.13
Judicial Council Form, request for entry of default, 13.6
Mobilehome, default judgment declaring abandonment of, 6.84
Notice
Damages greater than amount pleaded in complaint, prior notice to tenant required for, 13.5
Relief from default (see Relief from default, below)
Peremptory challenge of judge, effect of previously entered default on, 12.7
Procedure for obtaining default judgment
Entry of default, 13.3
Monetary relief, judgment for, 13.5
Restitution of premises, judgment for, 13.4

Quashal motion, effect on motion for default, 10.18
Relief from default
Actual notice of lawsuit, request for relief based on lack of, 13.15
Answer filed with motion for relief, 13.10
Conditions for relief under CCP §473(b), 13.14
Failure to appear, setting aside default judgment entered as result of, 12.69
Grounds for relief from default (see Grounds for relief from default, above)
Limited jurisdiction court, motion for relief from default in, 13.16
Noticed motion under CCP §473(b), 13.10
Stipulation to set aside default, 13.13
Time limits for motion (see Time limits for motion for relief, below)
Setting aside default (see Relief from default, above)
Time limits for motion for relief
Fraud or extrinsic mistake, motion to set aside default past 6-month time limit on grounds of, 13.13
Service of default or default judgment on defendant, 90-day time limit to request relief after, 13.12
6-month time limit for requesting relief, 13.11

Defects
Damage to property. See **Damage to Property**
Habitability. See **Habitability, Implied Warranty of**
Repairs. See **Improvements and Repairs**

Defenses
Affirmative defenses. See **Affirmative Defenses**
Eviction, defenses to. See **Eviction**
Unlawful detainer action
Complaint, affirmative defenses to. See **Complaint in Unlawful Detainer Action**
Trial, defenses at. See **Trial of Unlawful Detainer Action**
Wrongful termination as defense to, 1.4

Definitions
See also **Construction and Interpretation**
Abandonment, 6.84, 8.8, 8.13
Action, 9.9, 11.4
Actual damages, 2.55
Actual possession (of premises), 8.139
Advance fee, 4.11
Any rights under the law, 8.113
Arbitrary, 5.7, 8.119
Area of land, 6.11
Assignment (of leasehold interest), 3.50
Back rent, 13.18
Boarder, 7.24
Change of use of mobilehome park, 6.50
Chapter 22 bankruptcy, 14.52
Commercial modulars, 6.7
Common areas, 3.20
Comparable units, 7.65
Conspicuous service, 8.65
Constructive eviction, 3.15B, 8.19
Consumer debts, 14.13
Culpable tenants (drug use), 1.33
Cumis counsel, 9.29
Daily rental value, 13.65
Debt collectors, 8.26A, 13.76
Demurrer, 10.29
Disability, 2.26
Document, 11.20
Dwelling, 2.30
Endless lease, 1.36
Estate for years, 1.8
Extension of lease, 3.60
Factory-built housing, 6.6
Familial status, 2.23
FHA housing, 1.32

Fixed-term tenancy, 1.8
Fixture, 8.163
Forcible detainer, 8.141
Forcible entry, 8.140
Gender, 2.48
General adjustments, 7.33
Good faith (for eviction), 7.55
Habitability, 12.54-12.54A
Handicap, 2.26
Holiday, 8.42, 8.77
Homeowner, 6.12
Hostile environment sexual harassment, 2.27G
Housing accommodation, 2.50, 2.60
Housing discrimination, 2.50
Innocent tenants (drug use), 1.33
Inspection reports, 3.28
Invitee, 3.71
Key money, 4.29A
Late charge, 8.40
Lease, 1.1, 6.21
Lessee, 1.1
Lessor, 1.1
License, 1.6
Licensee, 3.71
Limited scope representation, 4.2A, 5.4A, 9.23A, 10.3A
Lodger, 1.3-1.3B, 7.24
Luxury units, 7.22
Malice, 12.33
Manufactured housing communities, 6.9
Mobilehome lease, 6.21
Mobilehome park, 6.9-6.11, 6.16
Mobilehome rental agreement, 6.21
Mobilehomes, 6.4
Multifamily manufactured homes, 6.8
Net listing, 6.57
New trial, 12.5
Normal business hours, 3.2, 4.43
Nuisance, 3.7, 4.44, 8.58-8.59
Occupant, 6.5, 8.141
Older persons, 6.18, 6.38
Operational officer, 1.19
Partial summary judgment, 11.31
Party, 12.16
Pass-throughs (to tenant), 6.29
Pattern or practice of discrimination, 2.40
Penalties, 7.44
Periodic tenancy, 1.1, 1.9, 8.20
Personal characteristics, 2.21
Personal delivery, 9.47
Personal service, 10.19
Persons who hire, 1.3B
Property of the estate, 14.9, 14.11
Public housing, 1.33
Qualified permanent residents, 2.25B
Quid pro quo sexual harassment, 2.27G
Reasonable accommodation, 2.27A
Reasonable rent, 12.36
Recreational vehicle park, 6.10
Recreational vehicles, 6.5
Renewal of lease, 3.60
Rental agreement, 1.1, 6.21
Repair-and-deduct, 1.60
Resident, 6.5, 6.91
Residential hotel, 1.3C
Retroactive rent abatement, 3.43

Revesting, 14.16A
Screening fee, 4.11
Security, 4.23, 8.168
Senior homeowner, 6.38
Sexual orientation, 2.58
Small daycare business, 1.28
Source of income, 2.9B
Sublease, 3.50
Surrender, 8.17
Surrender of premises, 8.8
Surviving tenant, 5.29
Tenancy, 6.12
Tenancy at will, 1.10
Tenant, 6.5, 8.83, 8.142
Tenantability, 4.16B
Term of tenancy, 1.27
Till tap, 13.74
Trade fixtures, 8.165
Transient occupant, 1.3C
Trespasser, 3.71
Trespass to property, 1.11A
Unbundling, 4.2A, 5.4A, 9.23A, 10.3A
Untenantable, 3.12
Warehouse's lien, 6.79
Without consent of the owner, 8.152

Delivery
Rent, specifying mode of delivery of, 4.33

Demolition of Buildings
See also **Destruction of Premises**
Local ordinance restricting landlord's right to demolish building and go out of business, 7.64
Rent control ordinance, applicability to demolishment of residential property and construction of new residential rental units, 7.25, 7.64D

Demurrer to Answer
Generally, 10.29
Leave to answer complaint after demurrer overruled, 10.34
Time limit for amending complaint after, 10.71, 11.2

Demurrer to Complaint in Unlawful Detainer Action
See also **Unlawful Detainer**
Generally, 10.29
Checklist, demurrable defects in complaint, 10.31
Extension of time to plead. See **Extension of Time**
Form, demurrer to complaint, 10.36
Frivolous demurrer, sanctions for filing, 10.37
Hearing (see Procedure for demurrer, below)
Landlord's response to demurrer, 10.30
Memorandum supporting demurrer (defective 3-day notice case), 10.36A
Motion to strike filed with demurrer, 10.38, 11.2
Order after hearing
Leave to answer complaint if demurrer overruled, 10.34
Sustaining demurrer without leave to amend complaint, 10.35
Procedure for demurrer
Order after hearing (see Order after hearing, above)
Scheduling hearing on demurrer, 10.32
Supporting documents, 10.33, 10.36A
Quashal motion
Effect of filing demurrer on, 10.29
Unlawful detainer complaint's failure to state cause of action, comparison of quashal motion to demurrer, 10.21
Rules of court affecting pleadings, 10.36
Tactical considerations for tenant, 10.30
Time. See **Time**

Department of Fair Employment and Housing. See **Fair Employment and Housing, Department of (DFEH)**

Depositions in Unlawful Detainer Action
See also **Discovery; Unlawful Detainer**
Generally, 11.7
Before unlawful detainer action filed, taking deposition, 11.10
Distinguishing written interrogatories from deposition on written questions, 11.12
Inspection of documents at deposition, 11.9
Procedures for taking deposition, 11.8

Deposits
See also **Security Deposits**
Execution of lease, deposit on, 1.39
Holding deposit, 1.39
Mobilehomes. See **Mobilehomes**
Pet deposit, public housing tenants' payment of, 2.14
Unlawful detainer action
Extension of trial date, order to deposit landlord's potential damages, 11.49
Rent, deposit of, 9.7

Description of Property
Lease provisions
Generally, 1.23
Check in/check out list, 1.25
Form, 1.38
Furniture inventory, sample form, 1.26
Joint prepossession inspection by landlord and tenant, 1.24
30-day or 60-day notice, description of property in, 8.71
3-day termination notice, description of premises in, 8.31

Destruction of Premises
See also **Demolition of Buildings**
Termination of tenancy as result of, 8.5

Directors and Officers
Corporation's noncompliance with Fair Housing Act, officers' liability for, 2.68
Operational officer defined, 1.19

Disabled Persons
Accessibility requirements for disabled persons, 2.27C
ADA. See **Americans with Disabilities Act (ADA)**
Antidiscrimination laws, 2.20, 2.29
Definition of, 2.26
Ellis Act evictions, 7.64F, 8.22C
Equal access to housing accommodations for disabled persons, CC §54.1 requiring, 2.60
Fair Housing Act. See **Fair Housing Act**
FEHA, landlord's inquiries about prospective tenant's disabilities prohibited, 4.12
Lease provisions regarding tenant's disability. See **Assignment and Subletting**
Live-in aide for disabled tenant, requirement that landlord allow, 2.27A
Mobilehomes. See **Mobilehomes**
Modifications of premises
Discrimination, refusal to permit modification of premises for disabled person as, 2.50
Landlord's duty to permit reasonable modifications of premises for disabled tenants, 2.27B
Public housing
Preferences for disabled persons, 2.14
Reasonable accommodations and modifications for disabled persons, 2.27-2.27D
Reasonable accommodation
Assistive pets, reasonable accommodations including allowing, 1.62
Family member cosigning lease guaranteeing rent payment by disabled person as reasonable accommodation of tenant's inability to meet landlord's income requirements, 2.9D
Modifications and reasonable accommodations for disabled persons, 2.27-2.27D
Screening process for prospective tenants, disabled person's right to request reasonable accommodation in, 2.4
Screening requirements for prospective tenants, effect on disabled persons. See **Screening Prospective Tenants**
Unruh Civil Rights Act. See **Unruh Civil Rights Act**

Disciplinary Action Against Attorneys
Delaying tactics in unlawful detainer action, disciplining attorney for, 10.2
Delay or harassment, disciplinary action against attorney filing action for purposes of, 5.39
Misrepresentation of facts or law to opponent appearing in propria persona as grounds for disciplinary action, 9.21
Rules of Professional Conduct, disciplinary action against attorney for violating, 9.20

Disclaimer
Public policy, disclaimer of liability by landlord as void against, 3.69

Disclosures
Agent for service of process, landlord's disclosure of, 1.21A, 1.29, 4.45
Lead-based paint. See **Lead-Based Paint**
Leases. See **Leases**
Mandatory disclosures re environmental and other hazards, 4.16A-4.16D
Methamphetamine contamination, property owner's disclosure obligations, 1.29, 3.11B, 4.16C
Mobilehomes. See **Mobilehomes**
Pest control disclosure notice, 4.16E
Professional liability insurance, attorney's duty to disclose absence of, 4.2C, 5.4A
Public records held by government agency, disclosure of, 5.35
Toxic mold, presence of, 3.11B, 4.16D

Discovery
See also **Inspection of Documents in Unlawful Detainer Action**
DFEH, discovery powers of, 2.53
Peremptory challenge of discovery referee, 12.7B
Unlawful detainer action
Generally, 9.9, 11.3
Admissions, request for. See **Admissions in Unlawful Detainer Action, Request for**
Answering complaint, tenant initiating discovery before, 11.42
Declarations. See **Affidavits and Declarations**
Depositions. See **Depositions in Unlawful Detainer Action**
Interrogatories. See **Interrogatories in Unlawful Detainer Action**
Protective orders. See **Protective Order in Unlawful Detainer Action**
Sanctions. See **Penalties**
Scheduling discovery, 11.5-11.6
Statutory authority for discovery in unlawful detainer actions, 11.4

Discretion of Court
Bankruptcy court's discretion to annul automatic stay retroactively, 14.21
Costs, court's discretion to award, 13.21
Default, discretion of court to vacate, 13.7
Unlawful detainer action
Attorney fees, award of, 13.29
Consolidation of actions, 11.65
Escrow of rent, discretion of court to order. See **Escrow of Rent Pending Unlawful Detainer Action**
Extension of time to plead in unlawful detainer action, restrictions on court's discretion to grant, 10.48
Forfeiture of lease, relief from. See **Forfeiture**
Nonpayment of rent, discretion of court in awarding statutory damages, 12.34
Oral amendment of unlawful detainer action by landlord, court's abuse of discretion in permitting, 12.40
Stay of execution of unlawful detainer judgment. See **Stay of Execution of Unlawful Detainer Action**

Discrimination
See also **Fair Housing Laws; Racial Discrimination; Sex Discrimination**
ADA. See **Americans with Disabilities Act (ADA)**
Advertising vacant units, prohibition against discrimination in, 4.3
Age. See **Age**
Chart, guide to antidiscrimination laws, 2.28
Civil Rights Act. See **Civil Rights Act**
Disparate impact of screening standards on protected classes. See **Screening Prospective Tenants**
Domestic violence, discriminating against tenant based on, 2.27H
Evaluating prospective tenant's application, state and federal laws prohibiting discrimination, 4.13
Fair Housing Act. See **Fair Housing Act**
Federal and state laws prohibiting discrimination, 2.20, 2.29
FEHA. See **Fair Employment and Housing Act (FEHA)**
Investigation of housing discrimination complaints. See **Investigations**

Rental discrimination. See **Rental Discrimination Action, Prosecution of**
Screening prospective tenants. See **Screening Prospective Tenants**
Section 8 housing certificates or vouchers, local ordinances prohibiting discrimination against tenants holding, 2.9B
Sexual orientation. See **Sexual Orientation**
Unruh Civil Rights Act. See **Unruh Civil Rights Act**

Dismissal of Action
Bankruptcy, motion to dismiss, 14.32, 14.52
Complaint filed with Department of Fair Employment and Housing (DFEH), requirements for dismissal of, 2.53
Demurrer without leave to amend, court's dismissal of complaint after granting, 10.35
Unlawful detainer action
Costs, early dismissal of nonmeritorious appeal to avoid imposition of, 13.58
Costs memorandum, defendant filing after plaintiff's voluntary dismissal of action, 13.21
Discovery sanction, dismissal of action as, 11.29
Fatally defective complaint, dismissal without prejudice of, 10.30
Prevailing party for purposes of attorney fees award, effect of dismissal on determining, 13.27
Stipulation for dismissal of, 9.19
Venue, dismissal on grounds of improper, 9.33
Voluntary dismissal
Lack of mandatory relief under CCP §473, 9.18A
Memorandum of costs, defendant filing after plaintiff's voluntary dismissal of action, 13.21

Disparate Impact in Housing
Generally, 2.65
Recipients of Aid to Families with Dependent Children, effect of landlord refusing to rent to, 2.27F
Screening prospective tenants. See **Screening Prospective Tenants**

Disparate Treatment in Housing, 2.63

Disqualification of Judge in Unlawful Detainer Action
See also **Unlawful Detainer**
Challenge for cause
Generally, 12.2
Procedures for challenging for cause, 12.3
Standard for disqualification in contested challenge for cause, 12.4
Peremptory challenge of judge
Generally, 12.5
Exercise of peremptory challenge, effect of, 12.8
Procedures for peremptory challenge, 12.6
Time limit for making peremptory challenge (see Time limit for making peremptory challenge, below)
Writ of mandate to review order granting or denying motion to challenge judge, 12.8A
Tactical considerations in challenging judge, 12.9
Time limit for making peremptory challenge
Generally, 12.3
After appeal on remand, 12.7
Before trial commences, 12.7
Commencement of hearing, challenging judge before, 12.7A
Intervening decision on issue of fact relating to merits, restriction on challenging judge after, 12.7B

Dogs. See **Pets**

Domestic Violence
Discriminating against tenant based on, 2.27H
Section 8 Voucher tenant denied admission based on status as domestic violence victim, prohibition against, 1.33, 1.36, 2.15A, 2.17
Termination of lease by domestic violence victim, 8.21B

Drafting Leases. See **Leases**

Drugs and Alcohol
Abatement, notice to landlord regarding drug dealing on premises and reasonable time for, 3.7, 3.10, 4.44
Bankruptcy proceedings
Exception to stay for eviction for endangerment of property or illegal use of controlled substances on it, 14.16B, 14.17, 14.68
Lessor's certification of endangerment of property or illegal use of controlled substance, 14.73
Disability, illegal use of drugs not within definition under state and federal law, 2.26

Eviction hearing for public housing tenants evicted for drugs, 1.33
Liability of landlord for drug dealing on premises, 3.7, 3.25, 3.68A, 4.44
Local ordinances relating to drug abatement, state law not preempting, 4.44
Methamphetamine contamination
Mobilehome owners and mobilehome park operators subject to Methamphetamine Contaminated Property Clean-Up Act of 2005, 6.13
Property owner's disclosure, remediation, and recordkeeping obligations regarding methamphetamine contamination, 1.29, 3.11B, 4.16C
Mobilehome parks
Methamphetamine Contaminated Property Clean-Up Act of 2005, mobilehome owners and mobilehome park operators subject to, 6.13
Rental agreement or park rules governing consumption of alcoholic beverages, mobilehome park management's enforcement of, 6.31
Nuisance, drug dealing as. See **Nuisance**
Public housing. See **Public Housing**
Section 8 housing, HUD regulations concerning landlord's denial of admission for criminal activity and alcohol abuse, 2.17

Due Process. See **Constitutional Law**

Ejectment
See also **Eviction**
Breach of lease by tenant, ejectment action based on, 8.25
Tenant at sufferance, ejectment action against, 1.11
Trespassers, ejection action against, 1.11A
Unlawful detainer action, comparison to ejectment action, 9.11

Elderly Persons. See **Age**

Electronic Filing
Bankruptcy courts, 14.24, 14.58
Local rules permitting electronic filing, 9.44, 11.23

Electronic Records
Public records in electronic format, obtaining copies of, 5.35

Ellis Act. See **Eviction**

Emergencies
Changing locks to prevent illegal entry by landlord, disadvantages in case of emergency, 5.18
Key in event of emergency, landlord's right to have, 1.66
Mobilehome park operator's adoption of emergency preparedness plan, 6.47
Rent control ordinances, emergency originally required for, 7.7
Right of landlord to enter premises in event of, 3.2, 4.43

Eminent Domain
Termination of lease due to, 8.6

Emotional Distress
Fair Employment and Housing Commission's authority to award damages for emotional distress, 5.7
Unlawful eviction, damages for emotional stress as result of, 7.78

Employers and Employees
Agents. See **Agents and Agency**
Distinguishing employee from employee-tenant, occupancy rights dependent on, 1.4
Resident property manager. See **Management of Property**
Subpoena duces tecum for employment records, 12.15
Termination of tenancy of employee-tenant
Generally, 1.4, 4.48
Notice of termination, 6.10
Self-help eviction by landlord, effect of tenant's termination of employment on, 8.137
Unlawful detainer action against tenant-employee after termination of tenancy, 8.84
Unlawful detainer action
Relationship between employer and employee as basis for unlawful detainer action, 9.36
30-day notice, landlord's right to file action against employee-tenant without giving, 8.84, 9.3

Unruh Civil Rights Act, discounts or benefits offered to persons due to loss of employment not characterized as arbitrary discrimination under, 2.7
Vicarious liability of employer for agent's acts of sexual harassment, 2.27G

Encumbrances. See **Liens and Encumbrances**

Enforcement of Unlawful Detainer Judgment
See also **Unlawful Detainer**
Credit reporting issues, 13.75
Nontenant occupants' objection to enforcement of judgment (see Postjudgment claim of right to possession, below)
Possession, writ of
Generally, 13.17, 13.64
Bankruptcy petition, effect of tenant filing, 13.68, 14.9, 14.17
Contents of writ, 13.65
Eviction of judgment debtor under writ, 13.67
Judicial Council Form, writ of possession of real property, 13.69
Service of writ, 13.66
Postjudgment claim of right to possession
Filing of postjudgment claim, 13.71
Hearing on postjudgment claim, 13.72
Judicial Council Form, postjudgment claim of right to possession and notice of hearing, 13.73
Notice procedure and limits on use, 13.70
Prejudgment claim of right to possession
Landlord's failure to give notice of prejudgment claim of right to possession, effect of, 13.67
Service of prejudgment claim, 13.70
Rent and damages, enforcement of judgment for, 13.74

Entry, Right of
See also **Forcible Entry and Detainer; Reentry, Right of**
Generally, 3.2, 4.43
Abandonment of dwelling by tenant, entry by landlord to confirm, 8.13
Eviction of tenant for denying landlord access to premises, 3.4, 7.60
Harassing tenant, prohibition against using right of entry for, 1.66, 3.3
Illegal entry by landlord
Generally, 5.17
Changing locks, 5.18
Mobilehomes. See **Mobilehomes**
Notice requirements, 1.66-1, 3.3, 3.3A
Personal property of tenant, landlord's wrongful entry onto premises and wrongfully holding, 8.154
Procedure for entry, 3.3
Remedies for landlord violating statutory right of entry, 3.4
Tenant organizing activities, prohibition against landlord's entry to interfere with, 3.2

Environmental Protection Agency (EPA)
Final regulations applicable to target housing and child-occupied facilities, 1.29
Lead-based paint disclosure, EPA pamphlet containing, 4.37

Escrow of Rent Pending Unlawful Detainer Action
See also **Unlawful Detainer**
Discretionary escrow of rent in habitability cases
Generally, 11.57
Amount of rent escrowed, 11.60
Factors in granting or denying landlord's request for protective order, 11.59
Legal basis for protective order, 11.58
Tenant's stipulation for protective order, 11.61
Motion for escrow of rent
Discretionary escrow of rent (see Discretionary escrow of rent in habitability cases, above)
Mandatory escrow of rent if trial date extended, 11.56
Payment of rent to court while tenant remains in possession, protective order requiring, 3.34

Estoppel
See also **Collateral Estoppel**
Breach of lease covenant by tenant, landlord estopped from asserting breach after accepting rent, 8.49
Equitable estoppel, 2.69
Implied surrender by tenant, 8.18

Option to renew, effect of estoppel certificate on enforceability of, 4.41
Rent control agency, estoppel effect of administrative decision by, 9.15
Unlawful detainer
Complaint, estoppel as affirmative defense to, 10.60
Jury instruction on estoppel of landlord's right to terminate tenancy, 12.63C

Ethics
Bankruptcy proceedings, ethical considerations in, 14.56
Delay, breach of ethics to take action solely for purposes of, 10.38A
Disciplinary action against attorneys. See **Disciplinary Action Against Attorneys**
Responsive pleadings. See **Responsive Pleadings in Unlawful Detainer Action**
Rules of Professional Conduct, 9.20, 10.2, 10.4
Unlawful detainer action, ethical considerations for attorneys in. See **Unlawful Detainer**

Eviction
See also **Ejectment; Termination of Tenancy; Unlawful Detainer**
Generally, 5.24
Anti-harassment statute, prohibited acts under, 8.150A
Attorney's advice to landlord. See **Unlawful Detainer**
Bankruptcy petition, stay of eviction caused by tenant filing. See **Bankruptcy and Insolvency**
Breach of lease by tenant
Access to premises by landlord, tenant's refusal to permit, 3.4, 7.60
Curing breach of covenant, eviction for failure regarding, 4.17, 7.57
Illegal purposes, use of premises for, 7.59
New lease, tenant's refusal to execute, 7.61
Nuisance, conduct constituting, 7.58
Rent, eviction for failure to pay, 7.56
Subtenant, eviction of unapproved, 7.62
Burden of proof. See **Burden of Proof**
Children, prohibition against evicting families with, 8.119
Claim of right to possession filed by occupant not named in eviction action, 5.27
Condominium conversions, eviction of tenants in anticipation of, 4.52
Constitutional rights of owners. See **Constitutional Law**
Constructive eviction
Defined, 3.15B, 8.19
Implied covenant of quiet enjoyment breached by, 3.6
Implied warranty of habitability, constructive eviction claim based on landlord's breach of, 3.15B, 3.25
Repair and maintain premises, landlord's failure resulting in constructive eviction, 3.8
Creditworthiness of tenant, effect of eviction lawsuit on, 5.25A
Criminal activities, eviction for
Eviction hearing for public housing tenant evicted for drugs or criminal activities, 1.33
Mobilehome tenant, eviction for committing specified criminal acts, 6.66
Use of premises for illegal purposes, 7.59
Damages for unlawful eviction
Generally, 7.78
Ellis Act, recoverable damages under, 7.64C
Fraudulent eviction of tenant based on landlord's intention to occupy premises, recovery of treble damages, 7.66
Retaliatory eviction. See **Retaliatory Eviction**
Self-help eviction. See **Self-Help Eviction**
Wrongful eviction, recovery of damages for, 3.55, 8.150
Defenses to eviction
Answer to complaint in unlawful detainer action, defenses in. See **Complaint in Unlawful Detainer Action**
Breach of implied warranty of habitability. See **Habitability, Implied Warranty of**
Ellis Act evictions, defenses to, 7.64F-7.64G, 10.65, 12.38, 12.60
Local rent control ordinances, defenses to evictions under, 7.76
Nonpayment of rent, landlord's failure to register unit as defense to eviction for, 7.76
Drug-related activity, eviction from public housing for, 2.15, 8.55, 8.59
Ellis Act
Generally, 7.64
Constitutionality of, 7.64-7.64A
Defenses to eviction under, 7.64F-7.64G, 10.65, 12.38, 12.60
Eviction suit under, 7.64G
Fair return on demolished and reconstructed units, 7.64D
Local requirements and restrictions on evictions, 7.64H
Multiple owner occupancy use not prohibited under, 7.64E

Notice requirements under, 7.64C, 7.64F, 7.64H, 8.22C
Preemption of local ordinances, 7.64-7.64A, 7.64H
Required payments to tenants on eviction, 7.76A
Retaliatory eviction as defense to eviction under, 7.64G
Senior and disabled persons, extension options for, 7.64F, 8.22C
Subsequent rental of withdrawn units, local restrictions on, 7.64, 7.64C
Withdrawal of housing accommodations from market, 7.64B
Employee-tenant, prohibiting forcible eviction of, 8.84
Enforcement of judgment. See **Enforcement of Unlawful Detainer Judgment**
Excess rent paid to previous landlord, offset against new landlord seeking eviction for non-payment of rent, 12.35
Fair Debt Collection Practices Act, violation of Act as affirmative defense in eviction case, 8.26A
Farmworkers residing in grower-supplied housing, eviction of, 8.84
Fee for eviction, 13.23
Forcible entry and detainer action, admissibility of evidence regarding landlord's title, 8.144
Foreclosure sale, protection for tenants from eviction after, 8.68C, 8.68F
Good cause required for eviction of tenant if landlord receives tax credits or mortgage incentives from government, 1.32
Good faith
Generally, 7.55, 9.16
Defense to eviction, implied covenant of good faith as, 3.75
Landlord's burden of proof regarding good faith in evicting tenant, 9.16C
Owner's intention to occupy premises, requirement of good faith in eviction of tenant based on, 7.67
Government-subsidized housing. See **Government-Subsidized Housing**
Injunctive relief. See **Injunctions**
In propria persona action by landlord, 5.26
Just cause for eviction
Generally, 7.54, 9.16
Alleging compliance with just cause ordinance, 7.74, 9.16A, 9.16D
Breach of lease by tenant (see Breach of lease by tenant, above)
Burden of proof, 7.74-7.75, 9.16B-9.16C
Death of tenant, effect of, 7.72
Foreclosure sale, rent control ordinances disallowing eviction after owner's purchase of property at, 7.69
Good cause to evict, local rent control ordinances requiring, 8.136, 9.13
Good faith requirement for eviction (see Good faith, above)
Landlord's need for possession (see Landlord's need for possession, below)
Local ordinances, pleading and proving compliance with, 9.16D
Mobilehome tenant, permissible grounds for eviction of. See **Mobilehomes**
Notice of termination by tenant but subsequent failure to vacate, 7.71
Occupancy by owner or owner's relative (see Occupancy by owner or owner's relative, below)
Pleading requirements, 7.74, 9.16A, 9.16D
Rent control ordinances with just cause eviction requirements, effect of, 1.8
Single-family homes and condominiums, local ordinance's good cause for eviction requirements affecting, 7.16
Subtenant, requirement of just cause for eviction of, 7.55A
Termination of resident manager, eviction of manager following, 7.70
Landlord's need for possession
Demolition or conversion of unit under Ellis Act (see Ellis Act, above)
Occupancy by owner or owner's relative (see Occupancy by owner or owner's relative, below)
Renovation or rehabilitation of unit, 7.63
Lockouts. See **Self-Help Eviction**
Mobilehome tenant, eviction of. See **Mobilehomes**
Notices required for eviction
Generally, 5.24A
Ellis Act, notice requirements under, 7.64C, 7.64F, 7.64H, 8.22C
Pre-eviction notice, landlords' service of, 13.76
Rent control ordinances, notice requirements under, 7.73
60-day notice. See **60-Day Notice**
Termination notices. See **Termination of Tenancy**
30-day notice. See **30-Day Notice**
3-day notice. See **3-Day Notice**
Occupancy by owner or owner's relative
Generally, 7.65
CC §1947.10, requirement that owner occupy premises for 6 months after evictions, 7.66
Good faith intent by landlord to occupy premises, 7.67
Potential buyers planning to occupy rented premises, review of rent-board ordinances by, 7.68
Partial eviction, excluding tenant from part of premises resulting in, 3.7
Payments to tenants on eviction, 7.76A

