WESTERN CENTER ON LAW & POVERTY

Housing Update No. 95
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Announcements

Register Now
for the
LA Housing Task Force
THIS Thursday September 13, 10am-4pm
at LAFLA, 1150 W. 8th St.

Join Western Center on Law & Poverty and
California Rural Legal Assistance Foundation
for the
Fourth Biennial Housing Policy Summit
October 18-19, 2018
Sacramento, CA
Register Now!
Space is limited: attendance limited to three people per organization.
For questions about the Summit please contact Anya Lawler at **alawler@wclp.org** or (916) 282- 5103.

Landlord Tenant

Landlord cannot enforce late fee clause in lease unless it can show that damages would be impracticable to calculate
Del Monte Properties & Investments, Inc. v. Dolan,___Cal.App.5th Supp.___, 2018 WL 3965632 (May 11, 2018)
Provisions in residential leases throughout California imposing late fees in set amounts are vulnerable to attack, thanks to a Humboldt County Superior Court Appellate Division opinion.

Civil Code §1671(d) prohibits liquidated damages clauses in contracts except when "from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage . . ." The court agreed with the tenant, represented by Greg Holtz at Legal Services of Northern California, that the landlord could not make that showing. The court thus not only invalidated the $50 late fee, but reversed an unlawful detainer judgment, as the notice it was based on was defective. Congratulations to Greg on winning this case and convincing the court to publish an excellent decision.

Court of Appeal decision upholding Section 8 anti-discrimination ordinance will not be reviewed
City and County of San Francisco v. Post, 22 Cal.App.5th 121 (2018), *review denied* (July 11, 2018)
As reported in **our last housing update**, the First District Court of Appeal upheld San Francisco's ordinance protecting Section 8 voucher holders from discrimination

in a published decision earlier this year. The California Supreme Court denied review of that decision on July 11, 2018, leaving the Court of Appeal decision in place. This is great news for those advocating for similar ordinances across California. Please contact Navneet Grewal at **ngrewal@wclp.org** for technical assistance in drafting an ordinance that will survive challenge.

Landlord must pay tenant for damages caused by illegal water shutoff, bankruptcy court holds
In re Tejeda, No. 2:17-AP-01308-ER, 2018 WL 3814291 (Bankr. C.D. Cal. Aug. 7, 2018)
Landlord turned off the electricity, gas and water service in an attempt to force her tenants out, then called child protective services to tell them her tenant's children did not have water. The bankruptcy court found that the tenant sustained damages from the lack of utilities and multiple inspections by child protective services, and that this debt would not be discharged in the bankruptcy proceeding because it resulted from the landlord's willful and malicious behavior. Landlord has filed an appeal. Congratulations to Cassandra Riles and Paul Estuar of LAFLA on this excellent decision.

Unlawful detainer filing not premature when tenant could have paid by mail during the notice period, court holds
Hsieh v. Pederson, 23 Cal.App.5th Supp. 1, 5 (2018)
A landlord served tenants with a 14-day notice to pay rent or quit. When the tenant did not pay, the landlord filed an unlawful detainer action more than 14 days later. The trial court dismissed the action, agreeing with the tenants that because of an intervening weekend the tenants were only given 13 days to pay the rent in person, thus making the unlawful detainer premature. The Los Angeles Superior Court Appellate Division reversed, holding that Code of Civil Procedure §1161, subdivision (2) generally permits payment by mail as well as by person; the notice gave the landlord's mailing address and did not prohibit payment by mail; the tenants could have paid by mail during the 14-day period; and therefore the unlawful detainer was not premature.

First District Court of Appeal holds statutory retaliation claims not subject to litigation privilege
Winslett v. 1811 27th Avenue, LLC, 26 Cal.App.5th 239 (Aug. 15, 2018)
Tenant Winslett complained to her landlord about uninhabitable conditions in her apartment and called County Services regarding the conditions. The landlord still refused to make repairs and tenant withheld rent. Landlord filed an unlawful detainer, which the parties settled. Winslett then sued the landlord for retaliation under Civil Code §1942.5 and violation of Oakland's Just Cause Ordinance. Landlord filed an Anti-SLAPP motion, which the trial court granted. The Court of Appeal reversed, holding that §1942.5 creates an exception to the litigation privilege. This holding is consistent with the Second District Court of Appeals decision in *Banuelos v. LA Investment, LLC*, 219 Cal.App.4th 323 (2013). The Court further held that Winslett's Just Cause claims did not arise out of protected activity, but rather from the landlord's conduct prior to the filing of the unlawful detainer. Congratulations to Caleb Rush, Andrew Wolff and their colleagues who represented the tenant. Centro Legal de La Raza, East Bay Community Law Center, Western Center on Law & Poverty, National Housing Law Project and Tenants Together were amici.

