



Real Property Law Section

38th Annual Real Property Law Section Spring Conference
May 2 – 5, 2019

Session 35: New Mandatory Disclosures Before Mediation and All the Key Confidentiality Issues

Panelists:

Ana Sambold, Esq.,
Mediator and Arbitrator,
Sambold Law and ADR Services

Marc D. Alexander, Esq.,
Of Counsel, Alvarado Smith



RIGHTEOUS AND WRONGFUL EVICTIONS IN CALIFORNIA

- **Kere K. Tickner, Esq.**
Tickner McCliman APC
ktickner@ticknermccliman.com
- **Stephanie A. Foster, Esq.**
Steven Adair MacDonald & Partners, P.C.
sfoster@samlaw.net
- **Jethro S. Busch, Esq.**
Steven Adair MacDonald & Partners, P.C.
jbusch@samlaw.net

COURSE OVERVIEW

Typical causes of actions under common law, state statutes, and local ordinances

Common claims that arise such as owner move-in sham, constructive eviction due to habitability, and retaliatory eviction

Common issues related to defenses, burden of proof, key definitions for “dominant motive” and “bad faith”; how to maximize/minimize damages; the measure of damages; and also touch on insurance related issues.

Practical tactics/tips

WRONGFUL EVICTION DEFINED:

A wrongful eviction occurs when the landlord fails to comply with proper legal procedures in order to recover possession of a rental unit.

Examples of wrongful eviction include:

- ▶ Lock out;
- ▶ Removing tenant's personal properties;
- ▶ Removing doors, windows, kitchens, or other housing services;
- ▶ Termination of utilities; and
- ▶ Evictions that violate local ordinance.



The Eviction Can Be Actual Or Constructive



ACTUAL



CONSTRUCTIVE

SOURCES OF CAUSE OF ACTION



Common Law



Statutory



Local
Ordinances



Covenant of
Quiet
Enjoyment



Emotional
Distress



Housing
Discrimination



Common Law Causes of Action

Statutory Causes of Action



- ▶ Business and Professions Code Sections 17200-17209
- ▶ Civil Code Section 789.3
- ▶ Civil Code Sections 1941 - 1942.5
- ▶ Civil Code Section 1927
- ▶ Civil Code Section 1940.2
- ▶ Code of Civil Procedure Sections 1159 - 1174

Local Ordinances

- ▶ San Francisco
- ▶ Oakland
- ▶ Richmond
- ▶ Los Angeles
- ▶ Santa Monica

San Francisco

► San Francisco Residential Rent Stabilization and Arbitration Ordinance (SFRRSAO) Chapter 37.9

- Subsection (a) 1 -16 (allowable just cause for eviction)
- Subsection (c) (the just cause must be the landlord's dominant motive)
- Subsection (e) (unlawful to evict except as so provided)
- Subsection (f) (tenant may sue for violation, treble damages)

► SFRRSAO Chapter 37.10B - Tenant Harassment

- Landlord cannot in bad faith influence tenant to vacate through fraud, intimidation or coercion, or interfere with tenants quiet enjoyment intended to cause tenant to vacate.



Oakland

▶ Oakland Just Cause for Eviction Ordinance

- ▶ Enumerated good causes for eviction
- ▶ The good cause reason must be the landlord's dominant motive for recovering possession and landlord must be seeking to recovery possession in good faith
- ▶ Tenant may sue for violation, treble damages

▶ Oakland Tenant Protection Ordinance

- ▶ protects tenants from harassment; landlord cannot coerce tenant to vacate through fraud, intimidation, threats, with offers of payments that are accompanied with threats or intimidation, remove a housing service for purpose of causing tenant to vacate; etc.

Richmond

Richmond Fair Rent, Just Cause for Eviction, and Homeowner Protection Ordinance Chapter 11.100

Enumerated just causes for eviction

Tenant may sue for violation, does not specify treble damages



A wide-angle, high-angle aerial photograph of the Los Angeles skyline at night. The city is densely packed with buildings, many of which are illuminated with warm lights. The sky is a deep blue, and the overall scene is vibrant and detailed. The image is positioned on the left side of the slide, partially obscured by a blue geometric overlay.

Los Angeles

- ▶ Los Angeles County Rent Stabilization Ordinance (LARSO) - applies to all property built before October 1, 1978 and replacement units

- ▶ 151.09(a)(1-7) - Eviction Grounds
 - ▶ 151.09(a)(8-14) - Landlord Ground to Recover Unit from Tenant

Santa Monica

- ▶ Santa Monica Rent Control - Residential buildings built after April 10, 1979.
- ▶ Just cause eviction only



Covenant of Quiet Enjoyment

California Civil Code 1927 states:

An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same.

In other words, implied in every rental agreement, there is an obligation by the landlord to provide the tenant with “quiet enjoyment” and not to disturb the tenant.

EMOTIONAL DISTRESS DAMAGES

▶ A tenant may sue his landlord for emotional distress damages if the landlord's acts are extreme and outrageous resulting in emotional distress or the tenant suffered as a result of the defendant's "knowing, intentional, and willful" failure to correct defective conditions of the premises..

▶ Emotional distress damages may also be provided by local ordinances:

▶ S.F.R.R.S.A.O. Chapter 37.9(f) - Emotional distress damages available - trebled if proven landlord acted in knowing violation of or in reckless disregard of Ordinance Sections 37.9 or 37.10

▶ Oakland Chapter 8.22.370(2) - same as San Francisco

▶ Richmond Fair Rent, Just Cause for Eviction, and Homeowner Protection Ordinance Chapter 11.100.050(g) - Allows for recovery of actual damages including emotional distress



HOUSING DISCRIMINATION

Unruh Act (Civil Code Sections 51, et seq.)

