CALIFORNIA JUDGES BENCHGUIDES

Benchguide 31

LANDLORD-TENANT LITIGATION: UNLAWFUL DETAINER

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JUDICIAL COUNCIL OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR JUDICIAL EDUCATION AND RESEARCH

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LANDLORD-TENANT LITIGATION: UNLAWFUL DETAINER

I. [§31.1] SCOPE OF BENCHGUIDE

This benchguide provides a general overview of the most frequently encountered issues in landlord-tenant litigation, usually referred to as

unlawful detainer proceedings. It also includes a procedural checklist, as well as spoken and written forms. Additional references on landlord-tenant law are listed in §31.109.

II. [§31.2] PROCEDURAL CHECKLIST: PRELIMINARY MATTERS

(1) *Ask the clerk or bailiff/court attendant to confirm that counsel and any self-represented party are present for the case management conference.*

Counsel for each party and each self-represented party must make contact by telephone or appear in person if required by the court, unless, based on its review of the parties' written submissions and other available information, the court has determined that appearances at the conference are not necessary. Cal Rules of Ct 3.722(c). Unless otherwise provided, all parties, including moving parties, may appear by telephone at all conferences, hearings, and proceedings when personal appearances are not required under Cal Rules of Ct 3.670(e). Cal Rules of Ct 3.670(c); see Cal Rules of Ct 3.670(h)–(k) (notice and procedures for telephone appearances). By local rule, a court may also provide that counsel and self-represented parties need not attend the case management conference if the case is a limited civil case, unless the court orders an appearance. Cal Rules of Ct 3.722(e).

(2) *Review the court file.*

The judge should review the complaint and answer. The judge should also review any case management statements the parties have submitted in accordance with Cal Rules of Ct 3.725 to ascertain if either party has requested a jury trial, the parties' estimate of how long the trial will take, and each party's statement of the case, including any damages. If legal issues are disputed, the judge may ask counsel to submit memoranda of points and authorities to assist the judge in ruling on the disputed issues. Although the summary nature of unlawful detainer proceedings does not lend itself to long briefing schedules, it is appropriate for the judge to require counsel to produce a brief memorandum of authorities, which may be in the form of a letter, with a copy to be provided to opposing counsel.

(3) *Determine whether the case is a regular unlawful detainer case.*

There are some matters that look very much like standard unlawful detainer cases, but are governed by completely different procedures. The most notable example of these is a mobilehome eviction, which is governed by CC §§798–799.79. There are also unlawful detainer matters that are subject to additional regulations, such as actions to terminate a tenancy under the Ellis Act (Govt C §§7060–7060.7) when the landlord is

withdrawing the property from the market (see §31.38) or actions to terminate a tenancy in public/subsidized housing (see §31.39).

☛ JUDICIAL TIP: A key to recognizing subsidized housing situations is the low rent involved. If there appears to be unusually low rent, the judge should inquire whether this is subsidized housing and, if so, which federal regulations apply.

(4) *Determine whether the case involves residential property.*

The judge should note whether the case is a residential or a commercial case. Commercial tenants generally have fewer protections than residential tenants. For example, acceptance of partial payment of rent after a notice to quit has been given in a commercial case may not be a waiver of the notice as it would be in a residential case. See CCP §1161.1(c); *Woodman Partners v Sofa U Love* (2001) 94 CA4th 766, 770–772, 114 CR2d 566. Parties to a commercial lease may agree to their own notice requirements for termination of the tenancy (see, *e.g., Folberg v Clara G.R. Kinney Co.* (1980) 104 CA3d 136, 140, 163 CR 426; *Culver Ctr. Partners East No. 1, L.P. v Baja Fresh Westlake Village, Inc.* (2010) 185 CA4th 744, 749–751, 110 CR3d 833 (e-mail notice to pay or quit, not received at address designated for service, was defective; defect not cured by tenant's actual receipt of e-mail)), and may modify or waive the covenant of quiet enjoyment (see *Lee v Placer Title Co.* (1994) 28 CA4th 503, 512–513, 33 CR2d 572). The defense of a breach of the implied warranty of habitability (see §§31.28–31.30) is not generally available to a commercial tenant. See *Schulman v Vera* (1980) 108 CA3d 552, 560–563, 166 CR 620; but see *Four Seas Inv. Corp. v International Hotel Tenants' Ass'n* (1978) 81 CA3d 604, 613, 146 CR 531 (defense may be available to small commercial enterprise).

(5) *Ascertain whether the defendant still occupies the property.*

If the defendant no longer occupies the property, the plaintiff is not entitled to a preferential trial setting. CC §1952.3; *Fish Constr. Co. v Moselle Coach Works, Inc.* (1983) 148 CA3d 654, 659, 196 CR 174 (once tenant has delivered possession of premises to landlord, need for summary proceeding no longer exists). The case is treated as an ordinary civil action in which the landlord may obtain any relief to which the landlord is entitled (CC §1952.3(a)(1)), and in which the tenant may seek any affirmative relief and assert all defenses to which the tenant is entitled (CC §1952.3(a)(2)).

The defendant's time to respond to a complaint for unlawful detainer is not affected by delivery of possession of the property to the landlord. CC §1952.3(b). However, if the landlord amends the complaint to seek recovery of damages that are not recoverable in an unlawful detainer

proceeding, the defendant has 30 days to respond to the amended complaint. CC §1952.3(b). If the defendant's default has been entered on the unlawful detainer complaint, the case proceeds as an unlawful detainer case. CC §1952.3(c).

☛ JUDICIAL TIP: When possession is no longer at issue, and the case becomes a regular civil action, the defendant is relieved from the prohibition against cross complaints and other relief. The best practice is to continue the case for at least 30 days to a case management conference, allowing both sides to amend their pleadings if desired. Many landlords choose to dismiss without prejudice at that point and return in small claims court for rent and damages. Only if the all parties stipulate in open court to waiving their amendment rights should the court hear testimony on damages at the current trial.

(6) *Confirm that the named plaintiff is the proper plaintiff.*

Only the real party in interest may appear in pro per. Generally, the judge should not permit a property manager, a representative of the management company, or even the spouse or relative of the owner who is not an attorney, to appear in pro per. The problem may be a dual one of not having the real party in interest and of having a nonattorney appear for a business entity. However, if the management company has entered into the lease in its own name and has the right to possession under the management agreement, it may have the right to bring the action in its own name. See discussion in §31.12.

(7) *Read the notice involved.*

A copy of the notice is required to be attached to the complaint if the action concerns residential property. CCP §1166(d)(1)(A). The type of notice given is important because certain defenses, *e.g.*, the landlord's breach of the implied warranty of habitability (see §31.28), only apply when the complaint is based on service of a 3-day notice to quit, based on nonpayment of rent, and do not apply when the complaint is based on service of a 30-day (or 60-day) notice of termination of the tenancy. The tenant's payment or nonpayment of rent is also not an issue if the complaint is based on service of a 30-day notice. See *North 7th St. Assocs. v Constante* (2001) 92 CA4th Supp 7, 11, 111 CR2d 815. However, a landlord invalidates a 30-day or 60-day notice and cannot file a court case to evict a tenant by accepting any rent that extends beyond the notice period.

The judge should confirm that the allegations in the notice are consistent with those in the complaint. The judge should also determine from the complaint whether the method used to serve the notice complies

with the statutory requirements for service. Service of a valid notice is jurisdictional. See CCP §§1162, 1166(a)(5). See also §§31.22–31.25. Landlords sometimes have the notices served by apartment managers who may be unfamiliar with the procedural requirements so that the wrong notice may be given (for example, a straight 3-day notice to quit when the alleged breach is one in which the tenant should have been given an opportunity to cure). The judge should note whether the notice contains a forfeiture provision. If no clear forfeiture provision is in the notice, the tenant may pay the rent after the expiration of the 3-day period and retain possession. CCP §1174(a); *Briggs v Electronic Memories & Magnetics Corp.* (1975) 53 CA3d 900, 905, 126 CR 34. Even if there is a forfeiture provision, the lease or rental agreement will remain in effect if the tenant cures the breach within the applicable time period. CCP §1161.5.

(8) *Confirm that the complaint was not filed prematurely.*

In a 30-day or 60-day notice case, the complaint may not be filed until after the 30 or 60 days have expired. In a 3-day pay-or-quit case when the notice was given on Wednesday or Thursday, the complaint cannot properly be filed until the following Tuesday. The final day of a 3-day notice period may not fall on a weekend or holiday; in such a case the tenant has until the end of the following weekday to satisfy the requirements of the notice. See §31.25.

(9) *Review the complaint for any irregularities and confirm that it has been verified.* See CCP §§446, 1166; discussion in §31.7.

(10) *Review the answer to see what matters are denied (i.e., put in issue by the pleadings) and what affirmative defenses are raised.* See §§31.26–31.30.

☛ JUDICIAL TIP: The tenant may not claim retaliatory eviction as a statutory affirmative defense if the tenant is in default on the rent. The common law defense of retaliatory eviction may be available, however. See §31.32.

III. APPLICABLE LAW

A. [§31.3] General Background

When a landlord wants to end a tenancy involuntarily after the tenant has taken possession of the rental premises, the landlord must take certain legal steps to do so. *Glass v Najafi* (2000) 78 CA4th 45, 48–49, 92 CR2d 606. Until these steps are taken, the tenant has a right to peaceful possession of the rented premises and the right to exclude anyone, including the landlord. *People v Thompson* (1996) 43 CA4th 1265, 1270, 51 CR2d 334. Unless a tenant vacates voluntarily, a landlord must have a valid writ of

execution or possession to reacquire possession of the premises. 43 CA4th at 1270.

An unlawful detainer proceeding under CCP §§1159–1179a is a summary method for recovery of possession of leased premises. It is a limited proceeding designed to permit a landlord to recover possession of real property from a tenant who is wrongfully in possession. *Glendale Fed. Bank v Hadden* (1999) 73 CA4th 1150, 1153, 87 CR2d 102. Although a landlord may utilize the civil causes of action of ejectment or quiet title, unlawful detainer is almost always preferred because the time span is greatly compressed, *i.e.*, the defendant has only 5 days to respond to the complaint, and the case is entitled to a preferential trial setting.

Like civil actions generally, unlawful detainer actions are initiated by the filing of a complaint, issuance of a summons, and service of the complaint and summons on the defendant. However, there are notable differences between unlawful detainer and other civil proceedings, including:

- The defendant in an unlawful detainer action must appear and plead within 5 days after service of the summons and complaint (CCP §1167), rather than the usual 30-day period (see CCP §412.20(a)(3)). See *Deal v Municipal Court* (1984) 157 CA3d 991, 997–998, 204 CR 79 (court may extend defendant's time to plead to such time as may be just).
- The proceeding is a summary one and is given legal precedence over other civil actions. CCP §1179a; see §31.70.
- There is no right to file a cross-complaint or counterclaim. See *Vella v Hudgins* (1977) 20 C3d 251, 255, 142 CR 414; *Glendale Fed. Bank v Hadden, supra*, 73 CA4th at 1153 (summary character of proceeding would be defeated if, by cross-complaint or counterclaim, issues irrelevant to right of immediate possession could be introduced).
- The only responsive pleadings that may be filed are an answer, a demurrer, or a motion to quash service of the summons. CCP §§418.10, 1170.
- A motion to quash (CCP §1167.4) must be heard within 3 to 7 days and any summary judgment motion (CCP §1170.7) within 5 days of notice.

☛ JUDICIAL TIP: A common delay tactic by tenants is to set motions far in advance, especially demurrers (which are not subject to the shorter times). But for good cause shown and after giving notice, the court may hold a demurrer hearing on an expedited timeframe. Cal Rules of Ct 3.1320(d). See §31.48. Keep in mind that all motions may be decided on the written

pleadings alone. There is no right to a personal appearance or oral argument on motions.

- Unlawful detainer proceedings are exempt from judicial arbitration (Cal Rules of Ct 3.811(b)(4)).
- Any stay on appeal is discretionary with the court. CCP §1176. See §31.83.
- Economic litigation procedures do not apply to unlawful detainer actions. CCP §91(b).
- Unless ordered by the court for good cause, no extension of time may exceed 10 days (30 days for other civil actions under CCP §1054) without the adverse party's consent. CCP §1167.5.

Because of its summary character, an unlawful detainer action is not a suitable vehicle for trying complicated ownership issues involving allegations of fraud. *Mehr v Superior Court* (1983) 139 CA3d 1044, 1049, 189 CR 138. See *Berry v Society of Saint Pius X* (1999) 69 CA4th 354, 363, 81 CR2d 574 (title cannot generally be tried in unlawful detainer action); *Martin-Bragg v Moore* (2013) 219 CA4th 367, 393–395, 161 CR3d 471 (abuse of discretion to try complex issues of legal and beneficial title to property using summary unlawful detainer procedures); *Ben-Shahar v Pickart* (2014) 231 CA4th 1043, 1053–1054, 180 CR3d 464 (former tenant's action for landlord's alleged violation of rent control ordinance and breach of unlawful detainer settlement agreement not collaterally estopped by tenant's "misguided attempt to enforce the settlement agreement in the unlawful detainer proceedings"; trial court lacked authority to resolve dispute about alleged breach of unlawful detainer settlement agreement in summary unlawful detainer proceeding); and *Asuncion v Superior Court* (1980) 108 CA3d 141, 145–146, 166 CR 306 (eviction of homeowners following foreclosure raises due process issues and cannot be heard as part of summary unlawful detainer proceeding).

Issues extrinsic to the right of possession are generally excluded even though they arise out of the parties' landlord-tenant relationship. *E.S. Bills, Inc. v Tzucanow* (1985) 38 C3d 824, 830, 215 CR 278; *Saberi v Bakhtiari* (1985) 169 CA3d 509, 515, 215 CR 359. However, an action for unlawful detainer may coexist with other causes of action in the same complaint, as long as the entire case is treated as a regular civil action and not as a summary proceeding. *Lynch & Freytag v Cooper* (1990) 218 CA3d 603, 608–609, 267 CR 189 (rejecting defendant's contention that unlawful detainer proceeding can be converted into regular civil action only when possession of the property is no longer in issue).

By choosing the summary unlawful detainer proceeding, a landlord is held to strict compliance with the applicable statutory requirements for

such a proceeding. *Berry v Society of Saint Pius X*, *supra*, 69 CA4th at 363.

B. [§31.4] Jurisdiction

An unlawful detainer case in which the amount of rent and damages claimed is $25,000 or less is a limited civil case. CCP §§85(a), 86(a)(4). The case is an unlimited civil case when the amount of rent and damages claimed is more than $25,000. See CCP §88. The landlord may agree to remit any amount claimed above $25,000, so that the action may continue as a limited civil case. CCP §403.040(f). A superior court is not, however, required to reclassify any action merely because the judgment to be rendered, as determined at trial, is a judgment that might have been rendered in a limited civil case. CCP §403.040(e). On motions for reclassification, see CCP §§403.010–403.090. See also *Stern v Superior Court* (2003) 105 CA4th 223, 227, 230–231, 129 CR2d 275 (considerations in determining whether reclassification is warranted).

C. Venue

1. [§31.5] Venue Allegations

The proper venue for the action is the county in which the property is located. CCP §§392(a), 396a(a) (the proper court location for an unlawful detainer proceeding is the location where the court tries that type of action that is nearest or most accessible to where the property is located); *Childs v Eltinge* (1973) 29 CA3d 843, 851, 105 CR 864. The plaintiff must allege in the complaint (or in an affidavit filed with the complaint) that the action has been commenced in the proper superior court and the proper court location for the trial of the action; the court may dismiss the action without prejudice if the plaintiff fails to comply with this requirement, or may permit the affidavit to be filed after the filing of the complaint on such terms as may be just. CCP §396a(a), (b) (in this event, defendant's time to answer or otherwise plead runs from date defendant is served with affidavit). The location of the property should be evident from the complaint, which should describe the premises sufficiently to allow for execution of a writ of possession. See CCP §§455, 1166, 1177.

2. [§31.6] Transfer of Action

The court must transfer an unlawful detainer action on its own motion (or on the defendant's motion) if it appears from the complaint or affidavit (or otherwise) that the superior court or court location where the action was commenced is not the proper court or court location for the trial. CCP §396a(b). Once the need for transfer is apparent, a judge may take the

initiative and order transfer to the proper court on an order to show cause or noticed motion and after giving the parties an opportunity to be heard. Transfer is not required if the defendant consents in writing, or in open court on the record, that the action may continue in the court in which it was commenced. CCP §396a(b). The consent may only be given by a defendant who is represented by counsel when the consent is given. CCP §396a(b).

D. Pleadings/Summons

1. [§31.7] Complaint

There are optional Judicial Council forms for both unlawful detainer complaints and answers. See CCP §425.12; Judicial Council forms UD-100 (complaint), UD-105 (answer). The complaint must set forth the facts on which the plaintiff seeks to recover and must describe the premises with reasonable certainty. CCP §1166(a)(2), (3); *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 1036, 194 CR 685. It must also set forth the amount of damages claimed, and if the case is based on the tenant's default in the payment of rent, the amount of that rent. CCP §1166(a)(4), (b). Finally, it must state the method used to serve the defendant with the notice of termination on which the complaint is based. CCP §1166(a)(5) (this requirement may be met by completing all items relating to service of notice on Judicial Council form complaint or by attaching proof of service of the notice). The complaint must be verified. CCP §§446, 1166(a)(1).

Parties must state in their pleadings and other forms whether a registered unlawful detainer assistant provided advice or helped them to complete forms. See Bus & P C §§6400 et seq; see, *e.g.*, Judicial Council form UD-100.

Attachments. If the action concerns residential property, a copy of the notice of termination must be attached to the complaint, along with a copy of the lease or rental agreement, as well as any addenda or attachments to the lease or rental agreement that form the basis of the complaint. CCP §1166(d)(1). These documents need not be attached if the action is based on the tenant's default in the payment of rent. CCP §1166(d)(1)(B)(iii). If the plaintiff fails to attach the required documents, the court must grant leave to amend the complaint for a 5-day period to include these attachments. CCP §1166(d)(2).

Caption. Each party's initial pleading in a limited civil case must state in its caption that it is a limited civil case. CCP §422.30(b); Cal Rules of Ct 2.111(10); see §31.4. On the complaint in a limited civil case, immediately below the character of the action, the amount demanded must be stated as either "Amount demanded exceeds $10,000" or "Amount

demanded does not exceed $10,000" to help determine the filing fee. Govt C §70613(b); Cal Rules of Ct 2.111(9).

In an action regarding residential real property based on CCP §1161a (eviction after sale of property), the plaintiff must state in the caption of the complaint "Action based on Code of Civil Procedure Section 1161a." CCP §1166(c).

2. [§31.8] Summons and Defendant's Time To Respond

When the complaint is filed, a summons must be issued (see CCP §1166(e)) in the form specified by CCP §412.20, except that the defendant has 5, rather than 30, days to respond to the complaint after service of the summons. CCP §§1167, 1167.3. If substituted service is used, the defendant has 15 days after the other copies are mailed within which to respond. See CCP §415.20(a). The summons must be served and returned in the same manner as a summons in a civil action. CCP §1167.

The 5-day response time includes Saturdays and Sundays, but excludes all other judicial holidays. CCP §1167. If the last day for filing a response is a Saturday or Sunday, the defendant has the next court day within which to file a response. CCP §1167.

The fact that a defendant in an unlawful detainer action has 5, not 30, days to file a response does not violate the due process or equal protection clauses of the federal or state constitutions. *Deal v Municipal Court* (1984) 157 CA3d 991, 994, 998, 204 CR 79. However, service of a 5-day summons on a complaint that fails to state a cause of action for unlawful detainer is defective, does not give the court jurisdiction over the defendant, and is subject to a motion to quash. See *Greene v Municipal Court* (1975) 51 CA3d 446, 451–452, 124 CR 139; §31.43.

3. [§31.9] Service of Summons by Posting

The summons in an unlawful detainer action may be served by posting only after the court has been satisfied that the defendant cannot be served by any other method using reasonable diligence. CCP §415.45. When service is made by posting, two affidavits of service must be filed with the court: one from the person who posted the summons on the property, showing when and where it was posted; and another showing when and where copies of the summons and complaint were mailed to the defendant. CCP §417.10(e).

4. [§31.10] Defendant's Responsive Pleading

The defendant may respond to the complaint by filing an answer, a demurrer (see §31.47), a motion to quash service of summons (see §31.61), or a motion to stay or dismiss on the ground of inconvenient

forum (see §§31.61). See CCP §§418.10, 1170; Cal Rules of Ct 3.1327(a). The defendant may not file a cross-complaint or counterclaim. See *Vella v Hudgins* (1977) 20 C3d 251, 255, 142 CR 414. At the time of filing a response to the complaint, the defendant may file a motion for reclassification of the case if the defendant claims that the complaint misstates the jurisdictional classification. See CCP §403.040(a); *Stern v Superior Court* (2003) 105 CA4th 223, 227, 230–231, 129 CR2d 275 (considerations in determining whether reclassification is warranted); §31.4. A motion for reclassification does not extend the defendant's time to answer or respond. CCP §403.040(a). At the time of filing a response to the complaint, the defendant may also file a motion for change of venue if the defendant claims that the action was not commenced in the proper court or proper court location. See CCP §396b(a); §31.6.

The defendant's demurrer is an appearance. CCP §1170. Once a defendant appears under CCP §1170, the plaintiff may request trial within 20 days. CCP §1170.5(a).

If the defendant files a demurrer, which is overruled, or a motion to quash, which is denied, the defendant generally has 5 days after the court's ruling within which to file an answer to the complaint. See CCP §1167.3.

5. [§31.11] Amendment of Complaint

When tenant has vacated property. When possession of the property has been delivered to the landlord before trial (or, if there is no trial, before judgment is entered), the case becomes an ordinary civil action for the purposes of trial setting. CC §1952.3(a). If the landlord seeks to recover damages that are not available in a summary unlawful detainer proceeding, the landlord must amend the complaint under CCP §472 (amendment of right) or CCP §473 (amendment with leave of court) to allege that possession of the property is no longer at issue and to state a claim for those damages. CC §1952.3(a)(1). A copy of the amended complaint must be served on the defendant in the same manner as a copy of the summons and original complaint. CC §1952.3(a)(1). The defendant has the same time to respond to the amended complaint as in an ordinary civil action. CC §1952.3(b). The defendant may, by appropriate pleadings or amendments to pleadings, seek any affirmative relief and assert all defenses to which he or she is entitled, whether or not the plaintiff has amended the complaint. CC §1952.3(a)(2).