Pet in violation of lease, eviction for, 10.68
Possession. See **Possession, Writ of**
Postjudgment claim of right to possession. See **Enforcement of Unlawful Detainer Judgment**
Proceedings, generally
Acts required by landlord, 5.24
Notices required, 5.24A
Timetable for evictions, 5.24B
Unlawful detainer judgment, 5.24C
Quiet enjoyment, eviction as breach of implied covenant of, 3.6
Rent
Breach of lease by tenant, nonpayment of rent as, 7.56
Defense to eviction for nonpayment of rent, landlord's failure to register unit as, 7.76
Withholding rent, eviction risk for tenant, 5.15
Rent control
"Last-in, first out" rule, rent control laws requiring, 7.68
Potential buyers planning to occupy rented premises, review of rent-board ordinances by, 7.68
Presumptions in eviction cases, rent control ordinances affecting, 7.75
Restrictions on eviction, ordinances as (see Restrictions on eviction, below)
Representing landlord. See **Unlawful Detainer**
Resident property manager, eviction of, 4.48, 7.70
Restrictions on eviction
Generally, 1.31, 7.28A, 7.53
Alleging compliance with eviction control ordinance in complaint, requirement of, 7.74
Burden of proof, rent control ordinances affecting, 7.75, 9.16B-9.16C
Just cause (see Just cause for eviction, above)
Notice of eviction, 7.73
Retaliatory evictions. See **Retaliatory Eviction**
Self-help evictions, restrictions on. See **Self-Help Eviction**
Retaliatory eviction. See **Retaliatory Eviction**
Roommates. See **Roommates**
Section 8 tenant, eviction of, 1.36
Self-help eviction. See **Self-Help Eviction**
Stipulated judgment, advantages to landlord of, 5.25
Subtenant, eviction of. See **Assignment and Subletting**
Surviving tenant, protection from eviction in event of tenant's death, 5.29
Tenant's breach of lease (see Breach of lease by tenant, above)
Timetables for eviction proceedings, 5.24B
Writ of possession, eviction of judgment debtor under, 13.67
Wrongful eviction, action against landlord for
Generally, 8.150
Attorney counseling landlord of restrictions against wrongful eviction, 9.24
Damages, recovery of, 3.55, 8.150
Insurance coverage for landlord against, 9.28
Sublessor's action against landlord for wrongful eviction of sublessee, 3.55
Tort, recovery in, 3.7

Evidence
See also **Burden of Proof; Proof**
Admissibility of evidence. See **Admissibility of Evidence**
Discovery sanction, prohibiting introduction of evidence as, 11.29
Habitability. See **Habitability, Implied Warranty of**
Hearsay. See **Hearsay**
Objections to evidence, preserving records for appeal, 11.39
Rental discrimination action, evidence required for prosecution of. See **Rental Discrimination Action, Prosecution of**
Rent control. See **Rent Control**
Retaliation by landlord. See **Retaliatory Eviction**
Subpoena duces tecum for production of documentary evidence. See **Subpoena Duces Tecum**
Waste, evidence required to establish, 8.57

Examination of Witness
See also **Cross-Examination of Witnesses**
Deposition, examination of witness at, 11.8

Excessive Late Fees. See **3-Day Notice**

Excess Rent. See **Rent; Rent Control**

Execution of Agreement
Lease. See **Leases**
Mobilehome rental agreement, execution of, 6.140

Execution, Writ of
Mobilehome, writ of execution against, 6.77

Exemplary Damages. See **Punitive Damages**

Exhaustion of Remedies. See **Fair Employment and Housing Act (FEHA)**

Ex Parte Application
Bankruptcy action, ex parte application for order to vacate premises, 14.68
Continuance ex parte to obtain evidence to oppose summary judgment motion, 11.39
Extension of time to respond to pleadings in unlawful detainer action, ex parte application for, 10.48
Notice to all parties of ex parte appearance, 10.48
Stay of execution. See **Stay of Execution of Unlawful Detainer Judgment**
Unlawful detainer action, ex parte request by landlord's counsel for early trial date, 9.7

Expenses and Expenditures
See also **Costs; Fees**
Deposition in unlawful detainer action, deponent's entitlement to mileage expenses, 11.8
Forcible entry or detainer action, displaced tenant recovering hotel or other housing expenses, 8.144
Personal property, tenant's payment of landlord's storage costs. See **Personal Property**
Rent control ordinances allowing landlord to recover expenses. See **Rent Control**
Witness, mileage fees for, 12.11, 12.14-12.15

Expert Witnesses
Fees for expert witness, limits on prevailing party's recovery of, 13.22
FEHA's lack of authorization for awarding expert witness fees, 2.56
Reasonable rental value of property, expert's opinion on
Generally, 12.29
Jury instruction regarding, 12.51

Extension of Lease. See **Renewal or Extension of Lease**

Extension of Time
Attorney fees, extension of time for filing motion for award of, 13.33C
Pleadings, extension of time for
Generally, 10.48
Application for order extending time to respond, 10.49
Service of papers
Answer served by express mail, extension of time to file demurrer due to, 11.2
Notice served by mail, extension of time for responding to, 8.29
3-day notice to pay or quit premises, extension of, 8.45
Unlawful detainer action
Answering complaint in unlawful detainer action, filing motion to strike complaint extending time for, 10.38
Interrogatories, extension of time for responding to, 11.17
Pleadings, extension of time for (see Pleadings, extension of time for, above)
Trial date, extension of. See **Setting Unlawful Detainer Case for Trial**

Factory-Built Housing, 6.6

Fair Debt Collection Practices Act
Generally, 8.26A
3-day notice to quit, applicability of Act to, 8.26A, 10.69A, 13.76

Fair Employment and Housing Act (FEHA)
See also **Fair Employment and Housing, Department of (DFEH)**
Generally, 2.48-2.49, 8.122
Advertising vacancies
Generally, 4.3

Sex, permissibility of discrimination in advertising based on, 2.50
DFEH ruling against party in administrative action, party collaterally estopped from bringing subsequent FEHA action, 2.56
Evaluating prospective tenant's application, prohibiting discrimination, 4.14
Exhaustion of remedies
Filing civil action before exhaustion of administrative remedies, 2.56
Filing complaint under FEHA before exhausting administrative remedies, 2.52
Expert witness fees, lack of authority under Act for, 2.56
Fair Housing Act, FEHA's protections in addition to, 2.29, 2.49
Familial status defined under, 2.23
Income standards, permissibility of landlord establishing reasonable, 4.15A
Inquiries by landlord about applicant's race, color, religion, sex, marital status, national origin, ancestry, or disability, prohibition against, 4.12
Marital status as basis for applying different financial standards for prospective tenants, prohibition under FEHA, 2.9C, 8.122
Post-acquisition discriminatory conduct, applicability of FEHA to, 2.50
Prohibited forms of housing discrimination under FEHA, 2.50
Protected class, prohibiting housing practices with discriminatory effect, 2.5
Religious beliefs
Exemptions for religious organizations, 2.50
Unmarried couple, landlord's religious beliefs as insufficient grounds for refusing to rent to, 2.9C, 2.50
Retaliatory eviction for exercise of rights under FEHA, prohibition against, 8.113
Sexual harassment action against landlord, broad construction of FEHA to encompass, 8.122
Source of income protections for prospective tenants, 2.9B
Unlawful detainer complaint, discrimination prohibited under FEHA as affirmative defense to, 10.68
Unruh Civil Rights Act, advantages of FEHA over, 2.48

Fair Employment and Housing Commission (FEHC)
Attorney fees awarded by, 2.56
Emotional distress, commission's award of damages for, 5.7
Penalties for housing discrimination, 2.55
Unruh Civil Rights Act, waiver of rights and claims under Act as prerequisite to FEHC remedy, 2.55

Fair Employment and Housing, Department of (DFEH)
See also **Fair Employment and Housing Act (FEHA)**
Administrative relief
Action on complaint by DFEH, 2.53
Compliance review within 1 year of final order or decision, 2.55
Filing administrative complaint, 2.52, 2.60
Prosecution of complaint on finding of reasonable cause by DFEH, 2.55
Statute of limitations for filing complaint, 2.52, 2.56
Complaints (see Administrative relief, above)
Conciliation or mediation, resolution of housing discrimination complaint through, 2.54
Discovery powers of DFEH, 2.53
Enforcement of FEHA
Generally, 2.51
Administrative relief (see Administrative relief, above)
Civil action to enforce FEHA, 2.56
HUD's transfer of housing complaints to, 2.32, 2.49
Investigation of complaints, 2.36, 2.48, 2.53
Standing to sue in actions brought under, 2.67
Unruh Civil Rights Act, enforcement by DFEH, 2.59

Fair Housing Act
See also **Civil Rights**
Generally, 2.29-2.30
Accessibility, design and construction requirements under Fair Housing Act, 2.27C
Administrative action by HUD
Charge or dismissal, issuance of, 2.37
Civil action in lieu of administrative hearing, complainants or respondent's election of, 2.38
Conciliation of dispute (see Conciliation of dispute, below)
Filing complaint with HUD, 2.33, 2.69
Investigation of dispute, 2.33A, 2.36
Memorandum of understanding between USDA and HUD, 2.33A
Official form, Housing Discrimination Complaint (HUD 903), 2.34
Response to complaint, 2.35
Service of complaint on respondent, 2.35

Statute of limitations for filing housing discrimination complaint, 2.33, 2.69
Advertising vacant units, discrimination prohibited, 4.3
Complaints
Administrative action by HUD (see Administrative action by HUD, above)
Statutes of limitations for filing complaint. See **Statutes of Limitations**
Conciliation of dispute
Generally, 2.36
Breach of conciliation action, statute of limitations for filing, 2.40
Domestic violence, protection under housing laws against, 2.27H
Enforcement of Act
Generally, 2.32
Administrative action (see Administrative action by HUD, above)
Civil action under 42 USC §3613, 2.39
Pattern or practice action brought by U.S. Attorney General, 2.40
Evaluation prospective tenant's applications, discrimination prohibited, 4.14
Exemptions from coverage under Act, 2.31
Fair Employment and Housing Act (FEHA), comparison to, 2.29, 2.49
Familial status defined under, 2.23
HUD's enforcement of Act (see Administrative action by HUD, above)
Intentional discrimination against members of minority groups, relief for, 2.5
Mobilehomes, applicability of Fair Housing Act to, 6.20
Occupancy limits as discrimination against families with children, 4.15
Protected class, prohibiting housing practices with discriminatory effect, 2.5
Reasonable accommodation and disability, establishing nexus between, 2.27A
Segregating or steering tenants to different sections of complex or different common facilities based on familial status constituting violation of Act, 2.22
Standing to sue in actions brought under, 2.67
Time. See **Time**
Triple income-to-rent ratio as criteria for prospective tenant, prohibition against, 2.9A

Fair Housing Laws
See also **Discrimination**
Generally, 2.2
Attorney General. See **Attorney General**
Attorneys
Court's appointment of attorney for party in housing discrimination action, 2.39
Fees. See **Attorneys' Fees**
Responsibility of attorney to know applicable laws, 2.1
Chart, guide to fair housing laws, 2.28
Civil Rights Act. See **Civil Rights**
Costs. See **Costs**
Damages for violation of. See **Damages**
Disparate impact in housing. See **Disparate Impact in Housing**
Disparate treatment in housing, 2.63
Fair Housing Act. See **Fair Housing Act**
FEHA. See **Fair Employment and Housing Act (FEHA)**
Injunctive relief. See **Injunctions**
Mobilehome owners and parks, applicability of fair housing laws to, 6.14A
Punitive damages. See **Punitive Damages**
Rental discrimination action. See **Rental Discrimination Action, Prosecution of**
Screening prospective tenants. See **Screening Prospective Tenants**
Statutes of limitations. See **Statutes of Limitations**
Unruh Civil Rights Act. See **Unruh Civil Rights Act**

Fair Return. See **Rent Control**

Familial Status
Fair Housing Act, familial status defined under, 2.23
FEHA. See **Fair Employment and Housing Act (FEHA)**
Screening families as prospective tenants. See **Screening Prospective Tenants**

Farms. See **Agricultural Property**

Fax
Answer to unlawful detainer complaint served by fax, extension of time to file demurrer, 11.2

Federal Housing Administration (FHA). See **Government-Subsidized Housing; Housing and Urban Development (HUD)**

Federal Preemption
See also **Preemption**
Fair Housing Act, preemptive effect of, 2.29
Public housing agency, federal law preempting state law prohibiting release of information to, 2.15

Fees
See also **Costs; Expenses and Expenditures**
Attorneys' fees. See **Attorneys' Fees**
Deposition fees for witness, 11.8
Eviction fee, 13.23
Expert witnesses, limit on prevailing party's recovery of fees for, 13.22
In forma pauperis (see Waiver of fees in unlawful detainer action, below)
Jury fees, advance deposits of, 11.53
Mobilehomes. See **Mobilehomes**
Nonrefundable applicant screening fee, 1.26A, 1.51, 4.11, 4.23
Unlawful detainer action
Appeal of unlawful detainer judgment, fees for preparation of transcripts or index in lieu of clerk's transcript, 13.59
Postjudgment claim of right to possession, fee for, 13.71
Underpayment of filing fee, relief for, 10.1B
Waiver of fees (see Waiver of fees in unlawful detainer action, below)
Waiver of fees in unlawful detainer action
Hearing on application for waiver of fees, 10.13
Postjudgment claim of right to possession, waiver of fee for, 13.71
Procedure for obtaining waiver of court fees, 10.13
Witness fees, 12.11, 12.14-12.15, 13.22
Writ of possession of real property, fees regarding, 13.69

FEHA. See **Fair Employment and Housing Act (FEHA)**

FHA-Subsidized Rental Programs. See **Government-Subsidized Housing**

Fictitious Names
Unlawful detainer action, use of fictitious name for defendant in, 9.35

Findings and Conclusions. See **Statement of Decision in Unlawful Detainer Action**

Fines. See **Penalties**

Firearms. See **Weapons**

Fires
Disclosure of mobilehome park's location in high fire hazard area to prospective tenant, 6.54
Local fire departments enforcing local fire codes within mobilehome parks, 6.13

Fixed-Term Tenancy
See also **Month-to-Month Tenancy; Periodic Tenancy**
Generally, 1.8
Drafting fixed-term lease
Holding over by tenant, nonliability of landlord to new tenant in event of, 4.21
Periodic tenancy distinguished, 1.9, 4.20
Rent control ordinances, effect of, 4.21-4.22
Holding over. See **Holding Over**
Lease provision for, 1.44-1
Modifying terms of, 3.66
Renewal or extension of lease. See **Renewal or Extension of Lease**
Rent. See **Rent**
Retaliatory eviction claim after expiration of fixed-term lease, 8.109
Sample leases
California Apartment Association Form (fixed-term lease), 1.82
National Housing Law Project Form (fixed-term lease), 1.85
Security deposits. See **Security Deposits**
Termination. See **Termination of Tenancy**
Written agreement required for enforceability of, 1.13

Fixtures
Disposition of
Generally, 8.162
Encumbered fixtures, disposition of, 8.166
Real property, fixtures as part of, 8.163
Removal of fixtures, tenant's limited rights regarding, 8.164
Removal of trade fixtures, tenant's rights regarding, 8.165
Mobilehome park lease, financial responsibility for maintaining, 6.48, 6.114

Forcible Entry and Detainer
See also **Entry, Right of**
Generally, 5.20-5.21, 8.138
Affirmative defense by landlord to charge of forcible entry or detainer, 8.143
Attorney fees, recoverability of, 5.22
Complaint for forcible entry and forcible detainer, 8.146
Criminal penalties for, 5.20, 8.152
Elements of cause of action
Definition of forcible detainer, 8.141
Definition of forcible entry, 8.140
Tenant's possession of property at time of landlord's entry, 8.139
Eviction under writ of execution based on vacated judgment as forcible entry, 13.67
Mobilehome purchaser's failure to execute rental agreement, forcible detainer action based on, 6.56
Procedure for forcible entry and detainer action, 8.145
Remedies, 8.144
Types of occupants protected, 8.142
Unlawful detainer action. See **Unlawful Detainer**

Foreclosure
Bankruptcy stay. See **Bankruptcy and Insolvency**
Eviction, protection for tenants after foreclosure sale, 8.68C, 8.68F
Extinguishment of lease subordinate to foreclosing deed of trust after sale of property at trustee's sale, 1.13
Lease priority issues after foreclosure, 8.68E
Rent control ordinances disallowing eviction after owner's purchase of property at foreclosure sale, 7.69
3-day notice to quit because of foreclosure, 8.68A-8.68D
Unlawful detainer action to remove tenant after foreclosure. See **Unlawful Detainer**
Warehouse's lien, foreclosure on, 6.83

Foreign Languages
Spanish language. See **Spanish Language**
Written lease in foreign language, landlord required to provide, 1.13

Forfeiture
Holding deposit, forfeiture of, 1.39
Relief from forfeiture
Generally, 13.56
Application for relief from forfeiture, 13.57
3-day notice
Landlord's election to seek forfeiture of lease, effect of, 8.34
Tender of rent by tenant during notice period, declaration of forfeiture nullified by, 8.44
Unlawful detainer action
Effect of landlord's failure to request forfeiture of lease in termination notice, 13.49
Judgment for plaintiff, forfeiture of possession and leasehold rights, 13.17
Relief from forfeiture (see Relief from forfeiture, above)

Fraud and Misrepresentation
Application for rental, effect of misrepresentation in, 1.10, 1.69
Damage award for fraudulent collection of rents, nondischargeability in bankruptcy of, 7.77
Default obtained by fraud, relief from, 13.9, 13.13
Disciplinary action against attorney, misrepresentation of facts or law to opponent appearing in propria persona as grounds for, 9.21
Eviction of tenant based on landlord's fraudulent intention to occupy premises, penalty for, 7.66
Manufactured Home Recovery Fund (MHRF) reimbursement in event of misrepresentation or fraud in purchase or sale of mobilehome or manufactured home, 6.57
Unlawful detainer complaint. See **Complaint in Unlawful Detainer Action**

Frivolous and Nonmeritorious Actions
Costs awarded against party filing frivolous motion to strike, 10.38A
Demurrer, sanctions for filing frivolous, 10.37
Litigation tactics, penalties for frivolous, 13.29
Summary judgment motion in response to frivolous answer, 11.32

Furniture
Inventory of furniture, sample form, 1.26

Future Rent. See **Rent**

Garages and Parking Facilities
Amenities, parking spaces as, 1.6, 1.38
Covered or underground commercial parking garages, landlord's liability for criminal conduct in, 3.68B-3.68C
User fees for parking space, 4.35
Written lease agreement, parking assignments and exclusions specified in, 1.23

Garnishment of Wages
Enforcement of unlawful detainer judgment for damages and rent, garnishment of wages for, 13.74
Federal employee, garnishing wages of, 13.74

Gender Discrimination. See **Sex Discrimination**

Good Faith
Eviction. See **Eviction**
Implied covenant of good faith and fair dealing in leases, 3.75
Itemized statement regarding disposition of security deposit, effect of landlord's good faith failure to give on right to setoff for unpaid rent, repairs, and cleaning, 4.28B, 8.174
Possession of premises, application of good faith standard to landlord seeking recovery of, 8.115
Security deposit not returned in good faith, effect on subsequent action against tenant, 8.177

Government Regulations
Tenancy for specified term, effect of government regulations on, 8.5

Government-Subsidized Housing
See also **Housing and Urban Development (HUD); Public Housing**
Bankruptcy
Assumption of lease to protect rights in government-subsidized housing, 14.42
Discharge of delinquent rent, effect on motion for relief from automatic stay, 14.27
Eviction for nonpayment of rent, relief from automatic stay to complete, 14.27
Criminal conduct by applicant, subsidized housing owner's inquiry into, 2.8
Due process (see Termination of tenancy, below)
Eviction (see Termination of tenancy, below)
FHA-subsidized rental programs
Lease form for, 1.35
Termination of (see Termination of tenancy, below)
Habitability, applicability of implied warranty to subsidized housing, 3.19
Lease requirements
Generally, 1.32
FHA-subsidized rental programs, lease form for, 1.35
Section 8 housing, 1.36, 3.66B, 10.66
Notice of termination (see Termination of tenancy, below)
Rent control ordinances, exemptions for government-subsidized housing, 7.19
Section 8 housing. See **Section 8 Housing**
Senior housing, 2.25A
Termination of tenancy
Generally, 8.85
Due process, 1.33, 8.85
Eviction, 1.33, 8.85
FHA-subsidized housing, 1.35
Notice of termination, 1.33, 1.85
Section 8 housing. See **Section 8 Housing**
Unlawful detainer complaint, lack of good cause to evict from government housing as affirmative defense to, 10.66

Guaranty
Lease, landlord's action against guarantor of, 13.74

Guardianships and Conservatorships
Execution of lease on minor's behalf by guardian or conservator, 1.16

Guests
Lease restrictions on, 1.46, 4.40
Mobilehomes. See **Mobilehomes**

Habitability, Implied Warranty of
Generally, 3.16
Applicability of warranty
Commercial tenancies, inapplicability of remedy to, 3.18, 10.64
Common areas, 3.20
Government-subsidized housing, 3.19
Inception of tenancy, applicability of warranty if premises uninhabitable at, 3.21
Notice to tenant to vacate, applicability of warranty if premises become uninhabitable after sending, 3.22
Single-family homes, 3.17
Attorneys
Letter to landlord regarding uninhabitable conditions, 5.12
Tactical considerations (see Tactical considerations for preparing lawsuit for breach of warranty, below)
Breach of implied warranty
Burden of proof, 12.53
Constructive eviction claim based on landlord's breach of warranty, 3.15B, 3.25
Damages (see Damages, below)
Defects (see Defects, below)
Defense to eviction action, landlord's breach of warranty as, 7.76
Examples of breaches of warranty, 3.27
Introducing evidence of breach of warranty, 12.28
Jury instructions. See **Jury Instructions in Unlawful Detainer Action**
Mobilehome tenant's complaints about breach of warranty, prohibiting retaliation, 6.72
Reasonable time for repairs, 3.30
Remedies for breach (see Remedies for breach of implied warranty, below)
Remedying uninhabitable conditions (see Remedying uninhabitable conditions, below)
Sale of premises, effect on tenant invoking implied warranty for preexisting uninhabitable conditions, 3.31
Severity of defects necessary to breach implied warranty, 3.27
Statute of limitations for action based on, 3.35
Unlawful detainer action, breach of warranty as defense in. See **Trial of Unlawful Detainer Action**
Damages
Generally, 3.35, 5.9
Action for damages against landlord for breach of implied warranty, 5.16
Complaint for damages for breach of warranty of habitability, 3.15A, 3.48A
Costs and attorney fees, 3.41, 3.46, 10.4, 13.25
General damages (see General damages, below)
Punitive damages, recovery by tenant of, 3.40
Special damages, recovery of tenant's expenses as, 3.39
Statutory damages, 3.15A, 3.36
Tort action for breach of warranty, recovery of damages in, 3.46
Willful violation of MRL, damages for, 6.16
Defects
Evidence of defects, 3.28
Housing codes, defects not covered by, 3.25
Housing codes or Civil Code §1941.1, defects covered by, 3.24
Notice of defects (see Notice of defects, below)
Tenant, defects caused by, 3.26
Estoppel certificate stating premises in good repair, effect on claim for breach of warranty habitability, 5.9
Eviction (see Breach of implied warranty, above)
Evidence
Defects, evidence of in action for breach of implied warranty, 3.28
Gathering and presentation of evidence in lawsuit for breach of implied warranty, 3.46A
General damages
Discomfort and annoyance, recovery for, 3.38
Jury instruction regarding reasonable rent owed. See **Jury Instructions in Unlawful Detainer Action**

Reasonable rent owed by tenant, difference in value or percentage reduction as formulas for determining, 3.37
Housing codes (see Defects, above)
Judgment in unlawful detainer action. See **Judgment in Unlawful Detainer Action**
Jury instructions on warranty. See **Jury Instructions in Unlawful Detainer Action**
Maintain and repair premises, landlord's duty to. See **Improvements and Repairs**
Mobilehomes
Applicability of implied warranty of habitability to, 6.16
Retaliation against mobilehome tenant for complaints about breach of warranty, prohibition against, 6.72
Notice of defects
Breach of warranty, notice of defects to landlord as prerequisite to action for, 3.29
Jury instruction regarding tenant's notice to landlord of defects, 12.55
Notice to tenant to vacate, applicability of warranty if premises become uninhabitable after sending, 3.22
Remedies for breach of implied warranty
Abatement of nuisance, 3.15A, 3.15C, 3.36
Constructive eviction action, failure to repair and maintain premises as grounds for, 3.15B
Damages (see Damages, above)
Declaratory relief, advantages of seeking judicial determination of materiality of breach, 3.44
Fines for failure to comply with notices of code violations, 3.11, 5.9
Injunctive relief, 3.42, 3.48A
Personal injury damages, 3.38A
Specific performance, 3.48A
Tactical considerations (see Tactical considerations in preparing lawsuit for breach of warranty, below)
Termination and rescission of lease, 3.43
Unlawful detainer action, defenses to. See **Trial of Unlawful Detainer Action**
Remedying uninhabitable conditions
Generally, 5.10
Damages action against landlord for breach of implied warranty of habitability, 5.16
Informing building or health inspector of conditions needing repair, 5.11
Landlord, attorney's letter to, 5.12
Rent (see Rent, below)
Repair and deduct remedy, 5.13
Rent
Damages, difference in value or percentage reduction as formulas for determining, 3.37
Escrow of rent. See **Escrow of Rent Pending Unlawful Detainer Action**
Jury instruction regarding reasonable rent owed. See **Jury Instructions in Unlawful Detainer Action**
Petitioning rent control board for rent decrease, 5.14
Withholding rent on grounds of landlord's breach of implied warranty, 5.9, 5.15
Repairs. See **Improvements and Repairs**
Retaliatory eviction of tenant for reporting uninhabitable conditions. See **Retaliatory Eviction**
Tactical considerations in preparing lawsuit for breach of warranty
Generally, 3.45
Contract or tort action, choosing between, 3.46
Evidence (see Evidence, above)
Insurance coverage, effect on alleging causes of action, 3.47
Monetary versus equitable claims, 3.48
Valuation
Breach of implied warranty of habitability, difference in value or percentage reduction as formulas for determining damages, 3.37
Defense of breach of warranty of habitability, plaintiff as prevailing party after tenant's failure to timely pay reasonable rental value, 13.36
Waiver of warranty, prohibition against, 3.23

Handicapped Persons. See **Disabled Persons**

Harassment
Anti-harassment statute, 8.150A
Right of entry by landlord, harassment prohibited, 1.66, 3.3, 4.43
Sexual harassment. See **Sexual Harassment**

Hazardous Materials and Toxic Waste
Mobilehome parks, pass-through of expenses related to contaminated wetlands, 6.29
Toxic mold. See **Mold**

Health and Safety Standards
Uninhabitable conditions, informing building or health inspector of, 5.11

Hearings
Bankruptcy stay
Landlord's objection to certification allowing tenant to retain automatic stay protection, hearing regarding, 14.16
Relief from stay, hearing on motion for, 14.26
Business records exception to hearsay rule, 12.26
Eviction hearing for public housing tenants evicted for drugs or criminal activities, 1.33
Extension of trial date in unlawful detainer action, hearing on probability that landlord will prevail, 11.46
Fair Housing Act, administrative hearing under. See **Fair Housing Act**
Garnishment, hearing on claimed exemptions, 13.74
Rent control. See **Rent Control**
Unlawful detainer
Demurrer to unlawful detainer complaint, hearing on. See **Demurrer to Complaint in Unlawful Detainer Action**
Postjudgment claim of right to possession, hearing on, 13.72
Quashing service of unlawful detainer summons. See **Quashing Service of Unlawful Detainer Summons**
Settlement hearing, 9.18D
Summary judgment hearing in unlawful detainer action. See **Summary Judgment**
Waiver of fees, hearing on application for, 10.12-10.13

Hearsay
Business records exception to hearsay rule, 12.26
Inspection reports, exception to hearsay rule for, 3.28
Rent control ordinances allowing hearsay evidence to establish base rent, 7.32, 7.47

Holding Over
See also **Unlawful Detainer**
Generally, 3.64
Assignee, assignor's lack of liability for holding over by, 3.53
Damages (see Malicious holding over, below)
Expiration of fixed-term tenancy, tenant holding over after, 8.82
Malicious holding over
Lease provision specifying statutory damages for, 1.70
Unlawful detainer action, recovery of damages in, 9.40, 13.19
Periodic or fixed-term tenancy, provisions in lease regarding holding over by tenant, 4.21
Tenancy at sufferance created by holding over after expiration of fixed-term tenancy, 1.8, 3.64, 8.82

Holidays
Court closures due to budget cuts treated as holidays, 10.1
Defined, 8.42, 8.77
Statutory extension of rental due to next business day if due date falls on holiday, 8.42
3-day termination notice, extension of rental due date in, 8.28
Unlawful detainer complaint
Delay in filing date for unlawful detainer complaint, holiday resulting in, 9.44
Discovery cutoff date, effect of final date falling on Saturday, Sunday, or holiday, 11.5

Homosexuality. See **Sexual Orientation**

Hotels and Motels
Definition of transient occupant, 1.3C
Forcible entry or detainer action, displaced tenant recovering hotel or other housing expenses, 8.144
Proprietor-lodger relationship, distinguishing lease from
Generally, 1.3
CC §1940 provisions, 1.3B-1.3C
Common law provisions, 1.3A
Evictions and abandoned personal property, effect on, 1.3D
Exclusions under CC §1940, 1.3C
Rent control ordinances, exemption for hotel rooms rented to transient guests, 7.21
Self-help evictions, lodgers protected against, 8.142
Terminating occupancy of hotel and motel guests, no notice required for, 8.83

Housing and Urban Development (HUD)
See also **Government-Subsidized Housing; Public Housing**
Fair Employment and Housing Department (DFEH), referral of HUD complaints to, 2.32, 2.49
Fair Housing Act, HUD's enforcement of. See **Fair Housing Act**
Filing discrimination complaint with HUD, 2.33, 2.69
Investigation of housing discrimination complaint by HUD, 2.32, 2.36

Local fair housing counseling and enforcement agencies, HUD's funding of, 2.1
Occupancy limits, effect of HUD regulations on, 4.15
Section 8 housing. See **Section 8 Housing**
Settlement of civil rights complaint by HUD, restrictions on, 2.33A
Statute of limitations for filing complaint with HUD, 2.33, 2.69
Steering housing applicant to particular section of development, HUD regulations prohibiting, 2.30
US Department of Agriculture (USDA), referral of complaints against USDA funds recipients to HUD, 2.33A

Housing Codes
See also **Uniform Housing Code**
Habitability. See **Habitability, Implied Warranty of**
Repairs, landlord's duty to make. See **Improvements and Repairs**
Retaliatory eviction of tenant for reporting housing code violations, prohibition against, 8.110

Housing Discrimination. See **Fair Housing Laws**

HUD. See **Housing and Urban Development (HUD)**

Husband and Wife. See **Spouses**

Illegal Entry by Landlord. See **Entry, Right of**

Immigrants
Local ordinances promoting excessive and selective enforcement of building codes against owners renting to immigrants, legal basis for challenging, 2.19
Penalties against landlords for renting to undocumented immigrants, 4.14
Public housing, restrictions on immigrants in, 2.12

