

From: [Western Center on Law & Poverty](#)
To: [Madeline Howard](#)
Subject: Western Center Housing Update No. 87
Date: Monday, February 08, 2016 12:36:40 PM

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Housing Update No. 87 February 2016

Announcements

Don't miss Western Center's March 9 training, *Advocates' Guide to Protecting Tenants' Rights: Advanced Unlawful Detainer Defense*, live at PLI in San Francisco with simultaneous webcast. Registration details below.

Check out our summary of **2015 Tenants' Rights Cases** [here](#).

Litigation and Local Advocacy

Court of Appeal disagrees with *Delta* decision; motions to quash in legal limbo

Borsuk v. Appellate Div. of the Superior Court, 242 Cal.App.4th 607 (2015)

In the last *Housing Update*, we reported that the Court of Appeal transferred the *Borsuk* case to itself after the Appellate Division held, in accordance with *Delta Imports v. Mun. Court*, 146 Cal.App.3d 1033 (1983), that a tenant could challenge improper service of a notice to quit with a motion to quash. The Court of Appeal

held "that a motion to quash service of summons is not the proper remedy to test whether a complaint states a cause of action for unlawful detainer or service of a notice to pay or quit," disagreeing with the longstanding and often-cited *Delta* decision. Since both *Borsuk* and *Delta* were Court of Appeal decisions, *Delta* is not overruled; however, trial courts may be persuaded by the reasoning in the more recent decision.



Housing Advocates gather at Tenants Together's annual Tenant Lawyer Network conference

Appeals Court upholds San Francisco regulation prohibiting eviction for unilaterally imposed terms of tenancy

Foster v. Britton, 242 Cal.App.4th 920 (2015)

In another effort to combat displacement, the San Francisco Rent Board passed a regulation prohibiting landlords from evicting tenants for violating terms that were not included in the tenant's original lease unless the new term was authorized by the rent ordinance, required by law, or agreed to by the tenant. Tenant filed suit challenging her new landlord's house rules, and the Rent Board intervened, requesting a declaration confirming the regulation's validity. Despite state law allowing landlords to change the terms of tenancy on 30 days' notice, the Court of Appeal affirmed the trial court's ruling upholding the regulation.

Tenant evicted for renting on AirBnB despite express agreement with landlord
Chen v. Kraft, No. BV 031047, 2016 WL 147154 (Cal. App. Dep't Super. Ct. Jan. 13, 2016)
The Appellate Division upheld the trial court's grant of summary judgment against the tenant for renting her unit on AirBnB, finding that the tenant's express agreement with her former landlord allowing her to list the unit on AirBnB was an illegal, unenforceable contract. The court was unpersuaded by the fact that the tenant had a permit to collect the Transient Occupancy Tax and found that renting the unit on AirBnB constituted an illegal purpose under LA's municipal code.

San Francisco ordinance regulating tenant buyouts survives Constitutional challenge

San Francisco Apartment Ass'n v. City and Cnty. of San Francisco, No. 15-cv-01545-PJH, 2015 WL 6747489 (N.D. Cal. Nov. 5, 2015)

San Francisco passed an ordinance that required landlords to make certain disclosures and file documents with the Rent Board when negotiating tenant buyouts. The ordinance also gives tenants the right to rescind buyout agreements and creates a private right of action. After landlords' groups filed suit in state court raising various constitutional challenges, the City removed the suit to federal court and moved for judgment on the pleadings. Held: the ordinance did not violate landlords' constitutional rights. The landlords are appealing.

Trial court erred by failing to clearly explain requirements for obtaining default to incarcerated self-represented landlord, Court of Appeal holds

Holloway v. Quetel, 242 Cal.App.4th 1425 (2015)

Self-represented incarcerated landlord filed an unlawful detainer alleging nonpayment of rent and damages of \$36,000, and submitted multiple applications for default judgment, all of which were rejected. The trial court entered judgment for the tenants five years later. The Court of Appeal reversed, concluding that the trial court should have explained the requirements for obtaining a default more clearly. In a footnote, the Court of Appeal remarks that the tenants could not be located and were served via substitute service.

Access to justice

SCOTUS holds that rejected offer to named plaintiff does not moot class claims

Campbell-Ewald Co. v. Gomez, ___ U.S. ___, 136 S. Ct. 663 (2016)

Defendant marketing company offered the named plaintiff complete relief for his claims in a putative class action alleging violations of the Telephone Consumer Protection Act. Plaintiff rejected the offer. The District Court granted defendant summary judgment, finding that where no class had been certified, the unaccepted offer to the named plaintiff deprived the court of jurisdiction and no controversy remained between the parties. The Ninth Circuit reversed. Held: the unaccepted offer had no legal effect on

plaintiff's claims. The Court left open the question of whether a defendant could moot putative class claims by depositing full relief in an account payable to the named plaintiff and obtaining judgment for the plaintiff. More analysis of this case [here](#).