Defendant's time to answer in other cases. If the complaint is amended for any other reason, the defendant generally has 5 days within which to file an answer to the amended complaint. See CCP §1167.3.

Amendment to allege different type of notice. A plaintiff in an unlawful detainer action based on a 30-day notice to quit may not amend

the complaint, immediately before trial, to allege that the defendant is unlawfully detaining the premises following service of a prior 3-day notice to pay rent or quit. Such an amendment is not based on the same general set of facts set forth in the original complaint, and the defendant would be prejudiced by the amendment because different defenses are permitted. *North 7th St. Assocs. v Constante* (2001) 92 CA4th Supp 7, 10, 111 CR2d 815. Nor is such an amendment authorized by CCP §1173, which requires the judge to order an amendment of the complaint to conform to proof when it appears from the evidence introduced at trial that the defendant is guilty of an unlawful detainer other than that charged in the complaint. The statute does not apply to a motion to amend the complaint that is made before there is any evidence before the court. 92 CA4th Supp at 11–12.

E. Parties

1. [§31.12] Proper Plaintiff

Only the proper plaintiff, the landlord or successor in estate to the landlord (see CCP §1161(1)), may bring the action. See CCP §§369, 1165. An agent, such as the property manager, cannot sue in his or her own name (see CC §2322) even if the agent has been given a power of attorney (see *Drake v Superior Court* (1994) 21 CA4th 1826, 1831, 26 CR2d 829).

However, under CCP §369(a)(3), a person with whom a contract is made for the benefit of another may sue without joining as a party the person for whose benefit the action is prosecuted. Therefore, a management company that has a written agreement with the owner to sign the lease, collect the rent, maintain the property, and sue for possession may probably sue without joining the owner.

☛ JUDICIAL TIP: Simply being the resident manager or management company for the landlord, or holding a written power of attorney, does not give an agent the authority to sue in his or her own name or to make appearances in court for the pro per plaintiff. Judges should not sanction the unauthorized practice of law by allowing a nonattorney family member or apartment manager to appear on behalf of the proper plaintiff.

Corporations may not appear in court through nonattorney agents (*Merco Constr. Eng'rs, Inc. v Municipal Court* (1978) 21 C3d 724, 730–731, 147 CR 631) or appear in pro per (*Say & Say, Inc. v Ebershoff* (1993) 20 CA4th 1759, 1767, 25 CR2d 703). An unincorporated association must also be represented in court by a licensed attorney. See *Albion River Watershed Protection Ass'n v Dep't of Forestry & Fire Protection* (1993) 20 CA4th 34, 37, 24 CR2d 341. See also Bus & P C §6125, requiring

active State Bar membership as a prerequisite to the practice of law in California.

There must be a landlord/tenant relationship between the plaintiff and the defendant. See *Marvell v Marina Pizzeria* (1984) 155 CA3d Supp 1, 5, 7–12, 202 CR 818. The purchaser of property is not a lessor or the successor in interest of the lessor when the seller has reserved lessor's rights as part of the sale. *Commonwealth Mem., Inc. v Telophase Soc'y of Am.* (1976) 63 CA3d 867, 871, 134 CR 58.

2. [§31.13] Proper Defendants

The only essential defendants in an unlawful detainer action are the tenants and subtenants in actual occupation. See CCP §1164. However, landlords often serve all occupants under CCP §415.46. See §31.42. A defendant appearing in a representative capacity at an unlawful detainer proceeding against a corporation does not appear in a personal capacity and is not bound by any settlement agreement. *Canaan Taiwanese Christian Church v All World Mission Ministries* (2012) 211 CA4th 1115, 1124–1126, 115 CR3d 415 (pastor who lived on church property and was barred from returning to premises under oral settlement agreement between church and its landlord was not personally bound by agreement because he was not a party to the case).

3. [§31.14] Effect of Defendant's Bankruptcy Petition

A landlord is prohibited from prosecuting an unlawful detainer action against a tenant who has filed a bankruptcy petition. 11 USC §362(a). The landlord may petition the bankruptcy court for relief from the automatic stay and, if relief is granted, the unlawful detainer action may proceed. 11 USC §362(d). When the tenant files a bankruptcy petition after the landlord has obtained a judgment and writ of possession against the tenant, the sheriff is required by CCP §715.050 to enforce the writ. *Lee v Baca* (1999) 73 CA4th 1116, 1119–1122, 86 CR2d 913; see §31.84. The automatic stay provisions of 11 USC §362(a) do not prohibit a landlord from regaining possession of residential premises from a wrongfully holding-over bankruptcy debtor-tenant, if the landlord seeks only to repossess the property. The landlord may not seek to enforce any other portion of the unlawful detainer judgment, such as money damages, against the tenant and the tenant's bankruptcy estate.

Some practical effects of bankruptcy are as follows:

- On receipt of a notice of stay, if the court determines the bankruptcy was filed before service of the notice to quit or filing of the action, the court should dismiss the case and require service of a

new notice after the landlord obtains leave from the bankruptcy court.

- If the tenant files for bankruptcy after the unlawful detainer complaint is filed but before judgment, the landlord must obtain relief from the stay to go forward regarding possession (without the award of a money judgment). Common practice is for the court to continue the case for 30 days so the landlord may obtain relief from the stay.
- Subject to 11 USC §362(l) (tenant's right to cure monetary default), if a judgment of possession is obtained before the tenant files for bankruptcy, there is no automatic stay (see 11 USC §362(b)(22)) and the eviction may proceed.
- The automatic stay is limited if the landlord files a certification that the tenant is endangering the property or is illegally using controlled substances on the property. See 11 USC §362(b)(23), (m).

F. Notices

1. In General

a. [§31.15] Notice Requirements

An unlawful detainer proceeding is usually initiated by serving the tenant with a 3-day notice to pay rent or quit (CCP §1161(2)–(3)) or a 30-day or 60-day notice of termination of a residential tenancy (CC §§1946, 1946.1). See *Saberi v Bakhtiari* (1985) 169 CA3d 509, 514, 215 CR 359. See also CC §789 (tenancy, however created, may be terminated by landlord's written notice to tenant).

No particular format is required for the notice, but it must be in writing, and if the breach is curable, the notice must be stated in the alternative to give the tenant the opportunity to cure the default. CC §§1946, 1946.1(f); CCP §1161(2)–(3). A lessor's or owner's notice must contain statutory language about the tenant's right to reclaim abandoned personal property. CC §§1946, 1946.1(h). The plaintiff may not file the complaint until the time limit for the tenant to perform has expired. *Lamanna v Vognar* (1993) 17 CA4th Supp 4, 7–8, 22 CR2d 501. See CC §790 (landlord may not proceed under law to recover possession until period specified by notice has expired).

See §§31.22–31.23 for service requirements.

b. Three-Day Notices

(1) [§31.16] General Use

Among 3-day notices are notices to quit, notices to perform covenant or quit, and notices to pay rent or quit. Three-day notices to quit are used when the tenant has allegedly breached a covenant in the lease, which cannot be cured. A 3-day notice-to-perform covenant or quit is used when there has been a curable breach other than nonpayment of rent, *e.g.*, breach of a covenant not to assign or sublet the premises. See CCP §1161(2)–(3).

The most common notice is a 3-day notice to pay rent or quit. Unless the breach is not curable, the notice must be stated in the alternative (*e.g.*, "pay rent *or* quit"). *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 1036, 194 CR 685. The 3-day notice to pay rent or quit must state the amount due. It must also list the name, telephone number, and address of the person to whom rent is due. If rent may be paid in person, the notice must list the days and hours the person can receive payment. But if the address does not allow for personal delivery, it is presumed that the tenant's mailing of any rent or notice to the owner is deemed received on the date mailed if the tenant can show proof of mailing. The notice may list the number of a financial institution account rent may be paid into, and the institution's name and street address if within 5 miles of the rental property. If an electronic funds transfer procedure has been previously established, the notice may state that payment may be made under that procedure. See CCP §1161(2).

A 3-day notice that listed a website address instead of a physical address where rent could be paid was invalid under CCP §1161(2). *Foster v Williams* (2014) 229 CA4th Supp 9, 15–16, 177 CR3d 371. The notice also did not comply with the statute because it did not indicate rent could be paid under a previously established electronic funds transfer procedure. *Foster v Williams*, *supra*, 229 CA4th Supp at 16–18. This notice may be served at any time within 1 year after the rent becomes due and must be served on the tenant or a subtenant in actual possession. CCP §1161(2). Even if the landlord does not elect to pursue the summary remedy of unlawful detainer, the landlord must still serve the tenant with the 3-day notice prescribed by CCP §1161(2) or provide the tenant with an opportunity to avoid forfeiture by making a demand for rent as required by the common law. *Gersten Cos. v Deloney* (1989) 212 CA3d 1119, 1128, 261 CR 431. The tenant of a dwelling may not waive the notice provisions of CCP §1161(2). 212 CA3d at 1128.

A landlord's election to declare a forfeiture of the lease or rental agreement on a 3-day notice is nullified and the lease or rental agreement remains in effect if the tenant performs within 3 days after service of the

notice or if the landlord waives the breach after service of the notice. CCP §1161.5.

(2) [§31.17] Nuisance or Illegal Use

A landlord may serve a 3-day notice to quit on a tenant who is permitting a nuisance (including the sale of illegal substances or unlawful sale or possession of illegal weapons) on the premises, or who uses the premises for any illegal purpose. See CCP §1161(4). This is considered an incurable breach, and the landlord is entitled to file a UD action on the expiration of the 3-day period if the tenant has not vacated.

A "nuisance" is defined as an act that is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses or that obstructs the free use of property so as to interfere with the comfortable enjoyment of life or property. See CC §3479.

A nuisance includes the illegal use, manufacture, causing to be manufactured, importation, possession, possession for sale, sale, furnishing, or giving away of any of the following (CCP §1161(4); CC §3485(c)):

- A firearm, as defined in Pen C §16520(a).
- Any ammunition, as defined in Pen C §§16150(b), 16650, or 16660.
- Any assault weapon, as defined in Pen C §§30510 or 30515.
- Any .50 BMG rifle, as defined in Pen C §30530.
- Any tear gas weapon, as defined in Pen C §17250.

A nuisance also includes committing an offense involving the manufacture, cultivation, importation into the state, transportation, possession, possession for sale, sale, furnishing, administering, or giving away, or providing a place to use or fortification of a place involving controlled substances. CCP §1161(4); CC §3486(c). It is also a nuisance to use any building or property to willfully conduct dogfighting or cockfighting. CCP §1164(4); CC §3482.8.

Moreover, nuisance or illegal purpose unlawful detainer actions may be initiated by prosecutors or city attorneys against tenants in certain cities in Alameda, Los Angeles, and Sacramento Counties who are engaged in controlled substance, unlawful weapons, or ammunition activities. See CC §§3485–3486.5.

In addition, if a person commits an act of domestic violence (see Fam C §6211), sexual assault (see Pen C §§261, 261.5, 262, 286, 288a, 289), or stalking (see CC §1708.7) against another tenant or subtenant on the premises, there is a rebuttable presumption affecting the burden of proof

that the person has committed a nuisance on the premises. The presumption does not apply, however, if the victim of the act, or a household member of the victim other than the perpetrator, has not vacated the premises. Note that this provision does not supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub L 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants. CCP §1161(4). See also §31.41.

A landlord has a tort duty to evict a vicious or dangerous tenant only when the tenant's behavior make violence toward neighbors or others on the premises highly foreseeable. *Castaneda v Olsher* (2007) 41 C4th 1205, 1219–1222, 63 CR3d 99 (tenancy governed by Mobilehome Residency Law, which requires cause for eviction).

c. [§31.18] Thirty-Day or 60-Day Notice

A 30-day notice (see CC §1946) or 60-day notice (see CC §1946.1) to quit usually addresses the situation in which the landlord wishes to terminate an indefinite term tenancy (*i.e.*, a holdover tenant or a tenant on a month-to-month tenancy). See CCP §1161(5) (holdover tenant); see also CC §1945 (implied renewal if landlord accepts rent after lease expired); *Kaufman v Goldman* (2011) 195 CA4th 734, 740–741, 124 CR3d 555 (term not renewed by tender of checks after right of occupancy expired under agreement to vacate premises).

Unless local ordinances or federal regulations (in the case of subsidized housing) provide otherwise, a landlord generally may terminate a periodic tenancy without cause by serving the tenant with a 30-day notice if the tenant or resident has resided in the dwelling less than 1 year. See CC §§1946, 1946.1(c). A 30-day notice may not include a request for pretermination rent, although such a notice will not invalidate the unlawful detainer complaint. *Saberi v Bakhtiari* (1985) 169 CA3d 509, 512–513, 517, 215 CR 359 (tenant may object to improper request for pretermination rent by motion to strike or defense in answer, but not by motion to quash service of summons). The landlord and tenant may provide by agreement at the time the tenancy is created that either party may terminate the tenancy on less than 30 days' notice; but the agreement may not provide for less than 7 days' notice. CC §1946.

A landlord must give a 60-day notice to a residential tenant or resident who has resided on the premises for 1 year or more. CC §1946.1(b).

Finally, an owner of a residential dwelling who is selling the premises may give a 30-day notice if (CC §1946.1(d)):

(1) The dwelling or unit is alienable separate from title to any other dwelling or unit;

(2) The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a title insurer or an underwritten title company, or a licensed escrow agent or real estate broker;
(3) The purchaser is a natural person or persons;
(4) The notice is given no more than 120 days after the escrow was established;
(5) Notice was not previously given under this section; and
(6) The purchaser in good faith intends to reside in the property for at least 1 full year.

d. [§31.19] When Notice Is Not Required

No notice is required for an unlawful detainer action based on the expiration of a fixed-term tenancy. CCP §1161(1); *Stephens v Perry* (1982) 134 CA3d 748, 757 n4, 184 CR 701. No notice is required when the tenant occupies the property as part of employment (*e.g.*, as an apartment manager) that has been terminated. See CCP §1161(1).

2. Overstatement of Rent

a. [§31.20] Statement of Amount Due

For residential tenancies, the 3-day notice to pay rent or quit must accurately state the amount that is due and various other payment information. See CCP §1161(2); §31.16. A notice that overstates the amount of rent due is ineffective and will not support an unlawful detainer action. See *Levitz Furniture Co. v Wingtip Communications, Inc.* (2001) 86 CA4th 1035, 1038, 1040, 103 CR2d 656; *Bevill v Zoura* (1994) 27 CA4th 694, 696–698, 32 CR2d 635. One purpose of this provision is to discourage landlords from claiming an overdue rental figure that is so exaggerated that a tenant would never choose to pay. *Levitz Furniture Co. v Wingtip Communications, Inc., supra*, 86 CA4th at 1040.

Even a minor overstatement of the rent due may be sufficient to render the notice defective. See *Nourafchan* v *Miner* (1985) 169 CA3d 746, 763, 215 CR 450 (error of $5.96 when more than $1000 rent was due rendered the notice defective). But see *Gruzen v Henry* (1978) 84 CA3d 515, 519, 148 CR 573, in which the court refused to overturn an unlawful detainer judgment despite the *de minimus* nature of the error of $18 when a total amount of $582 rent was due. Although *Nourafchan* and *Gruzen* are often cited for the two sides of the minor overstatement of rent issue, neither case ruled directly on the issue. *Johnson v Sanches* (1942) 56 CA2d 115, 116–117, 132 P2d 853, applied the precise amount rule to CCP §1161 in the context of a notice that was almost double the amount of rent due.

☛ JUDICIAL TIP: Before the presentation of the landlord's case, some judges consider dismissing the case (usually without prejudice and on request) if they have determined that there is an overstatement in the rent due and a settlement cannot be reached.

b. [§31.21] Commercial Tenancies

The "precise sum of rent due" rule does not apply in commercial tenancies. Under CCP §1161.1(a), the notice may claim an amount that is reasonably estimated. Such a provision makes sense in a commercial context because monthly rent is not always easily fixed or readily ascertained by simply reading the terms of the lease, *e.g.,* the rent is often affected by the tenant's revenues, assessments made by taxing authorities that are passed on to the tenant, and the like. *Levitz Furniture Co. v Wingtip Communications, Inc.* (2001) 86 CA4th 1035, 1040, 103 CR2d 656. There is a presumption that the amount of rent claimed is reasonably estimated if it is no more than 20 percent higher than the rent that is determined to be due. CCP §1161.1(e). Under CCP §1161.1(e), when the landlord's excessive demand does not exceed 20 percent, the burden shifts to the commercial tenant to prove that the demand was unreasonable. *Cinnamon Square Shopping Ctr. v Meadowlark Enters.* (1994) 24 CA4th 1837, 1843, 30 CR2d 697. However, even with this greater latitude, a notice that overstates the rent by more than 20 percent is defective and will not support an unlawful detainer judgment in a commercial tenancy. *WDT-Winchester v Nilsson* (1994) 27 CA4th 516, 534, 32 CR2d 511.

3. Service of Notice

a. [§31.22] In General

Proper service on the tenant of a valid notice to quit is jurisdictional and a prerequisite to a judgment declaring a landlord's right to possession. *Liebovich v Shahrokhkhany* (1997) 56 CA4th 511, 513, 65 CR2d 457 (3-day notice to pay rent or quit). The landlord must allege and prove proper service of the required notice; a court may not issue a judgment for possession in the landlord's favor without evidence that the required notice was properly served. 56 CA4th at 513. When the fact of service is contested, compliance with one of the statutory methods for service must be shown. 56 CA4th at 514. See §31.23. Affidavits of service may not be relied on at trial to prove the notice to quit was served in accordance with the statutory requirements; the testimony of the person who made the service is required (56 CA4th at 514), unless service was made by a sheriff, marshal, or registered process server (see Evid C §647; Govt C §§26662, 71265).

When service is carried out by a registered process server, Evid C §647 applies to eliminate the necessity of calling the process server as a witness at trial. Under Evid C §647, the return of a registered process server establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return. *Palm Prop. Invs., LLC v Yadegar* (2011) 194 CA4th 1419, 1427, 123 CR3d 816.

A 3-day notice to pay rent or quit must be served within 1 year after the rent is due. A notice that demands more than 1 year's rent is defective. *Levitz Furniture Co. v Wingtip Communications, Inc.* (2001) 86 CA4th 1035, 1038, 103 CR2d 656; *Bevill v Zoura* (1994) 27 CA4th 694, 697, 32 CR2d 635; see §31.20.

The tenant of a dwelling may not waive the notice provisions of CCP §1161(2). *Gersten Cos. v Deloney* (1989) 212 CA3d 1119, 1128, 261 CR 431.

Cotenants. Service on one of several tenants named in a lease constitutes service on the cotenants. *Univ. of Southern Cal. v Weiss* (1962) 208 CA2d 759, 769–770, 25 CR 475.

Subtenants. The landlord need only serve the tenant, not any subtenants, to maintain an unlawful detainer action against the tenant. *Chinese Hosp. Found. Fund v Patterson* (1969) 1 CA3d 627, 631–632, 81 CR 795. But to evict the tenant and a subtenant for a curable breach, the subtenant must be served with a separate notice; service of a copy of the tenant notice is not sufficient. *Briggs v Electronic Memories & Magnetics Corp.* (1975) 53 CA3d 900, 904–905, 126 CR 34. In comparison, it appears that subtenants need not be served a notice based on an incurable default. See *Four Seas Inv. Corp. v International Hotel Tenants' Ass'n* (1978) 81 CA3d 604, 611–612, 146 CR 531 (subtenants not served with 30-day notice).

b. [§31.23] Methods of Service

Compliance with statutory requirements. A landlord must strictly comply with the statutory requirements for service of the notice to quit. *Liebovich v Shahrokhkhany* (1997) 56 CA4th 511, 513, 65 CR2d 457. Under CCP §1162(a), the notice to quit must be served on a residential tenant by: (1) personal service on the tenant; (2) substituted service—leaving a copy with a person of suitable age and discretion at the tenant's residence or business and simultaneously mailing a copy to the tenant at his or her residence (if the tenant is not home or at his or her usual place of business); or (3) affixing a copy of the notice to a conspicuous place on the property if the tenant's place of residence and business cannot be ascertained, or a person of suitable age or discretion there cannot be found, and by also delivering a copy to a person residing there (if such a person

can be found) and mailing a copy to the tenant at the property. This last method is known as "nail and mail." Unless there is an admission of receipt, service of the notice by certified mail is not equivalent to personal service under CCP §1162(a)(1). *Liebovich v Shahrokhkhany, supra,* 56 CA4th at 516.

Service of the notice on a subtenant may also be made in the same manner. CCP §1162(a)(3).

Service of a notice terminating a tenancy for an unspecified term or a periodic tenancy (*e.g.,* from month-to-month) differs in that it may be given either in the manner prescribed by CCP §1162, or by sending a copy of the notice to the tenant by certified or registered mail. CC §1946.

Substituted service. Code of Civil Procedure §1162 does not require reasonable diligence in attempting personal service before substituted service may be used. *Nourafchan v Miner* (1985) 169 CA3d 746, 750–751, 215 CR 450. For example, if the tenant is not at home or at his or her usual place of business when personal service is attempted, the notice may be served by substituted service without making further attempts at personal service.

Substituted service must be attempted, however, before service by posting and mailing. *Hozz v Lewis* (1989) 215 CA3d 314, 317–318, 263 CR 577. A person using the posting and mailing method of service must first have determined that the tenant's residence and business cannot be ascertained or that a person of suitable age and discretion cannot be found there. *Highland Plastics, Inc. v Enders* (1980) 109 CA3d Supp 1, 6, 167 CR 353. The issue of "suitable age" depends on the facts of the case. See *Lehr v Crosby* (1981) 123 CA3d Supp 1, 6, 177 CR 96 (16-year-old child was found to be of "suitable age").