Immunity
City inspector's order to vacate building, lack of immunity for failure to offer tenant's administrative hearing after issuance of order, 3.10
Public buildings, limited liability of public entity for third party criminal actions in, 3.68D
Rent control ordinance as taking of property, government immunity from action claiming, 7.14

Impeachment of Witness
Deposition, use of to impeach witness, 11.7

Implied Warranty of Habitability. See **Habitability, Implied Warranty of**

Improvements and Repairs
See also **Alterations**
Building codes (see Housing codes, below)
Capital improvements
Mobilehome tenant, pass-through of costs of capital improvements to, 6.106-2
Rent control ordinances allowing landlord to pass-through cost of capital improvements, 7.35
Constructive eviction, landlord's failure to repair and maintain premises resulting in, 3.8
Damages
Breach of covenant to make repairs, damages for, 3.73
Dead bolt or window lock, damages for landlord's failure to repair, 3.11A
Disabled person, modifications of premises for. See **Disabled Persons**
Entry by landlord to repair or improve premises, right of, 4.43
Fixtures. See **Fixtures**
Housing codes
Dead bolts and window locks, landlord's duty to install, 3.11A
Enforcement process, 3.10
Failure to comply with housing or building codes, consequences of, 4.50
Familiarity with housing codes, 3.11
Landlord's duty to maintain and repair premises
Generally, 3.8, 4.50
Exceptions to landlord's duty, 3.73
Housing codes (see Housing codes, above)
Lease provision requiring landlord to perform repairs, construction of, 3.9
Methamphetamine contamination, property owner's remediation obligations, 1.29, 3.11B, 4.16C
Mobilehomes. See **Mobilehomes**

Notice to tenant concerning renovation or repair of rental unit, 1.29
Payment for repairs, party responsible for, 3.9
Personal injuries caused by landlord's failure to correct defects, 3.67
Reasonable accommodation for disabled person, repair request as, 2.27A
Reimbursement for repairs or improvements made without landlord's consent, no right of, 3.73
Rent control ordinances, increase or decrease in rent based on increase or decrease in maintenance. See **Rent Control**
Rent, landlord's obligation to make repairs dependent on tenant's payment of, 1.2
Repair-and-deduct remedy. See **Repair-and-Deduct**
Security deposit funds used to pay for repairs. See **Security Deposits**
Statute of frauds, effect on landlord's oral promise to make repairs after lease signed, 3.9, 10.61
Tenants
Duty of tenant to make repairs, 3.73
Repair-and-deduct remedy. See **Repair-and-Deduct**
Toxic mold conditions, remediation of, 3.11B, 4.16D, 5.10
Unlawful detainer complaint, breach of express promise to repair as affirmative defense to, 10.61

Income
Aggregate income of persons proposing to reside together, landlord's failure to consider, 2.9C
Disabled person dependent on spouse's income, prohibiting income requirements for, 2.9D
Financial characteristics of prospective tenant, landlord's discrimination based on, 2.58
Low-income housing. See **Government-Subsidized Housing; Public Housing; Section 8 Housing**
Reasonable income standards, landlord establishing, 4.15A
Rent-to-income ratios, landlord's use of, 2.9A
Source of income protections for prospective tenants, 2.9B

Indemnity
Landlord's liability for property manager's actions, landlord's indemnification action against management firm, 4.49
Lease provision for indemnification of landlord, 1.47
Mobilehome rental agreement provision for indemnification of park management, 6.123

Independent Contractors
Liability of landlord for actions by manager acting as independent contractor, 4.49
Resident property manager as independent contractor or employee, 4.46

Independent Covenants, 1.2, 3.9, 10.61

Indigent, Waiver of Fees for. See **Fees**

Inferences. See **Presumptions and Inferences**

In Forma Pauperis. See **Fees**

Injunctions
See also **Temporary Restraining Order (TRO)**
Attorney General, injunctive relief in civil housing discrimination actions brought by, 2.40
Dead bolt or window lock, injunctive relief for landlord's failure to repair, 3.11A
Denial of tenant's access or use of premises, injunctive relief against landlord for, 8.149
Drug dealing on premises, preliminary injunction against, 4.44
Habitability, injunctive relief for breach of implied warranty of, 3.42, 3.48A
Housing discrimination
Generally, 2.2
Chart, injunctive relief under fair housing laws, 2.28
Civil action for housing discrimination, availability of injunctive relief in, 2.39
Civil Rights Act of 1866, injunctive relief under, 2.46
Fair Housing Act, injunctive relief under, 2.38
FEHA, injunctive relief in civil action brought under, 2.56
Unruh Civil Rights Act, injunctive relief under, 2.59
Implied covenant, injunctive relief for breach of, 8.47
Mobilehome park
Change of use of park, injunction against, 6.52
Modification of premises by disabled tenant, injunction against landlord's refusal to permit, 2.27B
Unlawful business practices by park management, injunction against, 6.86
Picketing in front of residences, constitutionality of injunctions prohibiting, 5.37
Public housing, injunction against zero tolerance policy for drug use in, 1.33
Quiet enjoyment, injunctive relief for breach of implied covenant of, 3.7

Rent strike, availability of injunctive relief to force tenants to release rent trust account funds to landlord, 5.38
Retaliatory action by landlord, injunctive relief against pending, 8.134
Self-help eviction by landlord, injunction restoring premises to tenant, 5.22
Stay of eviction by filing bankruptcy characterized as federal court injunction, 14.3
Tenant organization's standing to file for injunctive relief on behalf of members, 5.39
Unfair business practice, public's right to bring action to enjoin, 3.48A
Unlawful business practices in violation of local rent control ordinances, injunction and penalties for, 7.77
Unlawful detainer actions
Bond required for injunction, 11.64
Grounds for enjoining eviction, 11.63
Newby exception, adequate remedy at law, 11.63A
Overcoming *Newby* limitations, 11.63B
Procedure for obtaining injunction, 11.64
Unruh Civil Rights Act, injunctive relief available under, 8.121

In Limine Motion
Equitable defenses, in limine motion to strike request for damages or to sever, 11.55

In Propria Persona
Attorney's misrepresentation of facts or law to opponent appearing in propria persona as grounds for disciplinary action, 9.21
Eviction, landlord acting in propria persona, 5.26
Fees, waiver of. See **Fees**
Unlawful detainer
Attorney fees, restriction on recovery by attorney acting in pro per, 13.28
Limited civil case, in propria persona action by landlord in, 9.23

Insolvency. See **Bankruptcy and Insolvency**

Inspection of Documents in Unlawful Detainer Action
See also **Discovery; Unlawful Detainer**
Deposition, inspection of documents at, 11.9
Nonparty, demands addressed to, 11.22
Party, demands addressed to
Generally, 11.20
Responding to demands, 11.21
Supplemental demand for inspection, 11.20

Inspection of Property
Building inspection department, obtaining information about landlord from, 5.35
Dangerous conditions. See **Dangerous Conditions of Property**
Entry by landlord to inspect tenant's waterbed, 3.2
Housing code violations, inspection by building inspector to determine, 3.10, 3.28
Joint inspection of premises by landlord and tenant, statement of, 1.53-1
Judge, inspection of property by, 3.28
Mobilehome management's representation of space and facilities, inspection to corroborate, 6.134
Move-out inspection, tenant's agreement to, 1.48-2, 4.28A, 4.51
Notice of inspection by landlord, 4.28A, 4.51
Posttrial inspections by landlord, 13.33D
Premises opened to public, inspection of, 11.20
Prepossession inspection of premises by landlord and tenant, 1.24
Termination of tenancy, tenant's right to request inspection of premises and cure deficiencies before, 8.172A-8.172B
Uninhabitable conditions, inspection of property to document, 5.10

Instructions for Jury. See **Jury Instructions in Unlawful Detainer Action**

Insurance
Daycare operated by tenant out of residential premises, insurance requirement for, 1.28
Eviction suit, landlord's insurance policy covering, 8.150
Habitability, effect of insurance coverage in alleging causes of action for breach of implied warranty of, 3.47
Personal injuries occurring on premises, insurance coverage for landlord's tort liability, 3.71
Professional liability insurance, attorney's duty to disclose absence of, 4.2C, 5.4A
Renter's insurance, 4.43B
Title insurance company, obtaining information about landlord from, 5.35
Unlawful detainer action, insurance coverage for. See **Unlawful Detainer**

Interest on Money
Extension of trial date, order to deposit landlord's potential damages in interest bearing account, 11.49
Judgment in unlawful detainer action
Generally, 9.41
Prejudgment interest, award of, 13.20
Security deposits, 1.48, 4.25, 7.13, 8.170
3-day notice, inclusion of demand for interest and late charges in, 8.39

Interpretation of Statutes and Cases. See **Construction and Interpretation**

Interrogatories in Unlawful Detainer Action
See also **Unlawful Detainer**
Advantages and disadvantages of interrogatories, 11.11
Answers and objections to interrogatories, 11.18
Depositions on written questions distinguished, 11.12
Judicial Council form interrogatories, 11.16
Non-individual entities, response to interrogatories by, 11.15
Number of special interrogatories, limits on, 11.14
Protective order, motion for, 11.19
Response to interrogatories, time for service of, 11.17
Restrictions on use of interrogatories, 11.13
Sanctions. See **Penalties**
Service of interrogatories, 11.17
Summary judgment motion, answers to interrogatories supporting, 11.38

Inventory
Furniture, sample form for inventory of, 1.26
Mobilehome, inventorying contents of abandoned, 6.84

Investigations
Housing discrimination complaints, government investigation of
Generally, 2.2
Department of Fair Employment and Housing (DFEH), investigation by, 2.36, 2.48, 2.53
HUD's investigation of housing complaint, 2.32, 2.36
Unlawful detainer complaint, process server's investigation of occupants unnamed in, 9.52

Joint and Several Liability
Lease provision specifying joint liability for rent, 1.45
Roommate's joint and several liability for full amount of rent after signing lease, 5.30

Joint Tenancy
See also **Tenancy in Common**
Execution of lease by joint tenants, 1.18, 4.40

Judges
Discretion of court. See **Discretion of Court**
Disqualification of judge in unlawful detainer action. See **Disqualification of Judge in Unlawful Detainer Action**
Inspection of property by judge in action for breach of implied warranty of habitability, 3.28
Notice. See **Judicial Notice**

Judgment in Unlawful Detainer Action
See also **Trial of Unlawful Detainer Action; Unlawful Detainer**
Appeal of judgment. See **Appeals**
Attorney fees awarded to prevailing party
Actions not arising from lease, 13.28D
Amount of fees, determination of, 13.29
Anti-SLAPP statute, award of fees under, 13.40A
Appeals. See **Appeals**
Attorney representing self, 13.28
Basis for recovery of fees, 13.25, 13.33
Contractual attorney fees, 13.33A
Cost item, attorney fees as, 13.23
Defendant, award of fees to, 13.40
Determining prevailing party, 13.26-13.27

Dismissal of action, effect on determining prevailing party, 13.27
In-house or pro bono representation, 13.28A
Lease or rental agreement containing attorney fee provision, fee award to prevailing tenant under, 13.40
Legal services rendered before complaint filed, recovery of fees for, 13.30
Local rules of court, effect of, 13.33A
Procedure for claiming fees, 13.33
Statutory fees, 13.33B
Successors in interest, award of fees against, 13.31
Tenant rendering full amount of rent owed, effect of, 13.28B
Time limit for claiming fees, 13.33C
Wrong court, effect of attorney filing action in, 13.28C
Contingent fee agreement, prohibition against fee award exceeding amount of fees incurred under, 13.40
Costs awarded to prevailing party
Generally, 13.21
Allowable costs and expenses, 13.22
Attorney fees as cost item, 13.23
Defendant, award of costs to, 13.40
Limits on recovery of costs, 13.24
Procedure for claiming costs, 13.23
Damages
Interest on judgment. See **Interest on Money**
Measure of damages, 13.19
Statutory damages, 13.19
Warranty of habitability damages (see Warranty of habitability damages, below)
Default judgments. See **Default and Default Judgment in Unlawful Detainer Action**
Defendant prevailing
Attorney fees and costs, tenant's award of, 13.40
Res judicata effect of judgment, 13.39
Retention of premises by defendant, 13.35
Warranty of habitability damages (see Warranty of habitability damages, below)
Enforcement of judgment. See **Enforcement of Unlawful Detainer Judgment**
Forfeiture of lease, relief from. See **Forfeiture**
Forms, 13.40B-13.40C
Habitability (see Warranty of habitability damages, below)
Jury verdict distinguished from judgment, 12.68
Plaintiff prevailing
Attorney fees (see Attorney fees awarded to prevailing party, above)
Back rent, recoverability of, 13.18
Costs (see Costs awarded to prevailing party, above)
Damages (see Damages, above)
Defense of breach of warranty of habitability, plaintiff as prevailing party after tenant's failure to timely pay reasonable rental value, 13.36
Forfeiture of possession and leasehold rights, 13.17
Interest on judgment. See **Interest on Money**
Judgment for plaintiff, 13.34
Writ of possession, execution of judgment by, 13.17
Posttrial inspections by landlord, 13.33D
Res judicata effect of judgment in unlawful detainer action, 11.62, 13.39
Stay of execution. See **Stay of Execution of Unlawful Detainer Judgment**
Stipulated judgment, 9.18, 9.19-9.19A
Successive actions not barred by pending appeal of earlier action, 13.42
Summary judgment. See **Summary Judgment in Unlawful Detainer Action**
Vacating judgment, motion for, 13.46
Warranty of habitability damages
Delinquent rent, assessing damages against, 13.37
Notice of breach, assessing damages against all rent due after, 13.38
Order for judgment for defendant, 13.41
Payment of reasonable rental value within 5 days, judgment for tenant conditioned on, 13.36

Judgment Notwithstanding Verdict, 13.45

Judgment on Pleadings
Unlawful detainer action, motion for judgment on pleadings in, 11.40

Judgments

Bankruptcy stay, entry of state court judgment as violation of, 14.10
Eviction action, advantages of stipulated judgment to landlord in, 5.25
Unlawful detainer action, stipulated judgment in, 9.18, 9.19-9.19A

Judicial Discretion. See **Discretion of Court**

Judicial Notice
Summary judgment motion in unlawful detainer action, judicially noticeable matters supporting, 11.38

Judicial Review. See **Appeals**

Jurisdiction
Limited civil action. See **Limited Civil Action**
Public utilities
Submetering equipment, jurisdiction over, 4.41E
Water and sewer tenant utility billing, jurisdiction over, 4.41A
Quashal motion. See **Quashing Service of Unlawful Detainer Summons**
Small claims court's lack of jurisdiction over unlawful detainer action, 13.24
Special appearance by party challenging service of process, 10.18
Unlawful detainer action, court's lack of jurisdiction to enter judgment for tenant on condition tenant pay pendente lite rents, 12.27

Jury Instructions in Unlawful Detainer Action
See also **Unlawful Detainer**
Generally, 12.42
Burden of proof
Retaliatory eviction (see Retaliatory eviction, sample instructions on, below)
Sample jury instruction regarding burden of proof and preponderance of evidence, 12.46
Damages (see Rent and damages, below)
Estoppel of landlord's right to terminate tenancy, 12.63C
Filing proposed instructions, procedures and deadlines for, 12.43
Format for jury instructions, 12.44
Good faith in eviction of tenant, instruction regarding lack of, 7.55
Habitability, breach of implied warranty of
Generally, 12.53
Definition of habitability, sample instruction on (landlord's instruction), 12.54
Definition of habitability, sample instruction on (tenant's instruction), 12.54A
Factors to consider, sample instruction on, 12.55
Housing code standards, instruction regarding landlord's failure to comply with, 3.24
Notice of defective conditions to landlord, sample instruction on timeliness of, 12.55
Reasonable rent owed (see Reasonable rent owed if habitability warranty breached, below)
Quiet enjoyment, breach of implied warranty of, 12.63A
Reasonable rent owed if habitability warranty breached
Difference-in-value method, sample instruction on calculation of reasonable rent by, 12.58
Drafting instructions on computing reasonable rent owed, 12.56
Percentage-reduction-in-use method, sample instruction on calculation of reasonable rent by, 12.57
Tenant's discomfort and annoyance, sample instruction on calculation of reasonable rent by factoring in, 12.59
Rent and damages
Calculation of rent and damages, sample instruction on, 12.49
Fair rental value for assessing damages, sample instruction for definition of, 12.50
Reasonable rent owed if habitability warranty breached (see Reasonable rent owed if habitability warranty breached, above)
Statutory damages, definition of malice, 12.52
Witnesses' opinions concerning fair rental value, sample instruction on, 12.51
Retaliatory eviction, sample instructions on
Generally, 12.60
Elements of retaliatory eviction in month-to-month tenancy, 12.61
Landlord bears burden of disproving intent, sample instruction, 12.63
Refusal of landlord to rent, 12.63D
Tenant bears entire burden of proof on defense, sample instruction, 12.62
Sample jury instructions
Burden of proof and preponderance of evidence, 12.46
Facts plaintiff must establish, 12.47
Habitability (see Habitability, breach of implied warranty of, above)
Rent and damages (see Rent and damages, above)
Retaliatory eviction (see Retaliatory eviction, sample instructions on, above)

Service of notices and computation of time, 12.48
Sources of jury instructions, 12.41
Valuation
Breach of warranty of habitability, sample instruction on calculation of reasonable rent by difference-in-value method, 12.58
Fair rental value (see Rent and damages, above)
Waiver of landlord's right to terminate tenancy, 12.63B

Jury Trial
Contractual predispute jury trial waivers, validity of, 1.30
Forcible entry and detainer action, landlord's demand for jury trial, 5.22
Mobilehome park rules, denying homeowners right to jury trial prohibited, 6.46
Unlawful detainer action, jury trial in. See **Trial of Unlawful Detainer Action**

Juveniles
Law enforcement agency supplying information to housing authority on conviction of juvenile, 2.15

Keys and Locks
Consent of landlord required for changing or adding locks, 1.66-2
Dead bolts and window locks, landlord's duty to install, 3.11A
Emergencies. See **Emergencies**
Forcible entry, changing tenant's locks characterized as, 8.140
Illegal entry by landlord, tenant changing locks in response to, 5.18
Liability of landlord for changing locks or using bootlock to prevent tenant's access to premises, 8.148

Labor Unions
Retaliation against employee for union activities, motive in, 8.129, 8.132

Landscaping Fees. See **Mobilehomes**

Late Charges. See **Rent**

Law Enforcement Personnel
Enforcement of unlawful detainer judgment. See **Enforcement of Unlawful Detainer Judgment**
Eviction of tenant after bankruptcy, sheriff requiring order of relief from automatic stay, 14.17
Juvenile conviction, law enforcement agency supplying information to housing authority on, 2.15
Unlawful detainer action
Criminal activity on premises, subpoenaing police reports, 11.22
Summons, sheriff or marshal serving occupants not named in complaint, 9.51
Writ of possession, requirement that county sheriff or marshal serve, 13.66

Lead-Based Paint
Disclosure by landlord of, 1.29, 4.16B
Disclosure in lease regarding presence of, 1.77, 1.82A, 4.37
Injuries caused by lead-based paint chips, tenant's recovery for, 3.67

Leases
Generally, 3.1
Agent and service of process information included in lease, 1.21A
Amending terms of lease (see Modifying terms of tenancy, below)
Assignment of lease. See **Assignment and Subletting**
Attorney fees
Construction of lease provisions concerning attorney fees. See **Construction and Interpretation**
Invalidity of lease, fee award to tenant establishing, 13.40
Motion to strike unlawful detainer complaint based on complaint's failure to allege lease provision for recovery of fees, 10.43
Prevailing party's entitlement to, 1.14, 1.74, 4.42
Unlawful detainer. See **Judgment in Unlawful Detainer Action**
Bankruptcy stay affecting lease rights. See **Bankruptcy and Insolvency**
Breach of lease
Abandonment. See **Abandonment**
Covenant, breach of. See **Covenants**
Ejectment action based on breach of lease, 8.25
Eviction. See **Eviction**
Sublessee's standing to sue lessor for breach of contract, 1.14

Termination of tenancy on grounds of tenant's breach of lease. See **Termination of Lease**
Tripling of rent for breach of lease provision, unenforceability as penalty, 8.16
Certificate of occupancy. See **Certificates and Certification**
Condition of premises. See **Condition of Premises**
Consideration for lease. See **Consideration**
Covenants in lease. See **Covenants**
Creation of lease by contractual agreement, 1.1
Credit reports. See **Credit Reports and Agencies**
Defined, 1.1
Deposits. See **Deposits**
Description of property. See **Description of Property**
Disclosures
Generally, 1.29
Mobilehome leases over 5 years in length, disclosure requirements for, 6.24
Distinguishing lease from other relationships
Licenses, 1.6
Occupant of rental premises, effect of status as employee or employee-tenant, 1.4
Proprietor and lodger, 1.3-1.3D
Roommates, 1.7-1.7C
Seller-purchaser, 1.5
Drafting rental agreement
Description of premises. See **Description of Property**
Disclosures required by state and federal law, 1.29
Fixed-term lease. See **Fixed-Term Tenancy**
Government-subsidized housing. See **Government-Subsidized Housing**
Month-to-month tenancy. See **Month-to-Month Tenancy**
Mutual consideration requirement for valid lease, 1.22
Parties to lease (see Parties to lease, below)
Periodic tenancy. See **Periodic Tenancy**
Printed lease forms (see Printed lease forms, below)
Prohibited provisions, 1.30
Public housing. See **Public Housing**
Rent control ordinances, effect on drafting lease provisions, 1.31
Rent, lease provision specifying amount and manner of paying, 1.22
Term of tenancy, 1.27
Terms of lease (see Terms of lease, below)
Use of premises, 1.28, 4.38
Written or oral agreement (see Written or oral agreement, below)
Dual character of landlord tenant agreement, 1.2
Enforcement of lease, 1.13
Entry, landlord's right of. See **Entry, Right of**
Eviction. See **Eviction**
Execution of lease
Deed of trust, effect of executing lease prior to, 8.68E
Deposit on, 1.39
Parties to lease (see Parties to lease, below)
Signature clause, 1.79
Extension of lease. See **Renewal or Extension of Lease**
Extinguishment of lease subordinate to foreclosing deed of trust after sale of property at trustee's sale, 1.13
Fair housing laws. See **Fair Housing Laws**
Fixed-term tenancy. See **Fixed-Term Tenancy**
Garage. See **Garages and Parking Facilities**
Government-subsidized housing. See **Government-Subsidized Housing**
Guarantor of lease, landlord's action against, 13.74
Habitability. See **Habitability, Implied Warranty of**
Holding over. See **Holding Over**
Improvements and repairs. See **Improvements and Repairs**
Inspection of property. See **Inspection of Property**
Interpretation of lease. See **Construction and Interpretation**
Joint tenancy. See **Joint Tenancy**
Maintenance of premises (see Tenant obligations and restrictions, below)
Mobilehomes. See **Mobilehomes**
Modifying terms of tenancy
Fixed-term tenancy, 3.66
Periodic tenancy. See **Periodic Tenancy**

Month-to-month tenancy. See **Month-to-Month Tenancy**
Notice, lease provisions regarding. See **Notice and Notification**
Occupants
Bankruptcy stay, inapplicability to non-debtor occupants, 14.13
Discovery in unlawful detainer action, identifying all occupants through, 11.3
Guests, boarders, lodgers, and roommates, restrictions on, 1.46, 4.40
Identification and joint liability of, 1.45, 4.40
Postjudgment claim of right to possession by nontenant occupants. See **Enforcement of Unlawful Detainer Judgment**
Operational officer of corporation sign lease, effect of, 1.19
Option to buy agreement, 1.5
Oral agreement (see Written or oral agreement, below)
Parking facilities. See **Garages and Parking Facilities**
Parties to lease
Agent of party, execution of lease by, 1.20
Capacity of party to enter into lease, 1.16, 1.19
Corporations and other business entities, execution of lease by, 1.19
Form, 1.37
Joint tenants, execution of lease by, 1.18, 4.40
Listing names of all tenants in lease, preventing occupancy of unknown tenants by, 1.21, 4.40
Spouses, requirement that lease of community real property be signed by, 1.17
Tenants in common, execution of lease by, 1.18
Periodic tenancy. See **Periodic Tenancy**
Preprinted lease forms (see Printed lease forms, below)
Presumptions. See **Presumptions and Inferences**
Printed lease forms
Generally, 1.12
Advantages of printed lease forms, 4.18
Disadvantages of printed lease forms, 4.19
Older forms, dangers of using, 3.1
Privity of contract created by, 1.2
Public housing. See **Public Housing**
Public utilities. See **Public Utilities**
Quiet enjoyment of lease. See **Quiet Enjoyment, Implied Covenant of**
Recordation of lease, 1.12
Renewal of lease. See **Renewal or Extension of Lease**
Rent. See **Rent**
Repair-and-deduct remedy. See **Repair-and-Deduct**
Roommates. See **Roommates**
Sample residential leases
Generally, 1.80
Fixed-term lease. See **Fixed-Term Tenancy**
Month-to-month tenancy. See **Month-to-Month Tenancy**
Rental agreement (Professional Publishing Corporation Form), 1.84
Security deposits. See **Security Deposits**
Spanish language. See **Spanish Language**
Subletting. See **Assignment and Subletting**
Tenancy at sufferance. See **Tenancy at Sufferance**
Tenancy at will. See **Tenancy at Will**
Tenant obligations and restrictions
Automobile repair on premises prohibited, 1.64
Consideration for rental, tenant's agreement to maintain premises as, 1.61
Disturbance, unlawful conduct, and waste, tenant's obligations to refrain from, 1.58-1
Pets, landlord's consent required for, 1.62
Protect and maintain landlord's property, 1.57
Repairs by tenant. See **Improvements and Repairs**
Rugs on floor, tenant's obligation to place, 1.58-3
Rules and regulations of building, tenant's obligations to comply with, 1.59
Sound equipment, limits on, 1.58-2
Waterbeds, requirements regarding, 1.63
Termination of tenancy. See **Termination of Tenancy**
Term of tenancy. See **Term of Tenancy**
Terms of lease
Assignment and subletting. See **Assignment and Subletting**
Attorney fees (see Attorney fees, above)
Breach of covenant. See **Covenants**

Condition of premises. See **Condition of Premises**
Death or disability of tenant. See **Assignment and Subletting**
Deposit on execution of agreement, 1.39
Description of property. See **Description of Property**
Entire agreement, provision regarding, 1.78
Entry of landlord onto premises, notice requirements, 1.66-1
Fixed-term lease, tenant's termination for cause under, 1.73, 8.21A
Indemnification of landlord, 1.47
Key money, 1.26A, 4.23, 4.29A
Lead-based paint, disclosure regarding, 1.77, 1.82A, 4.37
Locks, landlord's consent required for changing or adding, 1.66-2
Malicious holding over by tenant, statutory damages for, 1.70
Misrepresentation in tenant's application, effect of, 1.10, 1.69
Modifying terms of tenancy (see Modifying terms of tenancy, above)
Nonrefundable applicant screening fee, 1.26A, 1.51, 4.11, 4.23
Occupants (see Occupants, above)
Parties to agreement, 1.37
Personal property remaining on premises after tenant vacates, 1.71
Possession of premises, 1.72
Rent. See **Rent**
Security deposits. See **Security Deposits**
Service of notices, 1.76
Signatures, 1.79
Tenant obligations (see Tenant obligations and restrictions, above)
Term of tenancy. See **Term of Tenancy**
Use of premises, 1.55
Utilities, tenant's responsibility for payment of, 1.56, 4.41A
3-day notice, lease provision altering requirements regarding notice void, 8.27
Types of tenancy
Fixed-term tenancy, 1.8
Periodic tenancy, 1.9
Tenancy at sufferance, 1.11
Tenancy at will, 1.10
Trespassers, 1.11A
Unexpired lease, 5-day stay of execution of unlawful detainer judgment on, 13.49
Utilities. See **Public Utilities**
Waiver. See **Waiver**
Written or oral agreement
Generally, 1.13, 4.17
Agent for service of process, request by tenant under oral agreement for name of, 1.21A, 1.29
Landlord, advantages of written agreement for, 1.14
Tenant, advantages of written agreement for, 1.15

Legal Ethics. See **Ethics**

Licenses and Permits
Distinguishing license from lease, 1.6
Fixtures, disposition of encumbered, 8.166
Mobilehomes, use permits. See **Mobilehomes**

Liens and Encumbrances
Mechanics' liens. See **Mechanics' Liens**
Mobilehomes. See **Mobilehomes**
Personal property, landlord's lien on. See **Personal Property**

Limitation of Actions. See **Statutes of Limitations**

Limited Civil Action
Appeal, time limit for filing, 13.33C
Jurisdiction
Ejectment action, superior court's jurisdiction to hear, 8.25
Unlawful detainer actions, 9.32
Unlawful detainer action
Attorney fees, effect of court's jurisdictional limit on award of, 13.29
Captions on pleadings, 12.44

Class action in municipal court, permissibility of, 10.3
Default, motion for relief from, 13.16
In propria persona unlawful detainer action by landlord in limited civil case, 9.23
Jurisdiction over, 9.32
Notice of appeal, 13.59
Priority trial calendar, removal of case from, 11.41

Limited Liability Companies (LLCs)
Execution of lease by, 1.19

Liquid Petroleum Gas (LPG)
Mobilehome park owner's sale of LPG, price restrictions on, 6.43

Lis Pendens
Tenants recording lis pendens against property, 5.39

Litigation Privilege. See **Privileges**

Local Rules of Court. See **Rules of Court**

Lockouts. See **Self-Help Eviction**

Locks. See **Keys and Locks**

Lodgers
Hotels. See **Hotels and Motels**
Lease restrictions on, 1.46, 4.40
Roommate as lodger of original tenant, 5.30

Low-Income Housing. See **Government-Subsidized Housing; Public Housing; Section 8 Housing**

Mail
Housing discrimination, filing complaint with HUD by mail, 2.33
Renewal of lease, option effective on mailing notice to landlord, 3.62
Rent increase, dangers of mailing notice of, 3.65A
Service by mail
Answer to unlawful detainer complaint served by express mail, extension of time to file demurrer as result of, 11.2
Deposition notice, effect of serving by mail, 11.8
Extension of time as result of serving notice by mail, 8.65
New trial motion, inapplicability of 5-day extension to time limit for, 13.44
30-day or 60-day notice, effect of serving by mail, 8.77
3-day notice, service by mail. See **3-Day Notice**
Unlawful detainer complaint, service by mail, 9.49, 13.2
Writ of possession, 13.66