Ellis Act-based eviction reversed because of improper exclusion of evidence concerning sham transaction
Coyne v. De Leo,___Cal.App.5th__, 2018 WL 4090886 (July 30, 2018)
A tenant should have been permitted to show that a landlord had not gone out of the rental business, the Court of Appeal has held. The court thus reversed an eviction based on the Ellis Act, which permits landlords to leave the rental business but only if they do so entirely; the Act does not permit a landlord to withdraw from less than all of the accommodations in a building. Gov. Code §7060.7(d). In this case, the appellate court held, the trial court should have admitted evidence that a "sale" to a former tenant was really a sham agreement to permit that tenant to continue renting her apartment.

City may not impose 10-year waiting period for altering non-conforming properties on landlords who exercise Ellis Act rights
Small Property Owners of San Francisco Institute v. City and County of San Francisco, 22 Cal.App.5th 77 (2018)
San Francisco allows landowners to receive permits to modify housing that previously could not be altered. But the City imposed a 10-year waiting period to make such alterations for landlords who exercised their Ellis Act right to leave the

rental business. The Court of Appeal held that the ordinance was preempted by the Ellis Act for imposing a "prohibitive price" on going out of business.

Court of Appeal holds forced arbitration clause unconscionable in tenant affirmative litigation.
Cerneka v. Russell No. 8 Santa Monica Properties, LLC, 2018 WL 3154565 (Cal.App. 2018)
An arbitration clause existing tenants were forced to sign was procedurally and substantively unconscionable, the Court of Appeal has held, thereby permitting the tenants to continue litigation over habitability and relocation issues stemming from a fire and its aftermath. Among other unconscionable features, the agreement would have denied any relief at all to tenants if they could not afford steep arbitrator fees; denied tenants attorneys' fees if they prevailed; and contained a virtually unreadable 1200-word arbitration clause, almost all of it in ALL CAPS. Though the opinion is unpublished, it is worth reading for ideas on how to attack forced arbitration clauses. And while unpublished opinions may not be cited in California state courts, they may be cited in federal litigation. Congratulations to Denise McGranahan at LAFLA who represented the tenants along with pro bono counsel.

Kimball Tirey's Anti-SLAPP granted against tenant seeking to enforce debt collection protections
Picazo v. Kimball, Tirey & St. John, LLP, No. 17CV1437 JM (BGS), 2018 WL 1583228 (S.D. Cal. Apr. 2, 2018)
Kimball Tirey represented a landlord who sought to evict a HOME tenant for failure to report income. Landlord dismissed the unlawful detainer after learning that the income inaccuracy was due to a mistake on recertification paperwork, possibly resulting from a language barrier. The tenant then sued Kimball for violations of the Rosenthal Act and Fair Debt Collection Practices Act. The court found that the Rosenthal Act prevails over the litigation privilege. However, the court granted Kimball's Anti-SLAPP motion, finding that the litigation arose from Kimball's protected litigation activity and that the tenant could not meet her burden to demonstrate likelihood of success because the unlawful detainer was not an attempt to collect a consumer debt. The court then granted Kimball's motion for summary judgment on tenant's FDCPA claims, finding that Kimball is not a debt collector under the Act.

Mixed results for tenant seeking to repair credit after security deposit dispute
Markosyan v. Hunter Warfield, Inc., No. CV 17-5400 DMG (JCx), 2018 WL 2718089 (C.D. Cal. May 11, 2018)
Landlord failed to conduct a requested move-out inspection, kept tenant's entire security deposit, sent tenant a bill for an additional $1600 in alleged damages, then sold the resulting debt to collection agency Hunter Warfield. Tenant notified Hunter that the debt was disputed, but Hunter reported it to credit reporting agencies anyway. Tenant sued for violation of various consumer credit laws. The court granted Hunter's motion for summary judgment on several state law claims on preemption grounds, but tenant's claims otherwise survived.

Sheriff not immune from suit challenging Washington state law allowing eviction without hearing, Ninth Circuit holds
Moore v. Urquhart, __F.3d__, No. 16-36086, 2018 WL 3892984 (9th Cir. Aug. 16, 2018)
The Ninth Circuit reversed the district court's decision granting judgment on the pleadings, allowing tenants to proceed with their Constitutional challenges to a Washington state law that permits landlords alleging nonpayment of rent to evict tenants without a hearing.