A landlord need not "conduct an extensive investigation of all the possible whereabouts of its tenants before seeking the posting alternative" to personal service under CCP §415.45. *Bd. of Trustees of the Leland Stanford Jr. Univ. v Ham* (2013) 216 CA4th 330, 334, 338–341, 156 CR3d 893 (within court's discretion to accept service by posting and mailing when process server went to address on 5 different days to serve tenant who had her university employment terminated and was not represented by counsel, and no other adult was found on premises).

Insufficient service. Under CCP §1162(a)(3), posting of the notice without also mailing the notice does not constitute sufficient service. *Jordan v Talbot* (1961) 55 C2d 597, 609, 12 CR 488. Service of a 3-day notice to quit by certified mail, return receipt requested, is not, by itself, a sufficient method of service under either CCP §1162(a)(2) or CCP §1162(a)(3). *Liebovich v Shahrokhkhany, supra,* 56 CA4th at 516. Post-and-mail service "is not authorized as a first-resort method of service." *Bank of New York Mellon v Preciado* (2013) 224 CA4th Supp 1, 8, 169

CR3d 653 (proofs of service do not indicate tenants or anyone of a suitable age were not home when process server posted notice on property).

Service on commercial tenant. Under CCP §1162(b), the notice to quit must be served on a commercial tenant by (1) personal service on the tenant; (2) substituted service—leaving a copy with a person of suitable age and discretion at the commercial property and simultaneously mailing a copy to the tenant at the property; or (3) affixing a copy of the notice to a conspicuous place on the property if a person of suitable age or discretion is not found at the property through the exercise of reasonable diligence, and by also mailing a copy to the tenant at the property. Service on a subtenant may be made in the same manner. A "commercial tenant" means a person or entity that hires any real property that is not a dwelling unit, as defined in CC §1940(c), or a mobilehome, as defined in CC §798.3. CCP §1162(c).

c. [§31.24] One-Year Limitation

In addition to meeting the "precise sum of rent due" rule (see §31.20), a 3-day notice must be served within 1 year after the rent becomes due. CCP §1161(2); see §31.22. If the landlord waits over 1 year to sue for unpaid rent, the landlord is limited to collecting this rent in a standard breach of contract action, which can result only in a money judgment without restitution of the rented property. *Levitz Furniture Co. v Wingtip Communications, Inc.* (2001) 86 CA4th 1035, 1038, 1042, 103 CR2d 656. The purpose of this provision is to prevent a landlord from sitting on his or her rights when rent is unpaid at some point during the term of the lease, then using long-overdue rent (but no recently overdue rent) to effect an eviction. 86 CA4th at 1040.

☛ JUDICIAL TIP: Landlords may adhere to standard accounting practices wherein rent monies received are applied to the oldest rent then due. A tenant's claim that rent was paid in subsequent months is moot if applied by the landlord to the earlier months. This is acceptable so long as the total rent claimed in the notice does not exceed 12 times the monthly rent.

A commercial tenancy, however, in addition to not being subject to the precise sum of rent rule, is not automatically invalidated because it demands rent due more than 1 year before the notice. 86 CA4th at 1040, 1042.

d. [§31.25] Time To Respond to Notice

When service is by mail. There is disagreement about whether the tenant's time to respond to the notice is extended under CCP §1013 when

the notice is served by mail under either CCP §1162(2) or CCP §1162(3). The prevailing authority indicates that the tenant's response time is not extended. See *Losornio v Motta* (1998) 67 CA4th 110, 112, 78 CR2d 799 (CCP §1013, which generally extends notice periods for service by mail, does not apply to 3-day and 30-day notice periods under unlawful detainer statutes); *Walters v Meyers* (1990) 226 CA3d Supp 15, 18, 277 CR 316 (CCP §1013 does not extend tenant's time to respond to 3-day notice); *Highland Plastics, Inc. v Enders* (1980) 109 CA3d Supp 1, 7–10, 167 CR 353 (CCP §1013 does not extend tenant's time to respond to 30-day notice); but see *Davidson v Quinn* (1982) 138 CA3d Supp 9, 11, 188 CR 421 (3 days' "actual" notice is required).

When there is an intervening weekend or holiday. If a 3-day notice requires performance on a holiday, Saturday, or Sunday, CCP §§10–13b (computation of time generally) permit the tenant to perform on the next court day. See *Lamanna v Vognar* (1993) 17 CA4th Supp 4, 7–8, 22 CR2d 501. The plaintiff may not file the complaint until the court day after the tenant may perform. 17 CA4th Supp at 7–8.

G. Tenant Defenses

1. [§31.26] Listing of Common Defenses

A tenant may assert only those defenses that, if proved, would either preserve the tenant's possession of the property or preclude the landlord from recovering possession. *Drouet v Superior Court* (2003) 31 C4th 583, 587, 3 CR3d 205; *Vella v Hudgins* (1977) 20 C3d 251, 255, 142 CR 414. Specifically recognized defenses include the following:

(1) *Breach of warranty of habitability.* See §§31.28–31.29.

(2) *Waiver of notice to quit.* The landlord waived, changed, or canceled the notice to quit. If part of the rent is accepted after the notice is given in a residential rental setting, the landlord may have waived the right to proceed on the original notice. *EDC Assoc. Ltd. v Gutierrez* (1984) 153 CA3d 167, 170, 200 CR 333. If the notice does not contain a forfeiture declaration, the tenant may pay the rent due after the expiration of the notice and retain possession. *Briggs v Electronic Memories & Magnetics Corp.* (1975) 53 CA3d 900, 905, 126 CR 34.

☛ JUDICIAL TIP: Tenants will often argue that there has been a waiver and/or estoppel in that they paid part of the rent in reliance on the landlord's statement that if they did so, the landlord would forego the unlawful detainer proceeding and would give them additional time to pay the balance of the rent. This is a factual issue, and the court must hear evidence from both sides to determine whether a waiver has occurred.

(3) *Retaliatory eviction. Drouet v Superior Court, supra,* 31 C4th at 587. See §§31.31–31.36.

(4) *Landlord's breach.* The landlord is in material breach of the rental agreement. See *Green v Superior Court* (1974) 10 C3d 616, 634–635, 111 CR 704 (discussing the dependence between the tenant's covenant to pay rent and the landlord's covenants arising out of the rental agreement).

(5) *Discrimination.* The landlord has discriminated against the tenant in violation of the constitution or laws of the United States or California. *Dep't of Fair Employment & Housing v Superior Court* (2002) 99 CA4th 896, 899–902, 121 CR2d 615 (racial discrimination); see *Smith v Fair Employment & Housing Comm'n* (1996) 12 C4th 1143, 1155–1161, 1176, 1179, 51 CR2d 700 (discrimination based on tenants' marital status); *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 724–726, 180 CR 496; CC §51.2 (discrimination based on tenant's age). But see *Colony Cove Assocs. v Brown* (1990) 220 CA3d 195, 199, 269 CR 234 (senior citizen housing is not unconstitutional under CC §§51.2–51.3).

(6) *Violation of eviction or rent control ordinance.* The action violates local rent control or eviction control ordinances. See *Nourafchan v Miner* (1985) 169 CA3d 746, 753, 215 CR 450. See also *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 149, 130 CR 465 (statutory remedies for possession do not preclude defense based on municipal rent control legislation). For example, when a rent control ordinance requires landlords to pay relocation assistance as a condition to evictions based on certain grounds, failure to pay that assistance is a defense to an unlawful detainer action; the tenant is entitled to remain in possession until the benefits are paid. *Salazar v Maradeaga* (1992) 10 CA4th Supp 1, 4–6, 12 CR2d 676; see also *NIVO 1 LLC v Antunez* (2013) 217 CA4th Supp 1, 4–5, 159 CR3d 922 (landlord changed lease to require tenant to obtain renter's insurance in violation of local rent control ordinance prohibiting unlawful detainer action based on unilateral change to tenancy terms; tenant's failure to maintain insurance was not forfeiture entitling landlord to possession, but trivial breach). A local regulation, however, that prohibits all attempts at owner-occupancy evictions for 4 years after the landlord voluntarily dismisses an owner-occupancy eviction action is an invalid restriction on the landlord's right to voluntarily dismiss an action without prejudice. *Bohbot v Santa Monica Rent Control Bd.* (2005) 133 CA4th 456, 471–472, 34 CR3d 827.

A tenant's claim against a landlord for allegedly violating a rent stabilization ordinance by imposing an excessive rent increase did not arise from protected activity under the anti-SLAPP (strategic lawsuit against public participation) statute. *Oviedo v Windsor Twelve Props., LLC* (2012) 212 CA4th 97, 108–114, 151 CR3d 117. See also *Ben-Shahar v Pickart* (2014) 231 CA4th 1043, 1050–1054, 180 CR3d 464 (former

tenant's lawsuit for landlord's alleged violation of rent control ordinance and breach of unlawful detainer settlement agreement did not arise from landlords' protected activity of bringing unlawful detainer action, but from landlord's failure to timely occupy property as required by rent control ordinance); and *Moriarty v Laramar Management Corp.* (2014) 224 CA4th 125, 139, 168 CR3d 461 (same holding; court noted that "unlawful detainer suit . . . is nowhere referenced in the complaint"). See also §§31.31 (CC §47 litigation privilege and tenant's retaliatory eviction claim), 31.38 (general discussion of anti-SLAPP statute).

Some of these cases were decided before the enactment of the Costa-Hawkins Rental Housing Act (CC §§1954.50–1954.535), which preempts local rent control by permitting landlords to set the initial rent for vacant units (CC §1954.53(a)), but which also expressly preserves local authority to regulate or monitor grounds for eviction (CC §1954.53(e)). *Bullard v San Francisco Residential Rent Stabilization Bd.* (2003) 106 CA4th 488, 489–490, 130 CR2d 819; *Cobb v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2002) 98 CA4th 345, 351–353, 119 CR2d 741; *DeZerega v Meggs* (2000) 83 CA4th 28, 40–41, 99 CR2d 366.

The Act does not preempt municipal ordinances that:

- Require good cause for eviction (see 83 CA4th at 41–42),
- Require a landlord to offer a 1-year lease to a prospective tenant and make the landlord's failure to do so a defense to an unlawful detainer action (see *Roble Vista Assocs. v Bacon* (2002) 97 CA4th 335, 340–343, 118 CR2d 295),
- Require a landlord to provide conspicuous written notice of any absolute prohibition against subletting or assignment in order for a sublet or assignment to constitute grounds for eviction (see *Danekas v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2001) 95 CA4th 638, 645–647, 115 CR2d 694), or
- Prohibit a landlord from evicting a surviving relative of a deceased tenant who has occupied the premises for a specified time period (see *Pick v Cohen* (2000) 83 CA4th Supp 6, 8–12, 100 CR2d 839).

But see *Bullard v San Francisco Residential Rent Stabilization Bd.*, *supra*, 106 CA4th at 489–493 (Act *does* preempt local ordinance that regulates rent landlord may charge tenant for replacement unit, after landlord evicts tenant in order to move into tenant's unit, and complies with local ordinance that requires landlord to offer tenant another unit if one is vacant).

Other state laws may preempt parts of a local ordinance. For example, a provision of a "tenant harassment" ordinance allowing a suit in response to a landlord's bringing action to recover possession was preempted by the

litigation privilege. *Action Apartment Ass'n, Inc. v City of Santa Monica* (2007) 41 C4th 1232, 1249–1250, 63 CR3d 398.

If the rental property is located in a city that has rent controls, and the landlord evicts a tenant so that the landlord or an immediate relative may occupy the property, the landlord or landlord's relative must reside in the property for at least 6 months. CC §1947.10(a). If a court determines that the eviction was based on fraud by the landlord (or his or her relative), the court may order the landlord to pay treble the cost of relocating the tenant back into the landlord's property, and may order the landlord to pay treble the amount of any increase in rent that the tenant has paid elsewhere. CC §1947.10(a).

The court must award attorneys' fees and costs to the prevailing party. CC §1947.10(a). When a court determines that a landlord has willfully or intentionally charged a tenant rent in excess of that allowed under a local rent control ordinance, the court must award the tenant a judgment for the excess and may treble that amount. CC §1947.11(a). A rent control ordinance may require a successor landlord to refund excess rent collected by a former landlord; it is not unreasonable to place the burden on the successor landlord to exercise due diligence in buying rental property and to determine if rents were charged in accordance with the ordinance. *Baychester Shopping Ctr., Inc. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2008) 165 CA4th 1000, 1008–1009, 81 CR3d 341.

(7) *Repair and deduct.* See §31.37.

(8) *Title is at issue.* The litigation is between a plaintiff-lender and a defendant-homeowner, rather than between landlord and tenant, and title is at issue. *Mehr v Superior Court* (1983) 139 CA3d 1044, 1049, 189 CR 138 (because of summary nature of unlawful detainer proceedings, it is unsuitable forum to try complicated ownership issues); *Asuncion v Superior Court* (1980) 108 CA3d 141, 145–146, 166 CR 306 (eviction of homeowners following foreclosure raises due process issues and must be heard in superior court).

(9) *Violation of Subdivision Map Act.* There is an alleged violation of the Subdivision Map Act (Govt C §§66410–66499.38). *Adler v Elphick* (1986) 184 CA3d 642, 645–646, 229 CR 254.

(10) *Overpayment of rent.* Previous overpayments of rent entitle the tenant to an offset. See *Minelian v Manzella* (1989) 215 CA3d 457, 463–465, 263 CR 597 (when landlord charges and tenant pays rent in excess of maximum rent allowable under local rent control ordinance, tenant has affirmative defense to unlawful detainer action based on claim that rent has already been paid). See also *Sego v Santa Monica Rent Control Bd.* (1997) 57 CA4th 250, 259–262, 67 CR2d 68 (local rent control board must issue a certificate of permissible rent levels under CC §1947.8(c) on

request of either landlord or tenant to resolve rent dispute between them); *ABCO, LLC v Eversley* (2013) 213 CA4th 1092, 1098–1100, 152 CR3d 812 (tenant may refuse to pay rent greater than that allowable under local rent stabilization ordinance).

(11) *Lack of compliance with lock requirements.* The landlord has failed to comply with the provisions of CC §1941.3, which require a landlord to install and maintain certain door and window locks. See CC §1941.3(c); see also CC §§1941.5, 1941.6 (right of protected tenant under a restraining order or police report to change locks).

(12) *Constructive eviction.* The landlord has breached the covenant of quiet enjoyment, resulting in a constructive eviction under which the tenant was justified in refusing to pay rent. See *Stoiber v Honeychuck* (1980) 101 CA3d 903, 925–926, 162 CR 194; *Clark v Spiegel* (1971) 22 CA3d 74, 79–80, 99 CR 86. "A lease's covenant of quiet enjoyment runs with the land and binds successors in interest by privity of estate." *Nativi v Deutsche Bank Nat. Trust Co.* (2014) 223 CA4th 261, 291 n5, 167 CR3d 173. A tenant need not "show that the landlord acted with the subjective intent to compel the tenant to leave the property or deprive the tenant of quiet enjoyment." 223 CA4th at 292. A landlord is presumed to intend the natural and probable consequences of his or her acts. 223 CA4th at 292. A tenant who remains in possession of the premises after the landlord has breached the implied covenant of quiet enjoyment may sue the landlord for breach of contract damages. *Ginsburg v Gamson* (2012) 205 CA4th 873, 902, 141 CR3d 62.

(13) *Unlawfully influencing tenant to vacate.* It is unlawful for a landlord to do any of the following for the purpose of influencing a tenant to vacate a dwelling: (1) engage in conduct that violates Pen C §484(a) (theft) or Pen C §518 (extortion); (2) use, or threaten to use, force, willful threats, or menacing conduct that interferes with the tenant's quiet enjoyment of the premises in violation of CC §1927 that would create an apprehension of harm in a reasonable person; or (3) commit a significant and intentional violation of CC §1954. CC §1940.2(a), (b) (tenant is entitled to civil penalty of up to $2000 for each violation). Also note that a landlord may not inquire about, or require a statement or certification concerning, the immigration or citizenship status of a tenant or occupant of residential rental property. CC §1940.3(b). Nor may a landlord prohibit a tenant from displaying or posting political signs that comply with statutory guidelines. CC §1940.4. A landlord also may not require any tenant or occupant to declaw or devocalize any animal allowed on the premises. CC §1942.7(a)(3), (c)(1) (city or district attorney has standing to enforce).

(14) *Failure to give tenant required notice of demolition.* The owner of a residential dwelling unit must give the tenant written notice that the owner intends to apply for a permit to demolish the dwelling. CC

§1940.6(a). The notice must specify the earliest possible approximate date on which the demolition will occur and the approximate date on which the owner will terminate the tenancy. The demolition may not occur before the earliest possible approximate date noticed. CC §1940.6(b). If the landlord fails to comply with these notice requirements, the tenant may recover the actual damages suffered, a civil penalty of up to $2500, and reasonable attorneys' fees. CC §1940.6(c).

(15) *Demanding "key money" to initiate or renew commercial lease.* It is unlawful for an owner of commercial property to require a tenant to pay "key money" or the owner's attorneys' fees incurred in preparing the lease, as a condition of initiating, continuing, or renewing the lease, unless the amount of the payment is stated in the lease. CC §1950.8(a), (b). An owner that violates this provision is subject to a civil penalty of 3 times the amount of the tenant's actual damages, plus the tenant's reasonable attorneys' fees and costs. CC §1950.8(c).

(16) *Failure to obtain a certificate of occupancy.* The landlord has failed to obtain a certificate of occupancy for the premises under the city code, making the lease an illegal contract. *Espinoza v Calva* (2008) 169 CA4th 1393, 1399–1400, 87 CR3d 492.

(17) *Evicting a subsidized housing tenant without good cause.* A management company's eviction of a tenant at her lease's expiration from an apartment regulated and subsidized by the city constituted state action for purposes of a due process claim. *Anchor Pacifica Mgmt. Co. v Green* (2012) 205 CA4th 232, 244–245, 140 CR3d 524. The tenant had a due process property interest in lease renewal because the city's policies and practices fostered the tenant's expectation that she was entitled to a continued subsidized tenancy that could be terminated only on a showing of good cause. 205 CA4th at 246–247. See §31.39 for a general discussion of public/subsidized housing.

(18) *Failure to cash tenant's rent check.* A landlord is not entitled to an unlawful detainer judgment when a tenant has paid via check received by the landlord the rent that the complaint alleges is due, but the landlord refused to accept and cash the check. *Boyd v Carter* (2014) 227 CA4th Supp 1, 10–11, 174 CR3d 268. See also *Kruger v Reyes* (2014) 232 CA4th Supp 10, 16–19, 181 CR3d 521 (commercial tenants' timely deposit of rent covering 6 months into landlord's bank account satisfied monthly obligation to pay rent, and landlord's 3-day notice was void because landlord returned some rent payments without later demanding payment for the returned rent).

Additional defenses. As discussed in *Nork v Pacific Coast Med. Enters., Inc.* (1977) 73 CA3d 410, 414, 140 CR 734, additional specifically recognized defenses include the following:

- There was an oral lease rather than a month-to-month tenancy. *Schubert v Lowe* (1924) 193 C 291, 296, 223 P 550.
- The lease was part of the consideration in the sale of the property in question, and the landlord had not drawn up the lease as required by the sales contract. *Rishwain* v *Smith* (1947) 77 CA2d 524, 528, 175 P2d 555.
- There was no rental because the supposed tenant was really the purchaser of a life estate. *Manning* v *Franklin* (1889) 81 C 205, 207, 22 P 550.
- There was no rental because the supposed landlord and tenant were really partners. *Pico* v *Cuyas* (1874) 48 C 639, 642.
- The landlord refused a timely tender of the rent. *Strom v Union Oil Co.* (1948) 88 CA2d 78, 81, 198 P2d 347.

2. [§31.27] Pleading and Proving Defenses

Generally, the tenant must raise any defenses in the answer to the complaint. But if the notice to quit is defective on its face, the tenant need not plead ineffective notice as an affirmative defense. Instead, the landlord must plead proper service of a valid notice. *Bevill v Zoura* (1994) 27 CA4th 694, 698, 32 CR2d 635 (landlord overstated the rent by including rent owed for more than 1 year before the notice was served).

As with any other civil action, denials should be distinguished from affirmative defenses. Affirmative defenses are matters on which the tenant-defendant bears the burden of proof (see Evid C §500) by a preponderance of the evidence (Evid C §115).

3. Breach of Warranty of Habitability

a. [§31.28] Rent Adjustment When Breach Is Found

Nature of defense. The most commonly claimed affirmative defense to residential unlawful detainer actions is a claimed breach of the warranty of habitability. This defense was explicitly recognized in the California Supreme Court case of *Green v Superior Court* (1974) 10 C3d 616, 631–632, 111 CR 704, and has subsequently been codified in CCP §1174.2 and CC §§1941–1942.5. The landlord's covenant of habitability is independent of the tenant's covenant to pay rent, *i.e.*, the tenant's failure to pay rent does not excuse the landlord's failure to maintain the premises in a habitable condition. *Fairchild v Park* (2001) 90 CA4th 919, 927–928, 109 CR2d 442.

A landlord of residential premises must put those premises in a condition fit for human occupancy and must repair all subsequent dilapidations to the property that render it untenantable. CC §1941. The

landlord owes a nonwaivable duty to the tenant to provide habitable premises. CC §1942.1. "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. 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. . . ." *Green v Superior Court, supra,* 10 C3d at 637. If the landlord has breached this duty, the tenant may raise the breach as an affirmative defense in an unlawful detainer action, but only if the action is based on nonpayment of rent. 10 C3d at 635, 637; *North 7th St. Assocs. v Constante* (2001) 92 CA4th Supp 7, 11, 111 CR2d 815.