Fair Employment and Housing Act (Govt. Code Section 12900, et seq.)

Local Ordinances

Types Of Claims



SHAM OWNER MOVE IN



RETALIATION



**BREACH OF IMPLIED
WARRANTY OF HABITABILITY**

Page 1

MLS#: [REDACTED] Active [REDACTED] 19th St, San Francisco 94114 Eureka Valley/Dolores \$ 1,995,000

2-4 Units LD: 01/18/18 OMD: 01/18/18 D/S: 5/K
 Cross St: Castro Map: CQ45
 Block/Lot/APN [REDACTED] Zoning: RH3 Lot SqFt: 2,121
 #Units: 2 #Owr Occ: #Vacant: 2 #Floors:
 #Pkg: 1 #Indep Pkg: 1 #Tand Pkg:
 ~Sq Ft: 2050 Per Tax Records \$/SF: 973.17 GRM: 0.00 YB: 1900
 Gross Annual Income: A/S: Ann Expense:
 Short Sale: No REO: No Pend. Lit.: Probate: No Court:

Marketing Remarks: Welcome to life at 19th and Castro! Enjoy living in one of two tastefully updated, vacant, full-floor flats in the most desirable and walkable neighborhood in the city. This gorgeous stick Victorian contains tall ceilings, original period details, two fireplaces, and hardwood floors. Upstairs includes 2 bedrooms + an office, with views of Sutro Tower and Corona Heights. The lower unit includes 2 bedrooms and direct access to the charming backyard and patio. A 650 sqft. renovated unwarranted in-law downstairs, 1 car garage, & seismic upgrades complete this trophy building perfect for an owner occupier or investor. Total area measured w/ unwarranted in-law is 2,620 sqft.

Agent Only Remarks: Total area measured w/ unwarranted in-law is 2,620 sqft. Send clients to [REDACTED] Please contact [REDACTED] for disclosure requests or questions [REDACTED].

Show	Appointment Only	Show	Call Listing Agent	Poses	Close of Escrow	Park	Attached	Park	Garage
Park	Auto Door	Type	Flats	Type	Duplex	Type	2 Story	Style	Contemporary
Style	Victorian	Exter	Wood Siding	Exter	Concrete	Exter	Other	Unit 1	3 Bedrooms
Unit 1	1 Bath	Unit 1	Flat	#1 Inc	Oven/Range	#1 Inc	Refrigerator	#1 Inc	Views
#1 Inc	Fireplace(s)	Unit 2	2 Bedrooms	Unit 2	1 Bath	Unit 2	Flat	#2 Inc	Window Coverings
#2 Inc	Oven/Range	#2 Inc	Refrigerator	#2 Inc	Garbage Disposal	#2 Inc	Microwave	#2 Inc	Fireplace(s)
#2 Inc	Balcony/Deck	Unit 3	1 Bedroom	Unit 3	1 Bath	Unit 3	Inlaw/Illegal	#3 Inc	Refrigerator
#3 Inc	Garbage Disposal	#3 Inc	Microwave	Views	City Lights	Views	Garden/Greenbelt	Views	Hills
Views	Twin Peaks	Floors	Hardwood	Floors	Tile	Foundn	Concrete	Foundn	Combination
Constr	Wood Frame	Roof	Shingle	Heat	Wall Furnaces	Separ	Electricity	Laund	In Common Area
Bsmt	Partial	Bsmt	Finished	Bsmt	Apartment in Basemnt	Misc	Garden	Misc	Landscaping-Rear
Misc	Fenced Yard	Misc	Patio(s)	Misc	Deck(s)	Misc	Fireplace(s)	Misc	Bay Window(s)
Misc	Window Coverings	Misc	Double Pane Windows	Misc	Storage Area(s)	Misc	Smoke Alarm(s)	Misc	Cable TV
Discs	Disclosure Pkg Avail	Discs	Strct Pst Cntr Rpt	Discs	Gen Prop Insp Report				

Brokers Tour Date: 01/23/18 Time: 12:00 - 01:30 Lockbox Only: N Price Reduction: No

Remarks: Vacant Duplex w/ in-law in A+ Castro! Views, pkg, backyard!

Open House Date: 01/20/18 Time: 2:00 pm - 4:30 pm

Remarks: Vacant 2-unit w/ in-law in A+ Castro loc! Views, pkg, backyard, orig details, nwly renovated. Must see!

Open House Date: 01/21/18 Time: 2:00 pm - 4:30 pm

Remarks: Vacant 2-unit w/ in-law in A+ Castro loc! Views, pkg, backyard, orig details, nwly renovated. Must see!

Unit#1:	4065	#Rms:	6	Sqft:	Rent:	Rent Type:	Lease Expires:
Occupant Name:					Occupant Phone:		
Unit#2:	4067	#Rms:	5	Sqft:	Rent:	Rent Type:	Lease Expires:
Occupant Name:					Occupant Phone:		
Unit#3:	Unwarranted	#Rms:	3	Sqft:	Rent:	Rent Type:	Lease Expires:
Occupant Name:					Occupant Phone:		
Unit#4:		#Rms:		Sqft:	Rent:	Rent Type:	Lease Expires:
Occupant Name:					Occupant Phone:		
List Office:	[REDACTED]				List Type:	ER	

Owner Move-In Sham

SSRRSAO Section 37.9B(b) - if landlord *re-rents* the unit anytime within three years of the service of the notice to quit, the landlord must first offer the unit to the displaced tenants

Oakland does not have this right of first refusal requirement for OMI.

Richmond requires that that tenant be given right of first refusal if the unit is *ever* re-rented again.