Land Use

Local voters can veto a zoning ordinance enacted to achieve compliance with general plan, California Supreme Court holds
City of Morgan Hill v. Bushey,____Cal.5th___ , 2018 WL 4017404 (Aug. 23, 2018)

A city's voters can challenge by referendum a zoning ordinance enacted to bring zoning into compliance with the general plan for land use, the California Supreme Court has held. Even when defeat of the ordinance temporarily continues inconsistency between the zoning ordinance and the general plan, the referendum may still be valid if the local government has other reasonable means to achieve consistency, the Court concluded.

Subsidized Housing

Supreme Court to decide whether IHSS benefits are income for Section 8
Reilly v. Marin Housing Auth., 23 Cal.App.5th 425 (2018), *review granted* (Aug. 29, 2018)
The California Supreme Court has agreed to decide whether a parent's receipt of IHSS payments to take care of her child in their home can increase the rent or potentially disqualify a family from the Section 8 program. A federal regulation, 24 C.F.R. § 5.609(c)(16), exempts from countable income payments from a state agency "to offset the cost of services and equipment needed to keep [a] developmentally disabled family member at home." The Court of Appeal held that the regulation only applied to reimbursement for out-of-pocket expenses. The parent, represented by Disability Rights California, petitioned for review, supported by letters from National Housing Law Project & Western Center on Law and Poverty, along with other legal services and disability rights programs. The parent also sought depublication of the Court of Appeal opinion. The Court unanimously voted to grant review, while denying the depublication request.
Under California Rule of Court 8.1115(e)(1), the Court of Appeal opinion, while remaining published, has no binding effect and can only be cited for any persuasive value it may have. Please contact Madeline Howard at **mhoward@wclp.org** if you are interested in supporting an amicus brief.

Class cert granted to Section 8 tenants in side payments case
United States v. Wasatch Advantage Group, LLC, No. 2:15-CV-00799 KJM DB, 2018 WL 3618381 (E.D. Cal. July 30, 2018).
Plaintiffs' motion to amend the complaint and for class certification was granted in this ongoing Section 8 side payments case. Please see our prior summary of this case **here**.

Fair Housing

Baltazar v. Winstar Properties Inc., No. 2:16-cv-04697—ODW-KS (C.D. Cal. Aug. 3, 2018)
Landlord acquired a building in unincorporated East Los Angeles occupied primarily by Latino immigrants and immediately raised the rent by 63% on everyone except the only white family in the building. Tenants sued, alleging that the rent increase had a disparate impact on immigrants in violation of fair housing laws. Jury found fair housing violations and awarded over a million dollars in damages, including $500,000 for each plaintiff in punitive damages. Congratulations to Noah Grynberg of

LA Center for Community Law & Action on this victory!

Failure to engage in interactive process is not a separate cause of action under the Fair Housing Act, district court holds
Howard v. HMK Holdings, LLC, No. CV-17-5701-DMG (JPRx), 2018 WL 3642131 (C.D. Cal. June 11, 2018)
Plaintiff husband, wife, and daughter brought Fair Housing Act claims against landlord for failure to reasonably accommodate husband's disability. Husband suffered from a brain injury which required around-the-clock care. Landlord increased the family's rent by more than $1200, and family requested a reasonable accommodation of a 3-month lease extension at the original rent. Landlord granted the request. The family requested a further accommodation of a 6-month extension, so that they could delay moving to be with family in Florida until the husband's condition stabilized. Landlord did not respond. The court found that the accommodation requested was not necessary, because there was no evidence that the husband's condition precluded the family from moving somewhere closer, therefore the causal nexus was missing. The court further held that failure to engage in the interactive process is not a separate cause of action. Tenants have filed an appeal, and are seeking amicus support. Please contact Denise McGranahan at **DMcGranahan@lafla.org** if you are interested in working on or joining an amicus.

Operator of senior community violates Fair Housing Act by permitting harassment and violence against tenant based on sexual orientation
Wetzel v. Glen St. Andrew Living Community, LLC, No. 17-1322, 2018 WL 4057365 (7th Cir. Aug. 27, 2018)
The Seventh Circuit ruled in favor of an older adult who suffered harassment and violence from other residents because of her sexual orientation. The court held that the duty not to discriminate in housing conditions under the Fair Housing Act "encompasses the duty not to permit *known* harassment on *protected* grounds," and that the housing provider's lack of discriminatory animus was not a defense. Click **here** for more on the case and a link to the decision.