If the tenant raises the defense, the court must determine whether a substantial breach has occurred. CCP §1174.2(a). See §31.29. If the court finds proof of a substantial breach, it must (1) reduce the rent to reflect the breach, (2) give the tenant the right to possession conditioned on the tenant's payment of the reduced rent, (3) order the landlord to make the repairs and correct the conditions that constitute the breach, (4) order that the rent is to remain reduced until the repairs are made, and (5) award costs and attorneys' fees to the tenant if permitted by statute or the parties' rental agreement. CCP §1174.2(a). If the court determines that there has been no substantial breach of CC §1941 or the warranty of habitability, the landlord is entitled to possession and judgment in its favor. CCP §1174.2(b). If the action is tried by a jury, the jury determines whether there was a breach of the warranty of habitability and, if so, the judge determines the amount of the rent adjustment. See CCP §1174.2(d) (nothing in CCP §1174.2 is intended to deny tenant right to a jury trial).

Payment of adjusted rent. Once the tenant pays the adjusted rent within 5 days (or 10 days including 5-calendar day extension under CCP §1013(a) if notice of judgment is given by mail), the tenant is the prevailing party in the suit and retains possession. CCP §1174.2(a)(2). If the tenant does not pay the adjusted rent within the 5 days allowed, the landlord is the prevailing party and is entitled to judgment and possession. CCP §1174.2(a).

☛ JUDICIAL TIP: When preparing judgment for the tenant, the judge should condition the judgment on the payment of the adjusted rent within 5 days (or 10 days if service of judgment is by mail). Some judges also require the landlord to file a declaration if the rent is not paid, stating that fact. Under this procedure, a judgment will not be entered until the tenant has complied or the landlord has prevailed, and credit reporting services will not be misled as to who is the prevailing party. The

proper way to state judgment in this case is as follows: "The court finds habitability issues that decrease the rental value by xx%. Judgment for defendant IF defendant pays the amount of $xxx.xx by 5:00 pm on January xx, 2017, and rent continues at the reduced amount until the stated habitability issues are corrected. If defendant does not pay in full, then judgment for plaintiff in the same amount. Prevailing party is awarded costs (and attorney fees)." See conditional judgment form in §31.107; see also entry of judgment in §§31.76–31.80.

There is no set manner for determining the rent adjustment. Courts commonly calculate the figure by determining that a percentage of the rent that was otherwise due should be forgiven because of the breach. See *Green v Superior Court, supra,* 10 C3d at 638 (courts must adjust the rent by the difference between the fair rental value of the premises as warranted and as they actually were during the tenant's occupancy). The *Green* court recognized that the determination of damages will be difficult and will not lend itself to precise calculation, but noted with approval the "percentage reduction of use" approach used by an out-of-state court. See worksheet in §31.106.

☛ JUDICIAL TIP: Some judges find it helpful to use a grid with a vertical column representing the months that apply and a horizontal column for types of defects to determine the adjustment. Such a grid can be helpful regardless of whether the loss of fair market value or "percent of reduction of use" formula is used. The grid and any notes on a case should be kept. They can be useful in the event the case returns for further litigation.

Code of Civil Procedure §1174.2 does not limit or supersede any provision of the Ellis Act (Govt C §§7060–7060.7), which permits a landlord to go out of business. See CCP §1174.2(d); §31.38.

b. [§31.29] What Constitutes a "Substantial Breach"

Habitability requirements. "Substantial breach" means the landlord's failure to comply with applicable building and housing code standards that materially affect health and safety. CCP §1174.2(c). "Habitability" comprises a number of conditions relating to plumbing, heating, electricity, and other aspects of residential living as set out in CC §1941.1(a). That section lists the following items as standard characteristics necessary for habitability as a dwelling:

(1) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.

(2) Plumbing or gas facilities that conform to applicable law in effect at the time of installation, and maintained in good order.

(3) A water supply approved under applicable law capable of producing hot and cold running water, furnished in appropriate fixtures, and connected to an approved sewage system.

(4) Heating facilities conforming to applicable law at the time of installation and maintained in good order.

(5) Electrical lighting, with wiring and electrical equipment conforming to applicable law at the time of installation and maintained in good working order.

(6) Premises clean at the time of commencement of the rental agreement, free from debris, filth, rubbish, garbage, rodents, and vermin, with lessor-controlled areas kept free from debris, filth, rubbish, garbage, rodents, and vermin.

(7) Adequate garbage and rubbish receptacles.

(8) Floors, stairways, and railings maintained in good repair.

(9) A locking mail receptacle for each residential unit in a residential hotel. See Health & S C §17958.3.

(10) Door locks and window locks in certain circumstances. See CC §1941.3.

Presumption of breach. In any unlawful detainer action by the landlord to recover possession from a tenant, there is a rebuttable presumption that the landlord has breached the habitability requirements of CC §1941 if (CC §1942.3(a)):

- The dwelling substantially lacks any of the affirmative standard characteristics listed in CC §1941.1(a), is deemed and declared substandard under Health & S C §17920.3, or contains lead hazards as defined in Health & S C §17920.10;
- A public official who is responsible for enforcing any housing law has notified the landlord (or the landlord's agent) in a written notice issued after inspecting the premises of the landlord's obligation to abate the nuisance or repair the substandard or unsafe conditions;
- The conditions have existed and have not been abated for 60 days after the date the notice was issued, and the delay is without good cause; and
- The conditions were not caused by the tenant's act or omission in violation of CC §1929 or §1941.2.

This presumption arises only if all these conditions are proved; however, failure to establish the presumption does not affect the tenant's right to raise and pursue any defense based on the landlord's breach of the implied

warranty of habitability. CC §1942.3(b). A tenant's failure to check a box on a Judicial Council answer form indicating that the landlord breached the warranty of habitability does not waive the defense when the tenant's allegations in the answer put the landlord on notice that the defense was in issue, and it was reversible error for the court to refuse to consider the defense. *Boyd v Carter* (2014) 227 CA4th Supp 1, 7–10, 174 CR3d 268.

☛ JUDICIAL TIP: In addition to the items listed in CC §1941.1(a), other defects may rise to the level of a substantial breach of the warranty of habitability. For example, the trier of fact may find that the failure of air-conditioning during the summer in a hot climate (not a listed item) when the tenant has rented air-conditioned premises might amount to as much a breach as lack of heat during the winter (a listed item).

Effect of local rent control ordinance. No decrease in housing services within the meaning of a local rent control ordinance is created when a landlord who undertakes to perform reasonably necessary repair and maintenance work on rental property temporarily interferes with a tenant's full use of housing services, but does not substantially interfere with the tenant's right to occupy the premises as a resident. Thus, the tenant is not entitled to a reduction in rent under that ordinance. *Golden Gateway Ctr. v San Francisco Residential Rent Stabilization & Arbitration Bd.* (1999) 73 CA4th 1204, 1209–1213, 87 CR2d 332 (tenants lost use of their outside decks during four-month maintenance project). A tenant may, however, be entitled to a reduction in rent if the construction work on the property leaves the common areas unusable for a long period of time and causes considerable disruption. *Ocean Park Assocs. v Santa Monica Rent Control Bd.* (2004) 114 CA4th 1050, 1069–1070, 8 CR3d 421.

No waiver of habitability requirements. When the landlord has notice of the defect and the breach is substantial, the breach of the warranty of habitability exists from the time of the notice, whether or not there has been a reasonable time to repair. *Knight v Hallsthammar* (1981) 29 C3d 46, 55, 171 CR 707 (court did not resolve whether giving of notice to the landlord of the defects is a prerequisite to withholding of rent). Because of public policy, there can be no waiver of the warranty of habitability in a residential situation, even when the tenant rented the premises with knowledge of the condition or continues to live in the premises after learning of the condition. 29 C3d at 59; CC §1942.1.

Inhabitable condition caused by tenant. However, a tenant who substantially contributes to the existence of an untenantable condition cannot claim relief under the statute. Specific tenant obligations under CC §1941.2(a) include the duty to:

(1) Keep the tenant-occupied part of the premises clean and sanitary.

(2) Dispose of all garbage and rubbish.

(3) Properly use all fixtures and keep fixtures clean and sanitary.

(4) Not permit any person who is on the premises with the tenant's permission to destroy, deface, or remove any part of the fixtures, equipment, or structure.

(5) Use the property as intended.

Items (1) and (2) do not apply if the landlord has expressly agreed in writing to perform these obligations. CC §1941.2(b).

When a tenant claims breach of the warranty of habitability, the landlord will often counter with a claim that the tenant has caused the condition.

☛ JUDICIAL TIP: When each side claims the other is responsible for the poor condition of the premises, the judge may consider announcing that he or she might visit the premises in question to personally view the claimed habitability breach, picking a time later that day (preferably without leaving time for either party to remedy any breach or do clean-up work before arriving). Once this intention is announced, if one side objects, the judge may have a good indication of who is in the wrong. A judge who visits the premises should be accompanied by the bailiff.

c. [§31.30] Tenant's Independent Action for Damages

Right to bring action. A tenant or former tenant may bring an independent action for damages for breach of the landlord's implied warranty of habitability. *Landeros v Pankey* (1995) 39 CA4th 1167, 1169, 46 CR2d 165; *Stoiber v Honeychuck* (1980) 101 CA3d 903, 913–925, 162 CR 194 (action for nuisance and intentional infliction of emotional distress by residential tenant based on landlord's breach of warranty of habitability). Such an action may supplement a tenant's statutory "repair and deduct" remedy (see §31.37) or a tenant's affirmative habitability defense in the landlord's unlawful detainer action. *Landeros v Pankey*, *supra*, 39 CA4th at 1170.

Liability for actual and special damages. A landlord is liable to a tenant for the tenant's actual damages and for special damages of not less than $100 nor more than $5000, as well as for reasonable attorneys' fees and costs, if the landlord has demanded rent, collected rent, issued a notice of a rent increase, or issued a 3-day notice to pay rent or quit, while the dwelling substantially lacks any of the affirmative standard characteristics listed in CC §1941.1 (see §31.29) or violates Health & S C §17920.3 (substandard conditions) or Health & S C §17920.10 (lead hazards), and

after a public officer or employee responsible for the enforcement of housing laws has given the landlord written notice of his or her obligation to abate the nuisance or repair the substandard conditions, and the landlord has not done so within 35 days after service of the notice. CC §1942.4(a), (b). Liability may not be imposed if the substandard conditions were caused by the tenant in violation of CC §1929 or §1941.2. CC §1942.4(a)(4). The court, in addition to awarding damages, may also order the landlord to abate any nuisance and to repair any substandard conditions that significantly or materially affect the health or safety of the occupants. To ensure compliance with the order, the court retains jurisdiction over the matter until the required repairs are made. CC §1942.4(c). The tenant may file the action in the small claims court if the tenant's claim does not exceed $5000, or $10,00 if the tenant is a natural person. CC §1942.4(e). A landlord is not required to comply with CC §1942.4 if the landlord is pursuing his or her rights under the Ellis Act (Govt C §§7060–7060.7) to go out of business. CC §1942.4(f). See §31.38.

Liability for prohibited acts. A landlord who terminates utility service to leased residential premises, or who prevents the tenant from gaining reasonable access to those premises (*e.g.*, by changing the locks), or removes outside doors or windows, or removes the tenant's property from the premises, with the intention of terminating the tenancy, is liable to the tenant for the tenant's actual damages, plus up to $100 for each day the landlord continues to commit one or more of these prohibited acts. CC §789.3(a)–(c). The court must award at least $250 for each separate cause of action. CC §789.3(c)(2). Subsequent or repeated violations, which are not committed contemporaneously with the initial violation, must be treated as separate causes of action and are subject to a separate award of damages. CC §789.3(c)(2). The court must also award reasonable attorneys' fees to the prevailing party. CC §789.3(d). The court may also award the tenant appropriate injunctive relief to prevent continuing or further violations of these provisions during the pendency of the action. CC §789.3(d). This remedy is not exclusive and does not preclude the tenant from pursuing other remedies. CC §789.3(d).

4. Retaliatory Eviction

a. [§31.31] Nature of Defense

As with the habitability defense, retaliatory eviction is both a common law (*Barela v Superior Court* (1981) 30 C3d 244, 249, 178 CR 618) and a statutory (CC §1942.5) defense. See CC §1942.5(h) (remedies provided by CC §1942.5 are in addition to any other remedies provided by statutory or decisional law); *Drouet v Superior Court* (2003) 31 C4th 583, 587, 3 CR3d 205; *Rich v Schwab* (1998) 63 CA4th 803, 811, 75 CR2d 170

(tenants who are the victims of retaliatory conduct have complementary rights of action in the common law and under statute). The common law defense is equally available to residential and commercial tenants. *Custom Parking v Superior Court* (1982) 138 CA3d 90, 101, 187 CR 674. Mobilehome tenants are also entitled to the protection of CC §1942.5. *Rich v Schwab, supra,* 63 CA4th at 811. A tenant who has not involuntarily vacated the premises "cannot state a common law cause of action for retaliatory eviction." *Banuelos v LA Investment, LLC* (2013) 219 CA4th 323, 328, 161 CR3d 772.

The retaliatory eviction defense is a claim that the landlord has improperly increased rent, decreased services, or caused the tenant who is not in default in paying rent to quit the premises involuntarily because of the tenant's (1) lawful and peaceful exercise of rights under CC §§1940–1954.1, (2) lawful and peaceful exercise of any other legal rights, (3) complaint to an appropriate agency about the tenantability of the leased residential premises, or (4) participation in a tenants' association or organization advocating tenants' rights. CC §1942.5(a), (c).

Courts have allowed the retaliatory eviction defense in a variety of circumstances, including:

- A mobile home tenant made oral and written complaints to the city and courts about the landlords' alleged wrongful acts and omissions. *Banuelos v LA Investment, LLC, supra,* 219 CA4th at 328 (statutory retaliatory eviction).
- A tenant exercised his statutory right to repair dilapidations and deduct the cost from rent after notice to the landlord. *Schweiger v Superior Court* (1970) 3 C3d 507, 517, 90 CR 729.
- A tenant complained to the police that the landlord had committed a crime. *Barela v Superior Court, supra,* 30 C3d at 251–252.
- Tenants exercised their statutorily protected rights in a dispute under the Agricultural Labor Relations Act (Lab C §§1140 et seq). *Vargas v Municipal Court* (1978) 22 C3d 902, 915–916, 150 CR 918.

However, it was not retaliatory eviction when a new landlord purchased a property to demolish it. *Four Seas Inv. Corp. v International Hotel Tenants' Ass'n* (1978) 81 CA3d 604, 610, 146 CR 531. It is reversible error for a court to refuse to allow a tenant to raise retaliatory eviction as an affirmative defense. *Boyd v Carter* (2014) 227 CA4th Supp 1, 7–10, 174 CR3d 268.

Appellate courts are split as to whether the CC §47 litigation privilege bars a tenant from suing a landlord for retaliatory eviction based on an allegedly wrongful unlawful detainer action. See *Banuelos v LA*

Investments, LLC, supra, at 219 CA4th at 328–335 (analyzing legislative intent of CC §1942.5 to conclude litigation privilege does not bar tenant's retaliatory eviction suit after unlawful detainer action); but see *Feldman v 1100 Park Lane Associates* (2008) 160 CA4th 1467, 1486, 74 CR3d 1 (filing unlawful detainer action "clearly fell within the litigation privilege"); *Wallace v McCubbin* (2011) 196 CA4th 1169, 1212–1215, 128 CR3d 205 (litigation privilege barred wrongful and retaliatory eviction causes of action based on filing of unlawful detainer). See §§31.26, 31.38 for discussions of the anti-SLAPP (strategic lawsuit against public participation) statute.

Any purported waiver by a tenant of his or her rights under CC §1942.5 is void as contrary to public policy. CC §1942.5(d).

A landlord is not precluded by CC §1942.5 from exercising his or her rights under any law pertaining to the hiring of property, or his or her right to do any of the acts described in CC §1942.5(a) and (c) for lawful cause. CC §1942.5(d).

A landlord may also recover possession of a dwelling even if the landlord has done any of the acts described in CC §1942.5(a) and (c), if the notice of termination, rent increase, or other act states the ground on which the landlord, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in CC §1942.5(a) and (c). CC §1942.5(e) (if tenant controverts landlord's good faith, landlord must establish good faith at trial). It is not retaliatory eviction if a landlord in good faith communicates the belief that the tenant is violating a term of the lease. *Morrison v Vineyard Creek* (2011) 193 CA4th 1254, 1268–1271, 123 CR3d 414 (tenant exercised legal right to conduct family child care home on premises).

For example, the Ellis Act (Govt C §§7060–7060.7), which permits a landlord who complies with the Act to go out of the residential rental business by withdrawing the rental property from the market, qualifies as a "law pertaining to the hiring of property" under CC §1942.5(d), and the landlord's withdrawal of the property from the market is an exercise of the right to go out of the rental business under that law. Therefore, a landlord's bona fide intent to withdraw the property from the rental market under the Act precludes the tenant from asserting the statutory defense of retaliatory eviction. *Drouet v Superior Court, supra*, 31 C4th at 588, 593–600 (landlord may go out of business and evict tenants even if landlord has a retaliatory motive, as long as landlord has bona fide intent to go out of business). If the landlord does not establish a bona fide intent to go out of business, a tenant may rely on a retaliatory eviction defense to resist eviction. 31 C4th at 597, 600. See §31.38.

b. [§31.32] Default in Rent

A tenant who is in default in the payment of agreed rent is precluded from asserting the statutory defense of retaliatory eviction under CC §1942.5(a), even if the tenant has complained of habitability defects. CC §1942.5(a), (c); see *Western Land Office, Inc. v Cervantes* (1985) 175 CA3d 724, 733, 740, 220 CR 784. It remains an open question whether a defaulting tenant likewise is precluded from asserting the common law defense. In the seminal common law cases, the tenant was current in the payment of rent. See *Barela v Superior Court* (1981) 30 C3d 244, 247, 178 CR 618 (tenant had been paying contract rent, but withheld the increased rent demanded by the landlord after the tenant accused him of a crime—unlawful detainer action based on 30-day notice; see also *Schweiger v Superior Court* (1970) 3 C3d 507, 510, 90 CR 729 (tenant had exercised "repair and deduct" remedy and paid balance of contract rent; landlord's attempt to collect purported monthly rental increase found to be retaliatory).

☛ JUDICIAL TIP: If there is evidence that the tenant is in default in the payment of rent, the judge should first require the parties to present evidence concerning that rent default before hearing any claims of retaliatory eviction. When the tenant withheld rent because of a breach of the warranty of habitability and deposited the withheld rent into a special account, most judges will not find a default in rent. In addition, judges should be wary of the landlord demanding the rent at an earlier time from the defendant than from similarly situated tenants, thereby making it seem that the defendant is in default.

c. [§31.33] Time Limits

The claimed retaliatory action must have occurred within 180 days of the tenant's lawful exercise of rights. CC §1942.5(a). A retaliatory eviction defense based on CC §1942.5(a) may be used only once in a 12-month period. CC §1942.5(b). When the defense is based on the common law, this limit does not apply. See *Glaser v Meyers* (1982) 137 CA3d 770, 774, 187 CR 242. A landlord is not precluded from giving eviction notices during the 180-day period as long as the tenancy is not terminated before the expiration of this period. See CC §1942.5(a).

d. [§31.34] Jury Trial Right

The tenant has the right to a jury trial on the factual issues raised by this defense. *Dep't of Transp. v Kerrigan* (1984) 153 CA3d Supp 41, 46, 200 CR 865. The existence or nonexistence of a retaliatory motive by the

landlord is a question of fact to be resolved by the trier of fact. *Western Land Office, Inc. v Cervantes* (1985) 175 CA3d 724, 731, 740, 220 CR 784. But a judge should not submit the issue to the jury unless there is substantial evidence in the record to support it. See *Four Seas Inv. Corp. v International Hotel Tenants' Ass'n* (1978) 81 CA3d 604, 610, 146 CR 531. See the right to jury trial generally in §31.74.

e. [§31.35] Burden of Proof

Whether retaliatory eviction is raised as a claim or as a defense, the burden of proof is on the tenant to prove retaliatory motive by a preponderance of the evidence. See Evid C §500 (party raising claim or defense has burden of proof); *Schweiger v Superior Court* (1970) 3 C3d 507, 517, 90 CR 729 (tenant must factually establish claim—common law defense); *Western Land Office, Inc. v Cervantes* (1985) 175 CA3d 724, 742, 220 CR 784 (statutory defense). Punitive damage claims must be proved by clear and convincing evidence. CC §3294(a).

f. [§31.36] Liability for Actual and Punitive Damages

If the defense of retaliatory eviction is successfully established, the judgment in the unlawful detainer action is entered in favor of the defendant tenant, and the tenant remains in possession of the property. See *Schweiger v Superior Court* (1970) 3 C3d 507, 517, 90 CR 729 (retaliatory eviction is a bar to eviction); CC §1942.5(a) (if a lessor retaliates, he or she may not recover possession). When a tenant files an affirmative action for retaliatory eviction, the landlord may be held liable for compensatory damages, as well as for punitive damages of not less than $100 nor more than $2000 for each retaliatory act for which the landlord was guilty of fraud, oppression, or malice. CC §1942.5(f).

Tenants who are the victims of a retaliatory rent increase are entitled to punitive damages in a statutory action for damages in a case brought under CC §1942.5. See *Rich v Schwab* (1998) 63 CA4th 803, 814–816, 75 CR2d 170. When punitive damages are fixed by statute, as under CC §1942.5, there is no requirement that tenants must also show the landlord's financial condition. 63 CA4th at 817. Nor must a tenant move out in order to collect punitive damages. CC §1942.5(f); 63 CA4th at 817.

In a statutory action for damages, the court must award reasonable attorneys' fees to the prevailing party if either party has requested attorneys' fees in their initial pleadings. CC §1942.5(g); 63 CA4th at 818. For a discussion of attorneys' fees in unlawful detainer proceedings generally (as opposed to a statutory action for damages), see §31.81.