Los Angeles requires right of 1st refusal to prior tenants if within two (2) years

San Francisco tenant verdict of more than \$3.5M against landlord for wrongful eviction and harassment. San Francisco Superior Court, Case No. CGC-15-545655.

Retaliation



Retaliatory eviction occurs, as Witkin observes, '[When] a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who ...has exercised his legal right to obtain compliance with requirements of habitability.' *Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978 81 Cal.App.3d 604, 610).

Civil Code Section 1942.5

May also be a violation of the local rent ordinance - see LARSCO 151.09(B)

Retaliation:

In the form of
non-payment
of rent cases
and late
payment of
rent cases

► Civil Code Section 1942.5(a)

► Is retaliation available as a defense if tenant is “in default as to the payment of his (sic) rent? What constitutes “default as to payment of rent?” What about at common law? See Schweiger v. Superior Court (1970) 3 Cal.3d 507.

► PAUL KELLY ET AL VS. MATTHEW C. DIRKES ET AL, San Francisco Superior Court Case No. CGC17556288. Relying on Costa-Hawkins, a San Francisco landlord tripled tenants rent from \$1,900 to \$6,700. Tenants sued for wrongful eviction claiming that the landlord improperly used Costa-Hawkins to evict and circumvent just cause eviction provisions. The judge ruled in favor of the landlord, finding there are no limits on rent increases for single-family homes, regardless of landlord’s motives. Tenants appealed.



Breach of Implied Warranty of Habitability

► Green v. Superior Court (1974) 10 Cal.3d 616

► This implied warranty of habitability 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.

► Stoiber v. Honeychuck (1980) 101 Cal.App.3d 903

COMMON BURDEN OF PROOF ISSUES



**GENERALLY -
EVIDENCE CODE 500**



PROOF OF MOTIVE

DEFENSES TO WRONGFUL EVICTION LAWSUIT

- ▶ **Unlawful Detainer Stipulation (Release)**
- ▶ **Statutes of Limitations**
 - ▶ Code of Civil Procedure Section 340(a)
(one year statute of limitations when action based on statute for penalty)
- ▶ **Defenses To Violations of Local Rent Ordinance (Tenant Protection or Anti-Harassment)**
 - ▶ Lack of Notice
 - ▶ Tenant Interference
 - ▶ Oakland - T is obligated to give LL opportunity to cure
 - ▶ Santa Monica Rent Control - may not evict a tenant who has been a tenant for 5 years and is 62 or older or disabled, or a tenant who is terminally ill. The only exception is if the owner or owner's relative intends to occupy, and they also meet the above criteria.

DEFENSES TO WRONGFUL EVICTION LAWSUIT: Litigation Related Claims

Anti Slapp

- ▶ CCP Section 425.16
- ▶ Jarrow Formulas, Inc. v. La Marche (2003) 31 Cal.4th 728, 733-741; Birkner v. Lam (2007) 156 Cal.App.4th 275, 284-289 (reversing trial court's denial of anti-SLAPP motion filed by defendant-landlord in wrongful eviction case arising out of landlord's service of a notice to terminate tenancy for purpose of allowing his mother to move into the rental unit).
- ▶ Clark v. Mazgani (2009) 170 Cal.App.4th 1281 (denying use of anti-SLAPP motion, and holding that removing property from rental market and alleged fraudulent eviction of plaintiff were not protected activities taken in furtherance of defendant's rights of petition or free speech)

Litigation Privilege

- ▶ CC Section 47
- ▶ Rubin v. Green (1993) 4 Cal.4th 1187, 1193-1196; Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal.4th 1232 (litigation privilege preempted portions of local ordinance which provided civil remedies and criminal penalties for wrongfully seeking to recover possession of rental units); Birkner v. Lam (2007) 156 Cal.App.4th 275, 285-289 (case remanded to trial court for determination of whether defendant-landlord's notice of termination of tenancy related to litigation which was contemplated in good faith and was under serious contemplation).
- ▶ Banuelos v. LA Investment, LLC, 219 Cal.App.4th 323 - litigation privilege does not bar statutory retaliation eviction

DAMAGES:

Any amounts necessary to compensate the tenant for detriment proximately caused by the eviction or likely to result from the eviction.

Breach of Contract - Civ. Code § 3300

Tort - Civ. Code § 3333

The measure of damages can be the difference between the rental value of the demised premises and the contract rent for the remainder of the term of the lease, or for a period the tenant may be expected to retain possession.

Civil Code Section 1942.5(h) (allows for recovery of actual damages and punitive)



DAMAGES

Maximizing and Minimizing Damage
Awards

Maximizing Damages



- ▶ Look to the local ordinance:
 - ▶ S.F.R.R.S.A.O. Chapter 37.9(f) - allows for injunctive relief, money damages of not less than three times actual damages (including damages for mental or emotional distress, and whatever other relief the court deems appropriate.
 - ▶ LARSO 151.10 - three times the amount of rent collected in excess of the statutory limit, and attorney's fees and cost.
- ▶ Damages for loss of leasehold
 - ▶ Rent Differential Calculations
 - ▶ Fair Market Rental Value
 - ▶ Length of Tenancy

Mitigating or Minimizing Damages

- ▶ S.F.R.R.S.A.O. Chapter 37.9, subsection (f) (Damages for emotional distress only trebled if landlord acted knowingly or in reckless disregard of Ordinance)
- ▶ Castillo v. Friedman (1987) 197 Cal.App.3d Supp.6 (Damages may be limited to difference in rent for period tenant may have been expected to occupy the unit)
- ▶ Balmoral Hotel Tenants Ass'n v. Lee (1990) 226 Cal.App.3d 686 (Ordinance subsequently amended, but interesting discussion of “arbitrary/excessive damages”)
- ▶ Offer back unit at former rental rate
- ▶ Dismiss faulty unlawful detainer.
- ▶ Tax issues - damage allocations (e.g., as rent rebate or personal injury), etc. in settlement *MAY* be to client's benefit. Consult tax professional.
- ▶ Offer tenant buy out to move as part of settlement terms.