Maintenance of Premises. See **Improvements and Repairs; Leases**

Malicious Holding Over. See **Holding Over**

Management of Property
Generally, 4.45
Actions by manager, liability of landlord for, 4.49
Disclosure by landlord of manager's name and address, 1.29
Independent contractors. See **Independent Contractors**
Making repairs and code compliance, 4.50
Privately owned apartment building, manager's liability for tenant's personal injuries, 3.68A
Rent (see Resident property managers, below)
Resident property managers
Compensation of manager, 4.47
Daily incident logs or records kept by on-site manager, admissibility as business records, 12.26
Employee status of, 4.46, 8.84
Eviction of manager after termination of employment, 4.48, 7.70
Labor-for-rent agreement, 4.31
Maximum rent and rent credit for apartment-house employees, 4.47

Termination and eviction of, 4.48
Unlawful detainer action (see Unlawful detainer action, below)
Security deposit issues on termination of tenancy, 4.28A, 4.51
Unlawful detainer action
Generally, 9.5
Plaintiff in unlawful detainer action, resident property manager acting as, 4.45

Mandate, Writ of
Fair Employment and Housing Commission's final order, review by administrative mandamus, 2.55
Rent control board
Decisions of board, judicial review by filing writ of administrative mandamus, 7.51
Establishment and certification of permissible rent levels, writ of mandate to force rent control board to comply with, 7.45
Rent increase, mandate petition as prerequisite to filing lawsuit challenging city's denial of, 7.14
Unlawful detainer action
Generally, 13.63
Discovery, writ of mandate to review court order affecting, 11.7
Motion to quash, writ of mandate for review of court order denying, 10.27
Peremptory challenge of judge, writ of mandate to review order granting or denying motion for, 12.8A
Stay of execution of unlawful detainer judgment pending appeal, review of denial by writ of mandate, 13.60
20-day mandatory trial setting, mandamus proceeding to enforce, 11.42

Marital Status
See also **Spouses**
Antidiscrimination laws, 2.20
Fair Employment and Housing Act (FEHA), discrimination based on marital status prohibited under, 2.9C, 8.122
Unruh Civil Rights Act, discrimination based on marital status prohibited under, 2.58

Marshals. See **Law Enforcement Personnel**

Mechanics' Liens
Mobilehome, applicability of mechanics' lien to, 6.4

Mediation of Housing Dispute. See **Conciliation or Mediation of Housing Dispute**

Memorandum in Opposition to Motion
See also **Memorandum in Support of Motion**
Unlawful detainer complaint, summary judgment motion, 11.39

Memorandum in Support of Motion
See also **Memorandum in Opposition to Motion; Memorandum of Points and Authorities**
Complaint (see Unlawful detainer complaint, below)
Default, memorandum supporting motion for relief from, 13.10
Forfeiture, memorandum supporting application for relief from, 13.57
Unlawful detainer complaint
Demurrer to unlawful detainer complaint, supporting memorandum for, 10.33, 10.36A
Motion to quash, memorandum in support of, 10.25, 10.28A
Motion to strike complaint, supporting memorandum for, 10.46, 10.47A
Summary judgment motion, 11.38

Memorandum of Points and Authorities
See also **Memorandum in Opposition to Motion; Memorandum in Support of Motion**
Bankruptcy
Application for order to surrender property, memorandum in support of, 14.70
Motion for allowance and payment of administrative rent claim and supporting memorandum, 14.61
Motion for relief from stay and supporting memorandum, 14.63

Mental Capacity. See **Capacity**

Mileage Expenses for Witnesses. See **Expenses and Expenditures**

Military
Servicemember's Civil Relief Act (SCRA), termination of lease agreement by servicemembers and dependents under, 1.73, 8.21A

Minors. See **Children and Minors**

Misrepresentations. See **Fraud and Misrepresentation**

Mobilehomes
Generally, 6.1
Abandoned mobilehome, disposition of
Judicial declaration of abandonment, 6.84
Rental agreement provision regarding, 6.118
Acknowledgment of rental agreement
Acceptance of commercial goods or services not required, 6.138
Consent to entry, 6.139
Inspection to corroborate management's representation of space and facilities, 6.134
Mobilehome Residency Law, receipt and understanding of, 6.135
Month-to-month agreement, charges for, 6.136
Term agreement, charges for, 6.137
Voluntary acknowledgment by homeowner, 6.133
Addresses (see Rental agreement, below)
Adults-only restrictions
Generally, 6.18
Fair Housing Amendments Act of 1988, compliance with, 6.54
Sale of mobilehome in violation of adults-only policy, management's withholding of approval, 6.54
Alcoholic beverages, management's enforcement of rental agreement or park rules governing consumption of, 6.31
Amendments
Master lease, changes in (see Zoning, use permits, or changes in master lease, below)
Park rules, 6.45, 6.112
Rental agreement, amendments to, 6.132
Assignment (see Cotenants, sublessees, and subsequent tenants, below)
Attorney fees and costs
Mobilehome Residency Law, prevailing party's recovery of fees under, 13.27
Rental agreement provision for recovery of fees, 6.128
Statutory authority for recovery of, 6.89, 13.25
Changes in master lease (see Zoning, use permits, or changes in master lease, below)
Common areas
Fees for maintenance of common areas prohibited, 6.34
Public nuisance, park management's failure to keep common areas in good order as, 6.16, 6.85
Responsibility of park management for, 6.47, 6.113
Condemnation of mobilehome park, eviction of tenants in event of, 6.69
Conversion of mobilehome parks (see Zoning, use permits, or changes in master lease, below)
Costs
Litigation costs (see Attorney fees and costs, above)
Pass-through of costs (see Pass-throughs to tenant, below)
Service charges (see Fees and service charges, below)
Cotenants, sublessees, and subsequent tenants
Generally, 6.59
Cotenants, management's attempts to require execution of rental agreement by, 6.60
Form, subletting of mobilehome, 6.117
Rental agreement provision on subletting and assignments, 6.118
Sublessee takes possession, management changing terms of rental agreement before, 6.61
Criminal conduct of tenants, mobile-home park owner's liability for, 3.68B
Definition of mobilehome park, 6.9-6.11, 6.16
Deposit
Amount of deposit, 6.99
Clubhouse or recreation hall, prohibition against charging cleaning deposit for use of, 6.31
Payment of deposit amount, 6.100
Disabled persons
Full use and enjoyment of premises by disabled persons, mobilehome park's duty to make accommodations for, 6.14A
Tenant's disabled child, landlord required to assume reasonable financial burdens to accommodate, 6.38
Disclosure
Seller, disclosures by, 6.57A
Term of rental agreement over 5 years, reporting and disclosure requirements for, 6.24
Zoning, use permits, or changes in master lease, disclosure to potential homeowners before start of tenancy on status of, 6.49, 6.101
Dwelling, mobilehomes within definition of, 2.30
Emergency preparedness plan, park operator's adoption of, 6.47
Enforcement of standards
Nuisance (see Nuisance, below)

Park rules (see Park rules, below)
Removal of vehicles by management, 6.88
Tenant remedies, 6.87
Unlawful business practices, penalties for, 6.86
Willful violation of mobilehome residency standards or sales requirements, liability of park management for, 6.86
Entry
Consent to entry by homeowner, 6.139
Management's lack of right of entry, 6.115
Eviction
Grounds for eviction (see Grounds for eviction, below)
Impermissible grounds (see Impermissible grounds for eviction, below)
Termination and eviction (see Termination and eviction, below)
Facilities (see Rental agreement, below)
Fair Housing Act, applicability to mobilehomes, 6.20
Fees and service charges
Generally, 6.33
Amortization of fees, 6.42
Chart, fees for utilities and services, 6.98
Fines or penalties awarded against park management, charging homeowners fees for prohibited, 6.40
Form, fees, service charges, and utilities, 6.110
Governmental entities, fees charged by, 6.35
Landscaping fees (see Landscaping fees, below)
Occupancy related fees, restrictions on, 6.38
Park rules and regulations, charging fees prohibited, 6.41
Pets, restrictions on fees for, 6.37
Term longer than 12 months, fee for lease with, 6.31
Term of 12 months or less, prohibition against charging fee for lease with, 6.36
Transfer or sales fees in sale of mobilehome, restrictions on management charging, 6.57
Utilities provided by park management, charges for, 6.33, 6.43, 6.98, 6.110
Fires. See **Fires**
Grounds for eviction
Change of use of park, 6.70
Closure of park, 6.70
Compliance with laws, failure of tenant regarding, 6.64
Condemnation of mobilehome park, 6.69
Conduct constituting substantial annoyance, 6.65
Criminal acts, eviction for committing, 6.66
Impermissible grounds (see Impermissible grounds for eviction, below)
Park rules and regulations, failure to comply with, 6.67
Services or utilities, nonpayment of rent or charges for, 6.68
Guests
Fees for guests, restrictions on, 6.38
Management requiring guests to execute rental agreement, 6.59
Park rules regarding, 6.142
Rental agreement provision regarding, 6.118
Habitability. See **Habitability, Implied Warranty of**
Housing discrimination statutes, applicability to mobilehome owners and parks, 6.14A
Impermissible grounds for eviction
Breach of implied warranty of habitability, tenant's complaints about, 6.72
Expiration of term of lease, 6.73
Mobilehome Residency Law, impermissible grounds for eviction under, 6.71
Retaliation for exercise of protected rights, 6.17, 6.72
Improvements and repairs
Permits from Department of Housing and Community Development (HCD) for alterations or improvements to manufactured homes, 6.48
Public nuisance, park management's failure to keep common areas in good order as, 6.16, 6.85
Seller or third party buyer, management's right to demand repair or improvement from, 6.54
Injunctions. See **Injunctions**
Inspection to corroborate management's representation of space and facilities, 6.134
Installation of mobilehome (see Location of mobilehome, below)
Interpretations. See **Construction and Interpretation**
Landscaping fees
Common area landscaping and maintenance fees, 6.34
Installation, development, and initial landscaping fees, restrictions on, 6.39
Lease

Rental agreement (see Rental agreement, below)
Sale or lease (see Sale or lease of mobilehomes, below)
Legislation affecting mobilehomes
Landlord-tenant statutes, applicability to mobilehome park tenancies, 6.14
Mobilehome Residency Law (see Mobilehome Residency Law (MRL), below)
Rent control ordinances. See **Rent Control**
State legislation specific to mobilehomes, 6.13
Liens
Rental agreement provision regarding encumbrances, 6.118
Termination of tenancy (see Termination and eviction, below)
Warehouse's lien (see Warehouse's lien, below)
Litigation privilege, attorney's communications with mobilehome park residents protected under, 5.39
Location of mobilehome
Generally, 6.9
Individual lot, installation of mobilehome on, 6.11
Park, installation of mobilehome in, 6.10
Mediation. See **Arbitration**
Methamphetamine Contaminated Property Clean-Up Act of 2005, mobilehome owners and mobilehome park operators subject to, 6.13
Mobilehome Residency Law (MRL)
Generally, 6.1, 6.4
Admission to mobilehome park, discriminatory criteria prohibited, 6.20
Applicability of MRL, 6.2-6.12
Attorney fees, recovery of, 6.89
Commercial modulars, inapplicability of MRL to, 6.7
Factory-built housing, inapplicability of MRL to, 6.6
Fees (see Fees and service charges, above)
Impermissible grounds for eviction under, 6.71
Location of mobilehome (see Location of mobilehome, above)
Multifamily manufactured homes, 6.8
Receipt and understanding of MRL, 6.135
Recreational vehicles, inapplicability of MRL to, 6.5
Rental agreement, effect of MRL on (see Rental agreement, below)
3-day notice statute, preemption by Mobilehome Residency Law, 6.14
Type of structure subject to MRL, 6.3-6.8
Notices
Abandonment, notice of belief of, 6.84
CARE program, management notifying park residents about eligibility for, 6.43
Change of use, notice regarding (see Zoning, use permits, or changes in master lease, below)
Correction of rule infraction, notice to homeowner regarding, 6.41, 6.67
Filing action based on lack of services, requirement of 30-day notice to park owners before, 6.16
Rental agreement provision regarding notices, 6.121
Rent increase, notice of, 6.27, 6.30, 6.107
Termination notices, 6.74, 6.81-6.82
Nuisance
Licensee's right to sue neighbor for trespass and nuisance, limits on, 6.11
Park management's failure to keep physical improvements and common areas in good order as public nuisance, 6.16, 6.85
Tenant's violation of park rules as, 6.88
Ombudsman, park owner's duty to post sign identifying, 6.47
Organizations
Management organizations, 6.144
Tenant organizations, 6.143
Ownership
Change of use to resident ownership initiated by park owner or residents, 6.51
Fixtures, rental agreement provision regarding ownership of, 6.114
Information regarding ownership, 6.102
Multiple mobilehome ownership, 6.126
Rental agreement provision regarding, 6.125
Park rules
Generally, 6.141
Adoption and amendment of park rules, 6.45, 6.112
Adults-only restrictions (see Adults-only restrictions, above)
Binding arbitration, prohibiting park rules mandating, 6.15, 6.46, 6.142
Common park rules and regulations, 6.142
Eviction of tenant for failure to comply with park rules and regulations, 6.67

Fee for enforcing park rules and regulations, prohibition against charging, 6.41
Limits on park rules, 6.46
Notice to homeowner regarding correction of rule infraction, 6.41, 6.67
Nuisance, violation of park rules as, 6.88
Pass-throughs to tenant
Capital improvements, pass-through to tenant of, 6.106-2
Limits on pass-through amount, 6.106-4
Rent increase, pass-through of costs to tenant as, 5.5, 6.29
Utility increases, restrictions on passing-through to tenant, 5.5, 7.11
Utility maintenance and capital improvement costs, pass-through to tenants denied, 6.29
Penalties. See **Penalties**
Permits
Alterations or improvements to manufactured homes, permits from Department of Housing and Community Development (HCD) for, 6.48
Suspension of park permit (see Suspension or lapse of park permit, below)
Use permits (see Zoning, use permits, or changes in master lease, below)
Pets
Fees for pets, restrictions on, 6.37
Park rules regarding pets, 6.142
Preemption
Change of use or conversion of park to resident ownership, state preemption of local ordinances regulating, 6.15
Procedural and substantive requirements in excess of state law, preemption off, 6.51
Rent control ordinances affecting mobilehome parks, no preemption under state law, 7.12
3-day notice statute, preemption by Mobilehome Residency Law, 6.14
Public utilities (see Utilities, below)
Rental agreement
Generally, 6.21-6.22
Acknowledgments (see Acknowledgment of rental agreement, above)
Agreement to lease, 6.104
Amendments or alterations to agreement, 6.132
Attachments to agreement, 6.139A
Attorney fees, 6.128
Changes in zoning or master lease (see Zoning, use permits, or changes in master lease, below)
Common areas (see Common areas, above)
Consultation with homeowner, 6.122
Cotenants (see Cotenants, sublessees, and subsequent tenants, above)
Deposit (see Deposit, above)
Enforcement of agreement, 6.127
Entirety of agreement, 6.131
Entry (see Entry, above)
Execution of agreement, 6.56, 6.140
Facilities provided by management, 6.97
Fees (see Fees and service charges, above)
Fixtures, financial responsibility for maintaining, 6.48, 6.114
General prohibitions, 6.118
Identity of homeowner and residents, 6.91
Identity of park owner and management, 6.92
Indemnification for liability, 6.123
Interpretation and severability of agreement, 6.130
Miscellaneous information, 6.103
Notices, 6.121
Ownership (see Ownership, above)
Park management responsibilities for physical facilities, services, utilities, and compliance with laws, 6.47, 6.113
Park name, address and space number, 6.90
Park rules (see Park rules, above)
Parties to rental agreement, determination of, 6.12
Payments, management's right to make, 6.124
Rent (see Rent and rent increases, below)
Sale or lease of mobilehomes (see Sale or lease of mobilehomes, below)
Security deposit (see Security deposit, below)
Services provided by management for homeowners, 6.96
State laws, incorporation of, 6.112
Termination and eviction (see Termination and eviction, below)
Term of agreement (see Term of rental agreement, below)
Time of the essence, 6.129

Waiver, 6.120
Written agreement, requirement of, 1.13, 6.21
Zoning and land use (see Zoning, use permits, or changes in master lease, below)
Rent and rent increases
Generally, 6.26
Amount of rent, lease provision for, 6.95
Capital improvement pass-throughs, 6.106-2
Deduction for management's unreimbursed contribution, 6.106-3
Due date of rent payments, 6.107
Late charges for payment of rent, 6.109
Notice of rent increase, 6.27, 6.30, 6.107
Objective factors, rent increases in long-term agreements tied to, 6.28
Pass-throughs to tenant (see Pass-throughs to tenant, above)
Public rental assistance programs, types of, 6.15A
Rent and indexed rent increase, provision for long-term rental agreement, 6.106-1
Rent control ordinances for mobilehome parks. See **Rent Control**
Selling abandoned mobilehome for delinquent rent, 6.84
Statutory limitations on rent, fees, and charges, 6.31
Suspension of park permit, effect on failure to pay rent, 6.68, 6.73A
Taxes, inclusion in rent of, 6.30
Tender of rent, 6.108
Utilities (see Utilities, below)
Rent control ordinance violations, landlord's lack of entitlement to advance notice of before assessment for violation, 6.15
Repairs (see Improvements and repairs, above)
Retaliatory eviction protections for mobilehome tenancies, 6.14, 6.17, 6.72
Rules and regulations (see Park rules, above)
Sale or lease of mobilehomes
Abandoned mobilehomes, sale of (see Abandoned mobilehome, disposition of, above)
Disclosures by seller, 6.57A
Execution sale of mobilehome, 6.77
Form, sale or subletting of mobilehome, 6.117
Information for prospective homeowners, 6.54, 6.54A
Notice to residents of sale of mobilehome park, 6.53
Removal of mobilehome after sale, requirement of, 6.58
Removal of mobilehome after sale, restrictions on management requiring, 6.54
Rental agreement, consequences of purchaser's failure to execute, 6.56
Replacement of existing mobilehome with new mobilehome, management's requirements for, 6.54
Rights and duties of management, 6.54
Role of management in sales or listings, 6.57
Substandard mobilehome, illegality of selling, 6.57A
Warehouse's lien (see Warehouse's lien, below)
Withholding approval of sale, limits on management's rights regarding, 6.55
Security deposit
Restrictions on amount of, 6.44
Security and default deposits, 6.111
Senior housing, applicability of federal law to, 2.25, 2.25B
Service charges (see Fees and service charges, above)
Standards for mobilehome park (see Enforcement of standards, above)
Storage of mobilehome
Generally, 6.77
Warehouse's lien (see Warehouse's lien, below)
Sublessees (see Cotenants, sublessees, and subsequent tenants, above)
Suspension or lapse of park permit
Rent, effect of permits' suspension on failure to pay, 6.68, 6.73A
Violations of Mobilehome Parks Act as grounds for suspension of permit, 6.16
Termination and eviction
Generally, 6.62-6.63, 6.76
Abandoned mobilehome (see Abandoned mobilehome, disposition of, above)
Assignment of interest in mobilehome to lender, problems for management as result of, 6.75
Form, 6.119
Grounds for eviction (see Grounds for eviction, above)
Impermissible grounds for eviction (see Impermissible grounds for eviction, above)
Judgment lien against mobilehome, execution of, 6.77
Notices of termination, 6.74, 6.81-6.82
Security interest or lien in mobilehome, park management's acquisition prohibited, 6.78

Warehouse's lien (see Warehouse's lien, below)
Term of rental agreement
Beginning of term, lease provision for, 6.93
Charges for term agreement, 6.137
Eviction of tenant after expiration of lease term prohibited, 6.73
Fees (see Fees and service charges, above)
Form, rental agreement provision specifying term of agreement, 6.105
Homeowner's options, 6.23
Month-to-month term, 6.23, 6.94-2, 6.136
Renewal, limits on, 6.25
Reporting and disclosure requirements for lease term over 5 years, 6.24
Specified number of months, lease provision for, 6.94-1
3-day notice statute
Preemption by Mobilehome Residency Law, 6.14
Utilities, request for 3-day notice to quit for nonpayment of, 6.68
Time. See **Time**
Trees, maintenance or removal of, 6.34, 6.47-6.48
Tying arrangements, 6.20
Types of mobilehome tenancies, 6.19
Types of parks, 6.9
Unlawful detainer complaint involving mobilehome, documents attached to, 6.76
Use permits (see Zoning, use permits, or changes in master lease, below)
Utilities
Chart, fees for utilities, 6.98
Eviction of tenant for nonpayment of rent for utilities, 6.68
Fees and charges for, 1.56, 6.33, 6.43, 6.98, 6.110
Inclusion of utilities in rent, 6.30
Liquid petroleum gas, price restrictions on park owner's sale of, 6.43
Park management responsibilities for, 6.113
Park management's obligation to provide utilities, 6.16
Pass-throughs to tenant (see Pass-throughs to tenant, above)
PUC's limited jurisdiction over ratio utility bill-back system for mobilehome parks, 1.56
3-day notice to quit for nonpayment of utilities, request for, 6.68
Warehouse's lien
Defined, 6.79
Foreclosing on warehouse's lien, 6.83
Procedure for obtaining warehouse's lien, 6.80-6.82
Zoning, use permits, or changes in master lease
Change of use of mobilehome park, 6.50-6.52
Definition of change of use, 6.50
Disclosure to potential homeowners before start of tenancy regarding status of, 6.49, 6.101
Eviction of tenants in event of change of use of park, 6.70
Form, changes in zoning, use permits, or master lease, 6.116
Implementation of change of use, notices regarding, 6.51
Injunction against change of use, 6.52
Sale of mobilehome park, notice to residents of, 6.53
State preemption of local ordinances regulating change of use or conversion of parks to resident ownership, 6.15

Modifications. See **Amendments and Modifications**

Mold
Generally, 3.11B, 4.16D, 5.10
Expert testimony in mold exposure claims, 3.28
Negligence lawsuit for damages caused by mold, 3.69

Month-to-Month Tenancy
See also **Fixed-Term Tenancy; Periodic Tenancy**
Acceptance of rent after expiration of fixed-term tenancy, month-to-month tenancy created by, 8.82
Lease provision for, 1.44-2
Mobilehome tenancy, 6.23, 6.94-2, 6.136
Notice
Change of term or condition of tenancy, 30-day notice required for, 1.59, 3.65
Rent increases, 60-day notice required for, 3.65A-3.65B, 5.5
Termination of month-to-month tenancy, notice of, 1.9
Presumption creating month-to-month tenancy, 1.8-1.9

Rent. See **Rent**
Retaliatory eviction. See **Retaliatory Eviction**
Sample leases
California Apartment Association Form, sample month-to-month rental agreement, 1.81
California Association of Realtors Forms, sample month-to-month lease and lease/rental commission agreement, 1.83
National Housing Law Project Form (month-to-month lease), 1.85
60-day notice. See **60-Day Notice**
Termination of tenancy. See **Termination of Tenancy**
30-day notice. See **30-Day Notice**
Written consent of landlord for converting tenancy to month-to-month tenancy, 4.20

Motels. See **Hotels and Motels**

Motions
Admissions. See **Admissions in Unlawful Detainer Action, Request for**
Affidavit in support of motion. See **Affidavits and Declarations**
Attorneys' fees. See **Attorneys' Fees**
Bankruptcy, motion for relief from automatic stay. See **Bankruptcy and Insolvency**
Default, motion for relief from. See **Default and Default Judgment in Unlawful Detainer Action**
Disqualification of judge. See **Disqualification of Judge in Unlawful Detainer Action**
Escrow of rent. See **Escrow of Rent Pending Unlawful Detainer Action**
Judgment on pleadings, motion for, 11.40
Memorandum in opposition to motion. See **Memorandum in Opposition to Motion**
Memorandum in support of motion. See **Memorandum in Support of Motion**
New trial, motion for, 13.44
Preemption of local rules, 10.1A
Protective order. See **Protective Order in Unlawful Detainer Action**
Quashing service of summons. See **Quashing Service of Unlawful Detainer Summons**
Stay of execution. See **Stay of Execution of Unlawful Detainer Judgment**
Strike, motion to. See **Striking Unlawful Detainer Complaint, Motion for**
Summary judgment motion. See **Summary Judgment in Unlawful Detainer Action**
Trial motions. See **Trial of Unlawful Detainer Action**
Vacating judgment, motion for, 13.46

Motor Vehicles
Lease provision prohibiting automobile repair on premises, 1.64
Mobilehomes. See **Mobilehomes**

Municipal Courts. See **Limited Civil Action**

Municipalities. See **Cities and Counties**

Negligence
Personal injuries. See **Personal Injuries**
Uninhabitability, negligence cause of action for, 3.48A

New Trial
Defined, 12.5
Unlawful detainer action, motion for new trial in, 13.44

Nonprofit Institutions
Rent control exemptions for units maintained by nonprofit institutions, 7.24

Notice and Notification
Abandonment, notice of belief of. See **Abandonment**
Bankruptcy. See **Bankruptcy and Insolvency**
Costa-Hawkins Rental Housing Act, notice provisions subsidized housing tenants under, 3.66A
Credit reporting agency, landlord's notice to tenant before reporting tenant to, 4.9
Daycare business on premises, tenant's notice to landlord of intent to operate, 1.28
Dead bolt or window lock, tenant's notice to landlord of inoperable, 3.11A
Default, relief from. See **Default and Default Judgment in Unlawful Detainer Action**
Demurrer overruled, written notice of, 10.34
Deposition, notice of, 11.8
Drug dealing, notice to landlord of and reasonable time for abatement, 3.7, 3.10, 4.44

Entry by landlord, notice requirements, 1.66-1, 3.3, 3.3A
Eviction notices. See **Eviction**
Ex parte appearance, notice to all parties of, 10.48
Fair Debt Collection Practices Act, notice requirements under, 8.26A
Fixed-term tenancy, service of nonrenewal notice, 1.8
Habitability, notice of defects to landlord. See **Habitability, Implied Warranty of**
Inspection of premises and to cure deficiencies, notice of right to request, 8.172B
Judicial notice. See **Judicial Notice**
Landlord seeking to recover possession of premises, notice to tenant of good faith reasons for, 8.115
Lease provisions
Breach of covenant by tenant, service of notice of consequences, 1.68
Credit record agencies, notice that failure to pay rent on time may be reported to, 1.43
Entry of landlord onto premises, notice requirements, 1.66-1
Extension or renewal of lease, notice to landlord of election for, 3.62
Modification or waiver of tenant's right to notice as void, 8.27
Renovation or repair of rental unit, notice to tenant, 1.29
Mailing notices. See **Mail**
Mobilehomes. See **Mobilehomes**
Month-to-month tenancy. See **Month-to-Month Tenancy**
Peremptory challenge of judge, notice not required for, 12.6
Periodic tenancy, notice to tenant of change in terms of. See **Periodic Tenancy**
Personal property. See **Personal Property**
Pest control company's notice provided to tenant by landlord, 1.29, 4.16E
Postjudgment claim of right to possession, notice procedure and limits on use of, 13.70
Reentry by landlord without filing notice of belief of abandonment, landlord's liability for damages, 8.9
Rent increase, notice of. See **Rent**
Repair-and-deduct remedy, notice to landlord of dilapidations before using, 3.13
Section 8 housing. See **Section 8 Housing**
Security deposit, notice required for increasing amount of, 4.27
Service of notices. See **Service of Process and Papers**
60-day notice. See **60-Day Notice**
Stay of execution of unlawful detainer judgment, notice to landlord's attorney of application for, 13.54
Stay of state court proceedings due to bankruptcy petition, filing of, 14.2, 14.5
Strike unlawful detainer complaint, notice of motion to. See **Striking Unlawful Detainer Complaint, Motion for**
Termination of tenancy, notice of. See **Termination of Tenancy**
30-day notice. See **30-Day Notice**
3-day notice. See **3-Day Notice**
Time limits for filing notices. See **Time**
Unlawful detainer action
Generally, 9.37
Appeal, notice of, 13.59
Ex parte application for stay of execution of judgment, notice to opposing party of, 13.49, 13.54
Quash service of summons, notice of motion to, 10.28
Service of notice. See **Service of Process and Papers**
Strict compliance with statutory procedures for, 8.24
Summary judgment, notice of motion for, 11.36
Time limits for filing notices. See **Time**
Trial, notice of, 12.21
Underpayment of filing fee, notice to party of, 10.1B
Utility service, notifying customers of arrearages in account, 8.149A
Writ of possession, written notice required to obtain, 8.161

Nuisance
Breach of covenant of quiet enjoyment, nuisance as theory for redressing, 3.7
Defective condition of premises depriving plaintiff of sale as basis for nuisance action, 3.48A
Drug dealing
Generally, 1.58, 8.55, 8.58-8.59
Around property, nuisance action against landlord based on drug dealing, 3.25
On premises, landlord's liability for drug dealing, 3.7, 4.44
Eviction control ordinance permitting evictions for creating nuisance, 7.58
Habitability, abatement of nuisance as remedy for breach of implied warranty of, 3.15A, 3.15C, 3.36
Mobilehomes. See **Mobilehomes**
Termination of tenancy for, 8.21B, 8.58, 8.58-8.59

Objections
Bankruptcy proceedings
Debtor's objection to lessor's certification, 14.74
Landlord objecting to certification allowing tenant to retain automatic stay protection, 14.16
Lessor's objection to debtor's certification and/or debtor's further certification concerning residential property, 14.72

Occupancy Agreement. See **Leases**

Occupancy, Certificate of. See **Certificates and Certification**

Occupancy Standards
Families, effect of occupancy limits on, 2.24
HUD regulations, effect on occupancy limits, 4.15
Uniform Housing Code, preemption of local occupancy ordinances by, 3.11C

Officers. See **Directors and Officers**

Offsets. See **Setoffs**

Option to Renew Lease. See **Renewal or Extension of Lease**

Oral Agreement. See **Leases**

Oral Testimony
Summary judgment hearing, prohibition against oral testimony at, 11.35

Orders
Appeal of. See **Appeals**
Consolidation order, effect of, 11.67
Demurrer. See **Demurrer to Complaint in Unlawful Detainer Action**
Deposit, order for. See **Deposits**
Mandate, review of court order by. See **Mandate, Writ of**
Protective orders. See **Protective Order in Unlawful Detainer Action**
Rent board's lack of authority to issue order for withholding of rent, 7.77
Temporary restraining order. See **Temporary Restraining Order (TRO)**

Overcharged Rent. See **Rent Control**

Owner Occupancy. See **Eviction**

Ownership and Possession
Enforcement of unlawful detainer judgment. See **Enforcement of Unlawful Detainer Judgment**
Forcible entry and detainer. See **Forcible Entry and Detainer**
Lease provision covering possession of premises, 1.72
Mobilehomes. See **Mobilehomes**
Notice to tenant of landlord's good faith reasons for seeking recovery of possession of premises, 8.115
Records left on property after termination of tenancy, presumption affecting ownership of, 8.154
Unlawful detainer action to recover possession of premises. See **Unlawful Detainer**