H. [§31.37] Repair and Deduct Rights

When the premises are dilapidated, rendering them untenantable, the tenant may have the right to make repairs and deduct the costs from the rent, or to vacate the premises without being liable for further rent, if: (1) there is written or oral notice to the landlord of a breach making the premises untenantable, and (2) the tenant has waited a reasonable amount of time for the landlord to make the needed repair. CC §1942(a). Thirty days is presumed reasonable under CC §1942(b); however, that section also provides that a tenant may exercise the right to make repairs and deduct costs after a shorter notice period when the circumstances justify shorter notice. The tenant may not exercise repair and deduct rights for items exceeding the value of 1 month's rent and may not exercise repair and deduct rights more than twice in any 12-month period. CC §1942(a).

I. [§31.38] Landlord's Right To Go Out of Business

The Ellis Act (Govt C §§7060–7060.7) sets out the procedure by which a landlord may go out of business by removing rental units from the market. It provides that no statute, ordinance, regulation, or administrative action may compel the owner of residential property to offer, or to continue to offer, the property for rent or lease. Govt C §7060(a); see *Embassy LLC v City of Santa Monica* (2010) 185 CA4th 771, 775–778, 110 CR3d 579 (contractual Ellis Act waivers prohibited except for statutory exceptions). A landlord that complies with the Act is entitled to go out of the residential rental business even if (1) the landlord could continue to make a fair return by offering the units for rent, (2) the property is habitable, and (3) the landlord does not have approval for an alternative use of the property. *Drouet v Superior Court* (2003) 31 C4th 583, 587, 590, 3 CR3d 205.

Limitations on right. The Act does provide, however, that a landlord's right to go out of business is subject to certain other laws. For example, the Act is not intended to interfere with local authority over land use, including the regulation of the conversion of housing to condominiums or nonresidential use (Govt C §7060.7(a)), or to preempt local environmental or land use regulations that govern the demolition and redevelopment of residential property (Govt C §7060.7(b)). See *Lincoln Place Tenants Ass'n v City of Los Angeles* (2007) 155 CA4th 425, 447, 66 CR3d 120 (developer could not evict tenants without complying with CEQA mitigation conditions). The Act also provides that a local government may require landlords to provide it with notice of their intention to withdraw residential units from the rental market and precludes a landlord from withdrawing the units until 120 days after delivery of the notice. Govt C §7060.4(a), (b). The Act also precludes a landlord from with-

drawing less than all of the rental units in the building from rent or lease. Govt C §7060.7(d).

Unlawful detainer action. The landlord may file an unlawful detainer action to evict any tenants and recover possession of the property to be withdrawn. See Govt C §7060.6; *Drouet v Superior Court, supra,* 31 C4th at 587, 591. The tenants may answer or demur under CCP §1170 and may assert by way of defense that the landlord has not complied with the provisions of the Act or with any statutes, ordinances, or regulations adopted to implement the Act. Govt C §7060.6. The landlord's bona fide intent to withdraw the property from the rental market under the Act precludes a tenant from asserting the statutory defense of retaliatory eviction. *Drouet v Superior Court, supra,* 31 C4th at 588, 593–600 (if tenant controverts landlord's good faith, landlord must establish existence of bona fide intent to withdraw property from rental market but need not prove that this intent was *not* motivated by tenant's exercise of rights under CC §1942.5(a), (c)). If the landlord does not establish a bona fide intent to go out of business, a tenant may rely on a retaliatory eviction defense to resist eviction. 31 C4th at 597, 600. Code of Civil Procedure §1174.2, which sets forth the statutory defense of the landlord's breach of the warranty of habitability, does not limit or supersede the landlord's rights under the Ellis Act to go out of business. CCP §1174.2(d).

Subsequent re-renting of units. A local government may limit a landlord's right to re-rent the withdrawn property to others, to raise the rent, or to sell the property unencumbered by these limitations. See Govt C §§7060.2, 7060.3. But see *Naylor v Superior Court* (2015) 236 CA4th Supp 1, 7–9, 186 CR3d 791 (rent control ordinance did not require landlord to notify tenants of their right to re-rent units withdrawn from the rental market if a future owner again offers the units for rent).

SLAPP motions. An action by tenants seeking declaration of their rights under the Ellis Act filed after they received notice to quit was not based on the landlord's service of notice so as to support the landlord's motion to strike under the anti-SLAPP (strategic lawsuit against public participation) statute. *Marlin v Aimco Venezia, LLC* (2007) 154 CA4th 154, 160–162, 64 CR3d 488. On the other hand, if the sole basis of liability in a tenant's action is the service of a termination notice and the landlord's refusal to recognize the tenant as a protected household under the local ordinance, the complaint arises from an act in furtherance of the defendant's rights of petition or free speech under the anti-SLAPP statute. *Birkner v Lam* (2007) 156 CA4th 275, 281, 283, 67 CR3d 190; but see *Copenbarger v Morris Cerullo World Evangelism* (2013) 215 CA4th 1237, 1245–1248, 156 CR3d 70 (though service of 3-day notice "might have triggered" tenant to file a complaint against his landlord, causes of action were based on the parties' rights and obligations under lease terms,

or alleged breach and attempted termination of a sublease); *Ulkarim v Westfield LLC* (2014) 227 CA4th 1266, 1281–1283, 175 CR3d 17 (commercial tenant's causes of action against landlord for breach of contract, declaratory relief, negligent and intentional interference with prospective economic damages, and unfair competition did not arise from landlord's protected activity of bringing unlawful detainer action); and *Trapp v Naiman* (2013) 218 CA4th 113, 121, 159 CR3d 462 (attorneys' anti-SLAPP motion should have been granted in borrowers' suit against them because attorneys' only connection to action was protected activity of representing financial institution in earlier unlawful detainer proceedings).

"[T]he SLAPP Act can be invoked by someone who did not personally engage in the protected communicative conduct," including a successor business entity to the previous entity that owned an apartment building. *Daniell v Riverside Partners I, L.P.* (2012) 206 CA4th 1292, 1296–1297, 1300–1302, 142 CR3d 717 (permitting current landlord to bring motions under anti-SLAPP statute as successor-in-interest defendant to tenant's malicious prosecution case initiated against former landlord, who filed unlawful detainer action against tenant). See also §§31.26 (anti-SLAPP statute and alleged violation of rent control/stabilization ordinance), 31.31.

J. [§31.39] Public/Subsidized Housing

Public/subsidized housing encompasses both public housing projects under 42 USC §§1437–1437e and subsidized housing under 42 USC §1437f, commonly referred to as "Section 8 housing." Whether dealing with a housing project or subsidized housing, the lessor (which may be a public housing authority or a private person or entity) is contractually obliged to follow HUD regulations set out in 24 CFR pts 941, 960, 964–970, and 990. For example, public housing leases must contain VAWA provisions against domestic violence. 24 CFR §966.4(a)(1)(v).

Although these cases may be presented as regular unlawful detainer cases in court, there are procedural differences. The notice periods may be longer, *i.e.*, 14 days for nonpayment of rent, a reasonable amount of time (not to exceed 30 days) when health or safety of other tenants or lessor employees is threatened, and 30 days in all other cases. 24 CFR §966.4(*l*)(2)–(3). If an owner terminates or fails to renew a contract or recorded agreement with a public agency that provides Section 8 financial assistance or terminates a tenancy agreement with a Section 8 tenant, the owner must give 90 days' notice to the tenant even if the property is not subject to a local rent control ordinance. CC §1954.535; *Wasatch Prop. Mgmt. v Degrate* (2005) 35 C4th 1111, 1118, 1121–1123, 29 CR3d 262.

See also *Crisales v Estrada* (2012) 204 CA4th Supp 1, 7–8, 139 CR3d 780 (landlord's 90-day notice to terminate tenancy because of general business or economic reasons did not entitle him to possession when justification not enumerated in rent stabilization ordinance; federal Section 8 regulations did not preempt local ordinance). In some cases, the tenant is also entitled to an administrative hearing (technically a grievance proceeding under 24 CFR §§966.50–966.57) before the court case is filed. Good cause to evict is required in every case. 24 CFR §247.3.

The lessor's receipt of a housing assistance payment from the Department of Housing and Urban Development on behalf of a tenant does not waive the lessor's right to terminate the tenancy for nonpayment of rent. *Savett v Davis* (1994) 29 CA4th Supp 13, 15, 34 CR2d 550.

Drug use in subsidized housing in violation of a lease provision establishing a policy of "zero drug tolerance" may constitute grounds for eviction. See *City of South San Francisco Housing Auth. v Guillory* (1995) 41 CA4th Supp 13, 19–20, 49 CR2d 367 (upholding eviction based on drug possession by tenants' son). A public housing authority has the discretion to evict tenants for drug or criminal activity of other family members or guests regardless of whether the tenant knew or should have known of the offending activity. *HUD v Rucker* (2002) 535 US 125, 136, 122 S Ct 1230, 152 L Ed 2d 258. But see §31.26 for a law-abiding subsidized housing tenant's eviction defense based on a due process property interest in lease renewal.

K. [§31.40] Servicemember's Rights

The Servicemembers Civil Relief Act (50 USC App §§501 et seq) provides servicemembers some protection from immediate eviction. Without leave of court, a servicemember or his or her dependents may not be evicted from premises occupied or intended to be occupied primarily as a residence, and for which the rent does not exceed $2400 per month (adjusted annually for inflation starting in 2004). 50 USC App §531(a). On application for an eviction, the court may on its own motion, and must on application by or on behalf of a servicemember whose ability to pay rent is materially affected by military service (50 USC App §531(b)(1)):

- Stay the proceedings for 90 days, unless the court determines that a longer or shorter period is proper; or
- Adjust the lease obligation to preserve all the parties' interests.

If the court stays the proceedings, it may grant the landlord or other person with paramount title such relief as equity may require. 50 USC App §531(b)(2).

L. [§31.41] Domestic Violence or Elder Abuse

Depending on the circumstances involving domestic violence, sexual assault, stalking, human trafficking, elder abuse, or dependent adult abuse against a tenant, a landlord may or may not terminate or decline to renew a tenancy. CCP §1161.3. The Legislature has declared that domestic violence and stalking victims should not lose their housing because they are being abused and should not be forced to leave their homes to report abuse. It is critical for rental property owners to develop policies and procedures that balance the needs of tenants' peaceful enjoyment of the property while considering the safety and fair housing rights of victims of domestic violence, sexual assault, and stalking. Stats 2010, ch 626, §1(e), (h). A landlord may *not* terminate a tenancy or fail to renew a tenancy based on acts against a tenant or a tenant's household member that constitute domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or dependent adult if both of the following apply (CCP §1161.3(a)):

(1) The acts of domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or dependent adult were documented as (i) a temporary restraining order, emergency protective order, or protective order lawfully issued within the last 180 days, or (ii) a copy of a written report, created within the last 180 days, by a state or local law enforcement agency peace officer, stating that the tenant or household member has filed a report alleging domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult abuse; *and*

(2) The person named in the protective order or police report as the alleged perpetrator is not a tenant of the same dwelling unit as the tenant or household member.

"Tenant" means tenant, subtenant, lessee, or sublessee. CCP §1161.3(d); see Fam C §6211; CCP §1219(d)(1); CC §1708.7; Pen C §§236.1, 646.9 (defining "domestic violence," "sexual assault," "human trafficking," and "stalking").

In addition, if the conditions in CCP §1161.3(a) are met, a local agency is prohibited from requiring a landlord to terminate or fail to renew a tenancy based on either: (1) an act or acts against a tenant or a tenant's household member that constitutes domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult abuse; or (2) the number of calls made by any person to the emergency telephone system relating to a tenant or a member of the tenant's household being a victim

of domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult abuse. Govt C §53165.

A landlord *may* terminate a tenancy or not renew a tenancy if the tenant availed himself or herself of the above protections and (CCP §1161.3(b)):

(1) The tenant allows the person named in the protective order or police report to visit the property, or the landlord reasonably believes the same named person poses a physical threat to other tenants, guests, invitees, or licensees, or to the tenant's right to quiet possession; *and*

(2) The landlord previously gave at least 3 days' notice to the tenant to correct a violation of paragraph (1) immediately above.

The landlord may not be held liable to any other tenants for any action that arises due to the landlord's compliance with these provisions. CCP §1161.3(c).

Termination by tenant. A tenant may notify the landlord that he or she intends to terminate the tenancy because he or she or a household member was a victim of domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or dependent adult. CC §1946.7(a). The household member must be a family member. CC §1946.7(g)(1). Notice must be in writing, and include a copy of a protective order, restraining order, or police report. CC §1946.7(b)(1)–(b)(2). A tenant has 180 days from the order's issuance or report's creation to give notice. CC §1946.7(c). A tenant must pay rent for 30 days after giving notice (14 days starting 1/1/16), and existing law governs the security deposit. CC §1946.7(d). If during the notice period the tenant vacates the premises and they are rented to another party, then the rent due is prorated. CC §1946.7(e) (renumbered to (d) eff. 1/1/16). A landlord must not disclose any information a tenant provides under this section unless the tenant consents in writing, disclosure is required by law or court order, or is made to a qualified third party. CC §1946.7(h)(1)–(h)(2). See §31.108 for statements by a tenant and a qualified third party under CC §1946.7(b)(3)(B). Tenants other than the victim of domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or dependent adult are still bound by the rental agreement. CC §1946.7(f) (renumbered to (e) eff. 1/1/16).

M. Claims of Right to Possession

1. [§31.42] Service of Claim on Occupants

To eliminate postjudgment claims of a right to possession by occupants other than the tenant who has signed the lease or rental agreement, many landlords regularly serve all occupants with a form of prejudgment claim of right to possession and a copy of the summons and complaint at the same time that service is made on the tenant. CCP §415.46(a). The form prescribed in CCP §415.46(f) must be used. See form CP10.5, *Prejudgment Claim of Right to Possession.*

Service of a prejudgment claim of right to possession under CCP §415.46 may only be made by a marshal, sheriff, or registered process server. CCP §415.46(b). The person effecting service must make a reasonably diligent effort to ascertain if there are other adult occupants of the premises who are not named in the summons and complaint by inquiring of the person being personally served, or any person of suitable age and discretion who appears to reside on the premises, whether there are other occupants. CCP §415.46(c)(1). If the identity of such an occupant is disclosed and the occupant is present, the officer or process server must serve the occupant with the prejudgment claim of right to possession. CCP §415.46(c)(2). If personal service cannot be made at that time, service may be made by leaving a copy of the claim with a person of suitable age and discretion at the premises, affixing the claim in a conspicuous place on the premises in a manner most likely to give actual notice to the occupant, and mailing a copy of the claim to the occupant by first-class mail. CCP §415.46(c)(2). Proof of service must be filed with the court. CCP §415.46(d).

If there is no service under CCP §415.46, any occupant not named in the judgment may delay the eviction process by presenting a completed claim of right to possession to the officer seeking to levy on the writ of possession. See CCP §1174.3(a)–(b). If the unlawful detainer action results from the foreclosure sale of a rental housing unit, an occupant may file a claim of right to possession at any time up to and including when the levying officer returns to effect the eviction of those named in the judgment of possession, without regard to whether a prejudgment claim of right to possession has been served on the occupant. CCP §1174.3(a)(2). Further procedures and forms are set out in CCP §1174.3. See Judicial Council form CP10 (Claim of Right to Possession and Notice of Hearing). To prevail, an occupant who was not named in the judgment must follow the procedure set out in CCP §1174.3 (see *Cardenas v Noren* (1991) 235 CA3d 1344, 1349, 1 CR2d 367), unless that occupant was named in the complaint. CCP §1174.3(a)(1) (an occupant who was named in the action

need not file a claim of right to possession to protect that occupant's right to possession).

2. [§31.43] Filing of Claim With Court

Once occupants are properly served in accordance with CCP §415.46, any occupant who claims the right to possession of the property must file the claim with the court within 10 days. CCP §1174.25(a). Filing a claim of right to possession constitutes a general appearance. CCP §1174.25(a)(1). If the unlawful detainer action results from the foreclosure sale of a rental housing unit, an occupant may file a prejudgment claim of right to possession at any time before judgment is entered. CCP §1174.25(a)(2). When a claim is filed, the occupant is added to the complaint as a named defendant and must answer or otherwise respond to the complaint within 5 days, including Saturdays and Sundays but excluding all other judicial holidays. See CCP §1174.25(b). Thereafter, the occupant may not object under CCP §1174.3 to enforcement of a resulting judgment for possession of the premises, whether or not the occupant is named in the judgment. CCP §§415.46(e)(1), 715.020(d). In an unlawful detainer resulting from a foreclosure sale, however, a tenant's or subtenant's right to file a prejudgment claim of right to possession is not limited as described above. CCP §415.46(e)(2); see §31.96.

3. Hearing on Claim

a. [§31.44] Requirement and Timing of Hearing

The court must hold a hearing on the claim of an unnamed occupant who objects to enforcement of the judgment. At this hearing, it must determine whether the claimant has a valid claim of possession by considering all evidence produced at the hearing, including the information set forth in the claim. CCP §1174.3(d). The timing of the hearing to determine whether the unnamed occupant has a valid claim to possession is determined by whether that occupant chooses to pay 15 days' rent into court. CCP §1174.3(c). Within 2 court days after presenting the claim to the levying officer, the claimant must deliver to the court either of the following: (1) an amount equal to 15 days' rent and the appropriate fee or form for proceeding in forma pauperis, in which case, the court must set and hold a hearing on the claim not less than 5 nor more than 15 days after the claim is filed (CCP §1174.3(c)(1)); or (2) the appropriate fee or form for proceeding in forma pauperis without delivering the amount equal to 15 days' rent, in which case, the court must immediately set a hearing on the claim to be held on the fifth day after the filing is completed (CCP §1174.3(c)(2)).

b. [§31.45] Findings by Court

If the court finds that the claimant is an invitee, licensee, guest, or trespasser, it must determine the claim to be invalid and order the return of any rent tendered by the claimant, less a prorated amount for each day that enforcement of the judgment was delayed because of the filing of the claim of right to possession; this prorated amount must be paid to the plaintiff. CCP §1174.3(d). If the court determines that the claim is valid, the 15 days' rent paid by the claimant must be returned to the claimant. CCP §1174.3(d).

After the hearing, if the court decides that the claim was valid and finds that the unlawful detainer was based on a curable breach (such as nonpayment of rent) but that the claimant had no notice, the required notice may be served on the claimant at the hearing or thereafter at the plaintiff-landlord's discretion. CCP §1174.3(e)(1). If the claimant does not cure the breach, a supplemental complaint may be filed. CCP §1174.3(e)(1).

☛ JUDICIAL TIP: Service of the notice may have been personal or by posting and mailing. Generally, service on one person at the residence is service on all residents. The court could find that service was proper on all residents, amend the complaint on its face, serve the new defendant(s) at the hearing, require an answer within 5 days, and set the matter for trial as to the new defendant(s).

In all other cases, the court must deem the unlawful detainer summons and complaint to be amended on their faces to include the claimant as a defendant, and the claimant may be served at the hearing or afterwards. The claimant must answer or otherwise respond within 5 days after service. CCP §1174.3(e)(2).

If a claim is made without providing the court with the appropriate filing fee or a form for proceeding in forma pauperis, the claim is immediately deemed denied and the court must so order. CCP §1174.3(f). On denial of the claim, an endorsed copy of the order must be delivered to the levying officer, and an endorsed copy of the order must be served on the plaintiff and the claimant by first-class mail. CCP §1174.3(f).

When the claim is denied, the court must order the levying officer to proceed with enforcement of the original writ of possession as deemed amended to include the claimant. CCP §1174.3(g). On receipt of the court's order, the levying officer must enforce the writ against all occupants within a reasonable time, not to exceed 5 days. CCP §1174.3(g).

N. [§31.46] Landlord's Right to Immediate Possession

On filing the complaint, the plaintiff may file a motion to have possession of the premises immediately restored on the grounds that the defendant resides out of state, has departed from the state, cannot be found within the state after due diligence, or has concealed himself or herself to avoid service of summons. CCP §1166a(a). The plaintiff must serve the defendant with written notice of the hearing on the motion in accordance with CCP §1011. CCP §1166a(b). The court's order finding in the plaintiff's favor is enforceable by a writ of possession. CCP §1166a(d)–(e). The plaintiff must file an undertaking in the amount set by the court to the effect that, if the plaintiff fails to recover judgment against the defendant for possession of the premises or if the suit is dismissed, the plaintiff will pay the defendant such damages as the defendant may sustain by reason of the defendant's dispossession under the writ of possession. CCP §1166a(c).

O. Common Pretrial Matters

1. Demurrers

a. [§31.47] Right To Demur

Code of Civil Procedure §1170 specifically recognizes a defendant's right to either answer or demur in an unlawful detainer case. Any demurrer must be filed within 5 days after service of the summons. See CCP §§1167, 1167.3, 1170. Defendant's demurrer is an appearance (CCP §1170), thus a plaintiff may demand a trial to be held within 20 days. CCP §1170.5(a).

b. [§31.48] Notice of Hearing

The defendant must serve and file a notice of hearing with the demurrer. The notice must specify a hearing date in accordance with CCP §1005. Cal Rules of Ct 3.1320(c). California Rules of Court 3.1320(d) states that a demurrer must be set for hearing not more than 35 days after it is filed or on the first available date thereafter. The unlawful detainer statutes do not provide for a shortened period of notice of hearing on a demurrer as they do for a motion to quash (see CCP §1167.4) and for a summary judgment motion (see CCP §1170.7). See CCP §1177 (except as otherwise provided in CCP §§1159–1179a, rules of practice contained in CCP §§307–1062.20 apply in unlawful detainer actions). For good cause shown, a judge may order the hearing held on an earlier or later date, on notice prescribed by the judge. Cal Rules of Ct 3.1320(d).