INSURANCE



ADVISE LANDLORD/OWNER CLIENTS TO
OBTAIN PROPER INSURANCE FOR
WRONGFUL EVICTION, PERSONAL INJURY,
ETC.



GET AS MUCH INSURANCE AS POSSIBLE
ESPECIALLY IF LANDLORD/OWNER HAS AN
OLDER BUILDING WITH POSSIBLE LEAD
EXPOSURE CLAIMS.

- ▶ Early Mediation - Encourage early mediation by proposing mutual freeze on discovery if other side will agree to participate in early mediation
- ▶ Secure evidence early in litigation to support punitive damage claims under Civil Code 3295 - photos and video carry the most weight at trial
- ▶ Bi-lateral or uni-lateral attorney fees (for plaintiffs that have a risky case, maybe want to drop claims that allow for the prevailing *party* to recover their fees, and only seek claims that allow for the prevailing *plaintiff* to recover fees)
- ▶ CCP § 998 Offers - utilize cost-shifting impact of 998 offers to compromise in cases that have clear liability, and be sure to clearly include or exclude attorney's fees
- ▶ Use of RFA - Pursuant to CCP § 2033.420, if a party fails to admit the truth of a relevant matter, forcing the other side to prove the truth of the matter at trial, the party requesting the admission may obtain a court order requiring the non-admitting party to pay the reasonable expenses incurred in making that proof at trial, including reasonable attorney's fees.

HELPFUL TACTICS

THANK YOU

- ▶ **Kere K. Tickner, Esq.**
Tickner McCliman APC
ktickner@ticknermccliman.com
- ▶ **Stephanie A. Foster, Esq.**
Steven Adair MacDonald & Partners, P.C.
sfoster@samlaw.net
- ▶ **Jethro S. Busch, Esq.**
Steven Adair MacDonald & Partners, P.C.
jbusch@samlaw.net

Righteous and Wrongful Evictions In California

I. WRONGFUL EVICTION DEFINED:

- A. A wrongful eviction occurs when the landlord fails to comply with proper legal procedures in order to recover possession of a rental unit.
- B. Examples of wrongful eviction include:
 - 1. Lock out;
 - 2. Removing tenant's personal properties;
 - 3. Removing doors, windows, kitchens, or other housing services;
 - 4. Termination of utilities; and
 - 5. Evictions that violate local ordinance.
- C. CCSF Res. Rent Stab. And Arb. Bd. Rules and Regulations Section 1.20
 - 1. "**Wrongful Eviction**" means the serving of a notice to quit a rental unit, the making of a demand for possession of a rental unit, or the prosecution of an Unlawful Detainer action in violation of the Ordinance.
- D. An Eviction can Be Actual or Constructive
 - 1. **Actual** – where there is a physical expulsion of the tenant by the landlord or through the landlord's procurement.
 - 2. **Constructive** – results from interference with or disturbance of the tenant's possession by the act of the landlord or landlord's agent, whereby the whole or substantial part of the premises is rendered unfit for occupancy, or the tenant is deprived of the beneficial enjoyment of the premises, provided that the tenant vacates or abandons the premises within a reasonable time.

II. SOURCES OF CAUSE OF ACTION

- A. Common Law
 - 1. Black v. Knight (1917) 176 Cal. 722
 - 2. Lindenberg v. MacDonald (1950) 34 Cal.2d 678
 - 3. Richardson v. Pridmore (1950) 97 Cal.App.2d 124
 - 4. California Livestock Production Credit Ass'n v. Sutfin (1985) 165 Cal.App.3d 136
 - 5. Schweiger v. Superior Court (1970) 3 Cal.3d 507
 - 6. Nativi v. Deutsche Bank National Trust Company (2014) 223 Cal.App.4th 261, 312 - A landlord is not liable for a breach of the implied covenant of quiet enjoyment or a constructive eviction when he wrongfully commences an eviction proceeding in good faith, even though the tenant vacates the premises in response to the wrongful notice to quit.
- B. Statutory
 - 1. Business and Professions Code Sections 17200-17209
 - 2. Civil Code Section 789.3

3. Civil Code Sections 1941 – 1942.5
 4. Civil Code Section 1927
 5. Civil Code Section 1940.2
 6. Code of Civil Procedure Sections 1159 – 1174
- C. Local Ordinances
1. **San Francisco**
 - a) San Francisco Residential Rent Stabilization and Arbitration Ordinance (SFRRSAO) Chapter 37.9
 - (1) Subsection (a) 1 –16 (allowable just cause for eviction)
 - (2) Subsection (c) (the just cause must be the landlord’s dominant motive)
 - (3) Subsection (e) (unlawful to evict except as so provided)
 - (4) Subsection (f) (tenant may sue for violation, treble damages)
 - b) SFRRSAO Chapter 37.10B – Tenant Harassment
 - (1) Landlord cannot in bad faith influence tenant to vacate through fraud, intimidation or coercion, or interfere with tenants quiet enjoyment intended to cause tenant to vacate.
 2. **Oakland**
 - a) Oakland Just Cause for Eviction Ordinance (Chapter 8.22, Article II)
 - (1) 8.22.360(A)(1-11) - Enumerated good causes for eviction
 - (2) 8.22.360(B)(2) – The good cause reason must be the landlord’s dominant motive for recovering possession and landlord must be seeking to recovery possession in good faith
 - (3) 8.22.370(2) – Tenant may sue for violation, treble damages
 - b) Oakland Tenant Protection Ordinance (Chapter 8.22, Article V)
 - (1) 8.22.640 – protects tenants from harassment; landlord cannot coerce tenant to vacate through fraud, intimidation, threats, with offers of payments that are accompanied with threats or intimidation, remove a housing service for purpose of causing tenant to vacate; etc.
 3. **Richmond**
 - a) Richmond Fair Rent, Just Cause for Eviction, and Homeowner Protection Ordinance Chapter 11.100
 - (1) 11.100.050(a)(1-8) – Enumerated just causes for eviction
 - (2) 11.100.050(g) – Tenant may sue for violation, does not specify treble damages
 4. Los Angeles Rent Stabilization Ordinance (LARSO)
 - a) Section 151.09(A)(1-7) – allowable just cause evictions