Parking Facilities. See **Garages and Parking Facilities**

Pass-Throughs to Tenant. See **Rent**

Penalties
Agent and service of process information, penalties for nondisclosure of, 1.21A
Anti-harassment statute, tenant's recovery of penalties under, 8.150A
Attorney General, penalties in civil housing discrimination actions brought by, 2.40
Bankruptcy
Automatic stay in bankruptcy, penalties for violation of, 14.4, 14.6
Eviction, sanctions for filing bankruptcy petition to avoid, 14.56
Breach of lease, tripling of rent as unenforceable penalty, 8.16
Default, penalties in action for relief based on attorney's fault, 13.8
Denial of tenant's access or use of premises, penalties for, 8.149
Disabled person, penalty for denying equal access in housing to, 2.60

Discovery sanctions
Attorney acting in pro per, ineligibility to collect attorney fees as discovery sanctions, 13.28
Conduct punishable by sanctions, 11.28
Inspection of documents, sanctions for failure to respond to demand for, 11.21
Interrogatories (see Interrogatories, below)
Protective order against abusive discovery, 11.30
Types of sanctions, 11.29
Fair Employment and Housing Commission (FEHC), penalties for housing discrimination, 2.55
Fair Housing Act, civil penalties under, 2.38
Forcible entry and detainer, criminal penalties for, 5.20, 8.152
Fraudulent eviction based on landlord's intention to occupy premises, penalty for, 7.66
Frivolous actions, penalties for. See **Frivolous and Nonmeritorious Actions**
Habitability violations, fines for failure to comply with notices of, 3.11
Housing or building code violations, fines for failure to comply with, 4.50
Interrogatories
Exceeding numerical limits on interrogatories, sanctions for, 11.14
Judicial Council form interrogatories, sanctions for abusing use of, 11.16
Mobilehome parks
Park management, prohibition against charging fees for fines, penalties, or monetary penalties awarded against, 6.40
Unlawful business practices by park management, penalties for, 6.86
Motion to strike brought for purposes of delay, sanctions for, 10.40
Rent control
Advance notice of violation before assessment for violation, landlord's lack of entitlement to, 6.15
Good faith compliance with regulations requirement, exemption from penalties for, 9.16D
Late registration of rental units, ordinance providing for 5 percent penalty for, 7.44
Property owner's failure to register unit with local rent board, penalties for, 7.44, 9.16D
Rent board's authority to impose penalties, 7.77
Unlawful business practices in violation of local rent control ordinances, injunction and penalties for, 7.77
Subpoena duces tecum, penalties for disobeying, 12.18
Undocumented immigrants, penalties against landlord for renting to, 4.14
Unlawful detainer
Action filed in court outside county where premises located, sanctions for landlord's refusal to voluntarily transfer action, 9.33
Advancement of unlawful detainer trial date on tenant's default in paying landlord's potential damages to court, 11.50
Discovery sanctions (see Discovery sanctions, above)
Settlement hearing, sanctions for failure to notify arbitrator of, 9.18D
Vacate premise, penalty for attempting to force tenant to, 4.43

Peremptory Challenge of Judge. See **Disqualification of Judge in Unlawful Detainer Action**

Periodic Tenancy
See also **Fixed-Term Tenancy; Month-to-Month Tenancy**
Generally, 1.9
Defined, 1.1, 1.9, 8.20
Drafting periodic tenancy lease
Fixed-term tenancy distinguished, 1.9, 4.20
Holding over by tenant, nonliability of landlord to new tenant in event of, 4.21
Rent control ordinances, effect of, 4.21-4.22
Notice of changed terms
Effect of notice, 3.65B
60-day notice of rent increase over 10 percent, 3.65A-3.65B, 5.5
30-day notice of change of terms, 3.65
Presumption regarding term of, 4.20
Rent. See **Rent**
Retaliatory eviction. See **Retaliatory Eviction**
Security deposits. See **Security Deposits**
Tenancy at will, conversion into periodic tenancy by acceptance of periodic rent payments, 1.10
Termination of tenancy. See **Termination of Tenancy**

Permits. See **Licenses and Permits**

Personal Appearance
Unruh Civil Rights Act, discrimination on basis of personal appearance prohibited under, 2.58

Personal Injuries
Common areas

Due care for tenant's safety, landlord's liability for negligent failure to use, 3.20
Maintenance of common area, landlord's duty concerning, 3.67A
Landlord's liability for injuries
Common areas (see Common areas, above)
Crime on premises, liability for. See **Criminal Law**
Defective conditions on premises, negligent failure to correct, 3.67
Disclaimer of liability by landlord void as against public policy, 3.69
Mandatory arbitration clause in lease limiting landlord's personal injury liability, validity of, 5.16
Sexual harassment, landlord or property manager's liability for, 2.58, 3.70A
Strict liability of landlord, overturning of case establishing, 3.67, 3.70
Third parties (see Third parties, liability to, below)
Toxic mold, personal injuries resulting from, 3.11B
Tenant's liability for personal injuries
Duty to repair deterioration caused by lack of ordinary care, 3.73
Negligence of tenant, landlord's lack of duty to prevent injury caused by, 3.67
Third parties, tenant's liability to, 3.74
Third parties, liability to
Plaintiff's status as trespasser, invitee, or licensee, landlord's liability for negligence regardless of, 3.71
Tenant's actions causing injury to third parties, landlord's responsibility for, 3.72
Tenant's liability for injury to third parties, 3.74
Toxic mold, personal injuries resulting from, 3.11B, 5.10

Personal Property
Abandoned property (see Notices, below)
Costs of storage (see Storage of tenant's property, below)
Disposition of tenant's personal property
Lease provision covering personal property remaining on premises, 1.71
Mobilehomes, disposition of. See **Mobilehomes**
Notices (see Notices, below)
Removal of property, landlord's liability for, 8.148
Statutory requirements (see Statutory requirements after unlawful detainer, abandonment, or vacation by tenant, below)
Fixtures. See **Fixtures**
Liens
Apartment-house landlord's lien on tenant's baggage and other property, 8.148
Enforcement of landlord's lien, 8.161
Notices
Auction sale, notice of, 8.158
Reclaim abandoned property, notice to owner other than tenant of right to, 8.160
Reclaim abandoned property worth $300 or less, notice to tenant of right to, 8.159-2
Reclaim abandoned property worth $300 or more, notice to tenant of right to, 8.159-1
Sale of abandoned property, notice of, 8.158
Statutory notice to tenant regarding property left on premises, 8.156
Statutory requirements after unlawful detainer, abandonment, or vacation by tenant
Generally, 8.154
Notices (see Notices, above)
Storage of tenant's property (see Storage of tenant's property, below)
Unclaimed property, landlord's disposition of, 8.158
Storage of tenant's property
Generally, 8.155
Mobilehome, storage of. See **Mobilehomes**
Rent control ordinance, effect of, 1.23
Return of property after tenant's payment of storage costs, 8.157
Sale of property, deducting costs of storage from, 8.159

Pest Control
Notice by registered structural pest control provided to tenant by landlord, 1.29, 4.16E

Pets
Consent of landlord for pets, lease provision requiring, 1.62
Dangerous dog in neighborhood, no duty to warn prospective tenant of, 3.68B, 3.72
Eviction for pet in violation of lease, 10.68
Guide dog, refusing to rent to blind person prohibited, 1.62, 4.38
Mobilehome parks, pets in. See **Mobilehomes**
Public housing, tenant's right to have, 2.14, 2.18, 2.27A

Photographs
Uninhabitable conditions, tenant taking photographs of, 5.10

Picketing
Injunction prohibiting picketing in front of residences, constitutionality of, 5.37

Pleadings
Americans with Disabilities Act (ADA), requirements for pleading violation of, 2.21
Answers. See **Answers**
Bankruptcy stay, amendment of pleadings as violation of, 14.29
Caption on pleadings, 12.44
Complaint in unlawful detainer action. See **Complaint in Unlawful Detainer Action**
Complaints. See **Complaints**
Conforming to proof. See **Conforming Pleadings to Proof**
Cross-complaints. See **Cross-Complaints**
Demurrer. See **Demurrer to Complaint in Unlawful Detainer Action**
Disparate impact claim, 2.63
Extension of time to plead. See **Extension of Time**
Forfeiture, application for relief from, 13.57
Judgment for plaintiff in unlawful detainer action, 13.34
Judgment on pleadings, motion in unlawful detainer action for, 11.40
Quashing service of unlawful detainer summons. See **Quashing Service of Unlawful Detainer Summons**
Responsive pleadings in unlawful detainer action. See **Responsive Pleadings in Unlawful Detainer Action**
Stay of execution. See **Stay of Execution of Unlawful Detainer Judgment**
Striking unlawful detainer complaint. See **Striking Unlawful Detainer Complaint, Motion for**

Points and Authorities. See **Memorandum of Points and Authorities**

Possession. See **Ownership and Possession**

Possession, Writ of
Bankruptcy petition filed by tenant, effect on writ of possession after unlawful detainer judgment, 13.68, 14.9, 14.17
Unlawful detainer
Complaint, writ of immediate possession filed with, 9.56
Enforcement of judgment. See **Enforcement of Unlawful Detainer Judgment**
Written notice required to obtain writ of possession, 8.161

Postjudgment Claim of Right to Possession. See **Enforcement of Unlawful Detainer Judgment**

Posttrial Procedures. See **Trial of Unlawful Detainer Action**

Preemption
See also **Federal Preemption**
Bankruptcy Code preempting contractual and state law provisions on assignment and restrictions on assignment of leases, 3.59A
Drug abatement, state law not preempting local ordinances relating to, 4.44
Ellis Act preempting local ordinances preventing landlords from going out of business, 7.64-7.64A, 7.64H
Fair Employment and Housing Act's preemption of local ordinances prohibiting employment and housing discrimination against classes covered by FEHA, 2.48
Local rules, preemption of, 10.1A
Mobilehomes, preemption of statutes affecting. See **Mobilehomes**
Rent control. See **Rent Control**
Section 236 housing, no preemption of local ordinance by federal laws applicable to, 1.35
Uniform Housing Code, preemption of local occupancy ordinances by, 3.11C

Prejudgment Claim of Right to Possession. See **Enforcement of Unlawful Detainer Judgment**

Presumptions and Inferences
Agricultural property, presumption of 1-year lease for, 1.27
Damages
Housing discrimination, presumption of damages without proof of actual damages, 2.45
Tenant's breach of covenant to pay rent, no presumptions regarding, 8.40
Habitability, presumption of breach of implied warranty of, 12.36
Holdover period, no presumption of renewal if landlord refuses to renew or accept rent during, 3.64
Month-to-month tenancy, presumption creating, 1.8-1.9

Owner's failure to occupy premises after eviction of tenant, rebuttable presumption of lack of good faith, 7.67
Periodic tenancy, presumption regarding term of, 4.20
Records left on property after termination of tenancy, presumption affecting ownership of, 8.154
Rent control ordinances affecting presumptions in eviction cases, 7.75
Rent or notice mailed to landlord, presumption regarding date of receipt, 1.21A, 5.24A
Repair-and-deduct by tenant, presumption of acting after reasonable time, 1.60
Retaliation against tenant, court's rejection of rebuttable presumption of, 8.130
Return of service of notice, statutory presumptions, 12.20

Privacy
California's constitutional right to privacy, 2.8
Information on former tenants, DFEH requiring landlord to provide, 2.53
Rental records of other tenants in building, tenant obtaining to determine possible discriminatory practices by landlord, 5.7

Private Clubs
Rental of noncommercial lodging owned by club, preference given to club members, 2.31

Privileges
Litigation privilege
Attorney's communications with mobilehome park residents about anticipated lawsuit protected under, 5.39, 6.17
Eviction action by landlord, effect of litigation privilege on, 7.55, 7.78
Qualified privilege for landlord's communication to prospective landlord, 4.13

Privity of Contract. See **Contracts**

Privity of Estate
Assignment and subletting, effect of, 3.51-3.53, 3.55

Prohibition, Writ of
Discovery, writ of prohibition to prevent improper, 11.6
Unlawful detainer action, 13.63

Proof
See also **Burden of Proof; Evidence**
Conforming pleadings to proof. See **Conforming Pleadings to Proof**
Registration of rental unit, landlord's proof of, 7.56
Retaliatory eviction. See **Retaliatory Eviction**
3-day notice, service by mail insufficient without proof of actual receipt of, 8.63
Unlawful detainer action. See **Trial of Unlawful Detainer Action**

Pro Per or Pro Se. See **In Propria Persona**

Proprietor and Lodger. See **Hotels and Motels; Roommates**

Prosecution of Rental Discrimination. See **Rental Discrimination Action, Prosecution of**

Protective Order in Unlawful Detainer Action
See also **Unlawful Detainer**
Abusive discovery, protective order against, 11.30
Admissions, protective order against request for, 11.24
Escrow of rent pending unlawful detainer action. See **Escrow of Rent Pending Unlawful Detainer Action**
Inspection of documents, protective order against demand for, 11.21
Interrogatories, protective order against, 11.19

Public Assistance. See **Welfare**

Public Auctions. See **Auctions**

Public Housing
See also **Government-Subsidized Housing; Housing and Urban Development (HUD)**
Authority to select tenants
Generally, 2.13
Criminal background of applicants, housing authority's right to check, 2.15
Denial of admission based on status as domestic violence victim prohibited, 1.33, 1.36, 2.15A, 2.17
Preferences for disabled persons, victims of domestic violence, or elderly, 2.14

Residency preferences, 2.14A
Specific selection criteria used by public housing authority, 2.14
Bankruptcy
Discharge of delinquent rent, effect on motion for relief from automatic stay, 14.27
Eviction for nonpayment of rent, relief from automatic stay to complete, 14.27
Consent decree, housing authority prohibited from vacating based on changes in HUD law, regulations, and Circulars, 2.15
Criminal conduct by lease applicant, public housing owner's inquiry into, 2.8
Disabled tenants. See **Disabled Persons**
Drugs and alcohol
Eviction from public housing for, 2.15, 8.55, 8.59
Exclusion of applicants for use of controlled substance or abuse of alcohol, 2.15
Zero tolerance policy for drug use in public housing, distinction between innocent and culpable tenants, 1.33
Habitability, applicability of implied warranty to government-owned housing, 3.19
Lease provisions
Public housing authority, HUD regulations affecting leases used by, 1.33
Tenant conduct, HUD regulations governing, 1.34
Pets, tenant's right to have, 2.14, 2.18, 2.27A
Public Housing Agency (PHA) and Annuals Plans, 2.14
Screening prospective tenants
Generally, 2.11
Authority to select tenants (see Authority to select tenants, above)
Immigration status of applicants, housing authorities' verification of, 2.12
Unlawful detainer complaint, lack of good cause to evict from public housing as affirmative defense to, 10.66

Public Policy
Personal injury disclaimer by landlord void as against public policy, 3.69
Repair-and-deduct remedy, waiver as void against public policy, 3.14
Retaliatory evictions against, 8.110, 8.125
Security deposit, waiver of rights void as contrary to public policy, 8.175

Public Utilities
Acceptance of rent by landlord, effect on waiver of breach of failure to pay utilities, 1.56-11
Administrative fees charged to tenants, 1.56-7, 4.41D
Billing methods
Allocation, 1.56-3
Hot-water ratio billing, 1.56-4, 4.41B
Ratio utility bill-back system (RUBS), 1.56, 4.41A-4.41B, 4.41E
Security deposit withholding, 1.56-5
Submetered, 1.56-2, 4.41B-4.41C
Cutting off utilities with intent to terminate tenancy, landlord's liability for, 6.43, 8.147, 14.36
Disclosure by landlord of utility meter serving other units, 1.29
Estimating consumption when tenant's submeter broken, 1.56-10
Jurisdiction over submetering equipment, 4.41E
Jurisdiction over water and sewer tenant utility billing, 4.41A
Late fees charged by landlord, 4.41D
Limits on landlord's liability for losses or damages resulting from outages, interruptions, or fluctuations, 1.56-8
Mobilehomes, utilities for. See **Mobilehomes**
Notifying customers of arrearage in account, 8.149A
Raising rent to pass-through utility costs to tenant, restrictions on, 5.5
Remedies for tenant's failure to pay, 1.56-6
Rent control ordinances allowing landlord to pass-through increased cost of utilities, 7.35
Tampering by tenants prohibited, 1.56-9
Tenant's responsibility for payment of utilities, 1.56, 4.41A

Punitive Damages
See also **Damages**
Forcible entry and detainer, 8.144
Habitability, tenant's recovery of punitive damages for landlord's breach of implied warranty of, 3.40
Housing discrimination
Generally, 2.2, 2.39
Agent's discriminatory acts, owner's liability for punitive damages, 2.68
Chart, availability of punitive damages under fair housing laws, 2.28
Civil Rights Act of 1866, award of punitive damages under, 2.45
FEHA, award of punitive damages in civil action brought under, 2.56
Unruh Civil Rights Act, award of damages under, 2.59

Manager of property, liability of landlord for punitive damages for ratifying actions of, 4.49
Retaliatory eviction, landlord's liability for, 8.116, 8.135
Self-help eviction, recovery of punitive damages for, 5.22
Unlawful detainer action brought by landlord, effect on insurance coverage of tenant's claim for punitive damages, 9.29
Utility service, tenant's recovery of punitive damages against landlord for discontinuing, 8.149
Wrongful eviction, recovery of punitive damages for, 8.150

Quality Housing and Work Responsibility Act (QHWRA)
Drug treatment facilities, housing authority requiring applicants to sign releases for authority to receive information from, 2.15
Preferences for public housing, restrictions on, 2.14
Reasonable occupancy, number of persons per bedroom, 2.24

Quashing Service of Unlawful Detainer Summons
See also **Unlawful Detainer**
Generally, 10.18
Declaration supporting motion to quash service of summons, 10.28B
Defective complaint as grounds for quashing summons
Demurrer to complaint failing to state cause of action, 10.21
Failure to state cause of action in complaint, 10.20-10.21
Motion to strike. See **Striking Unlawful Detainer Complaint, Motion for**
Unauthorized relief sought in unlawful detainer complaint, 10.22-10.23
Demurrer. See **Demurrer to Complaint in Unlawful Detainer Action**
Error in summons, effect of, 9.45
Extension of time to plead. See **Extension of Time**
Grounds for quashal motion
Defective complaint (see Defective complaint as grounds for quashing summons, above)
Defective service of summons, 10.19
Hearing (see Procedure for motion to quash, below)
Memorandum supporting motion to quash service of summons (improper service case), 10.28A
Notice of motion to quash service of summons, 10.28
Opposition papers, service of, 10.24
Procedure for motion to quash
Documents supporting notice of motion to quash summons, 10.25, 10.28-10.28B
Ruling denying motion, landlord's responsibility to serve notice of, 10.26
Shortened hearing notice, 10.24
Writ of mandate, review of court's order denying motion, 10.27
Re-serving summons and complaint if motion to quash granted, 10.27

Questionnaires. See **Charts, Checklists, Questionnaires, and Tables**

Questions of Law and Fact
Abandonment as question of fact, 8.13
Consolidation of separate actions involving common question of law or fact, 11.65
Coordination of actions sharing common questions of fact or law, 11.69
Estoppel, question of law for court, 10.60
Motive as question of fact, 7.55
Security precautions, landlord's duty to take as question of law, 3.68B

Quiet Enjoyment, Implied Covenant of
Generally, 3.5
Breach of covenant
Affirmative defense to unlawful detainer complaint, breach of covenant as, 10.56
Circumstances constituting breach of covenant, 3.6
Jury instructions regarding, 12.63A
Remedies for breach of covenant, 3.7
Termination of lease by tenant as result of, 8.19
Entry, landlord's right of. See **Entry, Right of**
Mobilehome park management's duty regarding, 6.16
Mutual consideration for lease, implied covenant of quiet enjoyment as part of, 1.22

Quieting Title
Breach of lease by tenant, quiet title action to evict tenant, 8.25
Unlawful detainer action, comparison of quiet title action to, 9.12

Racial Discrimination
See also **Discrimination**
Antidiscrimination laws, 2.20
Civil Rights Act. See **Civil Rights**
Fair Housing Act. See **Fair Housing Act**
FEHA. See **Fair Employment and Housing Act (FEHA)**
Rent increase based on tenant's race prohibited, 5.7
Unruh Civil Rights Act. See **Unruh Civil Rights Act**

Real Estate Brokers. See **Brokers**

Reasonable Accommodations. See **Disabled Persons**

Receivership
Tenant's petition for appointment of receiver for substandard building, 3.10

Recordation
Ellis Act evictions, recording notice of, 7.64F
Lease, recording, 1.13
Lis pendens recorded by tenant, 5.39

Records and Reports
Applications, advantages for landlord in retaining, 4.16
Business records exception to hearsay rule, 12.26
Credit reports. See **Credit Reports and Agencies**
Duplicates or photocopies of original documents, stipulation regarding use of, 12.17
Electronic format, obtaining copies of public records in, 5.35
Housing code violations, prohibition against evicting tenant for reporting, 8.110
Inspection of records. See **Inspection of Documents in Unlawful Detainer Action**
Methamphetamine contamination, property owner's recordkeeping obligations, 1.29, 3.11B, 4.16C
Mobilehome leases over 5 years in length, reporting requirements for, 6.24
Nonpayment of rent, records proving. See **Trial of Unlawful Detainer Action**
Presumption affecting tenant's ownership of records left on property, 8.154
Public records, inspection of, 5.37
Rental records of other tenants in building, tenant obtaining to determine possible discriminatory practices by landlord, 5.7
Rent control administrative hearing record. See **Rent Control**
Sealing file in Los Angeles County to protect tenant, request for, 5.25
Subpoena duces tecum. See **Subpoena Duces Tecum**
Tax records, obtaining information about landlord from, 5.35
Unlawful Detainer Registry's reporting of unlawful detainer actions against tenants, 5.25A, 5.27

Recreational Vehicles
Generally, 6.5
Ban on commercial rent control, effect on long-term recreational vehicle park tenants, 8.22B
New construction standards for, 6.1

Reentry, Right of
See also **Entry, Right of**
License versus lease, landlord's right to reenter premises and terminate occupancy, 1.6
Notice of belief of abandonment, landlord's right to reenter premises if no response to, 8.9

References
False information regarding tenant, liability of former landlord for, 4.13

Refreshing Recollection of Witness
Unlawful detainer trial, use of documents to refresh witness' recollection, 12.24

Registration of Rental Units. See **Rent Control**

Regulations. See **Government Regulations; Rules and Regulations**

Reimbursement
Assignor's right of reimbursement against assignee for rent paid to landlord, 3.53
Repairs or improvements made without landlord's consent, no right to reimbursement for, 3.73

Rejection of Lease by Bankruptcy Trustee. See **Bankruptcy and Insolvency**

Religion
Antidiscrimination laws, 2.20
Fair Housing Act. See **Fair Housing Act**
FEHA. See **Fair Employment and Housing Act (FEHA)**
Landlord's religious beliefs as basis for refusal to rent to unmarried couple, 2.9C, 2.50
Sale, rental, or occupancy of dwellings owned by religious group, preference by religious organization to persons of same religion in, 2.31
Unruh Civil Rights Act. See **Unruh Civil Rights Act**

Renewal or Extension of Lease
Generally, 3.60
Assignee of tenant, option to renew exercised by, 3.62
Covenants to extend or renew
Generally, 3.61
Automatic renewal or extension, required language for, 3.63
Election to renew, exercise of, 3.62
Performance of conditions or covenants in lease, option to renew dependent on, 3.62
Disclosure of automatic renewal or extension of lease, 1.29
Distinguishing between extension and renewal of lease, 3.60
Eviction of tenant for failure to execute new lease, 7.61
Fixed-term tenancy
Automatic renewal or extension of lease, lease provision for, 8.82
Option for renewal of, 4.41
Holding over. See **Holding Over**
Mobilehome rental agreement, limits on renewal of, 6.25
Notice of nonrenewal of lease, 1.8
Option to extend or renew
Covenants (see Covenants to extend or renew, above)
Enforceability of, 3.62
Fixed-term tenancy, option for renewal of, 4.41
Periodic tenancy, automatic renewal of, 4.20
Perpetual renewal of lease, 3.61
Voidability of lease provisions
Ambiguous or indefinite lease provision for extension or renewal as void, 3.61
Automatic renewal provision in lease, voidability for failure to meet statutory requirements, 3.63
Tenant voiding lease provision for renewal or extension, 8.82

Renovations. See **Improvements and Repairs**

Rent
See also **Rent Control**
Generally, 1.22
Apartment-house employees, maximum rent and rent credit for, 4.47
Appliances, separate rental charges for, 4.35
Apportionment of rent. See **Apportionment of Rent**
Assignment of lease, assignor's liability for payment of rent after, 3.53
Attorney paying rent on tenant's behalf in unlawful detainer action, Rules of Professional Conduct prohibiting, 10.4
Back rent
Assumption or rejection of lease. See **Bankruptcy and Insolvency**
Bankruptcy discharge of delinquent rent, effect on motion for relief from automatic stay, 14.27
Civil complaint for back rent overdue beyond 1 year, 8.38
Enforcement of judgment for, 13.76
Judgment for plaintiff in unlawful detainer action, recovery of back rent, 13.18
Motion to strike unlawful detainer complaint on grounds of improper request for back rent, 10.41
Personal property of tenant, prohibition against landlord trying to recover back rent as condition of returning, 1.71
Stay of execution. See **Stay of Execution of Unlawful Detainer Judgment**
Certificate of occupancy, effect of tenant proving nonexistence of, 12.22
Cleaning deposit, applicability to unpaid rent, 8.173
Default in rent, recovering damages for, 9.38
Eviction for nonpayment of rent. See **Eviction**
Excess rent
Future rent, excess rent paid as credit for, 7.56, 7.80
New landlord seeking eviction for non-payment of rent, offset of excess rent paid to previous landlord, 12.35

Expert's opinion on fair rental value. See **Expert Witnesses**
Future rent
Excess rent paid as credit for future rent, 7.56
Vacating tenant's responsibility for, 8.52
Habitability. See **Habitability, Implied Warranty of**
Increase in rent (see Modification of rent, below)
Joint liability for rent. See **Joint and Several Liability**
Jury instructions. See **Jury Instructions in Unlawful Detainer Action**
Last month's rent, effect of labeling security deposit as security for, 8.173
Late charges
Generally, 1.22
Crediting excessive late fees to rent, 4.43A
Fixed daily amount, 1.41
Liquidated damages, late fees as, 4.43A, 8.39
Mobilehome rental agreement, charges for late payment of rent, 6.109
Percentage of rent due, 1.41
3-day notice, including demand for late charges in. See **3-Day Notice**
Lease provisions
Insufficient funds, rent check returned for, 1.42
Late charges (see Late charges, above)
Manner of receiving rent (see Manner of receiving rent, below)
Monthly amount of rent and manner of payment, 1.40
Notice that failure to pay rent on time may be reported to credit record agencies, 1.43
Maintenance and repair of premises by landlord, tenant's obligation to pay rent dependent on, 1.2
Manner of receiving rent
Cash, landlord's refusal to give receipt for rent paid in, 12.35
Date of payment for rent, 4.32
Delivery of rent payment, specifying mode of, 4.33
Labor-for-rent arrangements, 4.31
Personal check or cash equivalent, 4.30
Mobilehomes. See **Mobilehomes**
Modification of rent
Generally, 4.36
Breach of warranty of habitability by landlord, tenant's right to ignore rent increase due to, 5.9
Defeating or negotiating rent increase, 5.5
Discriminatory rent increase based on tenant's race or sex prohibited, 5.7
Fixed-term tenancy, prohibition against raising rent during, 3.66
Mobilehome parks, rent increases in. See **Mobilehomes**
Month-to-month tenancy, rent increase for, 3.66
Notice of rent increase (see Notice of rent increase, below)
Rental records of other tenants in building, tenant obtaining to determine possible discriminatory practices by landlord, 5.7
Retaliatory rent increase prohibited, 5.6
Roommates, effect of rent control ordinances on increasing rent of, 4.40B
Service of notice of rent increase improper, effect of, 5.8
3-day notice, effect of landlord overstating amount of right due, 8.37
Uninhabitable conditions, petitioning rent control board for rent decrease, 5.14
Unruh Civil Rights Act, arbitrary rent increase prohibited, 5.7, 8.118
Notice of rent increase
Generally, 3.65-3.66
Mobilehome tenancy, notice of rent increase for, 6.27, 6.30, 6.107
60-day notice of rent increase over 10 percent, 3.65A-3.65B
Overpayment of rent, successor landlord's liability for, 7.29
Pass-throughs to tenant
Mobilehome park owner, pass-through by. See **Mobilehomes**
Rent control ordinance, pass-throughs of utility and capital improvement costs not becoming part of base rent, 7.35
Renewal rent, enforceability of option calling for future agreement on, 4.41
Renter's insurance, 4.43B
Resident property managers, rent paid by. See **Management of Property**
Retroactive rent abatement, action for, 13.37
Roommates' joint and several liability for full amount of rent, 5.30
Screening prospective tenants, ability to pay rent as selection criteria, 2.9
Section 8 housing. See **Section 8 Housing**
Setoffs (see Excess rent, above)
Setoffs. See **Setoffs**
60-day notice. See **60-Day Notice**

Statutes of limitations. See **Statutes of Limitations**
Strikes, 5.38
Sublessor's obligation to pay rent despite landlord's acceptance of rent from sublessee, 3.55
Tenant at sufferance, liability for reasonable rental value of property, 1.11
Tender of rent
Mobilehome rental agreement, tender of rent, 6.108
3-day notice. See **3-Day Notice**
Termination of lease
Abandonment resulting in termination of lease, landlord's entitlement to unpaid rent, 8.14
Pretermination rent (see Back rent, above)
Repeated tenders of checks for insufficient funds, termination of lease for, 4.30
30-day notice. See **30-Day Notice**
3-day notice, nonpayment of rent as grounds for. See **3-Day Notice**
Unlawful detainer action
Ability to pay rent, landlord's use of services reporting unlawful detainer actions, 2.9
Back rent (see Back rent, above)
Default in rent, effect of, 9.38
Escrow of rent. See **Escrow of Rent Pending Unlawful Detainer Action**
Nonpayment of rent. See **Trial of Unlawful Detainer Action**
Tender of rent by tenant, effect on unlawful detainer action, 8.44
Unruh Civil Rights Act. See **Unruh Civil Rights Act**
User fees in lieu of rent, 4.35
Utility services, tenant deducting payments from rent, 8.149A
Waiver. See **Waiver**
Withholding rent
Breach of implied warranty of habitability by landlord, withholding rent on grounds of, 5.9, 5.15
Criminal actions by third parties, withholding rent if landlord fails to keep premises safe from, 3.9
Unlawful detainer action for withholding rent (see Unlawful detainer action, above)