Homelessness

Two Federal Appeals Courts deliver victories for homeless individuals and advocates
In *Martin v. City of Boise,* __F.3d__, No. 15-35845, 2018 WL 4201159 (9th Cir. Sept. 4, 2018), the Ninth Circuit held that "the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to." Judge Berzon wrote the Court's opinion, which was joined by Judge Watford. Judge Owens concurred in part and dissented in part. Coverage of the case is **here.**

In *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale,* __F.3d__, No. 16-16808, 2018 WL 4000057 (11th Cir. Aug. 22, 2018), the Eleventh Circuit held that a nonprofit's provision of food to homeless individuals was expressive conduct protected by the First Amendment, reversing the district court decision granting judgment to the City, which had enforced a local food sharing ordinance against the group.

Legislative Update: Legislative Session Adjourned

On the housing front, the 2017-2018 legislative session was the busiest one ever. The Legislature considered hundreds of housing-related measures over the last two years, including the roughly 150 measures that were introduced this year. Western Center sponsored five new bills in 2018 and had one sponsored bill that was carried over from 2017. We also worked to improve or defeat problematic bills and to support several non-sponsored bills with the potential to advance equitable land use and development, expand or protect the rights of low-income tenants, and address other issues of concern to our clients. Finally, we engaged in significant advocacy to ensure our clients' housing needs were accounted for in the budget.

We are pleased to announce that all of our sponsored housing bills passed the Legislature this year. AB 2219 (Ting) and AB 2343 (Chiu) have already been signed by the Governor, and the rest of our sponsored bills are on his desk. He has until September 30 to act on bills.

Key Western Center Bills

AB 686 (Santiago), introduced in 2017, would establish an obligation for California state and local governments to affirmatively further fair housing in their decisions related to housing and community development. The bill was introduced in anticipation of the current Administration in Washington, D.C., gutting the Obama-era AFFH rulemaking. The bill was co-sponsored by Western Center, the National Housing Law Project, and Public Advocates.

AB 1771 (Bloom) would reform the regional housing needs allocation (RHNA) process to ensure a more equitable, data-driven distribution of the RHNA within regions, establish greater transparency in the distribution process, and provide additional state oversight. It was co-sponsored by Western Center and the California Rural Legal Assistance Foundation (CRLAF).

AB 2219 (Ting) requires landlords to accept third-party rent payments that are made on behalf of a tenant, so long as accepting the third-party payment does not require a landlord to enter into a new contractual relationship. In essence, where rental assistance is available without creating additional obligations for the landlord, it cannot be refused so long as an acknowledgment is provided that accepting the payment does not create a new tenancy. This bill does not apply to Section 8 Housing Choice Vouchers or other similar programs. It was co-sponsored by Western Center and CRLAF.

AB 2343 (Chiu) would make common-sense changes to unlawful detainer procedures to give tenants a chance to resolve issues without the need for an eviction, and to ensure they are able to respond when an eviction is filed against them in court. The bill would alter existing timelines for complying with certain eviction notices and for answering a complaint in an eviction case to exclude weekends and judicial holidays. This ensures tenants are able to seek assistance from social services agencies in complying with a notice, remedy an issue with a paycheck or government benefits that may have prevented them from paying their rent, and seek legal advice in responding to court papers. It was co-sponsored by Western Center and CRLAF.

AB 2797 (Bloom) would correct a recent California appellate court decision that undermines the application of Density Bonus Law and the Mello Act in cities within

the Coastal Zone. It was co-sponsored by Western Center and CRLAF.

SB 1333 (Wieckowski) would correct a recent appellate court decision and modify the Planning and Zoning Law to require that charter cities, as is currently required of general law cities, make development decisions, draft specific plans, and enact zoning laws that are consistent with their adopted General Plan policies, including Housing Element policies. It was co-sponsored by Western Center, CRLAF and the Public Interest Law Project.
For our complete legislative update click here.

Trainings

Save the date for Advanced Eviction Defense: March 6, 2019 at PLI in San Francisco and Webcast.

Research and Resources

A recently released study, ***Damages Done: The Longitudinal Impacts of Natural Hazards on Wealth Inequality in the United States***, demonstrates how natural disasters exacerbate wealth inequality along racial lines. More on the study available **here** from the National Low Income Coalition.

Want to brag about a case or share a loss? Announce an upcoming training? Please contact Madeline at **mhoward@wclp.org** with updates or other items for inclusion in our Housing Update.

Western Center on Law & Poverty

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