- b) Section (A)(8-14) – allowable basis for owner recovery of rental unit
 - c) Section 151(B) – retaliation
 - d) Section 151(G) – mandatory relocation fee amounts
 - e) Section 151.10 – Remedies for violation of LARSO
 - 5. Santa Monica Rent Control Board
 - a) Similar to LARSO
 - b) Also cannot evict tenant who has been there five years, is over 62 or disabled, or terminally ill (exception if the owner or relative also meet these criteria and is moving in)
- D. Covenant of Quiet Enjoyment
 - 1. Civil Code Section 1927
 - a) Barkett v. Brucato (1953) 122 Cal.App.2d 264, 274
 - b) Chandler v. Hart (1911) 161 Cal. 405
 - c) Lost Key Mines v. Hamilton (1952) 109 Cal.App.2d 569
 - d) Petroleum Collections v. Swords (1975) 48 Cal.App.3d 841 (no breach of the implied covenant of quiet enjoyment unless and until tenant vacates)
 - e) Guntert v. City of Stockton (1976) 55 Cal.App.3d 131 (Tenant may remain in possession and sue for contract damages arising from service of an invalid notice of termination of tenancy)
 - 2. Andrews v. Mobile Aire Estates (2005) 125 Cal.App.4th 578
 - a) There may be an actionable breach where the interference is caused by a neighbor or tenant claiming under the landlord.
 - b) The covenant of quiet enjoyment requires a landlord take reasonable steps to respond to complaints about a nuisance tenant including investigating the complaint, issuing a warning letter, and eviction if necessary.
- E. Emotional Distress
 - 1. Richardson v. Pridmore (1950) 97 Cal.App.2d 124
 - 2. Newby v. Alto Riviera Apts. (1976) 60 Cal.App.3d 288 (Outrageous behavior by landlord's agents in seeking to evict tenants by threats of violence)
 - 3. Stoiber v. Honeychuck (1980) 101 Cal.App.3d 903 (Emotional distress claims arising out of habitability claims)
 - 4. See also 42 Cal.Jur.3d Landlord-Tenant, (Rev) Part 1, Sec. 144-147 (1999)
 - 5. Ehrlich v. Menezes (1999) 21 Cal.4th 543, 552-561 (Limiting emotional distress and physical injury damages arising out of damage to property or financial interests)
- F. Emotional Distress May Also Be Provided By Local Ordinances

1. S.F.R.R.S.A.O. Chapter 37.9(f) - Emotional distress damages available – trebled if proven landlord acted in knowing violation of or in reckless disregard of Ordinance Sections 37.9 or 37.10
2. Oakland Chapter 8.22.370(2) – same as San Francisco
3. Richmond Fair Rent, Just Cause for Eviction, and Homeowner Protection Ordinance Chapter 11.100.050(g) – Allows for recovery of actual damages including emotional distress

G. Housing Discrimination

1. Unruh Act (Civil Code Sections 51, et seq.)
2. Fair Employment and Housing Act (Govt. Code Section 12900, et seq.). See, e.g., Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com. (2004) 121 Cal.App.4th 1578, 1590-1600 (FEHC properly awarded emotional distress damages and other relief, based on condominium association's unreasonable refusal to accommodate request by clinically-depressed condominium owners for permission to keep comfort animal on premises).
3. Local Ordinances

III. TYPES OF CLAIMS

A. Owner Move-In Sham

1. SSRRSAO Section 37.9B(b) – if landlord re-rents the unit anytime within three years of the service of the notice to quit, the landlord must first offer the unit to the displaced tenants
2. Oakland does not have this right of first refusal requirement for OMI.
3. Richmond requires that that tenant be given right of first refusal if the unit is ever re-rented again.
4. LARSO provides right of first refusal to prior tenants within 2 years
5. San Francisco tenant verdict of more than \$3.5M against landlord for wrongful eviction and harassment. San Francisco Superior Court, Case No. CGC-15-545655.
6. Gibson v. Corbett (1948) 87 Cal.App.2d Supp. 926 (In owner move-in eviction, even if owner actually moves in, the issue of his or her good faith is still one of fact)
7. Gross v. Superior Court (1985) 171 Cal.App.3d 265 (Application of WW II rent control cases to interpretation of modern rent control issues)

B. Retaliation

1. Civil Code Section 1942.5
 - a) Schweiger v. Superior Court (1970) 3 Cal.3d 507 (Retaliation generally)
 - b) Aweeka v. Bonds (1971) 20 Cal.App.3d 278 (Plaintiffs may seek emotional distress as well as punitive damages in action for retaliatory eviction)