California Supreme Court to review decision denying relief to indigent defendant on grounds that "civil justice is not free"

Jameson v. Desta, 241 Cal.App.4th 491 (2015)(*review granted* Jan. 27, 2016)

An indigent prisoner sued a prison doctor for negligence and appealed when the trial court entered judgment against him, alleging he was denied due process because he could not afford a court reporter. After noting that "civil justice is not free" and declaring itself "sympathetic" to plaintiff's situation, the Court of Appeal concluded the plaintiff had no right to a court reporter and declared itself unable to reverse the trial court's orders in the absence of a transcript. The Supreme Court has not yet set a briefing schedule for the case.

Attorneys' fees

Statutory limit on attorneys' fees in small claims appeals trumps lease fee clause

Dorsey v. Superior Court, 241 Cal.App.4th 583 (2015)

Landlord appealed a small claims court judgment in favor of tenants. Both parties were represented on appeal. The trial court upheld the judgment in tenants' favor and ordered \$10,447.50 in attorneys' fees. Held: despite the lease provision entitling the prevailing party in litigation arising from the contract to "reasonable" attorney fees, the court was bound by Code of Civil Procedure § 116.780(c), which limits attorney fee awards in small claims appeals to \$150. The Court of Appeal further found that the landlord was not estopped from arguing that the statutory cap limited recovery even though he previously demanded fees exceeding \$150.

Court of Appeal denies request to review published decision holding that \$750 fee cap in lease is reasonable and enforceable

511 S. Park View, Inc. v. Tsantis, 240 Cal.App.4th Supp. 44 (Cal. App. Dep't Super. Ct., Sept. 15, 2015) (*request for transfer to Court of Appeal denied*, Oct. 29, 2015)

The Court of Appeal's denial of tenant's request for transfer leaves in place an Appellate Division decision holding that a lease provision capping attorney fees at \$750 is consistent with Civil Code §1717, which gives the court the power to award "reasonable" fees in an action on a contract containing a fee clause. The Appellate Division overturned the trial court's decision awarding over \$12,000 in fees after the tenant prevailed at trial. The decision effectively allows landlords to collect \$750 for a default judgment but protects them from significant fee awards when they take meritless cases to trial.

Anti-SLAPP and Litigation Privilege

District Court holds that lawyers violated Fair Debt laws with deceptive unlawful detainer claims and tenant's retaliation claim is not barred by litigation privilege

Phillips v. Archstone Simi Valley LLC, No. CV 15-5559 DMG (PLAx), 2016 WL 400100 (C.D. Cal. Feb. 1, 2016)

Avalon Properties, represented by Kimball Tirey & St. John, filed an unlawful detainer alleging nonpayment of rent. Tenant lost at trial but won on appeal by demonstrating that he did not owe the rent and pointing to a prior unlawful detainer judgment in his favor. The tenant then filed affirmative claims against his landlord and their lawyers, alleging retaliation and violations of the Fair Debt Collection Practices Act. Held: the Kimball Tirey partner whose name appeared on pleadings is a debt collector under the

Act, and the tenant sufficiently alleged that Kimball Tirey violated the Act's prohibition against "false and misleading representations" by filing an unlawful detainer alleging rent the tenant did not owe. The court also held that the tenant's retaliatory eviction claim under Civil Code section 1942.5 was not barred by the litigation privilege, affirming the ruling in *Banuelos v. LA Inv. LLC*, 219 Cal.App.4th 323 (2013).

Tenant seeking damages in civil suit may not defeat later filed unlawful detainer with anti-SLAPP motion

Olive Properties v. Coolwater Enters., 241 Cal.App.4th 1169 (2015)

Commercial tenant filed suit against landlord, alleging another tenant used too many parking spaces and interfered with tenant's business. Three weeks later, landlord filed an unlawful detainer for nonpayment of rent. Tenant then filed anti-SLAPP motion in the unlawful detainer. The trial court denied tenant's motion and awarded sanctions. The Court of Appeal upheld the decision, finding that the unlawful detainer was not based on protected litigation activity, but rather on the tenant's failure to pay rent.