☛ JUDICIAL TIP: Some courts have a standing order that any filing of a demurrer that asks for a hearing date in excess of 10 days is forwarded to the judge, who may find good cause to set an earlier date under Cal Rules of Ct 3.1320(d).

c. [§31.49] Special Demurrer

Because economic litigation procedures do not apply to unlawful detainer proceedings, special demurrers are permitted in these cases. See CCP §91(b) (economic litigation does not apply to unlawful detainer proceedings), CCP §92(c) (special demurrers are not permitted in cases governed by economic litigation statutes). A defendant may demur to a Judicial Council form complaint on the same grounds as any other complaint. To be "demurrer-proof," a form complaint must state all facts essential to a cause of action under existing statutes or case law. *People ex rel Dep't of Transp. v Superior Court* (1992) 5 CA4th 1480, 1484–1486, 7 CR2d 498. It is not a ground for demurrer that all adults in possession are not joined in the action. CCP §1164.

d. [§31.50] Time To Answer or Amend After Ruling on Demurrer

After the ruling on the demurrer in an unlawful detainer proceeding, the parties have only 5 days, rather than the usual 10 days, to answer or amend. CCP §1167.3; Cal Rules of Ct 3.1320(g).

☛ JUDICIAL TIP: It is not advisable to give more than 5 days to answer (through a continuance) after a demurrer is overruled because the defendant who demurs improperly should not be placed in a better position than the defendant who does not demur and has only 5 days to answer.

The time within which an answer must be filed runs from the date on which notice of the court's decision on the demurrer is served, unless the defendant waives notice in open court and the waiver is entered in the minutes. CCP §§472b, 1019.5. Waiver of notice must be express, not implied. *People v $20,000 U.S. Currency* (1991) 235 CA3d 682, 691, 286 CR 746. If the defendant fails to answer within the time allowed, the defendant's default may be entered. CCP §586(a)(2).

e. [§31.51] Sanctions

Like other motions, a demurrer that is made or opposed for an improper purpose or without legal or factual support may result in the imposition of sanctions under CCP §128.7.

2. [§31.52] Motion for Summary Judgment

A motion for summary judgment in an unlawful detainer action may be made at any time after the answer is filed, once 5 days' notice is given. CCP §1170.7; Cal Rules of Ct 3.1351(a). The CCP §1013 procedures governing methods of service apply. Cal Rules of Ct 3.1351(a).

Any opposition to a motion for summary judgment, and any reply to an opposition, may be made orally at the time of hearing. Cal Rules of Ct 3.1351(b). Alternatively, if a party seeks to have the court consider a written opposition in advance of the hearing, the written opposition must be filed and served on or before the court day before the hearing. Service must be by personal delivery, facsimile transmission, express mail, or other means consistent with CCP §§1010 and 1011–1013, and reasonably calculated to ensure delivery to the other parties no later than the close of business on the court day before the hearing. The court has the discretion to consider written opposition filed later. Cal Rules of Ct 3.1351(c).

In most other respects, summary judgment should be granted or denied on the same basis as a motion for summary judgment in any other civil action made under CCP §437c. CCP §1170.7. The provisions of CCP §437c(a)–(b) concerning the time for making and hearing the motion do not apply, however, to unlawful detainer actions. CCP §437c(r). In addition, the requirement of a separate statement in support of or in opposition to a summary judgment motion does not apply to unlawful detainer actions. CCP §437c(b), (r). The provisions for summary judgment set forth in CCP §437c do not extend the period for trial in an unlawful detainer action set forth in CCP §1170.5. CCP §437c(q). On the requirements for motions for summary judgment, see *California Judges Benchbook: Civil Proceedings—Before Trial, Second Edition*, chap 13 (Cal CJER 2008).

A judge properly denied plaintiff landlords' summary judgment motion made on the ground that because the defendant was not their tenant but occupied the apartment only as a subtenant of the tenant who was voluntarily terminating his tenancy, the defendant was merely a trespasser who could be lawfully evicted without notice and without compliance with the city's eviction ordinance. *DeZerega v Meggs* (2000) 83 CA4th 28, 36–38, 99 CR2d 366. The plaintiffs failed to meet their burden of showing that these assertions were sound and that there were no triable issues of fact. 83 CA4th at 36. Use of the term "tenants" throughout the lease to describe all authorized occupants could readily engender a belief by the tenant's roommates that they were also tenants. 83 CA4th at 37.

Conversely, a judge properly granted a defendant's summary judgment motion on the ground that the defendant was entitled to the protections against eviction without cause set forth in the city's eviction

ordinance. *DeZerega v Meggs*, *supra*, 83 CA4th at 38–43 (when landlord agrees to occupancy, characterization of occupancy as subtenancy in violation of lease does not prevent application of city ordinance's requirement of cause for eviction).

3. [§31.53] Motion for Judgment on Pleadings

The court may also grant judgment on the pleadings on its own motion when the complaint overstates the amount of rent that is due. See *Jayasinghe v Lee* (1993) 13 CA4th Supp 33, 36–37, 17 CR2d 117.

☛ JUDICIAL TIP: A finding that the complaint overstates the amount of rent due is ordinarily a factual one requiring evidence. But in unlawful detainer cases, a defective complaint is typically apparent on its face; the attached notice may list excess rent, include late fees, or have another irregularity. The court lacks jurisdiction if the notice is invalid on its face. The proper procedure is to set an order to show cause re: dismissal to allow the landlord to confirm that the defective notice was served. If it was, the case should be dismissed with prejudice. See *Liebovich v Shahrokhkhany* (1997) 56 CA4th 511, 513, 65 CR2d 457 (proper service of valid 3-day notice is prerequisite to judgment declaring lessor's right to possession).

On the requirements for motions for judgment on the pleadings, see *California Judges Benchbook: Civil Proceedings—Before Trial, Second Edition*, §§12.144–12.169 (Cal CJER 2008).

4. Discovery

a. [§31.54] General Right of Discovery

The Civil Discovery Act (CCP §§2016.010–2036.050) clearly contemplates that there may be discovery in unlawful detainer actions, although the time limits within which discovery must be completed are very narrow because of the summary nature of the proceedings. All discovery must be completed 5 days before trial. CCP §2024.040(b)(1). A discovery motion may be made at any time on giving 5 days' notice. CCP §1170.8; Cal Rules of Ct 3.1347(a). The CCP §1013 procedures governing methods of service apply. Cal Rules of Ct 3.1347(a).

Unlawful detainer actions are specifically exempted from the limitations on discovery set forth in the economic litigation statutes (CCP §§94–97). CCP §91(b).

For a detailed discussion of the various discovery methods, see generally *California Judges Benchbook: Civil Proceedings—Discovery, Second Edition* (Cal CJER 2012).

b. [§31.55] Opposition To Discovery Motion

Any opposition to a discovery motion, and any reply to an opposition, may be made orally at the time of hearing. Cal Rules of Ct 3.1347(b). Alternatively, if a party seeks to have the court consider a written opposition in advance of the hearing, the written opposition must be filed and served on or before the court day before the hearing. Service must be by personal delivery, facsimile transmission, express mail, or other means consistent with CCP §§1010 and 1011–1013, and reasonably calculated to ensure delivery to the other parties no later than the close of business on the court day before the hearing. The court has the discretion to consider written opposition filed later. Cal Rules of Ct 3.1347(c).

c. [§31.56] Depositions

Oral depositions in unlawful detainer actions must be scheduled for a date at least 5 days after service of the deposition notice but not later than 5 days before trial. CCP §2025.270(b). On motion or ex parte application, for good cause shown, the court may shorten or extend the time for scheduling a deposition. CCP §2025.270(d).

d. [§31.57] Interrogatories

The plaintiff may serve the defendant with written interrogatories without leave of court at any time that is 5 days after service of the summons on, or appearance by, the defendant, whichever occurs first. CCP §2030.020(c). On motion, with or without notice, the court, for good cause shown, may grant a plaintiff leave to propound interrogatories at an earlier time. CCP §2030.020(d). The defendant may serve the plaintiff with interrogatories at any time. CCP §2030.020(a). A response to the interrogatories must be served within 5 days, unless the court on motion shortens or extends the time for response. CCP §2030.260(b). There are Judicial Council form interrogatories that may be used by either side. See Judicial Council form DISC-003/UD-106.

e. [§31.58] Inspection Demands

The plaintiff may serve the defendant with a demand for inspection, copying, testing, or sampling of documents, electronically stored information, or land without leave of court at any time that is 5 days after service of the summons on, or appearance by, the defendant, whichever occurs first. CCP §2031.020(c). The defendant may serve the plaintiff with a demand for inspection, copying, testing, or sampling at any time. CCP §2031.020(a). The demand must specify a reasonable time for the inspection, copying, testing, or sampling that is at least 5 days after service

of the demand, unless the court for good cause has granted leave to specify an earlier date. CCP §2031.030(c)(2). The responding party has at least 5 days from the date of the service of the demand to respond, unless the court on motion shortens or extends the time for response. CCP §2031.260(b).

f. [§31.59] Request for Admissions

The plaintiff may serve the defendant with a request for admissions without leave of court at any time that is 5 days after service of the summons on or appearance by the defendant, whichever occurs first. CCP §2033.020(c). On motion, with or without notice, the court for good cause may grant the plaintiff leave to serve the request at an earlier time. CCP §2033.020(d). The defendant may serve the plaintiff with a request for admissions at any time. CCP §2033.020(a). The responding party has at least 5 days from the date of the service of the request to respond, unless the court on motion shortens or extends the time for response. CCP §2033.250(b).

g. [§31.60] Protective Orders

Good cause must be shown by a party seeking a protective order. See *Nativi v Deutsche Bank Nat. Trust Co.* (2014) 223 CA4th 261, 316–319, 167 CR3d 173 (abuse of discretion to enact sweeping protective order requested by mortgage loan servicer).

5. Motion To Quash Service or To Stay or Dismiss Action

a. [§31.61] Nature of Motion

The defendant may challenge whether service of the summons has been proper by filing a motion to quash service of summons on or before the last day on which the defendant must plead or within any further time the court may allow for good cause. CCP §418.10(a)(1). The defendant may also file a motion to stay or dismiss the action on the ground of inconvenient forum. CCP §418.10(a)(2); Cal Rules of Ct 3.1327(a). The notice of the motion to quash or to stay or dismiss must designate a hearing date not less than 3 nor more than 7 days after the notice is filed. CCP §1167.4(a); Cal Rules of Ct 3.1327(a). The CCP §1013 procedures governing methods of service apply. Cal Rules of Ct 3.1327(a).

A motion to quash service may be accompanied by a declaration in support of a peremptory challenge under CCP §170.6 to disqualify a judge from hearing the motion without converting the defendant's appearance into a general appearance. *Loftin v Superior Court* (1971) 19 CA3d 577, 579–580, 97 CR 215.

The defendant may file a motion to quash service, instead of a demurrer, to test whether the complaint states a cause of action for unlawful detainer and justifies issuance of a summons with the 5-day response time. *Smith v Municipal Court* (1988) 202 CA3d 685, 688, 245 CR 300; *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 1035, 194 CR 685. Service of a 5-day summons on a complaint that fails to state a cause of action for unlawful detainer is defective, does not give the court jurisdiction over the defendant, and is subject to a motion to quash. See *Greene v Municipal Court* (1975) 51 CA3d 446, 451–452, 124 CR 139. See also *Deal v Municipal Court* (1984) 157 CA3d 991, 996–997, 204 CR 79 (denial of motion to quash based on grounds that 5-day response time denies unlawful detainer defendants due process and equal protection).

The landlord or the landlord's attorney will often appear at the hearing on the motion and bring the process server; however, a registered process server's return establishes a presumption of the facts stated in the return. Evid C §647.

☛ JUDICIAL TIP: Service of notices and service of process require proper service of the notice, as opposed to actual receipt by the defendant. The Evidence Code presumptions are very helpful here. If served by a registered process server, the presumption is that service was proper and the burden is on the defendant to prove that it was NOT served. If service was not by a registered server, the burden is on the plaintiff to prove that it WAS served.

b. [§31.62] Opposition To Motion

Any opposition to the motion to quash or to stay or dismiss, and any reply to an opposition, may be made orally at the time of hearing. Cal Rules of Ct 3.1327(b). Alternatively, if a party seeks to have the court consider a written opposition in advance of the hearing, the written opposition must be filed and served on or before the court day before the hearing. Service must be by personal delivery, facsimile transmission, express mail, or other means consistent with CCP §§1010 and 1011–1013, and reasonably calculated to ensure delivery to the other parties no later than the close of business on the court day before the hearing. The court has the discretion to consider written opposition filed later. Cal Rules of Ct 3.1327(c).

c. [§31.63] Extension of Time To Plead

The service and filing of a motion to quash extends the defendant's time to plead to the complaint until 5 days after the defendant is served with a written notice of entry of an order denying the motion. The court

may extend this time for an additional period not exceeding 15 days for good cause. CCP §1167.4(b). A further extension of time to plead is afforded a defendant who files a petition for a writ of mandate seeking review of an order denying the motion to quash. See CCP §418.10(c). No default may be entered against the defendant before the expiration of the defendant's time to plead. CCP §418.10(d).

d. [§31.64] No Dismissal

When granting a motion to quash on the grounds of defective service, the judge should not dismiss the action. The plaintiff is entitled to attempt to perfect the court's jurisdiction over the defendant by valid service of process. *Roberts v Home Ins. Indem. Co.* (1975) 48 CA3d 313, 317, 121 CR 862.

e. [§31.65] Sanctions

Like other motions, a motion to quash that is made or opposed for an improper purpose or without legal or factual support may result in the imposition of sanctions under CCP §128.7.

6. [§31.66] Defaults/Default Hearings

Default proceedings in unlawful detainer cases are governed by CCP §1169. The clerk of the court must enter the default of a defendant who has failed to respond within the time allowed, on the plaintiff's application and proof of service of the summons and complaint. CCP §1169. If requested by the plaintiff, the clerk must immediately enter judgment for restitution of the premises and a writ of execution on the judgment. CCP §1169. The application for default judgment and the default judgment itself may indicate that the judgment includes tenants, subtenants, named claimants, and any other occupants of the premises. CCP §1169. Thereafter, the plaintiff may apply to the court for any other relief demanded in the complaint, *e.g.*, back rent, and attorneys' fees and costs. CCP §1169. See CCP §1174(b) (court must assess any damages and find amount of any rent due). Local practice dictates whether the plaintiff may proceed by way of declaration or only by way of a hearing with witnesses. See CCP §585(b), (d); Judicial Council form UD-116 (Declaration for Default Judgment by Court). Whether the plaintiff proceeds by declaration or by testimony, the plaintiff has the burden of proving all essential allegations entitling the plaintiff to the relief requested. See Evid C §500.

Default of servicemember. Under the Servicemembers Civil Relief Act (50 USC App §§501 et seq), a default judgment may not be entered unless the plaintiff files an affidavit or declaration stating whether the defendant is in military service or that the plaintiff is unable to determine

that fact. 50 USC App §521(a)–(b)(1). If it appears that the defendant is in military service, the court must appoint an attorney for the defendant before it may enter judgment. 50 USC App §521(b)(2). The court may require the plaintiff to file a bond if the court is unable to determine if the defendant is in military service. 50 USC App §521(b)(3). If the defendant is in the military, the court must, on application or its own motion, stay the proceedings at least 90 days when (a) there may be a defense that cannot be made without the defendant's presence, or (b) after due diligence, counsel is unable to contact the defendant or otherwise determine if a meritorious defense exists. 50 USC App §521(d); see 50 USC App §521(g) (servicemember's right to reopen default judgment).

7. [§31.67] Stipulation for Judgment

The parties may avoid trial and request that judgment be entered under a stipulation for judgment. CCP §664.6; see Judicial Council form UD-115.

P. Trial

1. [§31.68] Judicial Style

There may be as many styles of judging as there are judges. The judge who is new to unlawful detainer proceedings may wish to spend time with a judicial colleague who has handled unlawful detainer trials within the last year. That judge may provide insights into how unlawful detainer matters are handled locally (*e.g.*, some counties handle cases with attorneys involved on both sides differently from cases in which there is only one attorney involved), when prepared judgments are submitted after trial, how long it takes the local police authorities to serve a writ of possession, who the attorneys are that can be counted on to state the law accurately, the county's legal aid capability and standard practices, as well as any unique local issues like rent control.

When dealing with pro per litigants, some issues that a judge must decide include how far to go in requiring pro per litigants to know the rules of evidence and procedure, how much to intervene when they stumble or otherwise get frustrated, how long to tolerate discussion of legally irrelevant points, what tone to set for hearings at the outset of a court session, how to ensure that pro per defendants or plaintiffs will leave feeling that they have had their day in court, how much, if at all, to assist a pro per defendant in drafting a *Green* conditional judgment (*Green v Superior Court* (1974) 10 C3d 616, 631–632, 111 CR 704) in a successful habitability defense case, and how far to go in assisting a pro per landlord in drafting a judgment. Each judge must decide these matters based on judicial philosophy and experience.

2. Trial Setting

a. [§31.69] Assigning Trial Date and Giving Notice of Trial

Either party must use Judicial Council form UD-150 to request that the case be set for trial.

At the case management conference or review, if a trial date has not been previously set, the court must determine when the case will be ready for trial and must consider available trial dates. Cal Rules of Ct 3.727(14). The court may order, on the parties' stipulation or on its own motion, that the case is a short cause case because the time estimated for trial is 5 hours or less and must set the case for trial accordingly. Cal Rules of Ct 3.735(a), (b). Five days' notice of the trial must be given. CCP §594(a).

b. [§31.70] Trial Preference

Unlawful detainer proceedings are given statutory precedence in trial setting over all other civil actions. CCP §1179a; *Mobil Oil Corp. v Superior Court* (1978) 79 CA3d 486, 494, 145 CR 17. If the defendant has appeared and answered, the trial must be set no later than the 20th day after the request to set the trial is made. CCP §1170.5(a). This time may be extended on the agreement of the parties or after holding a hearing. CCP §1170.5(b)–(c). Unless good cause is shown to the court's satisfaction, no extension of time may exceed 10 days without the consent of the adverse party. CCP §1167.5. For discussion of timing with respect to discovery, see §31.54.

If the defendant no longer occupies the property, the plaintiff is not entitled to a preferential trial setting. CC §1952.3; *Fish Constr. Co. v Moselle Coach Works, Inc.* (1983) 148 CA3d 654, 659, 196 CR 174 (once tenant has delivered possession of premises to landlord, need for summary proceeding no longer exists).

c. [§31.71] Holding Trial Beyond Statutory Period

If the trial is not held within the time specified in CCP §1170.5, the court, on its own motion or the motion of a party, on finding that there is a reasonable probability that the plaintiff will prevail in the proceeding, must determine the amount of any damages the plaintiff will suffer by reason of the extension. The court must then issue an order requiring the defendant to pay that amount into the court as the rent that would have otherwise become due and payable or into an escrow designated by the court for as long as the defendant remains in possession, pending the termination of the proceeding. CCP §1170.5(b)–(c).

The court's determination of the amount of damages must be based on the plaintiff's verified statement of the contract rent, any verified

objection to it filed by the defendant, and any evidence presented at the hearing. This determination must include consideration of any evidence presented by the parties concerning diminution of value or any setoff permitted by law. CCP §1170.5(c). The court may order that the payments made by the defendant be invested in an insured, interest-bearing account. CCP §1170.5(g). If the defendant fails to make a payment ordered by the court, the trial must be held within 15 days of the date the payment was due. CCP §1170.5(d).

After trial, the court must determine the distribution of the payment made into court or the escrow designated by the court. CCP §1170.5(f). If the payments have been invested in an interest-bearing account, the court must allocate the interest to the parties in the same proportions as the payments are allocated. CCP §1170.5(g). Any cost for administering the escrow account is recoverable by the prevailing party as a cost of suit. CCP §1170.5(e).

d. [§31.72] Delay Reduction Guidelines

The Judicial Council time goals for case resolution provide that courts should strive to resolve 90 percent of unlawful detainer cases within 30 days of filing, and 100 percent within 45 days of filing. Cal Rules of Ct, Standards of J Admin 2.2(i).

e. [§31.73] No Stay of Action

A judge may not temporarily stay an unlawful detainer action on the ground that a related action is pending on appeal and may have a collateral estoppel effect. *Koch-Ash v Superior Court* (1986) 180 CA3d 689, 697, 225 CR 657.

3. Conduct of Trial

a. [§31.74] Right to Jury Trial

An unlawful detainer action is considered to be an action at law and therefore triable by a jury unless a jury is waived. CCP §§1171, 631(f) (waiver of jury); *Marquez-Luque v Marquez* (1987) 192 CA3d 1513, 1519, 238 CR 172. See *Dep't of Transp. v Kerrigan* (1984) 153 CA3d Supp 41, 45–46, 200 CR 865 (defense of breach of warranty of habitability and retaliatory eviction defense under CC §1942.5 are legal defenses triable by jury). A jury is waived either expressly under CCP §631(f)(2) or (3) or by a failure to demand a jury trial within 5 days of notice of trial setting. CCP §631(f)(4). The 5-day period is extended by 5-calendar days when the clerk's notices are sent by mail. See CCP §1013(a). Predispute jury trial waivers are not enforceable. *Grafton Partners LP v Superior Court* (2005)

36 C4th 944, 961, 967, 32 CR3d 5. A court's only remedy when a defendant fails to deposit damages into an escrow under CCP §1170.5(c) after a requested jury trial is not held within the required time is to advance the trial date; denying a jury trial request and conducting a bench trial instead is reversible error per se. *Garcia v Cruz* (2013) 221 CA4th Supp 1, 4–7, 164 CR3d 408. Defendants commonly file a "Demand for Jury" with the answer, but the notice is informational only if the requirements of CCP §631 are not followed.

The party requesting a jury must deposit the jury fees with the court 5 days before the date set for trial. CCP §631(b), (c)(1) (advance jury fee may not exceed $150). However, the nonrefundable jury-fee provision in CCP §631(b) does not override a waiver of jury fees and expenses. *Munoz v Silva* (2013) 216 CA4th Supp 11, 15, 157 CR3d 889 (denying jury trial to unlawful detainer defendant who had been granted jury fee waiver deprived her of constitutional right to jury trial and was miscarriage of justice and reversible error per se); see also *Kim v De Maria* (2013) 218 CA4th Supp 1, 5, 160 CR3d 849 (defendant's request for initial fee waiver to answer unlawful detainer complaint because he received public benefits included additional request for jury fee waiver, clerk lacked authority to partially grant fee-waiver application, and court erred when it denied defendant right to jury trial). The court should not deny a tenant's request for a jury trial, however, even if jury fees were not timely posted, unless the failure to post the fees would prejudice the landlord. See *Johnson-Stovall v Superior Court* (1993) 17 CA4th 808, 809–812, 21 CR2d 494.