- c) Custom Parking v. Superior Court (1982) 138 Cal.App.3d 90 (Retaliation theory applies in commercial eviction cases)
- d) May also be a violation of the local rent ordinance
- e) In the form of non-payment of rent cases and late payment of rent cases

2. Civil Code Section 1942.5(a)

a) (Is retaliation available as a defense if tenant is “in default as to the payment of his (sic) rent? What constitutes “default as to payment of rent?” What about at common law? See Schweiger v. Superior Court (1970) 3 Cal.3d 507.

b) PAUL KELLY ET AL VS. MATTHEW C. DIRKES ET AL, San Francisco Superior Court Case No. CGC17556288. Relying on Costa-Hawkins, a San Francisco landlord tripled tenants rent from \$1,900 to \$6,700. Tenants sued for wrongful eviction claiming that the landlord improperly used Costa-Hawkins to evict and circumvent just cause eviction provisions. The judge ruled in favor of the landlord, finding that there are no limits on rent increases for single-family homes, regardless of landlord’s motives. Tenants appealed.

C. Breach of Implied Warranty of Habitability

- 1. Green v. Superior Court (1974) 10 Cal.3d 616
 - a) This implied warranty of habitability 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.
- 2. Civil Code Section 1941 (landlord to put and keep building fit for occupancy)
- 3. Civil Code Section 1941.1
- 4. Health & Safety Code Sections 17920.3 and 17920.10
- 5. Civil Code Section 1942.4 (Prohibition against landlord demanding or collecting rent when certain types of notices of violations have been issued)
- 6. Stoiber v. Honeychuck (1980) 101 Cal.App.3d 903

IV. COMMON BURDEN OF PROOF ISSUES

A. Generally – Evidence Code 500

- 1. “Dominant motive” – Kriz v. Taylor (1979) 92 Cal.App.3d 302
- 2. “But for” test – Martori Brothers Distribs. V. ALRB (1981) 29 Cal.3d 721
- 3. “Substantial” or “motivating” factor – Mt. Healthy City School Dist. V. Doyle (1977) 429 U.S. 274

B. Mixed motive cases – if the illegal factor played any part in wrongdoers motive, liability established Price Waterhouse v. Hopkins (1989) 490 U.S. 228

C. Proof of Motive

1. Meeting the burden of proof
 - a) (Proof of valid ground for landlord's eviction of tenant is not equivalent to good faith) Western Land Office, Inc. v. Cervantes (1985) 175 Cal.App.3d 724
2. In Ellis Act cases (Cal. Gov't Code Section 7060) see discussion in Drouet v. Superior Court (Broustis) (2003) 31 Cal.4th 583, 588-600
3. Bad Faith - "Bad faith" means the deliberate refusal to perform an obligation without just cause or excuse. It can also mean acting unreasonably or without proper cause. Nelson v. Fernando Nelson & Sons (1936) 5 Cal.2d 511, 518; Mercer v. Lemmens (1964) 230 Cal.App.2d 167, 173; Brandolino v. Lindsay (1969) 269 Cal.App.2d 319, 325; Jordan v. Allstate Ins. Co. (2007) 148 Cal.App.4th 1062, 1074-1077; Chicago Title Ins. C. v. AMZ Ins. Services, Inc. (2010) 188 Cal.App.4th 401, 428-429.

V. DEFENSES TO WRONGFUL EVICTION LAWSUIT

- A. **Generally** – Unlawful Detainer Stipulation
- B. **Stipulations** in unlawful detainer are given limited res judicata effect:
 1. Vella v. Hudgins (1977) 20 Cal.3d 251
 2. Landeros v. Pankey (1995) 39 Cal.App.4th 1167
- C. **Statutes of Limitations:**
 1. Code of Civil Procedure Section 340(a) (one year statute of limitations when action based on statute for penalty)
 2. Menefee v. Ostawari (1991) 228 Cal.App.3d 239 (statute of limitations is one year from date notices served if notices facially invalid)
 3. Sylve v. Riley (1993) 15 Cal.App.4th 23 (if notice is facially valid, one year statute runs from when tenant discovers or could have discovered wrongfulness)
 4. Also, check local ordinances: San Francisco a lawsuit based on OMI/RMI sham shall be brought no later than 5 years after the landlord files the first statement of occupancy, or 3 months after the landlord recovers possession whichever is earlier.
 5. But see CCP Section 335.1; Stavropolous v. Superior Court (2006) 141 Cal.App.4th 190, 196-197 (statute of limitations for malicious prosecution is now two years)
- D. **To Violation of Local Rent Ordinance** (Tenant Protection or Anti-Harassment)
 1. Lack of Notice
 2. Tenant Interference
 3. Oakland – T is obligated to give LL opportunity to cure

4. Santa Monica Rent Control – may not evict a tenant who has been a tenant for 5 years and is 62 or older or disabled, or a tenant who is terminally ill. The only exception is if the owner or owner’s relative intends to occupy, and they also meet the above criteria.