Subsidized housing

Ninth Circuit reaffirms Section 8 tenants' right to due process

Nozzi v. Hous. Auth. of the City of Los Angeles, 806 F.3d 1178 (9th Cir. 2015)

Section 8 tenants sued HACLA for reducing payment standards, thereby increasing their share of the rent, without adequate notice. When the District Court granted summary judgment in HACLA's favor, tenants appealed and the Ninth Circuit reversed and remanded. (425 Fed. Appx. 539 (9th Cir. 2011)). On remand, the same district judge granted summary judgment again and the Ninth Circuit again reversed. Judge Reinhardt, writing for the panel, explains that tenants have a property interest in vouchers and HACLA's confusing flyer failed to provide adequate notice to tenants. Applying the *Mathews* balancing test, the court found that a \$104 rent increase constitutes a "deprivation that could be very serious to a poor person" and acknowledges that "inability to pay...could result in eviction, which ultimately would require the public housing agency to terminate benefits." Finding no material facts in dispute, the Ninth Circuit granted summary judgment to the tenants *nostra sponte* and took the unusual step of reassigning the case on remand. Kudos to the Public Counsel team who represented the tenants along with Kaye, McLane, Bednarski and Litt LLP.

Fair Housing

Tenant with disabilities' claims of sexual harassment against John Stewart Company survive summary judgment in federal district court

Sharon v. New Directions Inc., ___ F. Supp. 3d ___, 2016 WL 158223 (C.D. Cal. Jan. 12, 2016)

A veteran with post-traumatic stress disorder that resulted from sexual trauma she experienced in the military sued John Stewart Company and others for hostile living environment and failure to reasonably accommodate under the Fair Housing Act. The District Court denied defendants' motion for summary judgment, finding that the veteran's claims that she was sexually assaulted and harassed while living in supportive housing raised triable issues of fact. The opinion discusses HUD's sexual harassment rule and after analyzing the unique vulnerability of tenants to harassment, finds that housing providers may not assert the same affirmative defenses against vicarious liability as employers in Title VII cases.

Tenant perceived as having a disability entitled to injunction on fair housing claims

Johnson v. Macy, ___ F. Supp. 3d ___, 2015 WL 7351538 (C.D. Cal. Nov. 16, 2015)

The District Court granted tenant's motion for preliminary injunction, finding that she

was likely to prevail on her fair housing claims. After the tenant informed her landlord that she had been injured at work, the landlord engaged in a pattern of harassment, increasing the tenant's rent, and sending her notes stating that the "tenant's life would become easier" if she moved. The decision contains a useful discussion of discrimination based on perceived disability. Housing Rights Center represented the tenant.

Legislative Update from Sacramento

Western Center and co-sponsors' bills

AB 551 would take the first steps towards establishing rights and responsibilities in connection with bed bug infestations in residential rental property. The bill, first introduced in 2015, is currently the subject of negotiations and refinement. It is co-sponsored with CRLAF.

AB 587 will create a tax abatement program for those mobilehomes for which title was never properly transferred, thereby giving homeowners a path to bringing title current without paying years of back taxes. The complex provisions of this bill, which was first introduced in 2015, were refined over the fall and it is expected to move towards passage this year. AB 587 is co-sponsored with CRLAF and the Golden State Manufactured-Home Owners League.

Stay tuned for more ...housing is hot in Sacramento this season, and discussions continue in the Capitol over potential bills. The next *Housing Update* will include the full package of housing bills for this legislative session.

Federal Update from National Housing Law Project

I. LEGISLATIVE UPDATE

FY2016 Federal Budget

On Dec. 18, 2015 President Barack Obama signed the Consolidated Appropriations Act, 2016, including funding for Transportation, Housing and Urban Development, and Related Agencies. HUD programs saw funding increases but did not receive their fair share of the \$33 billion allocated for non-defense spending by the 'Balanced Budget Act.'

Expansion of Moving to Work Program

The Act expands the controversial Moving to Work (MTW) demonstration from the current 39 PHAs to another 100 high performing PHAs. Advocates were able to secure a number of significant restrictions and other improvements related to MTW evaluation and portability, but other suggestions to improve the program were ignored.

Important Win with Rural Development

The Act makes critical funding and other changes to the Rural Development Rental Assistance and Voucher programs. NHLP worked hard on these provisions of the bill with our allies in the Preservation Working Group. It averts the displacement of tens of thousands of households by increasing funding for the RA program and increases the proposed funding for the RD voucher program from \$7 million to \$15 million. This increase should prevent hundreds, if not thousands, of households from having their existing vouchers terminated due to inadequate funding.