Rental Agreement. See **Leases; Mobilehomes**

Rental Discrimination Action, Prosecution of
Generally, 2.61
Agent's discriminatory actions, owner's responsibility for, 2.68
Disparate impact, no requirement that tenant prove landlord's intent to discriminate, 2.65
Disparate treatment, indirect evidence to show, 2.63
Mixed motives on part of landlord in refusing to rent, effect of, 2.64
Overt discrimination, direct evidence of discriminatory conduct required to establish, 2.62
Standing to sue for housing discrimination, 2.67
Testers, establishing illegal discrimination through use of, 2.66

Rent Control
See also **Rent**
Generally, 7.1, 7.3
Actions regarding rent controls, 7.14C
Additional services provided for in lease, landlord charging extra for, 1.38
Administrative hearing
Cross-examination of witnesses by landlord at evidentiary hearing before rent control board, 7.11
Evidence (see Evidence, below)
Judicial review (see Judicial review of administrative decisions, below)
Power of rent control board to hold hearing to adjust rent, 7.43
Preservation of records, 7.48
Res judicata effect of rent control agency's administrative decision, 9.15
Administrative hearings, representing clients at
Generally, 7.46
Costs of preparing for and attending hearing, 7.49
Findings of fact and conclusions of law, review of decision for, 7.50
Agencies and groups assisting landlords and tenants, 7.2
Appeals (see Judicial review of administrative decisions, below)
Assignees (see Vacancy control or decontrol, below)
Attorney fees
Advantages of removing lease provision regarding, 4.42
Local ordinances authorizing award of fees, 7.45, 7.79
Attorneys (see Practicing before rent control boards, below)
Bankrupt tenant, effect of rent control law excusing landlord from accepting performance of lease from persons other than, 14.19

Base rent
Generally, 7.5
Annual base rent adjustments, 7.33
Changing base rent, local ordinances permitting, 7.30
Determining base rent, 7.29, 7.45
Evidentiary problems in establishing base rents, 7.32
Excess rent paid over base rent as credit for future rent, 7.56
General-adjustment increases, 7.33
Newly covered rental units, base rents for, 7.31
Pass-through of utility and capital improvement costs not becoming part of base rent, 7.35
Registration of rent, determining correct base rent through, 7.45
Breach of duty to pay rent, rent control ordinances allowing tenant to cure, 8.54
Burden of proof
Eviction cases, rent control ordinances affecting burden of proof in, 7.74-7.75, 9.16B-9.16D
Fair rate of return, landlord's burden of showing denial of, 7.14
Condition of premises. See **Condition of Premises**
Constitutionality of rent control ordinances
Generally, 7.10
Due process challenges to local regulations as applied to particular landowners, 7.14
Emergency wartime rent control, constitutionality of, 7.7
Facial challenges to ordinances, 7.9-7.12
Fair return issues, 7.13-7.14, 7.38
Mobilehome park rent control ordinances, 7.11
Peacetime controls, constitutionality of, 7.8
Rent withholding for landlord's failure to register rental units, unconstitutionality of rent ordinance allowing, 7.44
Return-on-investment standards, constitutionality of, 7.13
Substantive due process, criteria for determining denial of, 7.14
Substantive due process denied, landlord's recovery of damages for loss of rental income as result of, 7.14A-7.14B
Taking, rent control ordinance as, 7.14
Writ of mandate petition as prerequisite to filing lawsuit challenging city's denial of rent increase, 7.14
Costa-Hawkins Rental Housing Act
Generally, 3.58A, 4.22, 4.34, 7.1, 7.4, 7.25
Banking general-adjustment increases, effect of Act on, 7.33
Cotenant or subtenant, distinguishing rights of, 7.28
Determining when vacancy occurs, 7.26-7.28
Exemptions under, 7.16
Former law on subletting, 7.27
Limits on landlord's right to rent at market rate under, 4.34
Notice and protections for subsidized housing tenants under, 3.66A
Phasing out existing local vacancy controls, 7.25A
Preemption of local rent control ordinances by, 4.40B, 7.16, 7.25, 7.25B, 7.64D
Sublessee or assignee, effect of Act on, 7.28-7.28A, 7.62
Vacancy, termination of Section 8 housing not resulting in, 7.19, 7.25
Costs, recovery of (see Individual adjustments, below)
Damages for violating ordinances
Attorney fees, recovery of, 7.45, 7.79
Excess rent, damages for failure to refund, 7.45
Measure of damages, 7.78
New owner's liability for previous owner's rent overcharges, 7.80
Rent board's lack of authority to award treble damages, 7.43
Rent overcharges, 7.77
Unlawful business practices in violation of local rent control ordinances, injunction and penalties for, 7.77
Unlawful evictions, damages for, 7.78
Wrongful possession, damages not limited to rent set by local rent control ordinance, 13.19
Damages sought by landlord as result of confiscatorily low rent ceilings, 7.14A-7.14B
Decreases in rent (see Petition for rent decrease, below)
Demolishment of residential property and construction of new residential rental units, applicability of rent control ordinance to, 7.25, 7.64D
Domestic partner or surviving close relatives of deceased tenant, protection under local rent control ordinance for, 7.72
Drafting lease provisions, effect of rent control ordinances on, 1.31
Due process (see Constitutionality of rent control ordinances, above)
Ejectment action, effect of rent control ordinance on, 8.25
Eviction. See **Eviction**
Evidence
Generally, 7.47

Hearsay evidence to establish base rent, admissibility of, 7.32, 7.47
Rules of evidence applicable to administrative hearing, 7.47
Excess rent
Damages for charging tenant rent in excess of certified lawful ceiling, 7.77
Future rent, excess rent paid over base rent as credit for future rent, 7.56, 7.80
New owner's liability for excess rents charged by previous owner, 7.80
Power of rent board to adjudicate excess rent claims, 7.43
Refund of, 7.40A, 7.45
Statutes of limitations regarding excess rent. See **Statutes of Limitations**
Unlawful detainer complaint, setoff for overcharged rent as affirmative defense against, 10.57
Exemptions
Generally, 7.15
Care facilities, 7.20
Federally-assisted housing, 7.19
Hotel rooms rented to transient guests, 7.21
Luxury units, 7.22
Miscellaneous exemptions, 7.24
Mobilehome leases, 6.21, 6.32
New constructions, 7.18
Owner-occupied dwellings, 7.17
Single-family homes and condominiums, 1.7B, 7.16
Substantially rehabilitated units, 7.23
Unit not principal residence, 7.23A, 7.24, 7.38A
Expenses, landlord's recovery of (see Individual adjustments, below)
Fair return
Generally, 7.13
Administrative hearing, evidence regarding fair return, 7.47
Individual rent adjustment to ensure, 7.38
Fixed-term or periodic tenancy, effect of rent control ordinance on landlord's selection of, 4.21-4.22
Habitability, applicability of implied warranty to mobilehomes, 6.16
Hearings (see Administrative hearings, representing clients at, above)
Historical background
Constitutional challenges (see Constitutionality of rent control ordinances, above)
Peacetime controls, 7.8
Wartime rent controls and emergency requirement, 7.7
Improvements (see Maintenance, below)
Increases in rent
Base rent (see Base rent, above)
Individual adjustments (see Individual adjustments, below)
Individual adjustments
Fair return adjustments, 7.38
Hearing process for individual adjustments, 7.46
Limits on individual increases, 7.37
Operating and maintenance expenses, increases in, 7.34
Professional services to prove need for rent increase, landlord's recovery of costs of, 7.36, 7.49
Registration requirements, rent increase contingent on landlord's compliance with, 7.44
Unit not principal residence, 7.38A
Utility and capital-improvement pass-throughs, 7.35
Information about landlord obtained from local rent control board, 5.35
Judicial review of administrative decisions
Administrative mandamus, reviewing rent board decision by filing writ of, 7.51
New evidence, admissibility of, 7.51
Preserving record for judicial review, 7.48
Kavanau and *Galland* decisions applied, 7.14B
Maintenance
Inadequate maintenance as grounds for reduction in rent, 7.40
Individual adjustment in rent based on increases in maintenance expenses, 7.34
Reductions in maintenance, decrease in rent based on, 7.39
Mandate. See **Mandate, Writ of**
Mobilehome park rent control ordinances
Generally, 6.15, 7.11, 7.14
Exemption of mobilehome leases from rent control ordinances, 6.21, 6.32
Fair return adjustments, 7.38
Preemption under state law, lack of, 7.11-7.12
Public rental assistance programs, rent restrictions in, 6.15A

Utility-related capital cost pass-throughs to tenants prohibited, 6.13
Overcharges (see Excess rent, above)
Parking and storage, effect of rent control ordinances on, 1.23
Penalties. See **Penalties**
Petition for rent decrease
Maintenance, changes in (see Maintenance, above)
Reduction in services provided by landlord, petition based on, 7.39
Uninhabitable conditions, petitioning rent control board for rent decrease, 5.14
Powers of rent boards
Adjudicating excess rent claims and holding rent adjustment hearings, 7.43
Owner-occupancy, rent-board restrictions on, 7.68
Registration of rental units (see Registration of rental units, below)
Registration of rents (see Registration of rents, below)
Rules and regulations enacted by rent boards, 7.42
Treble damages award prohibited, 7.77
Withholding of rent, board's lack of authority to issue order authorizing, 7.77
Practicing before rent control boards
Generally, 7.41
Administrative hearings (see Administrative hearings, representing clients at, above)
Arbitration, rent control ordinances providing for, 7.52
Judicial review of rent board decision by writ of administrative mandamus, 7.51
Powers of rent boards (see Powers of rent boards, above)
Preemption
Community-care facilities, preemption of rent control ordinance for, 7.20
Costa-Hawkins Rental Housing Act, preemption of local rent control ordinances by, 4.40B, 7.16, 7.25, 7.25B, 7.64D
PUC's preemption of local rent control ordinances regarding utilities, 6.43
Records (see Administrative hearing, above)
Registration of rental units
Eviction, landlord's failure to register rental unit as defense to, 7.56, 7.76
Penalties assessed against property owner for failing to register, 7.44, 9.16D
Proof of landlord's compliance with registration requirements, 7.56
Remedies for landlord's failure to register, 7.77
Rent increase contingent on landlord's compliance with registration requirements, 7.44
Registration of rents
Base rent, determining correct amount of, 7.45
Damages for charging tenant rent in excess of certified lawful ceiling, 7.77
Retaliation by landlord. See **Retaliatory Eviction**
Retroactive application of rent control ordinances, 7.6, 9.14
Roommates. See **Roommates**
Section 8 housing exempt from local rent control ordinances, 7.19
Security deposit, rent control ordinance requiring payment of interest on, 1.48, 4.25, 7.13, 8.170
Service of termination notice on tenant and rent control board, 8.22C
Settlement agreement exempting property from rent control, landlord and tenant prohibited from entering into, 7.1, 7.64F
Statutes of limitations, 7.1
Subtenants (see Vacancy control or decontrol, below)
30-day or 60-day notice of termination, local rent control ordinance requiring statement of grounds for, 8.72
Unit not principal residence, 7.23A, 7.24, 7.38A
Unlawful detainer action, effect of local ordinances on
Generally, 9.13
Complaint in unlawful detainer action, violation of rent control ordinance as affirmative defense to, 10.59
Estoppel effect of administrative decision, 9.15
Just cause for eviction. See **Eviction**
Retroactive effect of ordinances, 9.14
Setoff for overcharged rent as affirmative defense in, 10.57
User fees in lieu of rent, disadvantages of in rent-controlled jurisdiction, 4.35
Vacancy control or decontrol
Generally, 7.4
Advantages to landlord of prohibiting assignment or subletting, 3.49, 3.58
Costa-Hawkins Rental Housing Act (see Costa-Hawkins Rental Housing Act, above)
Phase out of vacancy control provisions, 4.22, 4.34
Sublessee or assignee, increase in rent of, 4.40B
Waiver of rights by tenant, rent control ordinances restricting, 4.39

Rent Increases
Mobilehomes. See **Mobilehomes**

Notice of rent increase. See **Rent**
Rent control. See **Rent Control**

Repair-and-Deduct
Generally, 5.13
Commercial tenancies, applicability of remedy to, 3.15
Notice to landlord of dilapidations before using repair-and-deduct remedy, 3.13
Procedure for utilizing repair-and-deduct remedy, 3.13
Restrictions on repairs by tenants, 1.60
Retaliatory eviction by landlord prohibited, 8.111, 8.113
Statutory basis for remedy, 3.12
Waiver of remedy, prohibition against, 3.9, 3.14

Repairs. See **Improvements and Repairs**

Reports. See **Records and Reports**

Request for Admissions. See **Admissions in Unlawful Detainer Action, Request for**

Rescission
Habitability, rescission of lease on grounds of breach of implied warranty of, 3.43
Notice of rescission of lease, false information in tenant's application as grounds for, 1.10
Spanish language version of lease, tenant's rescission of lease based on landlord's failure to provide, 1.13

Resident Property Managers. See **Management of Property**

Res Judicata
Rent control agency's administrative decision, res judicata effect of, 9.15
Unlawful detainer judgment, res judicata effect of, 11.62, 13.39

Respondeat Superior
Discriminatory acts committed by agent, owner's responsibility for, 2.68

Responsive Pleadings in Unlawful Detainer Action
See also **Complaint in Unlawful Detainer Action; Unlawful Detainer**
Generally, 10.1
Attorney ethics
Delaying tactics, 10.2
Paying rent on tenant's behalf prohibited, 10.4
Representing group of tenants, 10.3
Default, effect on defendant's ability to enter responsive pleading, 13.2
Demurrer. See **Demurrer to Complaint in Unlawful Detainer Action**
Extension of time to plead. See **Extension of Time**
Fees. See **Fees**
5-day response time, 10.1
Local rules, preemption of, 10.1A
Motion to strike. See **Striking Unlawful Detainer Complaint, Motion for**
Quashal motion. See **Quashing Service of Unlawful Detainer Summons**
Underpayment of filing fee, relief for, 10.1B

Retaliatory Eviction
See also **Eviction; Self-Help Eviction**
Applicable law prohibiting retaliatory evictions
Generally, 8.110
California Fair Employment and Housing Act (FEHA), prohibition against housing discrimination under, 8.122
CC §1942.5 (see CC §1942.5, below)
Commercial tenancies, 8.128
Common law, prohibition against retaliatory eviction under, 8.125
Constitutional protections against landlord's retaliatory conduct. See **Constitutional Law**
Federal statutes, 8.123
Local rent control ordinances, prohibiting retaliatory eviction, 8.126
Statutory rights, prohibition against eviction of tenants for exercise of, 8.124
Unruh Civil Rights Act (see Unruh Civil Rights Act, below)
Burden of proof. See **Burden of Proof**
CC §1942.5

Grounds for recovering possession of premises, landlord's notice and subsequent proof of, 8.115
Habitability (see Habitability, tenant's actions on, below)
Limits on invoking protection of, 8.127
Noncumulative nature of remedies under CC §1942.5, 8.117
Tenant union, protection for tenant's exercise of legal rights or participation in, 8.113, 8.127
Violation of CC §1942.5, remedies for, 8.116
Waiver of rights under CC §1942.5, prohibition against, 8.114
Constitutional rights, exercise of. See **Constitutional Law**
Damages
Generally, 8.116, 8.135
Breach of implied warranty of habitability, prohibition against eviction of tenant for bringing damages action against landlord for, 5.16
Ellis Act eviction, retaliatory eviction as defense to, 7.64G, 8.109
Evidence of retaliation by landlord (see Proof of landlord's retaliatory motive, below)
Fair Employment and Housing Act (FEHA), prohibition against eviction for exercising rights under, 8.113
Fixed-term lease, retaliatory eviction claim after expiration of, 8.109
Habitability, tenant's actions on
Breach of implied warranty of habitability, prohibition against eviction of tenant for bringing damages action against landlord for, 5.16
Limits of protection under CC §1942.5(a), 8.112
Repair-and-deduct remedy and other protected acts, 8.111, 8.113
Illegal entry by landlord, retaliatory eviction of tenant for objecting to, 5.17
Jury trial on issue of retaliatory eviction, right to, 11.55
Mobilehome tenancies, retaliatory eviction protections for, 6.14, 6.17, 6.72
Proof of landlord's retaliatory motive
Burden of proof. See **Burden of Proof**
Circumstantial and inferential evidence, 8.131
Damages, action for, 8.135
Labor law cases providing analogy on issue of landlord's motive, 8.129, 8.132
Rebuttable presumption of retaliation, court's rejection of, 8.130
Sole motive or one of several motives in eviction of tenant, retaliation as, 8.129
Remedies for retaliation
Damages (see Damages, above)
Injunctive and declaratory relief against pending retaliatory action by landlord, 8.134
Unlawful detainer action, retaliatory eviction as defense in, 8.133, 10.65, 12.38
Rent control ordinances
Generally, 7.76
Good cause to evict, local rent control ordinances requiring, 8.136
Tenant's exercise of rights under local rent control ordinance, prohibiting retaliation for, 8.126
Rent increase as retaliation for tenant's actions, prohibition against, 5.6
Sexual harassment action against landlord, retaliatory eviction of tenant for filing, 8.124
30-day or 60-day notice of termination, preventing claim of retaliatory eviction by stating grounds for, 8.72
Unlawful detainer action
Affirmative defense, retaliatory eviction as, 8.133, 10.65, 12.38
Jury instructions. See **Jury Instructions in Unlawful Detainer Action**
Unruh Civil Rights Act
Arbitrary retaliatory conduct, protection against, 8.118-8.119
Burden of proof on tenant in raising Act as affirmative defense in unlawful detainer action, 8.120
Exercise of rights under Act, prohibition against eviction for, 8.118
Remedies for violation of Act, 8.121
Withdrawal of rental property from market by landlord, effect of, 8.129

Returned Payment Fee
Insufficient funds, rent check returned for, 1.42

Return of Security Deposit. See **Security Deposits**

Right of Entry. See **Entry, Right of**

Roommates
Generally, 1.7, 5.28
Consent of landlord for roommate, lease requiring, 5.29
Cotenant owners terminating relationship by statutory partition, 1.7C
Eviction of roommate
Just cause required for, 5.29

Local eviction control ordinance, protection for former tenant's roommate under, 1.7B
Partitioning cotenancy, expelling tenant through, 1.7A
Rent control ordinance, effect on tenant's eviction of roommate, 5.31
Written occupancy agreement between tenant and roommate, eviction provision in, 5.32
Joint and several liability of roommate for full amount of rent after signing lease, 5.30
Lodger of original tenant, roommate as, 5.30
Rent control ordinances
Death of tenant, effect on roommates, 7.72
Increase in roommates rent, effect of rent control ordinances on, 4.40B
Landlord's consent to additional adult tenant, 5.29
Notice to non-original occupants of rights under, 4.40B
Tenant's eviction of roommate, effect of rent control ordinances on, 5.31
Restrictions in lease regarding, 1.46, 4.40B

Rules and Regulations
Lease provision specifying tenant's obligations to comply with, 1.59
Mobilehome park rules and regulations. See **Mobilehomes**
Rent control boards, rules and regulations enacted by, 7.42

Rules of Court
Attorney fees, local rules of court affecting award of, 13.33A
Bankruptcy. See **Bankruptcy and Insolvency**
Demurrer to complaint in unlawful detainer action, rules of court affecting, 10.36
Extension of time to plead in unlawful detainer action, local court rules affecting, 10.48
Stay of execution of unlawful detainer judgment, notice to landlord's attorney of application for, 13.54
Summary judgment in unlawful detainer action, effect of local rules on, 11.37
Trial setting, local rules affecting, 11.41

Safety Standards. See **Health and Safety Standards**

Salaries and Compensation
Attorneys' fees. See **Attorneys' Fees**
Garnishment of wages. See **Garnishment of Wages**
Residential property manager, compensation of, 4.47

Sale of Mobilehomes. See **Mobilehomes**

Sale of Real Property
Abandonment of lease by tenant, effect of sale of property on landlord's remedies for, 8.14
Bankruptcy prepetition default, trustee's duty to cure, 14.36, 14.50, 14.52
Distinguishing between tenant and purchaser of real property, 1.5
Habitability, tenants invoking implied warranty for uninhabitable conditions existing before sale of property, 3.31
Involuntary sale, 8.68A, 8.68C
Lawsuit against landlord, effect of landlord selling building on, 5.39
Termination of tenancy, effect of sale on, 8.7
3-day notice served after sale of property, 8.68A-8.68D
Voluntary sale, 8.68A, 8.68D

Sanctions. See **Penalties**

Saturdays and Sundays. See **Holidays**

Screening Prospective Tenants
See also **Applications**
Generally, 4.4
Categories protected from landlord discrimination
Generally, 2.20
Disabled persons (see Disabled persons, below)
Disparate impact (see Disparate impact of screening standards, below)
Familial status (see Familial status as selection criteria, below)
Unruh Act's arbitrary discrimination proscription, protected categories created by, 2.21
Children (see Familial status as selection criteria, below)
Disabled persons
Income requirements for disabled person dependent on spouse's income, prohibition against, 2.9D

Prohibited inquiries by prospective landlord, 2.26
Reasonable accommodation, disabled tenant's request for landlord to make, 2.4, 2.27A
Section 8 housing, 2.17
Disparate impact of screening standards
Generally, 2.5
Families, effect of occupancy standards on, 2.24
Documentation by landlord of screening criteria, 2.65
Fair housing laws
Categories protected from landlord discrimination (see Categories protected from landlord discrimination, above)
Children, discrimination against families with (see Familial status as selection criteria, below)
Court's inquiry regarding factors used to reject applicants, 2.6
Disparate impact on protected classes, prohibition against screening standards having, 2.5, 2.18
Federal and state fair housing laws, prohibited selection factors under, 2.19, 4.14
Legal constraints in applying screening factors, 2.4-2.6
Procedures for screening tenants without risking charges of illegal discrimination, 2.3
Selection criteria (see Selection criteria and reasonable accommodations, below)
False information regarding tenant, liability of former landlord for, 4.13
Familial status as selection criteria
Generally, 2.22
Antidiscrimination laws, 2.20
Definition of familial status, 2.23
Occupancy standards, effect of, 2.24
Senior housing, exception to familial antidiscrimination laws for. See **Senior Housing**
HUD regulations prohibiting steering housing applicant to particular section of development, 2.30
Income. See **Income**
Nonrefundable applicant screening fee, 1.26A, 1.51, 4.11, 4.23
Occupancy limits, restrictions on, 4.15
Protected categories (see Categories protected from landlord discrimination, above)
Selection criteria and reasonable accommodations
Generally, 2.7
Character of tenant, selection criteria concerning, 2.8
Credit and income information, 2.9
Criminal background of applicants, 2.15
Disabled persons' protections, 2.9D, 2.17
Marital status and income, 2.9C
Minimum income requirements, 2.9A
Public housing. See **Public Housing**
Section 8 housing. See **Section 8 Housing**
Source of income, 2.9B
Subjective criteria, avoidance of, 2.10
Verifying application, 4.12
Written rental applications
Generally, 4.5
Checklist for information requested of prospective tenant, 4.8
Credit checks and other investigations, 4.9
Format of application, 4.6
Information requested in application, 4.7
Sample rental application (California Apartment Association), 4.10

Section 8 Housing
Discrimination against tenants holding Section 8 housing certificates or vouchers, local ordinances prohibiting, 2.9B
Lease provisions, 1.36, 3.66B
Notice of termination (see Termination of Section 8 housing, below)
Rent control ordinances, exemption of Section 8 housing from, 7.19
Selection and eligibility of tenants
Generally, 2.13
Criminal activities and alcohol abuse, HUD regulations concerning denial of admission for, 2.17
Discretion of private landlords in selection of tenants, 2.17
Discrimination against prospective tenants receiving Section 8 housing assistance, prohibition against, 2.5, 2.18-2.18A
Public housing authority's determination of applicant eligibility and rental amount, 2.16
State and federal tax credit programs, non-discrimination requirements under, 2.18A
State or federally subsidized programs, restrictions on private landlords' methods of tenant selection under, 2.18
Termination of Section 8 housing
Generally, 1.36, 10.66
Expiration of lease term, termination of lease on, 1.36

Vacancy, termination of Section 8 housing not resulting in, 7.19, 7.25

Security Deposits
See also **Deposits**
Generally, 1.26A, 4.23
Amount of security deposit
Daycare business operated on premises by tenant, increase in security deposit as result of, 1.28
Provision in lease regarding, 1.48-1
Replenishment and increase of deposit, 1.50, 4.27
Restrictions on, 4.24, 6.44
Statutory ceiling on amount of security deposit, 8.169
Bankruptcy stay, effect on landlord's right to offset rent against security deposit, 14.12
Cotenants (see Multiple tenants, below)
Interest on security deposit, 1.48, 4.25, 7.13, 8.170
Itemized written statement by landlord
Contents of itemized statement, 8.173C
Disposition of security deposit, 8.173B
Documents, waiver of right to receive with security deposit refund, 8.173E, 8.173F
Exceptions to required documentation, 8.173E
Good faith failure of landlord to furnish itemized statement, effect on landlord's right to setoff against security deposit for unpaid rent, repairs, and cleaning, 4.28B, 8.174
Last month's rent, effect of designating security deposit as, 8.173A
Lease provisions
Amount of security deposit (see Amount of security deposit, above)
Move-out inspection, tenant's agreement to, 1.48-2, 4.28A, 4.51
Multiple tenants (see Multiple tenants, below)
Limits on landlord's use of security deposit, 4.26
Maintenance of security deposit by landlord, 8.170
Mobilehomes. See **Mobilehomes**
Multiple tenants
No portion of deposit refunded until final occupant vacates, 1.49-2
Returning security deposit, difficulties involving cotenants, 4.28D
Vacating tenant refunded proportionately, remaining occupants replenish original deposit, 1.49-1
Nonrefundable security deposits, prohibition against, 4.23, 8.175
Payments within definition of security, 8.168
Priority of tenant's claim, 8.171
Remedies for landlord's improper retention of deposit, 4.28B, 8.174
Repairs
Inability of landlord to finish repairs within required time, effect of, 8.173D
Replenishment and increase of security deposit used to make repairs, 1.50
Setoff of security deposit owed tenant against unpaid rent, repairs and cleaning bills, 4.23
Returning deposit
Generally, 4.28
Commercial tenancies, 4.28C
Drafting tips for rental agreement, 4.28D
Duty of landlord to return deposit, 8.173
Good faith failure to return security deposit, effect on subsequent action against tenant, 8.177
Itemized written statement (see Itemized written statement by landlord, above)
Repair estimate, landlord using to calculate security deposit refund, 8.173D
Time limits for, 4.28C-4.28D, 8.173B
Unlawful business practices by landlord, restitution of unlawful security deposits, 8.169
Unused portion, refund of, 1.30, 1.48
Setoff of unreturned security deposit against unpaid rent, repairs and cleaning bills, 4.23
Summary of security deposit law, 8.167
Tenant's stipulation for protective order, 11.61
Termination of landlord's interest in unit
Disposition of security deposit on, 8.172
Release of landlord from liability for security deposit, 4.29
Tenant's right to request inspection of premises and cure deficiencies, 8.172A-8.172B
Unlawful detainer action for nonpayment of rent, no requirement landlord apply security deposit to unpaid rent before bringing, 8.176
Uses of security deposit by landlord, 8.173
Waiver
Documents, waiver of right to receive with security deposit refund, 8.173E, 8.173F
Public policy, waiver of rights as void contrary to, 8.175

Security Precautions, Landlord's Failure to Take. See **Criminal Law**

Self-Help Eviction
See also **Eviction; Retaliatory Eviction**
Generally, 5.20, 8.137
Advising landlords against, 4.3A
Damages for
Generally, 5.20
Amount of damages, 5.22
Denial of tenant's access to premises, award of damages for, 8.149
Denial of tenant's access or use of premises
Actions affecting tenant's access to premises, landlord's liability for, 8.148
Personal property of tenant, removal of, 8.148
Remedies for landlord's actions, 8.149
Utility cutoffs with intent to terminate tenancy, landlord's liability for, 8.147
Hotels, use of self-help eviction by, 1.3D
Joining claims for multiple remedies, 5.23
Licensee, self-help eviction of, 1.6
Lodgers protected against, 8.142
Recovering possession of premises, strategies for, 5.21
Remedies for self-help eviction
Generally, 8.137, 8.153
Criminal penalties, 8.152
Forcible entry and detainer. See **Forcible Entry and Detainer**
Wrongful eviction, tenant's action for, 8.150
Roommate, eviction of, 1.7B, 5.30
Uninhabitable, landlord's liability for rendering premises, 8.151

Senior Housing
See also **Age**
Generally, 2.25
Application of state and federal exemptions, 2.25C
California exemptions, 2.25B
Discrimination based on age, permissibility of, 2.58
Ellis Act evictions, 7.64F, 8.22C
Exception to familial antidiscrimination laws for, 2.25
Federal Fair Housing Act, exemption for senior housing under, 2.25A
Housing for Older Persons (HOP) exemptions, 2.25A-2.25B
Public housing, preferences for elderly persons, 2.14

Service of Process and Papers
Abandonment. See **Abandonment**
Agent for service of process
Landlord's disclosure of, 1.21A, 1.29, 4.45
Unlawful detainer summons, agent documenting attempts to serve, 9.48
Age requirement for service of summons, 9.47
Attorney fees, service of motion for award of, 13.33C
Bankruptcy. See **Bankruptcy and Insolvency**
Department of Fair Employment and Housing (DFEH), service of housing discrimination complaint by, 2.53
Extension of time. See **Extension of Time**
Fixed-term tenancy, service of notice of nonrenewal, 1.8
Forfeiture, service of application for relief from, 13.56
Housing discrimination complaint, service of, 2.35
Mail, service by. See **Mail**
Notices
Abandonment, service of notice of belief of, 8.11
Breach of covenant by tenant, service of notice of consequences, 1.68
Lease provision for service of notices, 1.76
Pre-eviction notice, landlord's service of, 13.76
Rent increase, service of notice of, 5.8
Termination notice (see Termination notice, below)
Rent increase, effect of improper service of, 5.8
Termination notice
60-day notice. See **60-Day Notice**
Tenant and rent control board, service of notice on, 8.22C