E. To Litigation-Related Claims

1. Consider anti-SLAPP motion.
 - a) CCP Section 425.16
 - b) Jarrow Formulas, Inc. v. La Marche (2003) 31 Cal.4th 728, 733-741; Birkner v. Lam (2007) 156 Cal.App.4th 275, 284-289 (reversing trial court’s denial of anti-SLAPP motion filed by defendant-landlord in wrongful eviction case arising out of landlord’s service of a notice to terminate tenancy for purpose of allowing his mother to move into the rental unit).
 - c) Clark v. Mazgani (2009) 170 Cal.App.4th 1281(denying use of anti-SLAPP motion, and holding that removing property from rental market and alleged fraudulent eviction of plaintiff were not protected activities taken in furtherance of defendant’s rights of petition or free speech)
2. Litigation Privilege.
 - a) CC Section 47
 - b) Rubin v. Green (1993) 4 Cal.4th 1187, 1193-1196; Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal.4th 1232 (litigation privilege preempted portions of local ordinance which provided civil remedies and criminal penalties for wrongfully seeking to recover possession of rental units); Birkner v. Lam (2007) 156 Cal.App.4th 275, 285-289 (case remanded to trial court for determination of whether defendant-landlord’s notice of termination of tenancy related to litigation which was contemplated in good faith and was under serious contemplation).
 - c) Banuelos v. LA Investment, LLC, 219 Cal.App.4th 323 – litigation privilege does not bar statutory retaliation eviction

VI. DAMAGES

A. Generally: Any amounts necessary to compensate the tenant for detriment proximately caused by the eviction or likely to result from the eviction.

1. Breach of Contract – Civ. Code § 3300
2. Tort - Civ. Code § 3333
3. The measure of damages can be the difference between the rental value of the demised premises and the contract rent for the remainder of the term of the lease, or for a period the tenant may be expected to retain possession.

4. Civil Code Section 1942.5(h) (allows for recovery of actual damages and punitive)

B. How to Maximize:

1. S.F.R.R.S.A.O. Chapter 37.9(f) – allows for injunctive relief, money damages of not less than three times actual damages (including damages for mental or emotional distress, and whatever other relief the court deems appropriate).
2. LARSO 151.10 - three times the amount of rent collected in excess of the statutory limit, and attorney's fees and cost
3. Beeman v. Burling (1990) 216 Cal.App.3d 1586 (Damages available under S.F.R.R.S.A.O.)
4. Kelly v. Yee (1989) 213 Cal.App.3d 336 (Treble damages mandatory under S.F.R.R.S.A.O.)
5. Castillo v. Friedman (1987) 197 Cal.App.3d Supp.6 (Damages for loss of leasehold)
6. Karp v. Margolis (1958) 159 Cal.App.2d 69
7. (Damages for loss of leasehold)
8. Drzwiecki v. H& R Block (1972) 24 Cal.App.3d 695 (Employment case, but may be used to argue that the trier of fact may project how long into the future the tenant would have remained in project how long into the future the tenant would have remained in the subject premises had s/he not been illegally evicted, for purposes of damages)
9. Klien v. Lewis (1919) 41 Cal.App. 463 (Moving expenses included in damage calculations)
10. Tooke v. Allen (1948) 85 Cal.App.2d 230 (Damages for loss of income due to landlord's campaign of harassment carried out for purposes of forcing tenants to move)

C. How to Mitigate/Minimize:

1. S.F.R.R.S.A.O. Chapter 37.9, subsection (f) (Damages for emotional distress only trebled if landlord acted knowingly or in reckless disregard of Ordinance)
2. Castillo v. Friedman (1987) 197 Cal.App.3d Supp.6 (Damages may be limited to difference in rent for period tenant may have been expected to occupy the unit)
3. Balmoral Hotel Tenants Ass'n v. Lee (1990) 226 Cal.App.3d 686 (Ordinance subsequently amended, but interesting discussion of "arbitrary/excessive damages")
4. Offer back unit at former rental rate

- a) This duty to mitigate applies to contract claims, and to both intentional and unintentional tort claims. See *Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 844; *Green v. Smith* (1968) 261 Cal.App.2d 392, 396; 23 CAL.JUR.3d Damages Sections 40-46.
 - b) Also see *Rubel v. Peckham* (1950) 94 Cal.App.2d 834, 837, affirming that plaintiff-buyers who rejected an offer to put them in possession pending resolution of the dispute about a property purchase forfeited any claim for loss of use.
 - c) *Zanker Development Co. v. Cogito Systems Corp.* (1989) 215 Cal.App.3d 1377, 1381-1383 (injured party's duty to mitigate probably does not include accepting offer of new contract with the breaching party)
5. Dismiss faulty unlawful detainer. But compare *Cakebread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063 and *Mitchell Land and Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.3d 479 re: possible liability for prevailing party attorney fees after voluntary dismissal.
6. Tax issues – damage allocations (e.g., as rent rebate or personal injury), etc. in settlement MAY be to client's benefit. Consult tax professional.

VII. INSURANCE

- A. Advise landlord/owner clients to obtain proper insurance for wrongful eviction, personal injury, etc. Consider highest available limits for older buildings/units that have potential for lead exposure
- B. Insurance Code Section 533 (insurer not liable for willful act of the insured)
 - 1. *J.C. Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1020 (gross negligence or recklessness on the part of the insured does not constitute "willful" misconduct for purposes of Insurance Code Section 533).
 - 2. Croskey, Heeseman and Popik, California Practice Guide: Insurance Litigation, Section 7:239 et seq. (TRG 2007)

VIII. Some Other Relevant Insurance Cases

- A. *City Prods. Corps v. Globe Indem. Co.* (1978) 88 Cal.App.3d 31 (intentional violations of ordinances prohibited from coverage)
- B. *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 161 Cal.App.3d 1199 (an "occurrence" under the policy usually means an accident)
- C. *Cal Shoppers v. Royal Globe* (1985) 175 Cal.App.3d 1, at 31-35 (even when insured had broken the law, carrier had duty to defend and indemnify, even for statutory trebling, where acts done without malice). But see *Trailer Marine Transport Corp. v. Chicago Ins. Co.* (N.D. Cal. 1992) 791 F. Supp. 809, 811 (rejecting Cal. Shoppers, and opining that another portion of the *Cal. Shoppers* opinion was based on subsequently overruled California Supreme Court precedent)