☛ JUDICIAL TIP: In practice this means that a jury is waived unless the party requests a jury within 5 days of the earliest of service of a "Request to Set Case for Trial" by the other party or the "Notice of Trial Setting" by the court. If the notice is made by mail, the time is extended by 5 days. By local rule, most courts require an Issue Conference Statement to be filed at least 5 days before the date set for a jury trial. Failure to file may also constitute waiver of the jury.

The jury is selected in the same manner as any civil jury would be chosen in that court. CCP §1171. The parties must submit jury instructions to the court before the first witness is sworn. CCP §607a.

b. [§31.75] Burden of Proof

The landlord has the burden of proof as to all essential elements of the prima facie case, *e.g.*, the existence of a landlord-tenant relationship, the tenant's wrongful occupation of the premises, proper service of all required notices, and the tenant's default in the payment of rent. See Evid

C §400; *Ahlers v Barrett* (1906) 4 CA 158, 160, 87 P 232. The tenant bears the burden of proof on affirmative defenses. See Evid C §500.

☛ JUDICIAL TIP: If a trial lasts for less than 8 hours or 1 day, and a party expects an unfavorable ruling, he or she may request, before the matter is submitted, a statement of decision "explaining the factual and legal basis for [the court's] decision as to each of the principal issues at trial." CCP §632. The request must specify the controverted issues for which a statement of decision is requested, and any party may make proposals about the content of the statement of decision. A statement of decision may be oral, on the record and in front of the parties, when a trial is shorter than 1 day or 8 hours.

If it appears from evidence introduced at trial that the defendant is guilty of an unlawful detainer other than that charged in the complaint, the judge must order the amendment of the complaint to conform to proof. CCP §1173.

c. [§31.76] Examination of Witnesses

The judge has a right to examine the witnesses called by the parties. See generally *People v Hawkins* (1995) 10 C4th 920, 947–948, 42 CR2d 636, overruled on other ground in 23 C4th 101, 110 (death penalty case). Generally, the judge should allow the parties to conclude their examination, and then intervene if additional questions (1) are necessary to clarify ambiguities in the witness's testimony, (2) might be helpful to the jury's understanding of the witness's testimony on a crucial point, or (3) might elicit answers from the witness that would affect the judge's decision in a nonjury trial. 10 C4th at 947–948. The judge should conduct any such examination impartially, so that the jury will not infer the judge's opinions about the case. 10 C4th at 948. Many judges are reluctant to question witnesses in a jury trial, but will freely do so in a nonjury trial.

When a party appears in pro per, the judge may call the party and examine him or her as a witness, although the judge should not act as an attorney for the party in presenting evidence. See *Taylor v Bell* (1971) 21 CA3d 1002, 1008, 98 CR 855. Many judges would rarely examine a pro per party in a jury trial, but might do so in a nonjury trial to expedite the proceedings. Any such examination should be limited to minor clarifications; the judge should not intervene to assist a pro per party in presenting his or her case.

4. Entry of Judgment

a. [§31.77] In General

Judgment must be entered on the trial. CCP §1170.5(a). If it appears that the tenant is guilty of the charged offense, judgment must be rendered against the tenant. CCP §1164. All persons who enter the premises under the tenant after the unlawful detainer action has been filed are bound by the judgment as if they had been made parties to the action. CCP §1164. If the jury's verdict or the court's findings are for the plaintiff, judgment must be entered for possession of the premises. CCP §1174(a).

For an optional Judicial Council form of judgment after trial or by default, see form UD-110. For a conditional judgment attachment based on a breach of the covenant to provide habitable premises, see form UD-110S.

b. [§31.78] Determining "Rent Due" and Damages

In general. The jury (or the judge in a nonjury trial) must assess the damages suffered by the plaintiff as a result of the unlawful detainer and, if the unlawful detainer is based on a default in the payment of rent, find the amount of any rent that is due. CCP §1174(b); *Saberi v Bakhtiari* (1985) 169 CA3d 509, 515, 215 CR 359. The "rent due" is the amount of rent that is due and unpaid under the lease or tenancy before expiration of the 3-day notice demanding payment of the unpaid rent or delivery of possession. "Damages" include the reasonable rental value of the premises for the period the tenant continues in possession after expiration of the 3-day notice until entry of judgment. *Superior Motels, Inc. v Rinn Motor Hotels, Inc.* (1987) 195 CA3d 1032, 1066, 241 CR 487.

A tenant who has made a payment to a utility under the Public Utilities Code may deduct the payment from the rent. CC §1942.2; see Pub Util C §§777, 777.1, 10009, 10009.1, 12822, 12822.1, 16481, 16481.1.

Rental value. The contract rent is evidence of the reasonable rental value of the premises. However, because the proceeding is not an action on the contract, but is an action for recovery of possession and for damages caused by the unlawful detainer, the rental value may be greater or less than the contract rent. *Lehr v Crosby* (1981) 123 CA3d Supp 1, 8–9, 177 CR 96. In determining the rental value for purposes of assessing damages, the jury (or the judge) is not limited by local rent control regulations. *Adler v Elphick* (1986) 184 CA3d 642, 649–650, 229 CR 254. The rental value of the premises for the period the defendant continues in possession *after* entry of the judgment is not properly included in the judgment as an element of damages. *Superior Motels, Inc. v Rinn Motor Hotels, Inc.*, *supra*, 195 CA3d at 1073.

☛ JUDICIAL TIP: The most commonly used method of computing daily rental value is to take the monthly rent and divide by 30, although 12 times the monthly rent divided by 365 (366 on a leap year) yields a slightly lower, more accurate daily rental value figure.

Period for which rent is due. Rent accruing before expiration of the period specified in the notice to quit may be recovered in an unlawful detainer proceeding only if the landlord has served the tenant with a 3-day notice to pay rent or quit under CCP §1161(2). *Saberi v Bakhtiari, supra,* 169 CA3d at 513. This unpaid rent is not recoverable in an unlawful detainer proceeding based on a 30-day notice to quit under CC §1946 or a notice to quit based on a violation of a covenant in the lease other than for the payment of rent. The landlord is only entitled to recover the daily rental value of the premises from the expiration of the notice until entry of judgment. 169 CA3d at 512–516; *Castle Park No. 5 v Katherine* (1979) 91 CA3d Supp 6, 9–11, 154 CR 498. This same reasoning should apply to a 60-day notice under CC §1946.1.

Statutory damages. In an unlawful detainer action, if the defendant is found guilty of forcible entry or forcible unlawful detainer and malice is shown, the plaintiff may be awarded statutory damages of up to $600 in addition to actual damages, including the rent found due. The trier of fact must determine whether actual damages, statutory damages, or both, should be awarded, and judgment must be entered accordingly. To be awarded these damages, the forcible entry or forcible unlawful detainer must be pleaded and proved. CCP §1174(b).

There is no authority, however, to order abatement of rent in favor of a successful commercial tenant. *Underwood v Corsino* (2005) 133 CA4th 132, 135–137, 34 CR3d 542.

Liquidated damages. A liquidated damages provision in a residential lease is normally void, except when the parties specifically agree and when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage. If the landlord makes such a showing, the amount agreed on is presumed to represent the amount of damage suffered by the breach. CC §§1671(d), 1951.5; *Orozco v Casimiro* (2004) 121 CA4th Supp 7, 10–11, 17 CR3d 175 (late fee provision void when landlord neither pleaded nor proved damages).

c. [§31.79] Prejudgment Interest

The plaintiff is entitled to recover prejudgment interest on the past due rent from the date each installment became due. See CC §§3287(a), 3302; CCP §1174(c); *Sullivan v Wellborn* (1948) 32 C2d 214, 220, 195 P2d 787. The court may award prejudgment interest even if the complaint

does not contain a prayer for interest. *Superior Motels, Inc. v Rinn Motor Hotels, Inc.* (1987) 195 CA3d 1032, 1067, 241 CR 487.

Prejudgment interest is not recoverable under CC §3287(a) on the amount awarded to the plaintiff as damages for the reasonable rental value of the property. *Wisper Corp. v California Commerce Bank* (1996) 49 CA4th 948, 960, 57 CR2d 141. This is because prejudgment interest is not appropriate when the amount of damages cannot be resolved except by verdict or judgment. 49 CA4th at 960; *Superior Motels, Inc. v Rinn Motor Hotels, Inc., supra,* 195 CA3d at 1072–1073. Prejudgment interest is also not recoverable under CC §3287(b). That section applies only to damages based on a cause of action in contract, and the defendant's obligation to pay the plaintiff reasonable rental value is not based on contract, but on the obligation imposed by law to compensate the plaintiff for the defendant's continued occupancy of the premises. 195 CA3d at 1073.

d. [§31.80] Costs

The prevailing party is entitled to recover costs under CCP §1032(b). For a discussion of allowable costs, see *California Judges Benchbook: Civil Proceedings—Trial, Second Edition,* §§16.30–16.32 (Cal CJER 2010).

Under CCP §1034.5, the plaintiff who recovers judgment for possession of the premises may recover the funds advanced to the sheriff or marshal for eviction by filing a supplemental cost memorandum. Cal Rules of Ct 3.2000(a). The court must enter judgment on this supplemental cost memorandum unless the defendant has filed a motion to tax costs within 10 days after service of the supplemental cost memorandum. In that case, the costs must be determined by the court. Cal Rules of Ct 3.2000(b), (c).

A tenant who prevails based on the landlord's breach of the implied warranty of habitability is entitled to recover his or her costs. CCP §1174.2(a)(5). If the court determines that there has been no substantial breach of the implied warranty of habitability by the landlord or if the tenant fails to pay all rent accrued to the date of trial as required by the court, the landlord is considered the prevailing party for purposes of awarding costs. CCP §1174.2(b).

e. [§31.81] Attorneys' Fees

Fees for acting in bad faith. Under CCP §128.5(a), the court may order a party or counsel, or both, to pay the reasonable expenses, including attorneys' fees, incurred by the other party "as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."

Statutory fees. In unlawful detainer cases, attorneys' fees are recoverable only if an agreement between the parties provides for their recovery or if the parties are entitled to attorneys' fees by statute. CCP §1021; *Selma Auto Mall II v Appellate Dep't* (1996) 44 CA4th 1672, 1684, 52 CR2d 599. See CC §1717 (general statute governing contractual attorneys' fees in actions on contracts); CCP §1174.2(a)(5) (court must award attorneys' fees to tenant when tenant prevails on habitability if provided by contract or any statute); CCP §1174.2(b) (court must award attorneys' fees to landlord if court determines that there has been no substantial breach of the warranty of habitability or if tenant fails to pay rent accrued to date of trial as ordered by court); CCP §1174.21 (landlord that files unlawful detainer action based on tenant's nonpayment of rent and that is liable for violating CC §1942.4 (see §31.30), is liable to tenant for reasonable attorneys' fees and costs in amount to be fixed by court).

Fees provided under lease. If attorneys' fees are provided for in the lease, the prevailing party should be allowed these fees as a recoverable cost under CCP §1033.5(a)(10). A court must reasonably exercise its discretion "given the totality of the case and all the facts and circumstances" when determining if a party is a prevailing party under CC §1717 for awarding attorneys' fees pursuant to a lease's fee clause. See *De La Cuesta v Benham* (2011) 193 CA4th 1287, 1290, 1299–1300, 123 CR3d 453 (landlord was prevailing party when he received repossession of property and 70% of requested monetary damages). A defendant may be a prevailing party where neither the plaintiff nor the defendant obtains any relief. See *David S. Karton, A Law Corp. v Dougherty* (2014) 231 CA4th 600, 611–612, 180 CR3d 55 (when an attorney sued his former client for unpaid fees but recovered nothing at trial, the former client was the prevailing party under CC §1717, and was entitled to costs as a matter of right).

Civil Code §1717 establishes a mutuality of remedy when a contract provision makes recovery of attorneys' fees available for only one party. Therefore, if a lease provides that the landlord is entitled to recover its attorneys' fees from the tenant in any action brought by the landlord to recover unpaid rent or for the tenant's breach of any covenant of the lease, the tenant may also recover his or her attorneys' fees if the tenant prevails in the action even if the lease does not specifically provide for the tenant's recovery of fees. *Fairchild v Park* (2001) 90 CA4th 919, 923–924, 929–930, 109 CR2d 442 (reciprocity provision of CC §1717 does not, however, entitle tenant, as prevailing party, to recover expert witness fees and other litigation costs).

A tenant who prevails on a claim that the landlord breached the implied warranty of habitability may be awarded attorneys' fees under the lease. 90 CA4th at 924–928. A federally funded legal aid foundation that

was assigned a tenant's rights may recover attorney's fees based on contract, not on substantive statute or common law. *Peretz v Legal Aid Foundation of Los Angeles* (2004) 122 CA4th Supp 1, 6, 18 CR3d 863.

Fees on dismissal. Under CC §1717(b)(2), a tenant cannot be the prevailing party under the lease when the landlord voluntarily dismisses the unlawful detainer action before trial. This rule applies even if the lease authorizes the recovery of attorneys' fees on a voluntary dismissal. See *Santisas v Goodin* (1998) 17 C4th 599, 617–619, 71 CR2d 830; *Mitchell Land & Improvement Co. v Ristorante Ferrantelli, Inc.* (2007) 158 CA4th 479, 485–490, 70 CR3d 9 (dismissal of action based on an alleged breach of contract during an unexpired term). However, if an unlawful detainer action is brought to oust a holdover tenant after expiration of the lease, the action is based on tortious conduct (*e.g.*, trespass), and it is an action sounding in tort. For such a noncontract claim, CC §1717 does not bar recovery of attorneys' fees if the action is voluntarily dismissed. *Drybread v Chipain Chiropractic Corp.* (2007) 151 CA4th 1063, 1071–1075, 60 CR3d 580.

Fees on acceptance of CCP §998 offer. In a landlord's action for breach of contract against the tenant in which the landlord accepts the tenant's CCP §998 offer, the landlord is entitled to reasonable attorneys' fees and costs as provided in the lease, because the landlord is the prevailing party. *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 263–265, 118 CR2d 276.

Attorneys whose fees are recoverable. A prevailing tenant may be awarded attorneys' fees even when the tenant is represented by a legal services organization without charge (see *Beverly Hills Prop. v Marcolino* (1990) 221 CA3d Supp 7, 11, 270 CR 605), or when the tenant has a contingency fee arrangement with his or her attorney (*Fairchild v Park, supra,* 90 CA4th at 924).

Procedure for claiming fees. An award of attorneys' fees based on the lease may be made only on a noticed motion or on entry of a default judgment. See CCP §1033.5(c)(5); Cal Rules of Ct 3.1700(a)(2), 3.1702(b)(1); *P.R. Burke Corp. v Victor Valley Wastewater Reclamation Auth.* (2002) 98 CA4th 1047, 1052, 120 CR2d 98 (motion is required to determine both entitlement to and amount of fees); *Russell v Trans Pac. Group* (1993) 19 CA4th 1717, 1725, 24 CR2d 274 (fees may not be claimed by filing memorandum of costs); and *Kaufman v Diskeeper Corp.* (2014) 229 CA4th 1, 11, 176 CR3d 757 (party seeking fees incurred before judgment under CC §1717 need not file memorandum of costs in addition to filing fee motion).

The trial judge has the discretion to award less than the amount of fees requested. *11382 Beach Partnership v Libaw* (1999) 70 CA4th 212, 220, 82 CR2d 533.

☛ JUDICIAL TIP: Requests for attorneys' fees should be considered as in any other case. Factors to consider should include hourly rates in the legal community, time expended/work performed, complexity of the issues, and the result obtained. The standard is those legal services "reasonably necessary" to obtain the judgment verdict rendered. Wide discretion in arriving at a "reasonable fee" is given. The only basis for reversal is an amount so large (or small) as to shock the conscience. But be careful in awarding attorneys' fees when dealing with multiple defendants. Fees are only recoverable against those defendants who are parties to the lease agreement. In some unlawful detainer judgments, the judge may award attorneys' fees against some defendants, but not against others.

f. [§31.82] Security Deposit Offsets

Although tenants may claim an offset for an unrefunded security deposit, presumably the security deposit is not due until the tenant has vacated the premises. See CC §1950.5(g)(1) (landlord of residential property has 21 calendar days from time tenant vacates premises to furnish tenant with itemized statement of funds withheld from security deposit and refund balance to tenant), CC §1950.7(c) (landlord of nonresidential property must refund deposit within 30 days after landlord receives possession of premises).

A tenant who is dissatisfied with the amount of the refund at that time may pursue the landlord in a later court action. See CC §1950.5(*l*), (n) (landlord of residential property may be liable for statutory damages of up to twice amount of security in addition to actual damages; action may be filed in small claims court if damages claimed do not exceed $5000, or $10,000 if the tenant is a natural person), CC §1950.7(f) (landlord of nonresidential property may be liable for statutory damages of up to $200 in addition to actual damages if retention of deposit was in bad faith). In any event, the landlord need not apply the security deposit to the rent before serving the notice to quit. See *Willys of Marin Co. v Pierce* (1956) 140 CA2d 826, 829, 296 P2d 25 (foreclosure proceedings need not be brought before unlawful detainer action, even when mortgage is given as security for rent).

The landlord in a commercial lease, however, may not retain the security deposit to cover damages for *future* rent. A security deposit may be applied only against unpaid rent that has accrued as of the date required for return of the deposit. *250 LLC v PhotoPoint Corp. (USA)* (2005) 131 CA4th 703, 712, 716, 726–728, 32 CR3d 296; see CC §1950.7(c).

The lease or rental agreement may not provide that the security deposit is nonrefundable. CC §1950.5(m).

Q. Posttrial Matters

1. [§31.83] Appeal of Judgment/Request for Stay of Execution

Defendants often request a stay of execution of the judgment pending appeal. Judges have the authority to stay execution of the judgment without the plaintiff's consent. CCP §918(a). If the request for the stay has been made ex parte, judges will generally require the defendant to notify the plaintiff before granting the request. A judge may not stay enforcement for more than 10 days beyond the last date for filing a notice of appeal without the adverse party's consent. CCP §918(b).

Procedures governing stays of unlawful detainer judgments pending appeal are set out in CCP §1176 and include the following conditions (CCP §1176(a)):

(1) There is no automatic stay if the defendant appeals;

(2) Any request for a stay must first be directed to the judge before whom the judgment was rendered;

(3) A stay must be granted if the judge finds that the moving party will suffer extreme hardship if no stay is granted and a stay will not irreparably injure the nonmoving party;

(4) Denial of a stay is reviewable by writ;

(5) Any stay may be subject to any conditions the court deems just; and

(6) Any stay must be conditioned on payment of the reasonable monthly rental value to the court each month in advance as rent would otherwise become due. "Reasonable rental value" means the contract rent unless the rental value has been modified by the court; in such event, the modified rental value must be used. The last requirement is often a barrier to ordering a stay because the defendant may not be able to pay the advance rent when requesting a stay.

The provision of CCP §1176(a) (authorizing a court to condition a stay on whatever conditions the court deems just) means that the court is authorized to impose a just condition that is otherwise authorized by law and that bears some reasonable relationship to the injury the nonmoving party might otherwise suffer from an unconditional stay. *Selma Auto Mall II v Appellate Dep't* (1996) 44 CA4th 1672, 1686–1687, 52 CR2d 599. Such conditions may include provisions to protect the status quo pending appeal and to pay the damages the nonmoving party may sustain because of the stay, but the court has no authority to impose a condition contrary to a statutory provision or case law. 44 CA4th at 1687 (court could not condi-

tion stay on sublessee's posting of bond to secure payment of attorneys' fees when sublessee was not liable for these fees).

If the judge denies the request for a stay, the defendant may petition the appropriate appeals court for an extraordinary writ. CCP §1176(a).

Appeals from unlawful detainer proceedings are governed by CCP §§901–923. See CCP §1178; *Anchor Marine Repair Co. v Magnan* (2001) 93 CA4th 525, 528–530, 113 CR2d 284 (appeal of judgment in unlawful detainer action that is limited civil case must be filed with appellate division of superior court, not with court of appeal). An appeal from an unlawful detainer judgment is not rendered moot when a defendant relinquishes possession of the property pending appeal but "challenge[s] the award of money damages, attorney fees, and costs." *Kruger v Reyes* (2014) 232 CA4th Supp 10, 15, 181 CR3d 521. On the trial court's role during an appeal, see *California Judges Benchbook: Civil Proceedings—After Trial, Second Edition*, chap 10 (Cal CJER 2014).

Servicemember's right to stay. Under the Servicemembers Civil Relief Act (50 USC App §§501 et seq), the court may, on its own motion, and must, on application of a servicemember, stay execution in any proceeding commenced before or during military service, or within 90 days of termination, when the servicemember is materially affected by military service in complying with a court judgment or order. 50 USC App §524. A stay may be ordered for the period of military service, and 90 days thereafter, or for any part of that period. The court may set reasonable terms and installment payments. 50 USC App §525(a).

2. Enforcement of Unlawful Detainer Judgment

a. [§31.84] Issuance of Writ of Possession

An unlawful detainer judgment is enforced by a writ of possession. CCP §§715.010(a), 715.020, 1174(d). The court, on the plaintiff's request, must issue the writ immediately. CCP §1170.5(a). However, if the proceeding is for an unlawful detainer after default in the payment of rent, the lease has not expired, and the notice required by CCP §1161 does not state the landlord's election to declare a forfeiture, the court may order that a writ will not be issued to enforce the judgment until the expiration of 5 days after entry of judgment. This 5-day delay is required if the lease is for a term of more than 1 year and does not contain a forfeiture clause. CCP §1174(c). The purpose of this provision is to give the tenant the opportunity to cure the default and retain possession by paying past due rent, damages, and costs. See CCP §1174(c).