30-day notice. See **30-Day Notice**
3-day notice. See **3-Day Notice**
Unlawful detainer action
Agent documenting attempts to serve summons, 9.48
Complaint, service of. See **Complaint in Unlawful Detainer Action**
Default or default judgment, effect of personal service on defendant, 13.12
Deposition, serving notice of, 11.8
Interrogatories, 11.17
Jury instruction regarding service of notices, 12.48
Notice of trial, service of, 9.7, 9.37, 11.43
Prejudgment claim of right to possession, service of, 13.70
Proof of service of 3-day notice, testimony of server required for, 12.20
Quashing service of summons. See **Quashing Service of Unlawful Detainer Summons**
Request/counter-request to set case for trial, service of, 11.41A
Return of service of notice, statutory presumptions regarding, 12.20
Striking unlawful detainer complaint, service of motion and opposition to motion, 10.46, 10.47A
Subpoena compelling attendance of nonparty witness at trial of unlawful detainer action, service of, 12.11
Subpoena duces tecum, service of, 12.15
Trial, service of subpoenas for. See **Trial of Unlawful Detainer Action**
Writ of possession, service of, 13.66
Writs
Execution, service of writ on mobilehome owner, 6.77
Possession, service of writ of, 13.66

Setoffs
Complaint in unlawful detainer action, setoff for rent overcharge as affirmative defense to, 10.57
Excess rent. See **Rent**
Extension of trial date in unlawful detainer action, setoff of landlord's potential damages due to, 11.48
Security deposit, setoff against unpaid rent, repairs and cleaning bills, 4.23, 4.28B, 8.174

Setting Aside. See **Vacating and Setting Aside**

Setting Unlawful Detainer Case for Trial
See also **Unlawful Detainer**
Case management or settlement conference, 11.52
Damages resulting from extension of trial date (see Extension of trial date, below)
Discovery, conflicts in setting trial date before completion of, 11.6
Early trial date, ex parte request by landlord's counsel for, 9.7
Extension of trial date
Generally, 11.44
Advancement of trial date on tenant's default in paying landlord's potential damages to court, 11.50
Determining amount of damages suffered by landlord due to delay, 11.47
Escrow of rent if trial date extended, 11.56
Good cause for extension, requirement of, 11.45
Hearing on probability that landlord will prevail, 11.46
Order to deposit damages, 11.49
Potential offsets to damages, 11.48
Notice of trial, requirement that all parties served with, 9.7, 11.43
Precedence for unlawful detainer actions over other civil actions, 9.7, 11.41
Request for trial setting
Generally, 11.41
Form of request/counter-request to set case for trial, 11.41A
Holding trial within 20 days after request to set trial filed, requirement of, 11.6, 11.42
Motion to advance and setting trial date after request filed, 11.42
Tenant vacating before trial, effect on trial date, 11.51
Time for setting for trial, 5.24B, 9.7
20-day mandatory trial setting, 11.42

Settlement
Attorney's advice to tenant regarding settlement of dispute, 5.4
Conciliation of housing dispute. See **Conciliation of Housing Dispute**
HUD's settlement of civil rights complaint, restrictions on, 2.33A
Rent control, landlord and tenant prohibited from entering into settlement agreement determining if property subject to, 7.1, 7.64F
Unlawful detainer action, settlement of. See **Unlawful Detainer**

Sex Discrimination
See also **Discrimination**
Generally, 2.27F
Advertising for housing limited to one gender, permissibility of, 2.50, 4.3
Antidiscrimination laws, 2.20, 2.48
Fair Housing Act. See **Fair Housing Act**
FEHA. See **Fair Employment and Housing Act (FEHA)**
Rent increase based on tenant's sex, prohibition against, 5.7
Sexual harassment by landlord as sex discrimination, 2.50
Unruh Civil Rights Act. See **Unruh Civil Rights Act**

Sex Offenders
Disclosure in residential leases of statewide data base on sex offenders, 1.29
Housing authority's exclusion of household containing registered sex offender, 2.15
Landlord's liability for rape of tenant, 3.68B-3.68C

Sexual Harassment
Landlord or property manager, sexual harassment action against, 2.58, 3.70
Quid pro quo and hostile work environment, 2.27G
Sex discrimination, landlord's sexual harassment of tenant as, 2.50
Unruh Act, applicability to sexual harassment, 2.58, 8.122

Sexual Orientation
Defined, 2.58
Local rent control ordinance providing protection for domestic partner of deceased tenant, 7.72
Unruh Civil Rights Act, discrimination on basis of sexual orientation prohibited under, 2.20-2.21, 2.58

Sheriffs. See **Law Enforcement Personnel**

Signatures
Lease provision for signatures, 1.79
Stipulated judgment in unlawful detainer action, requirement of parties' signatures on, 9.18
30-day or 60-day notice, description of property in, 8.71
3-day notice, no requirement for signing, 8.30

Single-Family Homes
Disabled persons, exemption from equal access provisions for, 2.60
Fair Employment and Housing Act (FEHA), no exemption for single-family homes under, 2.49
Fair Housing Act, exemption for rental of single-family home, 2.31
Implied warranty of habitability, applicability to single-family homes, 3.17
Rent control ordinances, exemptions for single-family homes, 1.7B, 7.16

60-Day Notice
See also **30-Day Notice**
Generally, 8.69
Date tenant must vacate, 8.77
Expiration of notice period before filing unlawful detainer action, requirement of, 8.78
Federal law increasing notice to 90 days for month-to-month tenants, 8.68F
Form, 8.80
Format and contents of notice
Description of property and owner's signature, requirements of, 8.71
Grounds for termination, preventing claim for retaliatory eviction by stating, 8.72
Termination of tenancy in 30 days, specific statement regarding, 8.73
Mailing notice, effect of, 8.65
Rent
Acceptance of rent for period after 60 days, implied withdrawal of 60-day notice by, 8.75
Increase over 10 percent, 3.65A-3.65B, 5.5
Service of notice in middle of term, apportionment of last month's rent, 8.73
Sale of property, 60-day notice to tenant after, 8.68C
Service of 60-day notice
Apportionment of last month's rent if notice served in middle of term, 8.73
Mail, effect of service by, 8.77
Method of service, 8.74
Middle of term, service of notice in, 8.73
Subtenants, no requirement for serving, 8.76

Waiver of notice period prohibited, 8.70
Withdrawal of notice, tenant's consent required for, 8.75

SLAPP Suits. See **Strategic Lawsuit Against Public Participation (SLAPP)**

Small Claims Court
Security deposit, small claims action for landlord's improper retention of, 8.174
Unlawful detainer action, small claims court's lack of jurisdiction over, 13.24
Unruh Civil Rights Act, small claims court action to enforce, 2.59

Smoking
Nuisance action based on owner's failure to limit secondhand smoke in outdoor common areas, 3.48A

Soliciting Tenants. See **Counseling Landlords**

Spanish Language
Written lease in Spanish, landlord required to provide, 1.13

Specific Performance
Breach of warranty of habitability, complaint for, 3.48A

Spouses
See also **Marital Status**
Community property. See **Community Property**

Standing
Civil Rights Act of 1866, standing of nonminorities to bring discrimination action under, 2.41, 2.67
Fair Employment and Housing Act (FEHA), standing to sue for retaliatory housing discrimination under, 2.67
Fair Housing Act, standing to sue for housing discrimination under, 2.67
Sublessee's standing to sue lessor for breach of contract, 1.14
Tenant organization's standing to file for injunctive relief on behalf of members, 5.39

Statement of Decision in Unlawful Detainer Action
See also **Unlawful Detainer**
Ambiguous or inadequate statement of decision, counsel's role regarding, 12.66
Request for statement
Deadlines for making request, 12.65
Party's request for statement, 12.64

Statute of Frauds
Covenant or option to extend or renew lease for more than 1 year, applicability of statute of frauds to, 3.61
Oral lease, enforcement of, 1.13
Repairs, effect of statute on oral promise made after lease signed, 3.9, 10.61

Statutes of Limitations
See also **Time**
Civil Rights Act of 1866, applicability of state statutes of limitations to, 2.44
Ellis Act, claims for unlawful eviction under, 7.64C
Excess rent
Future rent, no statute of limitations for asserting offset of excess rent as credit for, 7.29, 7.56
Unlawful detainer action, no statute of limitations for affirmative defense of excess rent paid, 10.57
Extension of time. See **Extension of Time**
Forcible entry and detainer, statute of limitations as defense to charge of, 8.143
Habitability, statute of limitations for breach of implied warranty of, 3.35
Housing discrimination
Civil action for discriminatory housing practices, statute of limitations for filing, 2.39
Fair Employment and Housing Act (FEHA), statute of limitations for filing complaint under, 2.52, 2.56
Fair Housing Act, statute of limitations for filing housing discrimination action under, 2.33, 2.69
Filing complaint with HUD, statute of limitations for, 2.33, 2.69
Unruh Civil Rights Act, statute of limitations under, 2.69
U.S. Attorney General's civil action for discriminatory housing practice, statute of limitations for filing, 2.40
Laches, effect of, 2.69
Rent
Administrative mandamus review of rent control board decision, statute of limitations for seeking, 7.51
Excess rent (see Excess rent, above)

Monthly rent payment, statute of limitations for, 8.38
Unlawful detainer action, no statute of limitations for affirmative defense of excess rent paid, 10.57
Retaliatory conduct by landlord, limitation in CC §1942.5, 8.127
Statutes of repose distinguished, 2.69
Tolling of statute
Delayed discovery rule, 7.65
Housing discrimination complaint, tolling of statute during administrative proceedings regarding, 2.39
Unruh Civil Rights Act, statute of limitations for filing action under, 2.69

Statutes of Repose
Statutes of limitations distinguished, 2.69

Stay of Execution of Unlawful Detainer Judgment
See also **Unlawful Detainer**
Generally, 13.48
Appeal, stay of execution pending, 13.58, 13.60, 13.62
Back rent
Condition of stay, prohibition against payment of back rent as, 13.53
Unexpired lease, effect of paying back rent owed on, 13.49
Court's inherent powers to grant stay
Grounds for granting stay, 13.52
Length and conditions of stay, limits on, 13.53
Declarations supporting motion for stay
Notice of motion for stay pending appeal of unlawful detainer judgment, declarations supporting, 13.62
Tenant's declaration of hardship in support of ex parte application for stay, 13.55
Discretion of court to grant stay
Generally, 13.52
5-day stay, 13.51
Discretion of court to require undertaking for stay during appeal of unlawful detainer judgment, 13.60
Ex parte application for stay of execution
Form, 13.54
Notice to opposing party of, 13.49, 13.54
Tenant's declaration of hardship in support of ex parte application, 13.55
Extraordinary writs
Generally, 13.63
Appeal, review of denial of stay by extraordinary writ, 13.60
5-day stay
Discretionary stay of execution, 13.51
Mandatory stay of execution, conditions requiring, 13.50
Restoring possession on unexpired lease, 13.49
Grounds for opposing stay, 13.53
Undertaking, posting of, 13.60
Writs (see Extraordinary writs, above)

Stay of Proceedings
Bankruptcy proceedings, automatic stay resulting from. See **Bankruptcy and Insolvency**
Unlawful detainer. See **Unlawful Detainer**

Stipulations
Attorney fees, stipulation extending time for filing motion for, 13.32, 13.33C
Automatic stay in bankruptcy, stipulation for relief from, 14.6, 14.30, 14.67
Default judgment, stipulation to set aside, 13.13
Duplicates or photocopies of original documents, stipulation regarding use of, 12.17
Judgments. See **Judgments**
Nonresidential lease, stipulated extension to assume or reject, 14.48
Unlawful detainer actions
Amend complaint or reclassify case, stipulation or motion to, 9.32
Attorney fees, stipulation on amount of, 13.23, 13.33A
Consolidation of actions, stipulation to, 11.65
Disadvantages of stipulated judgment, 9.18B
Duty to inform court of stay or settlement, 9.18D
Extension of time to plead in unlawful detainer action, parties' stipulation to, 10.48
Participation by parties in negotiations leading to stipulated judgment, requirement of, 9.18
Procedure for entering stipulated judgment, 9.18C
Rent deposit, stipulation for, 11.61

Trial, stipulations affecting. See **Trial of Unlawful Detainer Action**

Storage of Personal Property. See **Personal Property**

Strategic Lawsuit Against Public Participation (SLAPP)
Generally, 10.38A
Anti-SLAPP statute, protection for tenant under, 5.18A
Attorney fee award under anti-SLAPP statute, 5.18A, 10.38A, 13.40A
Striking landlord's SLAPP suit against tenant for reporting code violations to government agencies, 5.11
Unlawful detainer action, motion to strike as SLAPP suit, 8.110
Unlawful eviction, reversal of dismissal in favor of landlord under anti-SLAPP statute, 7.78

Strict Liability
Fair Debt Collection Practices Act violations, strict liability for, 13.76
Landlord's strict liability to tenant for defective condition on premises, overturning of, 3.67, 3.70

Strike, Motion To
Frivolous demurrer, prohibition against motion to strike, 10.37
In limine motion to strike request for damages or to sever equitable defenses, 11.55
SLAPP suit, striking landlord's action against tenant for reporting code violations to government agencies, 5.11
Unlawful detainer
Answer to unlawful detainer complaint, motion to strike all or part of, 11.2
Request to set trial filed before completion of discovery, effect of, 11.6

Striking Unlawful Detainer Complaint, Motion for
See also **Unlawful Detainer**
Generally, 10.38
Answer or demurrer filed with motion to strike, 10.38, 11.2
Extension of time to plead. See **Extension of Time**
Form, notice of motion to strike, 10.47
Grounds for striking unlawful detainer complaint
Generally, 10.39
Allegations of specific facts in complaint supporting statutory damages, lack of, 10.42
Attorney fees, complaint's failure to allege lease provision for recovery of, 10.43
Back rent, improper request in complaint for, 10.41
Damages, improper request for, 10.40
Discovery sanction, striking out pleading as, 11.29
Irrelevant, false, or improper matter in complaint, 10.44
SLAPP suit, landlord's action characterized as, 10.38A
Unauthorized relief sought in complaint, 10.22
Unverified complaint, 10.45
Memorandum supporting motion, 10.46, 10.47A
Opposing papers, filing and service of, 10.46, 10.47A
Procedure for filing motion to strike, 10.46
Quashal motion distinguished, 10.23

Subletting. See **Assignment and Subletting**

Subpoena Duces Tecum
Unlawful detainer action
Deposition, subpoena duces tecum for production of documents at, 11.9
Nonparty witness, subpoena duces tecum for production of documents in possession of, 11.22
Trial, production of documents at. See **Trial of Unlawful Detainer Action**

Subpoenas
Fair Housing Act, HUD Secretary's power to issue subpoenas under, 2.38
Trial of unlawful detainer action, compelling attendance at. See **Trial of Unlawful Detainer Action**

Subsidized Housing. See **Government-Subsidized Housing**

Sufferance, Tenancy at. See **Tenancy at Sufferance**

Summary Judgment in Unlawful Detainer Action
See also **Unlawful Detainer**
Generally, 11.31

Burden of proof
Defendant as moving party, 11.34
Initial burden of proof, requirement that moving party meet, 11.39
Statutory amendment affecting burden of proof, 11.32-11.33
Hearing
5-day notice of motion, 11.36
Local rules of court, effect of, 11.37
Oral opposition at time of hearing, 11.35, 11.39
Oral testimony at summary judgment hearing, prohibition against, 11.35
Memorandum in opposition to summary judgment motion, 11.39
Opposing documents, 11.34, 11.37, 11.39
Partial summary judgment, 11.31
Supporting documents, 11.34, 11.38
Written objections to evidence in summary judgment motion, 11.39

Summons. See **Complaint in Unlawful Detainer Action**

Supersedeas, Writ of
Unlawful detainer action, 13.63

Surrender of Premises
Generally, 8.17
Abandonment distinguished, 8.8
Acceptance of tenant's offer to surrender premises, effect of, 8.8
Bankruptcy stay, application for order for surrender of premises in response to. See **Bankruptcy and Insolvency**
Definition of surrender, 8.17
Entry by landlord in event of, 4.43
Implied surrender, 8.18
Unlawful detainer action
Advantages of surrendering premises immediately before trial, 11.51
Prohibition against unlawful detainer action after tenant's surrender of premises, 9.36

Surviving Tenant
Death of tenant, protection for surviving tenant from eviction in event of, 5.29
Definition, 5.29

Suspension Mobilehome Park Permit. See **Mobilehomes**

Tables. See **Charts, Checklists, Questionnaires, and Tables**

Taking of Property
Good cause for not renewing lease, requirement on landlords as taking of property, 8.136

Taxes
Housing code violations, effect of landlord's failure to cure on tax deductions, 3.10
Mobilehome park rent, inclusion of taxes in, 6.30
Obtaining information about landlord from tax records, 5.35

Telephones
Deposition of nonparty deponents by telephone, 11.7-11.8

Temporary Restraining Order (TRO)
See also **Injunctions**
Chart, availability of TROs under fair housing laws, 2.28
Department of Fair Employment and Housing (DFEH), TRO issued by, 2.53

Tenancy at Sufferance
Generally, 1.11
Holding over after expiration of fixed-term tenancy, tenancy at sufferance created by, 1.8, 3.64, 8.82
Termination of tenancy. See **Termination of Tenancy**

Tenancy at Will
Generally, 1.10
Termination of tenancy. See **Termination of Tenancy**

30-day notice, termination of tenancy by serving, 8.79

Tenancy in Common
See also **Joint Tenancy**
Execution of lease by tenants in common, 1.18

Tenant Organizations
Agreement negotiated with landlord
Parties to agreement, 5.41
Sample collective bargaining agreement, 5.42
Attorney's role in counseling tenant organization, 5.33
Entry of rental unit by landlord to interfere with tenant organizing activities prohibited, 3.2
First amendment protection for tenant organizing, 8.113, 8.127
Meeting on premises, legislation affecting, 5.33A
Mobilehome park, tenant organization, 6.143
Negotiating with landlord
Generally, 5.40
Agreement negotiated with landlord (see Agreement negotiated with landlord, above)
Retaliatory eviction of tenant for participating in tenant organization, prohibition against, 8.113, 8.127
Strategy and tactics for dealing with landlord
Generally, 5.34
Lawsuit against landlord, 5.39
Negotiating with landlord (see Negotiating with landlord, above)
Obtaining information about landlord, 5.35
Petitioning landlord about tenants' grievances, 5.36
Picketing landlord, 5.37
Publicity-seeking activities, 5.37
Rent strike, 5.38

Tender of Rent. See **Rent**

Termination of Tenancy
See also **Eviction**
Abandonment, termination by. See **Abandonment**
Assignment of lease terminating privity of estate between landlord and previous tenant, 3.51
Bankruptcy
Generally, 14.3
Assumption of terminated lease by trustee, prohibition against, 14.41
Automatic stay, termination of lease as grounds for termination of, 14.19
Possessory rights after termination of lease, 14.16
Postpetition damages for rental value, 14.39
Property of bankruptcy estate, tenancy interest terminated by judgment not part of, 13.68
Rejection of lease, effect of, 14.38
Breach of lease by tenant
Ejectment of tenant, 8.25
Eviction of tenant. See **Eviction**
Remedies for landlord without giving required notice, 8.25
Service of notice of consequences for breach of covenant, 1.68
3-day notice. See **3-Day Notice**
Breaking of lease by tenant, 5.19
Criminal activity, termination of tenancy based on, 1.33
Death of tenant. See **Death**
Determining occupants' identities, listing names of all tenants and children in lease as means of, 1.21
Employee-tenant, terminating tenancy of. See **Employers and Employees**
Fixed-term lease
Expiration of fixed-term lease, right of landlord to file unlawful detainer action on, 8.82
For cause termination of, 1.73, 8.21A
Fixtures. See **Fixtures**
Government-subsidized housing. See **Government-Subsidized Housing**
Habitability, termination of lease on grounds of landlord's breach of implied warranty of, 3.43
Hearing on termination of tenancy. See **Hearings**
Just cause for termination. See **Eviction**
Methods of terminating tenancy
Generally, 8.1
Actions by landlord or tenant to terminate tenancy, 8.3

Death of landlord or tenant, tenancy at will or at sufferance terminated by, 8.4
Destruction of premises, tenancy terminated by, 8.5
Eminent domain, effect on lease, 8.6
Expiration of term, 8.2
Government regulations, effect on tenancy for specified term, 8.5
Sale of premises, 8.7
Military servicemembers and dependents, termination of lease agreement by, 1.73, 8.21A
Mobilehome tenancy, termination of. See **Mobilehomes**
Month-to-month tenancy
Generally, 1.9, 8.69
Death of tenant, termination of tenancy caused by, 1.65, 8.21
Lapses of time, month-to-month tenancy not terminated by, 8.69
Tenant's termination of, 8.20
Notice of termination by landlord
Ellis Act evictions, 8.22C
Employee Housing Act, property subject to, 6.10
Exceptions (see Notice requirement, exceptions to, below)
Extended notice to tenant when landlord going out of rental business, 8.22C
Forfeiture of lease, effect of landlord's failure to request, 13.49
Government-subsidized housing. See **Government-Subsidized Housing**
Inspection by landlord, 4.28A, 4.51
Mobilehome tenancy, notice of termination of, 6.74
Periodic tenancies, 8.22
Recreational vehicle park, notice of termination to tenant or occupant, 6.5
Rescission of lease, notice of, 1.10
Sale of residential unit, 8.22A
Section 8 housing, notice of termination of tenancy, 1.36, 10.66
60-day notice. See **60-Day Notice**
Statutory requirements for notice, effect of not complying with, 8.23
Tenancy at will, notice for termination of, 1.10
Tenant breaches, 8.22B
30-day notice. See **30-Day Notice**
3-day notice. See **3-Day Notice**
Unlawful detainer, strict compliance with notice provisions required for, 8.24
Notice requirement, exceptions to
Employee-tenant, unlawful detainer action against, 8.84
Fixed-term lease, right of landlord to file unlawful detainer action on expiration of, 8.82
Hotel and motel guests, no notice required before terminating occupancy of, 8.83
Tenant gives 30-day notice but remains after notice expires, 8.81
Personal property of tenant, disposition of. See **Personal Property**
Possession of premises, tenant's termination of lease based on landlord's failure to deliver, 1.72
Public housing. See **Public Housing**
Rent. See **Rent**
Retaliatory eviction. See **Retaliatory Eviction**
Section 8 housing. See **Section 8 Housing**
Security deposits. See **Security Deposits**
Self-help eviction. See **Self-Help Eviction**
60-day notice. See **60-Day Notice**
Surrender of premises. See **Surrender of Premises**
Tenancy at will
Death of landlord or tenant, termination of tenancy after, 8.4
Notice for termination of, 1.10
Tenant, termination by
Abandonment. See **Abandonment**
Breach of lease covenant by landlord, tenant's termination of tenancy on grounds of, 8.19
Death of tenant, automatic termination of month-to-month tenancy on receiving notice of, 1.65, 8.21
Domestic violence victim, termination by, 8.21B
Notice of termination by tenant but subsequent failure to vacate, eviction of tenant after, 7.71
Periodic tenancy, tenant's termination of, 8.20
Surrender. See **Surrender of Premises**
30-day notice. See **30-Day Notice**
3-day notice. See **3-Day Notice**
Unlawful detainer. See **Unlawful Detainer**
Unpaid rent, termination for, 8.9
Unruh Civil Rights Act. See **Unruh Civil Rights Act**

Utilities, landlord's liability for cutting off with intent to terminate tenancy, 6.43, 8.147, 14.36

Term of Tenancy
Generally, 1.27
Extension of tenancy. See **Renewal or Extension of Lease**
Fixed-term tenancy. See **Fixed-Term Tenancy**
Lease provisions
Fixed-term tenancy, 1.44-1
Month-to-month tenancy, 1.44-2
Mobilehome tenancy, term of. See **Mobilehomes**
Month-to-month tenancy. See **Month-to-Month Tenancy**
Periodic tenancy. See **Periodic Tenancy**

Third Parties
Bankruptcy stay, effect on third parties, 14.4
Criminal acts. See **Criminal Law**
Discriminatory acts by third party, building owner's lack of responsibility for, 2.68
Utility billing providers, 4.41E

30-Day Notice
See also **60-Day Notice**
Generally, 8.69
Contents of notice (see Format and contents of notice, below)
Date tenant must vacate, 8.77
Expiration of notice period before filing unlawful detainer action, requirement of, 8.78
Form, 8.80
Format and contents of notice
Description of property and owner's signature, requirements of, 8.71
Grounds for termination, preventing claim for retaliatory eviction by stating, 8.72
Mailing notice, effect of, 8.65
Modification of notice period, agreement of parties to, 8.70
Rent
Acceptance of rent for period after 30 days, implied withdrawal of 30-day notice by, 8.75
Excess rent, effect of landlord collecting, 8.37
Service of notice in middle of term, apportionment of last month's rent, 8.73
Unpaid rent accruing during 30-day notice period, restrictions on awarding judgment for, 12.27
Service of 30-day notice
Apportionment of last month's rent if notice served in middle of term, 8.73
Mail, effect of service by, 8.77
Method of service, 8.74
Middle of term, service of notice in, 8.73
Subtenants, no requirement for serving, 8.76
Tenancy at will, terminating tenancy by serving 30-day notice on tenant, 8.79
Tenant gives 30-day notice but remains after notice expires, landlord's right to bring immediate unlawful detainer action, 8.81
Withdrawal of notice, tenant's consent required for, 8.75

3-Day Notice
Alternative of performing or vacating, 3-day notice phrased in, 8.22B, 8.46, 8.50
Assignment (see Subletting, assignment, or waste, breach of covenant against, below)
Attorney's review of notice prepared by, 8.46
Breach of lease covenant by tenant
Access by landlord, effect of tenant failing to comply with covenant guarantying, 3.4
Alternative of performing or vacating premises, form of notice containing, 8.50
Curable breach, 3-day notice to perform covenant of lease or quit, 8.53
Description of breach and demand for cure specified in notice, 8.31A
Express covenants, landlord's termination rights limited to breaches of, 8.47
Minor or technical breach of covenant insufficient to support forfeiture in unlawful detainer action, 8.48
Noncurable breach, 3-day notice to perform covenant of lease or quit, 8.54
Noncurable defect, form of notice for, 8.50
Pay rent or quit, serving 3-day notice to perform covenants or quit with 3-day notice to, 8.31A, 8.33, 8.37A-8.37B, 8.39
Performance by tenant within 3-day period, effect of, 8.52
Rectify breach, requirement that notice state tenant has 3 days to, 8.33
Reoccurring breach by tenant, 8.52
Specific facts constituting breach, form of notice containing, 8.51
Statutory right of landlord to terminate tenancy and recover possession in unlawful detainer action, 8.46

Subletting (see Subletting, assignment, or waste, breach of covenant against, below)
Waiver of breach, acceptance of rent or other benefits under lease by landlord resulting in, 8.49
Commercial tenancy, stating amount of rent due in 3-day notice, 10.69
Computation of notice period
CCP §1161, computation rules under, 8.28
Service of notice by mail, extension of time to respond as result of, 8.29
Content of notice (see Form and content of notice, below)
Covenant, breach of (see Breach of lease covenant by tenant, above)
Demand for rent
Alternative demand to pay rent or quit premises, notice stating, 8.36
Appliances, effect of including rent charges for, 4.35
Commercial landlord stating estimate of amount due, 8.37A
Exact amount of rent due, requirement that notice state, 8.37
Excess amount of rent, effect of demanding, 9.13, 10.69
Limit on notice to demand for rent due within year preceding notice, 8.38
Location and person to whom rent must be paid, specifying, 5.24A, 8.31A, 8.37B
Perform covenant or quit, serving 3-day notice to pay rent with 3-day notice to, 8.31A, 8.33, 8.37A-8.37B, 8.39
Excessive late fees (see Rent, nonpayment of, below)
Fair Debt Collection Practices Act, applicability to 3-day notice to quit, 8.26A, 10.69A, 13.76
Forfeiture. See **Forfeiture**
Form and content of notice
Dates in notice, effect of, 12.35
Description of breach and demand for cure, 8.31A
Description of premises in notice, specificity of, 8.31
Forfeiture of lease, effect of notice stating landlord's election to declare, 8.34
Rectify breach, requirement that notice state tenant has 3 days to, 8.33
Unequivocal demand for possession, requirement of, 8.32
Written notice, requirement of, 8.30
Grounds for termination with 3-day notice
Breach of lease covenant by tenant (see Breach of lease covenant by tenant, above)
Rent, nonpayment of (see Rent, nonpayment of, below)
Sale of premises, 8.68A-8.68D
Unlawful detainer, breaches or acts constituting (see Unlawful detainer, below)
Holidays, effect on 3-day notice, 8.28
Late charges (see Rent, nonpayment of, below)
Mail, service by
Conspicuous service of notice, 8.65
Extension of time to respond to notice served by mail, 8.29, 8.65, 9.44
Proof of actual receipt of mailed 3-day notice, service by mail insufficient without, 8.63
Mobilehomes. See **Mobilehomes**
Purpose of notice, 8.35
Rent, nonpayment of
Generally, 8.35
Demand for rent (see Demand for rent, above)
Excessive late charges, examining 3-day notice for, 8.40
Excessively fees, crediting towards rent, 4.43A
Grace period in lease for payment of rent, 3-day notice premature before expiration of, 8.42
Interest and late charges, demand for, 8.39
Notice to pay rent or quit, 8.31A, 8.33, 8.37A-8.37B, 8.39, 8.41
Security deposit, no requirement that landlord apply deposit to unpaid rent before serving 3-day notice, 8.176
Service of notice after rent becomes due, 8.42
Tender of rent by tenant (see Tender of rent by tenant, below)
Service of notice
Actual receipt of improperly served notice, effect of, 8.66
Cotenants or subtenants, effect of service on, 8.67
Mail, service by (see Mail, service by, above)
Proof of service, testimony by server required to establish, 12.20
Rent due, service of notice after, 8.42
Statutory requirements for service of notice, 8.62-8.65
Substituted service by landlord, 8.64
Tendering rent before service of 3-day notice, effect of, 8.43
Unlawful detainer, accrual of cause of action after service of 3-day notice, 8.28
Subletting, assignment, or waste, breach of covenant against
Evidence required to establish waste, 8.57
Express covenant, landlord's right to terminate tenancy limited to breach of, 8.56