- D. Mirapad, LLC v. Cal. Ins. Guarantee Assn. (2005) 132 Cal.App.4th 1058, 1074-1075 (liability insurance policy did not apply to wrongful eviction claim made by corporate tenant)
- E. Kelly v. Yee (1989) 213 Cal.App.3d 336, 340-342 (this is a wrongful eviction case, rather than an insurance case. However, it contains a very useful discussion of why treble damages under the San Francisco rent control ordinance do not constitute punitive damages, and serve a different purpose)

IX. HELPFUL TACTICS

- A. Early Mediation – Encourage early mediation by proposing mutual freeze on discovery if other side will agree to participate in early mediation
- B. Secure evidence early in litigation to support punitive damage claims under Civil Code 3295
- C. Bi-lateral or uni-lateral attorney fees (for plaintiffs that have a risky case, maybe want to drop claims that allow for the prevailing party to recover their fees, and only seek claims that allow for the prevailing plaintiff to recover fees)
- D. CCP § 998 Offers – utilize cost-shifting impact of 998 offers to compromise in cases that have clear liability. Make sure to clearly state whether the offer does or does not include attorney's fees – silence has been interpreted to mean it does not include attorney's fees.
- E. Use of RFA - Pursuant to CCP § 2033.420, if a party fails to admit the truth of a relevant matter, forcing the other side to prove the truth of the matter at trial, the party requesting the admission may obtain a court order requiring the non-admitting party to pay the reasonable expenses incurred in making that proof at trial, including reasonable attorney's fees.

Righteous And Wrongful Evictions in California SPEAKERS



JETHRO S. BUSCH is a partner at the San Francisco law firm of Steven Adair MacDonald & Partners, P.C., where his areas of practice include landlord/tenant and real estate litigation. Mr. Busch received his B.A. degree from the University of California at Berkeley and his J.D. degree from Tulane University, and served for five years on the Executive Committee of the State Bar Real Property Law Section. He has spoken for various business and professional groups. Mr. Busch has written on landlord-tenant topics, most recently for the California Real Property Journal. He is a member of the State Bar of California (member, Real Property Law Section; former co-chair, Landlord/Tenant

Subsection) and the Bars for the United States District Court for the Northern District of California, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court. He can be reached at 415-956-6488, or jbusch@samlaw.net.

STEPHANIE A. FOSTER is an associate at the law firm of Steven Adair MacDonald & Partners, P.C., where she focuses her practice on real estate and civil litigation. Stephanie has been instrumental in obtaining settlements for individuals, both landlords and tenants, in numerous landlord tenant cases and real property disputes. Additionally, Stephanie has litigation experience, having tried numerous cases in both San Francisco and Alameda Superior Courts. Stephanie obtained her B.A. degree in Political Theory from the University of San Francisco and her J.D from Southwestern Law School. Born and raised in Los Angeles, Stephanie relocated to San Francisco in 2011. She volunteers with various youth programs at the YMCA and enjoys sailing, golfing, and cooking. Stephanie and her husband have three sons who keep them very busy.



Kere Tickner has a well-earned reputation as a top litigator and trial attorney who is particularly skilled at handling complex civil litigation matters. Ms. Tickner also assists her clients in all phases of their legal needs, from outside general counsel on day-to-day

employment matters to pre-litigation, arbitration, State and Federal Court litigation (including class action cases), as well as DFEH/EEOC/Labor Board hearings.

Ms. Tickner's considerable legal experience includes not only labor and employment, but also environmental/toxic tort and general business litigation, HOA, construction defect and personal injury. Ms. Tickner's impressive trial results earned her the prestigious Farmers Insurance Trial Gladiator award.

Ms. Tickner is considered one of the top litigation advocates in the state. She has represented clients in matters ranging from corporations locked in complex multi-million dollar litigation, to class actions, to every size of business owner including small businesses and solo owners. Ms. Tickner also represents individuals and employees with claims ranging from wage and hour issues to wrongful termination, discrimination, and harassment, including ADA and disability accommodation claims.

Notwithstanding her proven track record as a trial attorney, Ms. Tickner also has a unique and well-known ability to resolve the most hard-fought, intractable litigation matters. She is often retained specifically for the purpose of providing added trial attorney power combined with a relentlessly focused approach to finding potential opportunities for settlement short of trial when her clients are in harm's way.

During her study of law at University of La Verne, Ms. Tickner was distinguished with 2 prestigious American Jurisprudence Awards, one for Torts and one for Appellate Advocacy, and was also the recipient of an invitation to join the Law Review. Ms. Tickner was installed as the Vice Dean of Delta Theta Phi Law Fraternity and clerked at the Fourth District Court of Appeals, Second Division for then Associate Justice Robert J. Timlin (later elevated to Federal Justice Timlin). Ms. Tickner graduated 4th in her class, with honors.

Ms. Tickner also assists her clients with general employment needs, including creating employee policies and employee handbooks, employee accommodations, discipline and termination, and wage and hour matters. To assist in making sure her clients are compliant with California's mandatory supervisor harassment training deadlines, Ms. Tickner provides seminars for her employer clients, making sure that they are up to date on all the most current legal requirements.

Ms. Tickner is admitted to practice before all courts in the State of California and the U.S. District Court, Central, Southern, Northern and Eastern Districts of California, as well as the United States Court of Appeals for the Ninth Circuit. Ms. Tickner is also a Barrister of the prestigious Banyard Inn of Court.

When she is not practicing law, Ms. Tickner competes in 6-man open ocean outrigger canoe racing everywhere from California to Hawaii to New York, enjoys running half-marathons, trail running, hiking, swimming and she also enjoys her boxing.