II. FAIR HOUSING/EQUAL ACCESS

HUD issued a finalized version of an assessment tool for Assessment of Fair Housing, which will play a central role in implementing the Affirmatively Furthering Fair Housing



regulation. HUD has also released its Data and Mapping Tool which jurisdictions and other HUD funding recipients are required to use to complete the Assessment Tool. The Data/Mapping Tool is available here: <http://egis.hud.gov/affht/>. Additional information, including a user guide, can be found [here](#). HUD has also issued its Affirmatively Furthering Fair Housing Guidebook, available [here](#).

American Insurance Ass'n v. HUD, 1:13-cv-00966-RJL. The insurance industry challenged the validity of the HUD disparate impact rule. The district court vacated the rule in an earlier decision finding that disparate impact claims were not cognizable under the FHA. In light of the Inclusive Communities Project decision, the D.C. Circuit vacated the lower court's decision and remanded the case. In December 2015, the insurance industry moved for leave to amend its complaint in the district court, opening its brief by stating that the HUD disparate rule "flouts" "substantial limitations" required by ICP.

III. ADDITIONAL HUD NOTICES

HUD Issues Proposed Smoking Ban in Public Housing

HUD announced a proposed rule banning smoking in all public housing. The rule requires PHAs to amend public housing leases within 18 -months of the effective date of the final rule. NHLP commented on the rule and suggested alternative enforcement mechanisms to reduce the number of smoking-related evictions that will likely result from a smoking ban. NHLP also provided comments on reasonable accommodations that PHAs should be required to provide to people with disabilities who smoke. The proposed rule can be found [here](#). For questions about this notice or NHLP's comments please contact Deborah Thrope at dthrope@nhlp.org.

HUD Issues Final Rule Defining "Chronically Homeless"

HUD issued a final rule narrowing the statutory definition of "chronically homeless" to ensure that funds are targeted to provide permanent supportive housing solutions for individuals with the longest histories of homelessness and highest need. It defines "chronically homeless" as a homeless individual with a disability who lives either in a place not meant for human habitation, a safe haven, or in an emergency shelter, or in an institutional care facility in certain circumstances. To meet the "chronically homeless" definition, the individual also must have been living as described above continuously for at least 12 months, or on at least 4 separate occasions in the last 3 years, where the combined occasions total at least 12 months. The rule was effective January 4, 2016. The final rule is available [here](#). For questions about this notice, please contact Karlo Ng at kng@nhlp.org.

HUD Issues Guidance Regarding Use of Arrest Records in Housing Decisions

In November 2015, HUD issued new guidance regarding the use of arrests in housing decisions within the federally subsidized housing programs. HUD has issued two notices with the same content-one for housing authorities and Section 8 Housing Choice Voucher landlords (Notice PIH 2015-19) and the other to owners of multifamily properties (Notice H 2015-10). These notices advise that arrest records alone cannot serve as the basis for an eviction, termination, or denial of admission. However, the underlying conduct for an arrest can be the basis of an adverse housing decision if there is "sufficient evidence" that someone engaged in the criminal activity at issue. For questions about this notice, please contact Deborah Thrope at dthrope@nhlp.org. Click [here](#) for the full federal update from NHLP.

Conferences, Trainings, and Webinars

Advocates' Guide for Protecting Tenants' Rights: Advanced Unlawful Detainer Defense (free) Mar. 9, 2016, Practising Law Institute, San Francisco, and Webcast. Register [here](#).
National Conference on Ending Family and Youth Homelessness
Feb. 18-19, 2016, National Alliance to End Homelessness, Oakland, California.
Register [here](#).

Diversity and Inclusion in Law Practice 2016 (free)
Feb. 18, 2016, Practising Law Institute, Webcast. Register [here](#).

Representing the Pro Bono Client: Effective Written Advocacy (free)
Mar. 3, 2016, Practising Law Institute, San Francisco and Webcast. Register [here](#).

17th Annual Housing Rights Summit (all-day civil rights conference)
Apr. 21, 2016, Housing Rights Center, Los Angeles.
Registration begins Feb. 1 at www.housingrightscenter.org

Research and Reports

Smith, R.E., Popkin, S.J., George, T., & Comey, J. [What Happens to Housing Assistance Leavers?](#) *17 Cityscape: A Journal of Policy Development and Research* 3 (2015)159-192.
This paper examines what happens to families that exit the housing assistance program with the Moving to Opportunity program.

The Annie E. Casey Foundation has issued [Investing in Tomorrow: Helping Families Build Savings and Assets](#), which proposes four policy recommendations for narrowing the racial wealth gap.

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**Western Center leads the fight
in the courts, counties and capital
to secure housing, healthcare and a strong safety net
for low-income Californians.**



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Western Center on Law & Poverty | 3701 Wilshire Blvd., Suite 208 | Los Angeles | CA | 90010