Naming subtenant in 3-day notice, 9.35
Service on subtenants, 8.67
Tenancy at will, 3-day notice unnecessary to terminate, 8.79
Tender of rent by tenant
After expiration of notice period, tender of rent, 8.45
Before service of 3-day notice, effect of tendering rent, 8.43
Cash payment by tenant, effect of landlord refusing, 4.30
During notice period, effect of tendering rent, 8.44
Partial payment of rent, effect of, 8.45
Unlawful detainer
Accrual of cause of action for unlawful detainer after service of 3-day notice, 8.28
Action for unlawful detainer, 3-day notice as basis for bringing, 8.26, 8.46
Breaches or acts constituting, 8.55-8.59
Complaint in unlawful detainer action, service of 3-day notice more than 1 year after rent due as affirmative defense to, 10.69
Nuisance on premises, termination of tenancy for, 8.58-8.59
Subletting (see Subletting, assignment, or waste, breach of covenant against, above)
Unlawful purpose, use of premises for, 8.59
Waste (see Subletting, assignment, or waste, breach of covenant against, above)
Withdrawal of notice by landlord during 3-day period, 8.68

Time
See also **Statutes of Limitations**
Admissions, time for responding to request for, 11.24
Appeals. See **Appeals**
Assumption or rejection of lease by bankruptcy trustee, time limit for, 14.34, 14.44, 14.49
Copy of lease or rental agreement to tenant, deadline for, 1.21A
Costa-Hawkins Rental Housing Act, notice requirements under, 4.34
Default, time limits for motion for relief. See **Default and Default Judgment in Unlawful Detainer Action**
Demurrer
Answering complaint after demurrer overruled, time limit for, 10.34
Filing demurrer to unlawful detainer complaint, time limit for, 10.32
Minimum number of days for scheduling, 10.21
Extension of time. See **Extension of Time**
Fair Housing Act
Answer to housing discrimination complaint, time limit for filing, 2.35
Charge or dismissal, time limit for issuing, 2.37
Electing civil action over charge, time limit for, 2.38
Investigation by HUD or DFEH, time limit for completing, 2.36
Forcible entry and detainer action, time limit for landlord to respond to, 8.145
Forfeiture, time limit for application for relief from, 13.56
Inspection of documents, time for demanding, 11.20
Interrogatories. See **Interrogatories in Unlawful Detainer Action**
Itemized written statement by landlord of disposition of security deposit, time limit for giving, 8.173B
Mobilehomes
Rental agreement, time of the essence provision, 6.129
Termination notices, 6.74
Written disclosure form, landlord's time limit for providing to tenant before execution of rental agreement, 6.24
Notices
Appear, time for serving opposing party with notice to, 12.13
Mobilehome tenancy, termination notices, 6.74
New trial, notice of motion for, 13.44
Unlawful detainer (see Unlawful detainer action, below)
Postjudgment claim of right to possession, time limit for holding hearing on, 13.72
Public agency's time limit for responding to request for copies of records, 5.35
Public Housing Agency (PHA) and Annual Plans, 2.14
Rent increase, time requirements for giving notice of, 3.65-3.65B
Retaliatory eviction of tenant for reporting uninhabitable conditions, time limit for protection under CC §1942.5(a), 8.112
Security deposits. See **Security Deposits**
60-day notice. See **60-Day Notice**
Summary judgment motion, time for filing and serving opposition papers, 11.37
30-day notice. See **30-Day Notice**
3-day notice. See **3-Day Notice**
Unlawful detainer action
Answer in unlawful detainer action, time for filing, 10.50
Attorney fees, time limit for claiming, 13.33C

Complaint in unlawful detainer action. See **Complaint in Unlawful Detainer Action**
Demurrer (see Demurrer, above)
Discovery in unlawful detainer actions, shorter response times for, 11.5
Disqualification of judge, time limits affecting motion for. See **Disqualification of Judge in Unlawful Detainer Action**
Filing complaint, time for, 9.44
Filing fee, timely payment of, 10.1B
Jury instructions, deadline for filing, 12.43
Mailing 3-day notice, effect on time for filing unlawful detainer action, 8.65
Notice of appeal, time limit for filing, 13.59
Notice of trial, time for serving, 11.43
Prejudgment claim of right to possession, time limit for occupant to file claim with court, 9.54
Quashal motion, extension of time to plead after filing, 10.18
Response to complaint, 5-day time limit for, 10.1
Setting trial date for, 5.24B, 9.7
Statement of decision, deadline for requesting, 12.65

Title Insurance Company
Obtaining information about landlord from, 5.35

Title to Property
Forcible entry and detainer action, admissibility of evidence regarding landlord's title, 8.144
Quiet title action. See **Quieting Title**
Unlawful detainer action
Complaint, title dispute as affirmative defense to, 8.68A, 10.54
Litigation of title in unlawful detainer action, prohibition against, 9.8

Title VIII of Civil Rights Act. See **Fair Housing Act**

Title VII of Civil Rights Act
Findings by state agency, no effect on Title VII claims, 2.56
Futile gesture doctrine, applicability of, 2.69

Tolling of Statutes of Limitations. See **Statutes of Limitations**

Toxic Waste. See **Hazardous Materials and Toxic Waste**

Transcripts
Appeal of unlawful detainer judgment, preparation of transcripts for, 13.59

Transfer of Leasehold Interest. See **Assignment and Subletting**

Transient Occupancy. See **Hotels and Motels**

Trespass
Landlord's duty of care to trespassers, 3.71
Tenant's duty of care to trespassers, 3.74
Tenant's organizational meeting on premises, no trespass as result of, 5.33A
Tort, recovery in, 3.7
Unlawful detainer action against trespasser, 1.11A

Trial of Unlawful Detainer Action
See also **Complaint in Unlawful Detainer Action; Judgment in Unlawful Detainer Action; Unlawful Detainer**
Admissibility of evidence to prove nonpayment of rent (see Nonpayment of rent, below)
Appeals. See **Appeals**
Attendance at trial (see Compelling attendance at trial, below)
Breach of implied warranty of habitability as defense
Generally, 12.36
Affirmative defense, breach of implied warranty as, 3.9, 10.64, 12.36
Compliance with implied warranty, no requirement that complaint allege, 3.33
Escrow of rent during pending trial. See **Escrow of Rent Pending Unlawful Detainer Action**
Independent covenants doctrine, effect on using breach of warranty as defense to unlawful detainer action, 3.9
Jury instructions regarding habitability. See **Jury Instructions in Unlawful Detainer Action**
Plaintiff as prevailing party after tenant's failure to pay reasonable rental value, 13.36
Presumption of breach of statute of habitability requirements, plaintiff establishing, 12.36
Reasonable rent, determination by trier of facts, 12.37

Summary of procedure, 3.32
Compelling attendance at trial
Mileage and witness fees, 12.11, 12.14-12.15, 13.22
Nonparty witness, compelling attendance of, 12.10-12.11
Party, notice to appear compelling attendance of, 12.12-12.13
Service of notice to appear on party, 12.13
Service of subpoena on nonparty witness, 12.11
Compelling production of documents (see Subpoena duces tecum, below)
Conforming pleadings to proof. See **Conforming Pleadings to Proof**
Consolidation of actions
Different courts, multiple actions pending in, 11.66
New cause of action after filing first unlawful detainer action, consolidation of cases for trial, 12.40
Order for consolidation, effect of, 11.67
Related issues, consolidation for trial of, 11.68
Same court, multiple actions pending in, 11.65
Continuance of trial date. See **Setting Unlawful Detainer Case for Trial**
Damages for nonpayment of rent
Absence of request for damages in complaint, court's authority to award damages despite, 12.30
Discretion of court in awarding statutory damages, 12.34
Jury instruction regarding statutory damages and definition of malice, 12.52
Limit on damages from termination of tenancy through judgment, 12.27
Malice by defendant, recovery of special damages for, 12.32-12.33
Opinions of landlord or expert, determination of reasonable rental value based on, 12.29
Pleading statutory damages, 12.32-12.33
Prejudgment interest, award of, 13.20
Reasonable rental value, damages based on, 12.28-12.30
Special damages, 12.31-12.34
Default. See **Default and Default Judgment in Unlawful Detainer Action**
Defenses
Breach of implied warranty of habitability (see Breach of implied warranty of habitability as defense, above)
Elements of unlawful detainer action not proved, 12.35
Retaliatory eviction for tenant's exercise of legal rights, 8.133, 10.65, 12.38
Disqualification of judge. See **Disqualification of Judge in Unlawful Detainer Action**
Elements of unlawful detainer, plaintiff's proof of
Generally, 12.19
Defense to action, elements of unlawful detainer not proved, 12.35
Nonpayment of rent (see Nonpayment of rent, below)
Return of service, statutory presumptions regarding, 12.20
Service of notice, plaintiff's proof of, 12.20
Tenant's failure to appear at trial, effect of, 12.21
Escrow of rent. See **Escrow of Rent Pending Unlawful Detainer Action**
Extension of trial date. See **Setting Unlawful Detainer Case for Trial**
Habitability (see Breach of implied warranty of habitability as defense, above)
Judge, disqualification of. See **Disqualification of Judge in Unlawful Detainer Action**
Jury instructions. See **Jury Instructions in Unlawful Detainer Action**
Jury trial
Generally, 9.9, 11.53
Deposit required for, 11.54
Equitable issues, no right to jury trial on, 11.55
In limine motion to strike request for damages or to sever equitable defenses, 11.55
Verdict (see Verdict, below)
Waiver of right to jury trial, 11.54
Motions
Posttrial motions (see Posttrial motions, below)
Pretrial procedures (see Pretrial procedures, below)
Nonpayment of rent
Books and records to prove amount or receipt of rent, 12.23-12.26
Burden of proof on landlord, 12.22
Business records exception to hearsay rule, admission of writing under, 12.26
Damages (see Damages for nonpayment of rent, above)
Dead bolts and window locks, landlord's failure to repair as defense in nonpayment of rent action, 3.11A
Past recollection recorded, admissibility of writing as, 12.25
Refreshing witness' memory, use of books and records for, 12.24
Notice of trial date, 12.21
Posttrial motions

Generally, 13.43
Clerical error, motion to correct, 13.47
Judgment notwithstanding verdict, 13.45
New trial motion, 13.44
Set aside and vacate judgment and enter different judgment, 13.46
Posttrial proceedings
Generally, 13.1
Appeals. See **Appeals**
Attorney fees, posttrial motions extending time for filing motion for, 13.33C
Forfeiture, relief from. See **Forfeiture**
Motions (see Posttrial motions, above)
Stay of execution. See **Stay of Execution of Unlawful Detainer Judgment**
Pretrial procedures
Generally, 11.1
Admissions, request for. See **Admissions in Unlawful Detainer Action, Request for**
Depositions. See **Depositions in Unlawful Detainer Action**
Discovery. See **Discovery**
Escrow of rent. See **Escrow of Rent Pending Unlawful Detainer Action**
Extension of trial date. See **Setting Unlawful Detainer Case for Trial**
Inspection of documents. See **Inspection of Documents in Unlawful Detainer Action**
Interrogatories. See **Interrogatories in Unlawful Detainer Action**
Judgment on pleadings, motion for, 11.40
Summary judgment motion. See **Summary Judgment in Unlawful Detainer Action**
Production of documents (see Subpoena duces tecum, below)
Proof
Complaint amended at trial to conform to proof, 9.43
Elements of unlawful detainer (see Elements of unlawful detainer, plaintiff's proof of, above)
Nonpayment of rent (see Nonpayment of rent, above)
Protective orders. See **Escrow of Rent Pending Unlawful Detainer Action**
Records
Nonpayment of rent (see Nonpayment of rent, above)
Subpoena duces tecum (see Subpoena duces tecum, below)
Related actions
Generally, 11.62
Consolidation of separate actions (see Consolidation of actions, above)
Coordination of actions by Judicial Council, 11.69
Injunctive relief. See **Injunctions**
Rent (see Nonpayment of rent, above)
Request to set case for trial. See **Setting Unlawful Detainer Case for Trial**
Service of papers
Notice of trial, service of, 9.7, 10.43
Subpoena or notice to appear, service of (see Compelling attendance at trial, above)
Setting case for trial. See **Setting Unlawful Detainer Case for Trial**
Statement of decision. See **Statement of Decision in Unlawful Detainer Action**
Stipulations
Consolidation of actions, stipulation to, 11.65
Duplicates or photocopies of records, stipulation regarding use of, 12.17
Subpoena duces tecum
Generally, 12.15
Nonparty witness, 12.15
Original document, production of, 12.17
Party, notice to produce served on, 12.16
Penalties for disobeying subpoena, 12.18
Stipulation regarding duplicates or photocopies, 12.17
Subpoenas (see Compelling attendance at trial, above)
Summary judgment. See **Summary Judgment in Unlawful Detainer Action**
Verdict
General and special verdicts, 12.67
Judgment distinguished from verdict, 12.68
Judgment notwithstanding verdict, motion for, 13.45
Warranty of habitability (see Breach of implied warranty of habitability as defense, above)
Witnesses
Compelling attendance at trial (see Compelling attendance at trial, above)
Refreshing witness' recollection with documents, 12.24

Trusts
Rent strike, depositing rent payments into trust account during, 5.38

Tying Arrangements
Mobilehome parks, 6.20

Undertakings. See **Bonds and Undertakings**

Unfair Business Practices
Public's right to bring action to enjoin, 3.48A
Security deposits, restitution of unlawful amount, 8.169

Unfair Competition Law
Domestic violence, protection against, 2.27H

Uniform Housing Code
See also **Housing Codes**
Generally, 3.11D
International Residential Code, replacement of Uniform Housing Code with, 3.11C
Preemption of local occupancy ordinances by, 3.11C

Uninhabitable Conditions. See **Habitability, Implied Warranty of**

Union for Tenants. See **Tenant Organizations**

Unions. See **Labor Unions**

Unlawful Detainer
See also **Eviction; Holding Over**
Generally, 9.1
Admissions, request for. See **Admissions in Unlawful Detainer Action, Request for**
Affidavits. See **Affidavits and Declarations**
Agents. See **Agents and Agency**
Appeals. See **Appeals**
Assignees. See **Assignment and Subletting**
Attorney fees and costs, recovery against landlord, 3.15A
Attorneys
Counseling and negotiating by attorney, 9.17
Default judgment entered as result of attorney's failure to appear, setting aside, 12.69
Delaying tactics, disciplining attorney for, 10.2
Ethical considerations (see Ethical considerations for attorneys, below)
Fees. See **Judgment in Unlawful Detainer Action**
Initial meeting with landlord (see Initial meeting between attorney and landlord, below)
Representing landlord (see Representing landlord, below)
Verification of unlawful detainer complaint by attorney, 9.42, 10.23
Bankruptcy, effect of tenant filing. See **Bankruptcy and Insolvency**
Bonds. See **Bonds and Undertakings**
Breaches or acts constituting unlawful detainer, 8.55-8.59
Burden of proof. See **Burden of Proof**
Class action suit, 10.3
Commercial tenant, defense against unlawful detainer action by, 8.128
Comparison of unlawful detainer action to other actions for possession
Generally, 9.10
Ejectment action at common law, 9.11
Quiet title action, 9.12
Complaint. See **Complaint in Unlawful Detainer Action**
Consumer reporting agency prohibited from reporting unlawful detainer action if tenant prevailed, 2.9
Damages
Amount of damages as consideration in determining limited versus unlimited civil case, 9.32
Complaint in unlawful detainer action. See **Complaint in Unlawful Detainer Action**
Extension of trial date, landlord's damages due to. See **Setting Unlawful Detainer Case for Trial**
Forfeiture, payment of damages as condition for granting relief from, 13.56
Judgment, damages awarded in. See **Judgment in Unlawful Detainer Action**
Jury instructions. See **Jury Instructions in Unlawful Detainer Action**

Limited grounds for recovering damages, 9.39, 13.19
Malice, award of damages if tenant guilty of, 9.8, 10.42, 13.19
Malicious holdover, fraud, force, or violence, recovery of damages for, 9.40, 13.19
Measure of damages, 13.19
Nonpayment of rent. See **Trial of Unlawful Detainer Action**
Postjudgment damages in unlawful detainer action, prohibition against award of, 9.31
Punitive damages for intentional wrongful misconduct, effect of tenant's claim for, 9.29
Rent default, damages and rent in eviction action based on, 9.38
Statutory damages, 10.42, 13.19
Striking unlawful detainer complaint, motion based on improper request for damages in complaint, 10.40
Declarations. See **Affidavits and Declarations**
Default in rent. See **Rent**
Defenses. See **Defenses**
Demurrer. See **Demurrer to Complaint in Unlawful Detainer Action**
Depositions. See **Depositions in Unlawful Detainer Action**
Deposits. See **Deposits**
Discovery. See **Discovery**
Discretion of court. See **Discretion of Court**
Dismissal of action. See **Dismissal of Action**
Disqualification of judge. See **Disqualification of Judge in Unlawful Detainer Action**
Employers and employees. See **Employers and Employees**
Enforcement of judgment. See **Enforcement of Unlawful Detainer Judgment**
Escrow of rent. See **Escrow of Rent Pending Unlawful Detainer Action**
Estoppel. See **Estoppel**
Ethical considerations for attorneys
Representing landlord (see Representing landlord, below)
Responsive pleadings, ethical considerations in filing. See **Responsive Pleadings in Unlawful Detainer Action**
Eviction control ordinances. See **Rent Control**
Extension of time. See **Extension of Time**
Fees. See **Fees**
Fixed-term lease, right of landlord to file unlawful detainer action on expiration of, 8.82
Forfeiture of possession. See **Forfeiture**
Grounds for unlawful detainer action, 9.3
Habitability, breach of implied warranty as defense in unlawful detainer action. See **Habitability, Implied Warranty of**
Hearings. See **Hearings**
Holidays. See **Holidays**
Initial meeting between attorney and landlord
Generally, 9.22
Information necessary to pursue eviction, 9.25-9.27
In propria action by landlord in limited civil case, attorney's assistance with, 9.23
Sample eviction questionnaire, 9.27
Unknown tenants, serving prejudgment right of claim to possession on, 9.26
Wrongful eviction, explaining consequences to landlord of, 9.24
Injunctions. See **Injunctions**
In propria persona. See **In Propria Persona**
Inspection of documents. See **Inspection of Documents in Unlawful Detainer Action**
Insurance coverage
Punitive damages for intentional wrongful misconduct, effect of tenant's claim for, 9.29
Wrongful eviction coverage, 9.28
Interrogatories. See **Interrogatories in Unlawful Detainer Action**
Judgment. See **Judgment in Unlawful Detainer Action**
Jury instructions. See **Jury Instructions in Unlawful Detainer Action**
Landlord-tenant relationship
Generally, 9.36
Termination of relationship, time for bringing unlawful detainer action, 9.4
Law enforcement personnel. See **Law Enforcement Personnel**
Limited civil action. See **Limited Civil Action**
Limits on unlawful detainer remedy, 9.5
Local ordinances. See **Rent Control**
Manager of property. See **Management of Property**
Meeting between attorney and landlord (see Initial meeting between attorney and landlord, above)
Memorandum in support of motion. See **Memorandum in Support of Motion**
Mobilehome, documents attached to unlawful detainer complaint involving, 6.76
Monetary relief (see Damages, above)
Motions. See **Motions**

Notice requirements. See **Notice and Notification**
Penalties. See **Penalties**
Personal property of tenant, disposition of. See **Personal Property**
Pleadings. See **Pleadings**
Possession of real property, unlawful detainer action as suit for, 9.5
Possession, writ of. See **Possession, Writ of**
Protective orders. See **Protective Order in Unlawful Detainer Action**
Quashing service of unlawful detainer summons. See **Quashing Service of Unlawful Detainer Summons**
Quiet title action, comparison of unlawful detainer action to, 9.12
Rent
  Generally. See **Rent**
  Nonpayment of rent. See **Trial of Unlawful Detainer Action**
  Rent control ordinances. See **Rent Control**
Representing landlord
  Generally, 4.2-4.2A
  Checklist, 4.2B
  Communications between attorney and adverse party, prohibition against, 9.21
  Initial meeting between attorney and landlord (see Initial meeting between attorney and landlord, above)
  Insurance (see Insurance coverage, above)
  Rules of Professional Conduct, 9.20
Representing tenant
  Generally, 5.4A
  Checklist, 5.4B
Resident property manager. See **Management of Property**
Responsive pleadings. See **Responsive Pleadings in Unlawful Detainer Action**
Retaliatory eviction, unlawful detainer action as. See **Retaliatory Eviction**
Roommate of tenant, landlord's unlawful detainer action against, 1.7A
Rules of court. See **Rules of Court**
Sanctions. See **Penalties**
Service of papers. See **Service of Process and Papers**
Setting case for trial. See **Setting Unlawful Detainer Case for Trial**
Settlement
  CCP §998 offers to settle, 9.17A
  Consumer reporting agency prohibited from reporting settled unlawful detainer action, 2.9
  Counseling and negotiation by attorney, 9.17
  Entry of judgment, stipulation for, 9.19-9.19A
  Release of claims in unlawful detainer action, 3.35
  Setting unlawful detainer action for trial, settlement conference as part of procedure for, 11.52
  Stipulated judgment. See **Stipulations**
60-day notice. See **60-Day Notice**
SLAPP suit, motion to strike unlawful detainer action as, 8.110
Statement of decision. See **Statement of Decision in Unlawful Detainer Action**
Statutory authority for, 9.2
Stay of unlawful detainer action
  Automatic stay of proceedings pending writ of mandate review of denial of motion to quash summons, 10.27
  Execution of unlawful detainer judgment. See **Stay of Execution of Unlawful Detainer Judgment**
  Foreclosure wrongfully obtained, stay of unlawful detainer action pending resolution of borrower's action to set aside, 8.68A
Stipulations. See **Stipulations**
Strict construction of unlawful detainer statutes, 8.145
Strike, motion to. See **Strike, Motion To**
Subpoena duces tecum. See **Subpoena Duces Tecum**
Subtenants. See **Assignment and Subletting**
Summary judgment. See **Summary Judgment in Unlawful Detainer Action**
Summary nature of remedy
  Generally, 9.6
  Applicability of civil action procedures to unlawful detainer actions, 9.9
  Expedited procedures, 9.7
  Issues concerning right to possession, unlawful detainer action limited to, 9.8
  Priority of unlawful detainer action over other civil actions, 9.7
Surrender of premises. See **Surrender of Premises**
Tenant at sufferance, unlawful detainer action against, 1.11
30-day notice. See **30-Day Notice**
3-day notice. See **3-Day Notice**
Time. See **Time**
Title. See **Title to Property**

Trespasser, unlawful detainer action against, 1.11A
Trial. See **Trial of Unlawful Detainer Action**
Unidentified occupants of premises, unlawful detainer action against, 9.5
Unlawful Detainer Registry's reporting of unlawful detainer actions against tenants, 5.25A, 5.27
Waiver of rights. See **Waiver**
Weapons or ammunition on premises, unlawful detainer action against tenant unlawfully possessing or using, 4.44
Writs
Generally, 13.63
Mandate. See **Mandate, Writ of**
Wrongful termination as defense to unlawful detainer action, 1.4

Unruh Civil Rights Act
See also **Civil Rights**
Generally, 2.48, 2.57
Arbitrary discrimination based on personal characteristics, prohibition against, 2.21, 2.58
Damages for violations of Act, 2.59, 8.121
Department of Fair Employment and Housing (DFEH), enforcement of Unruh Act by, 2.59
Disabled persons
Amendment to Unruh Act to protect, 4.14
Americans with Disabilities Act violations as violation of Unruh Act, 2.21, 5.7
Discounts or benefits offered to persons due to loss of employment not characterized as arbitrary discrimination, 2.7
Disparate impact in housing, rejection of cases brought under Unruh Act, 2.5
Domestic violence, protection against, 2.27H
Enforcement of Act, 2.59
Evaluating prospective tenant's application, prohibition against discrimination, 2.9A, 4.14
Fair Employment and Housing Act's advantages over Unruh Act, 2.48
Fair Employment and Housing Commission (FEHC), waiver of rights and claims under Unruh Act as prerequisite to remedy from, 2.55
Individuals, Unruh Act limited to discriminatory actions against, 2.21
Personal characteristics, prohibition against discrimination based on, 2.48
Price for services of similar or like kind, prohibition against gender discrimination in, 2.59
Remedies under Unruh Act, 2.59, 8.121
Rent
Increase in rent, prohibition against arbitrary, 5.7, 8.118
Triple income-to-rent ratio as criteria for prospective tenant, permissibility of, 2.9A
Restriction on scope of Act in non-housing claims, 2.21
Retaliatory eviction, protection against. See **Retaliatory Eviction**
Senior housing, Unruh Act's requirements for, 2.25B-2.25C
Sexual harassment by landlord, civil action under Unruh Act for, 2.58, 8.122
Sexual orientation defined under Unruh Act, 2.58
Small claims court action to enforce, 2.59
Statute of limitations for filing action under, 2.69
Unlawful detainer complaint, discriminatory eviction in violation of Unruh Act as affirmative defense to, 10.67

Use of Premises
Lease provision specifying permitted use of premises, 1.28
Mobilehomes. See **Mobilehomes**

Utilities. See **Public Utilities**

Vacancy Control. See **Rent Control**

Vacating and Setting Aside
Consent decree, housing authority prohibited from vacating based on changes in HUD law, regulations, and Circulars, 2.15
Default, setting aside. See **Default and Default Judgment in Unlawful Detainer Action**
Judgment in unlawful detainer action, motion to set aside and vacate, 13.46

Valuation
Expert witness's opinion regarding reasonable rental value of property. See **Expert Witnesses**
Habitability. See **Habitability, Implied Warranty of**
Jury instructions on fair rental value. See **Jury Instructions in Unlawful Detainer Action**
Reasonable rental value
Defense of breach of warranty of habitability, plaintiff as prevailing party after tenant's failure to timely pay reasonable rental value, 13.36

Tenant at sufferance, liability for reasonable rental value of property, 1.11
Unlawful detainer action, damages based on reasonable rental value, 12.28-12.30
Writ of possession for real property, declaration stating daily rental value of property, 13.65

Venue
Unlawful detainer action, venue for, 9.33, 9.37

Verdict in Unlawful Detainer Action. See **Trial of Unlawful Detainer Action**

Verification of Unlawful Detainer Complaint. See **Complaint in Unlawful Detainer Action**

Vicarious Liability
Sexual harassment by agent, employer's liability for, 2.27G

Video- or Audiorecording
Deposition, audio- or videotaping of, 11.7
Uninhabitable conditions, tenant making videotape of, 5.10

Void and Voidable Actions
Assignment in violation of lease covenant, voidability of, 3.57
Peremptory challenge of judge, subsequent actions of judge void, 12.8
Public policy, acts void as against. See **Public Policy**
Renewal or extension of lease, voidability of lease provisions for. See **Renewal or Extension of Lease**
Retainer agreement, effect of attorney's failure to provide client with written copy of, 4.2

Voucher Programs for Housing. See **Section 8 Housing**

Wages. See **Salaries and Compensation**

Waiver
Assignment of lease, landlord's waiver of covenant prohibiting, 3.57
Bankruptcy stay, prohibition against advanced waiver of, 14.7
Breach of lease covenant by tenant, acceptance of rent or other benefits under lease by landlord resulting in waiver of, 8.49
Demurrer to unlawful detainer complaint, failure to timely file demurrer resulting in waiver of objections to, 10.32
Fees in unlawful detainer action, waiver of. See **Fees**
Habitability, prohibition against waiver of implied warranty of, 3.23
Housing discrimination action, waiver of costs for party in, 2.39
Inspection of documents, waiver of objection to demand for, 11.21
Mitigation of damages, landlord's efforts not resulting in waiver of right to unpaid rent, 8.14
Mobilehome rental agreement provision regarding waivers, 6.24, 6.120
Rent
Breach of covenant, acceptance of rent as waiver of, 1.56-11, 1.75, 10.60
Costa-Hawkins Rental Housing Act, landlord's waiver of vacancy decontrol under, 7.25
Covenant against subletting, acceptance of rent by landlord not waiver of right to enforce, 4.40B
Notice of rent increase improperly served, tenant's waiver of rights by paying increased rent, 5.8
Subtenancy, effect of landlord's acceptance of rent after learning of, 5.29
Repair-and-deduct remedy, prohibition against waiver of, 3.9, 3.14
Retaliatory eviction, prohibition against tenant's waiver of rights under CC §1942.5, 8.114
Rights of tenant, prohibition against lease provisions waiving, 1.30, 4.39
Security deposits. See **Security Deposits**
Unlawful detainer action
Affirmative defense to unlawful detainer complaint, waiver of breach by landlord as, 10.60
Cross-complaint in unlawful detainer action, waiver of objection to, 10.75
Fees, waiver of. See **Fees**
Jury instruction regarding landlord's waiver of right to terminate tenancy, 12.63B
Jury trial, waiver of right to, 11.54
Void, lease provision waiving notice requirements, 8.27

War
Rent control ordinances enacted during wartime, 7.7

Warehouse's Lien. See **Mobilehomes**

Warranties

Habitability. See **Habitability, Implied Warranty of**
Repairs, effect of landlord's express promise to make, 3.9

Waste
Tenant's obligations to refrain from, 1.58-1
3-day notice for breach of covenant involving waste. See **3-Day Notice**

Waterbeds
Entry by landlord to inspect tenant's waterbed, 3.2
Lease provision imposing restrictions on use of, 1.63, 4.39

Weapons
Disclosure by landlord of government ordnance located in neighborhood, 1.29
Unlawful detainer action against tenant unlawfully possessing or using weapons or ammunition on premises, 4.44

Welfare
Discrimination against welfare recipients as prospective tenants, 2.58
Unruh Civil Rights Act, applicability to welfare recipients, 2.21

Wetlands
Mobilehome parks, pass-through of expenses related to contaminated wetlands, 6.29

Will, Tenancy at. See **Tenancy at Will**

Withholding Rent. See **Rent**

Witnesses
Cross-examination of witnesses. See **Cross-Examination of Witness**
Deposition of witness. See **Depositions in Unlawful Detainer Action**
Examination of witnesses. See **Examination of Witness**
Expenses of. See **Expenses and Expenditures**
Expert witnesses. See **Expert Witnesses**
Fees, 12.11, 12.14-12.15, 13.22
Summary judgment hearing, prohibition against oral testimony at, 11.35
Trial of unlawful detainer action, compelling attendance of witnesses at. See **Trial of Unlawful Detainer Action**

Words and Phrases. See **Construction and Interpretation; Definitions**

Writs
Certiorari, 13.63
Execution, writ against mobilehome, 6.77
Mandate. See **Mandate, Writ of**
Possession. See **Possession, Writ of**
Prohibition. See **Prohibition, Writ of**
Service of writ. See **Service of Process and Papers**
Stay of execution of unlawful detainer judgment. See **Stay of Execution of Unlawful Detainer Judgment**
Supersedeas, 13.63

Wrongful Eviction. See **Eviction**

Wrongful Termination
Unlawful detainer action, wrongful termination as defense to, 1.4

Zoning. See **Mobilehomes**

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