The writ of possession must describe the property and state (CCP §715.010(b)) the following:

- That if the property is not vacated within 5 days from the date of service of a copy of the writ on the occupant or, if the copy of the writ is posted, within 5 days from the date a copy of the writ is served on the judgment debtor, the levying officer will remove the occupants from the property and place the judgment creditor in possession.
- That any personal property remaining on the premises after the judgment creditor has been placed in possession will be sold or disposed of under CCP §1174, unless the judgment debtor or other owner pays the creditor the reasonable cost of storage and takes possession of the personal property within 15 days of the time the creditor takes possession of the premises. On the requirements for disposing of personal property remaining on the premises, see CCP §§715.030, 1174(e)–(m); see also CC §§1980–1991 (proper disposal of tenant's personal property after tenancy terminated through surrender or abandonment and tenant has vacated), CC §1965 (disposition of personal property on tenant's request), and CC §§1993–1993.09 (optional procedure for public sale of vacated commercial tenant's personal property after notice).
- The date the complaint was filed.
- The date on which a judge will hear objections to enforcement of the judgment of possession that are filed under CCP §1174.3, and the daily rental value of the property as of the date the complaint was filed, when a summons, complaint, and prejudgment claim of right to possession were not served on the occupants in accordance with CCP §415.46. See §§31.42–31.45.
- That the writ applies to all tenants, subtenants, named claimants, and other occupants of the premises when a prejudgment claim of right to possession was served on the occupants in accordance with CCP §415.46.

A writ of possession issued in an unlawful detainer action must be enforced without delay, notwithstanding receipt of notice that the defendant has filed a bankruptcy proceeding. CCP §715.050; but see *In re Butler* (Bankr CD Cal 2002) 271 BR 867, 876 (bankruptcy debtor/tenant has equitable interest even after landlord obtains unlawful detainer judgment; to obtain relief from automatic stay, landlord must request relief from bankruptcy court; CCP §715.050 is preempted and unconstitutional).

b. Execution of Writ

(1) [§31.85] Service of Writ

To execute a writ of possession, the levying officer must serve a copy of the writ on an occupant of the property. CCP §715.020(a). Service must be made by leaving a copy of the writ with the occupant personally or, in the occupant's absence, with a person of suitable age and discretion found on the property when service is attempted, and who is either the occupant's employee or agent or a member of the occupant's household. CCP §715.020(a). The sheriff need not conduct a fraud investigation before following a court order to evict a tenant from a property; likewise, "[t]he county recorder is not required to conduct a fraud investigation before recording documents that are valid on their face." *Lyons v Santa Barbara County Sheriff's Office* (2014) 231 CA4th 1499, 1503–1504, 181 CR3d 186.

When the levying officer is unable to serve an occupant at the time service is attempted, the officer must execute the writ by posting a copy in a conspicuous place on the property and serving a copy on the judgment debtor personally or by mail. CCP §715.020(b). If the debtor's address is unknown, the copy of the writ may be served by mailing it to the address of the property. CCP §715.020(b).

(2) [§31.86] Five-Day Period To Vacate

If the judgment debtor and other occupants do not vacate the property within 5 days from the date the writ is served, the levying officer must remove them from the property and place the judgment creditor in possession. CCP §715.020(c). This 5-day period is not extended by service of the writ by mail. CCP §715.020(c).

☛ JUDICIAL TIP: A writ of execution for a money judgment is issued after the tenant is evicted and the writ of possession is returned to the court. See Judicial Council form EJ-130 (Writ of Execution). The money judgment is enforced in the same manner as any other civil judgment. See CCP §§695.010–709.030.

(3) [§31.87] Removal of Occupants Not Named in Writ

The levying officer may not remove any person who is not named in the writ and who claims (1) a right to possession that accrued before the commencement of the unlawful detainer action, or (2) to have been in possession on the date the action was filed. CCP §715.020(d). If the summons, complaint, and prejudgment claim of right to possession were served on the occupants in accordance with CCP §415.46, no occupant,

whether named in the judgment or not, may object to its enforcement under CCP §1174.3 (see §§31.42–31.45). CCP §715.020(d). All persons who enter the property under the tenant after commencement of the unlawful detainer action are bound by the judgment. CCP §1164.

(4) [§31.88] Service of Writ by Registered Process Server

A registered process server designated by the judgment creditor may serve the writ when the levying officer fails to do so within 3 days (excluding Saturday, Sunday, and any legal holiday) after receiving it. CCP §715.040(a). The levying officer is required to perform all other duties under the writ, including removing the occupants, and must return the writ to the court. CCP §715.040(c). A judge has the discretion to allow the process server's fee as a recoverable cost on the judgment creditor's motion under CCP §685.080 for costs incurred in enforcing the judgment. CCP §685.080(c). The allowable amount of the fee is governed by CCP §1033.5(a)(4)(B). CCP §715.040(d).

(5) [§31.89] Effect of Tenant's Bankruptcy Petition

When the tenant files a bankruptcy petition after the landlord has obtained a judgment and writ of possession against the tenant, the sheriff is required by CCP §715.050 to enforce the writ. *Lee v Baca* (1999) 73 CA4th 1116, 1119–1122, 86 CR2d 913; see §31.84. The automatic stay provisions of 11 USC §362(a) do not prohibit a landlord from regaining possession of residential premises from a wrongfully holding-over bankruptcy debtor-tenant, as long as the landlord only seeks to repossess the property and not to enforce any other portion of the unlawful detainer judgment against the tenant and the tenant's bankruptcy estate, such as collecting money damages. 73 CA4th at 1121. There may be a contrary result, however, if the tenancy is commercial.

(6) [§31.90] Effect of Improperly Issued Writ

When a writ of possession is improperly issued, a tenant who is evicted under the writ may have a cause of action against the landlord for forcible entry and detainer, but only if the landlord has reason to know that the writ is improper, *e.g.*, because it was issued under a judgment that had been set aside. Liability is not imposed on a landlord who relies on a properly issued court order that is later determined to have been issued erroneously as a result of legal error. *Glass v Najafi* (2000) 78 CA4th 45, 49–51, 92 CR2d 606.

3. Other Posttrial Matters

a. [§31.91] Relief From Forfeiture

Within 30 days after forfeiture of an unexpired rental agreement term, a tenant may apply to the court for relief from the forfeiture. CCP §1179. In practice, requests for this relief are rare. Any application for relief must be made on a verified petition, setting forth the facts on which the relief is sought. Notice of the application and a copy of the petition must be served on the plaintiff, who may appear and contest the application. CCP §1179.

A trial court must consider the merits of a tenant's motion for relief from forfeiture of a lease, and use its discretion to grant or deny the motion, even if the landlord obtained a default judgment. *SRO Housing v Dyce* (2014) 223 CA4th Supp 1, 3–4, 167 CR3d 394 (abuse of discretion not to consider merits of CCP §1179 motion). If relief is to be granted under CCP §1179, it must be conditioned on full payment of rent due or full performance of applicable conditions or covenants. Under CCP §1179, a court has equitable power to consider and adjust all the equities between the parties. *Gill Petrolium Inc. v Hayer* (2006) 137 CA4th 826, 833, 40 CR3d 648 (court has jurisdiction to reconsider and modify per diem damages).

If a tenant was wrongfully evicted before the lease expired, the tenant's right to sue for breach of the lease survives an initial unfavorable judgment and judicially sanctioned eviction. *Munoz v MacMillan* (2011) 195 CA4th 648, 662, 124 CR3d 664 (commercial lease).

b. [§31.92] Recovery of Costs

A landlord may file a motion to recover the cost of expenses advanced to the sheriff or marshal for eviction. CCP §1034.5. See §31.80.

c. [§31.93] New Trial Motion

Any motion for a new trial must, in general, be made in accordance with CCP §§656–663.2. CCP §1178. For a detailed discussion of motions for new trial, see *California Judges Benchbook: Civil Proceedings—After Trial, Second Edition*, chap 2 (Cal CJER 2014).

d. [§31.94] Contempt

A person who is evicted from rented premises by the judgment or process of the court, and who reenters or takes possession of the premises without having a right to do so (or induces any other person to do so), is in contempt of court. CCP §1210.

R. Unlawful Detainer and Foreclosure Sales

1. [§31.95] Purchaser's Action Against Tenant

The purchaser of leased property at a deed of trust foreclosure sale may bring an unlawful detainer action against a tenant who is occupying the property. See CCP §1161a; *Vella v Hudgins* (1977) 20 C3d 251, 255, 142 CR 414 (CCP §1161a extends summary eviction proceedings beyond conventional landlord-tenant relationship to include certain purchasers of property). Under CCP §2924(a), the trustee need not obtain a court order or judgment before the trustee's sale, and such an order is not a prerequisite to an unlawful detainer action. *Lyons v Santa Barbara County Sheriff's Office* (2014) 231 CA4th 1499, 1505, 181 CR3d 186. The plaintiff-purchaser need prove only that the sale was in compliance with CC §2924 and that he or she has thereafter duly perfected title. *Stephens, Partain & Cunningham v Hollis* (1987) 196 CA3d 948, 952, 242 CR 251. The occupant may not raise other issues regarding the validity of the trust deed or other defects in the plaintiff's title. See *MCA, Inc. v Universal Diversified Enters. Corp.* (1972) 27 CA3d 170, 176, 103 CR 522. A recital in the trustee's deed that all the requirements of CC §§2924–2924.5 have been met is prima facie evidence of compliance. CC §2924(c).

Additional notice. The trustee or authorized agent must also post and mail by first class, at least 20 days before the sale of residential real property (nonjudicial foreclosure), an additional notice to the occupants concurrently with the mailing of the notice of trustee sale if the billing address for the note is different than the property address. CC §2924.8(a)(1), (d).

The additional notice must include statements that (1) the new owner may give the tenant a new lease or rental agreement or provide a 90-day eviction notice, and (2) the tenant may have a right to stay longer than 90 days. If the tenant has a fixed-term lease, the new owner must honor the lease unless the owner will occupy the property as a primary residence or under other limited circumstances. CC §2924.8(a)(1). The additional notice must also state that some cities have a "just cause for eviction" law, under which all rights and obligations under the lease or tenancy continue after foreclosure. CC §2924.8(a)(1).

Notice from purchaser. The purchaser must give a tenant, who was not the former owner, notice that is equivalent to the term of the lease (*e.g.*, weekly, monthly), but not exceeding 30 days. CCP §1161a(c). If the occupant was the former owner, the purchaser may initiate the unlawful detainer with a 3-day notice to quit. CCP §1161a(b)(3).

Notwithstanding CCP §1161a, a tenant or subtenant in possession of a rental housing unit under a month-to-month lease or periodic tenancy when the property is sold in foreclosure must be given a written 90-day

notice to quit. This requirement does not apply, however, if any party to the note remains in the property as a tenant, subtenant, or occupant. CCP §1161b(a), (d), (f).

Cover sheet. In the case of any foreclosure on a residential property, the immediate successor in interest must attach a special cover sheet (CCP §1161c(b)) to any notice of termination of tenancy served within the first year after the foreclosure sale. CCP §1161c(a), (d). However, this cover sheet is not required if (CCP §1161c(a)):

- The tenancy is terminated for any of the breaches under CCP §1161;
- The successor in interest and the tenant have executed a written rental agreement or lease or a written acknowledgment of a preexisting rental agreement or lease; or
- The tenant receiving the notice was not a tenant at the time of the foreclosure

2. [§31.96] Tenant's Rights

Tenants or subtenants holding possession of a rental housing unit under a fixed-term residential lease entered into *before* transfer of title at a foreclosure sale have the right to possession until the end of the lease term, and all rights and obligations under the lease survive foreclosure. CCP §1161b(b), (f). The tenancy may be terminated, however, on 90 days' written notice to quit (see CCP §1161b(a)) if any of the following conditions apply (CCP §1161b(b)):

- The purchaser or successor in interest will occupy the housing unit as a primary residence.
- The lessee is the mortgagor or the child, spouse, or parent of the mortgagor.
- The lease was not the result of an arms'-length transaction.
- The lease requires the receipt of rent that is substantially less than fair market rent for the property, except when rent is reduced or subsidized due to a federal, state, or local subsidy or law.

The purchaser or successor in interest bears the burden of proof in establishing that a fixed-term residential lease is not entitled to protection. CCP §1161b(c).

Prejudgment claim or postjudgment objection. In any action for unlawful detainer resulting from a foreclosure sale of a rental housing unit, the restriction on the occupant's right to object (see CCP §415.46(e)(1)) does not limit any tenant's or subtenant's right to file a prejudgment claim of right of possession (see CCP §1174.25(a)) at any time before judgment,

or to object to enforcement of a judgment for possession (see CCP §1174.3), regardless of whether the tenant or subtenant was served with a prejudgment claim of right to possession. CCP §415.46(e)(2).

Effect of red-tagging the property. A tenancy is not automatically terminated when a government building inspector red tags a property as unsuitable for habitation. *Erlach v Sierra Asset Servicing, LLC* (2014) 226 CA4th 1281, 1289, 1295, 173 CR3d 159 (tenant's action for damages; county code enforcement inspector found no electricity, heat, and hot water at residence that was sold in a foreclosure sale). "[N]ew owners of rental property are required to address outstanding code violations even if they were caused by the previous owner of the property." 226 CA4th at 1295.

3. [§31.97] Subsequent Buyer and Subordination

An unlawful detainer proceeding may be brought by the subsequent buyer from the purchaser at the foreclosure sale. See, *e.g.*, *Dover Mobile Estates v Fiber Form Prods., Inc.* (1990) 220 CA3d 1494, 270 CR 183. This subsequent buyer must also prove that the sale was conducted in accordance with CC §2924 and that title has been duly perfected. *Stephens, Partain & Cunningham v Hollis* (1987) 196 CA3d 948, 953, 242 CR 251.

A recital in the deed executed under the power of sale is prima facie evidence of compliance. CC §2924(c). The general rule is that a nonjudicial foreclosure sale is presumed to have been conducted regularly, and the burden of proof lies with the party trying to rebut that presumption. *Fontenot v Wells Fargo Bank, N.A.* (2011) 198 CA4th 256, 269–270, 129 CR3d 467. Cf. *Bank of New York Mellon v Preciado* (2013) 224 CA4th Supp 1, 9–10, 169 CR3d 653 (case silent about whether deed contained CC §2924 recital, but held title not duly perfected to maintain unlawful detainer action when deed upon sale identified different trustee than deed of trust, and no evidence established selling trustee's authority to conduct trustee's sale). See also *Dimock v Emerald Props. LLC* (2000) 81 CA4th 868, 876–879, 97 CR2d 255 (sale by pre-substitution trustee void; notice defects make deed voidable only where recitals of regularity appear in it and no contrary recitals have been made; and trustor overcomes defective voidable deed by showing grounds for equitable relief from the deed, such as fraud, defective notice, and that he or she tendered any amount due under the deed).

Subordination. A lease is subordinate to a prior recorded trust deed, foreclosure of which terminates all subordinate liens, including leases. *Miscione v Barton Dev. Co.* (1997) 52 CA4th 1320, 1326, 61 CR2d 280. However, the parties to a real estate transaction may contractually agree to alter the priorities otherwise fixed by law to avoid the termination of rights

under the general rule that foreclosure terminates the rights under a junior lease. 52 CA4th at 1326. Leases senior to the mortgage are unaffected by a foreclosure sale if the tenant is not in default. See *R-Ranch Markets #2, Inc. v Old Stone Bank* (1993) 16 CA4th 1323, 1327, 21 CR2d 21.

4. [§31.98] Equitable Defense After Nonjudicial Foreclosure

A trustor may challenge the right to possession under CCP §§1161a and 1161b (but not the ownership of the property) by asserting fraud or defects in the foreclosure process. For example, fraud may exist when there was a forbearance agreement in place when the sale took place. The defendant, however, may need to "do equity" by first tendering the full amount due up to the time of trial. *MCA, Inc. v Universal Diversified Enters. Corp.* (1972) 27 CA3d 170, 176–177, 103 CR 522; *Crummer v Whitehead* (1964) 230 CA2d 264, 268, 40 CR 826; see *Green v Superior Court* (1974) 10 C3d 616, 632–633, 111 CR 704; *Cheney v Trauzettel* (1937) 9 C2d 158, 160, 69 P2d 832. The availability of an equitable defense assumes that the plaintiff is not a bona fide purchaser for value. *Napue v Gor-Mey West, Inc.* (1985) 175 CA3d 608, 619–620, 220 CR 799.

The elements of an equitable cause of action to set aside a foreclosure sale are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering. *Lona v Citibank, NA* (2011) 202 CA4th 89, 104, 134 CR3d 622.

S. [§31.99] Access to Unlawful Detainer Filings; Notice to Defendants

Public access to the court file, index, register of actions, or other court records in unlawful detainer cases filed as limited civil cases is not allowed until 60 days after the complaint is filed, except under an ex parte court order issued on a showing of good cause. CCP §1161.2(a), (c). Access to the court file is allowed to the parties and their attorneys, and to:

- Any person who provides the clerk with the names of at least one plaintiff and one defendant, and the address of the subject premises, including the apartment or unit number;
- A resident of the premises who provides the clerk with the name of one of the parties or the case number and shows proof of residence;

- Any person on court order, which may be granted ex parte, on a showing of good cause;
- Any other person 60 days after the filing of the complaint, unless a defendant prevails within 60 days of the filing, in which case the clerk may not allow access except to those persons described immediately above; or
- Any other person 60 days after the filing of the complaint, if judgment against all the defendants was entered for the plaintiff after trial. The complaint must be based on CCP §1161a (see §31.95) and involve residential property. CCP §1161.2(a).

For purposes of this section, "good cause" may include the gathering of newsworthy facts by a news organization (see Evid C §1070). CCP §1161.2(b). See *U.D. Registry, Inc. v Municipal Court* (1996) 50 CA4th 671, 673–675, 57 CR2d 788 (access to all unlawful detainer filings in two municipal courts was properly denied to tenant screening company for lack of "good cause" and based on finding that CCP §1161.2 does not contemplate blanket orders, but requires that exceptions be determined on a case-by-case basis).

Within 24 to 48 hours (excluding weekends and holidays) after an unlawful detainer complaint is filed, the clerk must mail notice to each defendant named in the complaint to the address provided in the complaint. CCP §1161.2(c). The notice must describe the provisions regarding access to the court's file, as well as the name and phone number of the county bar association, the name and phone number of an office or offices funded by the Legal Services Corporation or qualified legal services projects that provide legal services to low-income persons in the county in which the action is filed, and a certified lawyer-referral service. CCP §1161.2(c)(1)–(4). One copy of the notice must be addressed to "all occupants," and mailed separately to the subject premises. The notice does not constitute service of the summons and complaint. CCP §1161.2(c)(4).

These notice and access requirements do not apply if the complaint clearly indicates that it seeks termination of a mobilehome park tenancy. CCP §1161.2(e).

IV. SAMPLE FORMS

A. [§31.100] Script: Court Trial

[*Introduction*]

For those of you on the unlawful detainer trial calendar, let me say a few words before we get started. I'm Judge _____ and, unless your case has settled, I will be hearing your matter this [*morning/afternoon*].

Note: Some judges choose to introduce their courtroom staff at this point.

[*To unrepresented parties*]

For those of you representing yourselves here, all trials will proceed in the following manner. When I call your case, come forward and have a seat at counsel table—the plaintiff on the side by the jury box and the defendants on the side of counsel table, away from the jury box. I have reviewed the case file, including the complaint and answer, so you do not need to make an opening statement.

Because plaintiff has brought the case, plaintiff will go first in presenting evidence. When a witness is called, he or she will come forward, be sworn by my clerk, and then have a seat in the witness stand. Whoever has called the witness will question the witness until he or she has finished with the witness; then the other side may ask questions of the witness. When asking questions, do not argue with the witness or try to testify yourself by making statements—just ask questions.

However, you do not have to ask questions. If you do not ask questions, I will not assume that you agree with what the witness has said. I assure you I will not decide your case until after I have heard all the evidence presented by both sides.

Any document that you want to introduce must be shown to the other side before the court will hear any testimony about that document. Once the plaintiff has finished presenting the plaintiff's case, the defense may call witnesses and present whatever evidence the defense wants to present.

Please understand, for those of you representing yourselves today, that you don't get any special privileges simply because you do not have an attorney. I am not allowed to, nor will I, be your attorney. I am the judge. I have the right to intervene and ask questions if I so choose, and I may do that from time to time. I also have the right to limit your presentation of legally irrelevant matters, and I may do that from time to time.

With that said, I now call the case of _____.

[*Plaintiff's case*]

[*To plaintiff or plaintiff's counsel:*] Please call your first witness.

[*If clerk administers the oath to all witnesses at one time, state*]

Everyone present who will be testifying before the court on unlawful detainer matters on today's calendar are ordered to rise and raise your

right hand to have the oath administered by the clerk. Anyone who will be testifying on any unlawful detainer case today for either side should now be standing with his or her right hand raised.

[*Mass oath, by clerk*]

Do you solemnly state, under penalty of perjury, that the evidence you will give in the case you testify in will be the truth, the whole truth, and nothing but the truth, so help you God?

[*Individual oath, if no mass oath given, by clerk*]

Do you solemnly state, under penalty of perjury, that the evidence you will give in the case now in hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

[*In all cases for each witness, the judge or clerk should say*]

Please state your full name and then spell your name for the record.

[*After the witness has complied, say*]

Please proceed.

[*Once plaintiff has completed direct examination of the witness, say to the defendant or defendant's attorney*]

You may now ask questions of the witness, but please remember the Court's admonition that you are not to argue with the witness, make statements, or testify yourself at this point. If you have questions for this witness, please proceed. [*Allow for redirect and recross-examination as appropriate.*]

[*For each documentary piece of evidence produced, ask*]

Has this document/object been shown to the defendant? [*Allow the defendant a short time to review any document/object and then say:*] What, if any, legal objections do you have to the [*document/object*]? [*Rule on each objection.*] [*Sustained/ Overruled.*]

[*Once it appears that the plaintiff has finished, if the plaintiff does not indicate that plaintiff rests, then ask*]

Does the plaintiff have anything further to present?

[*Defendant's case, to defendant or defendant's counsel*]

Does the defense desire to present witnesses or other evidence and/or will the defendant testify? If so, please proceed.

[*For each defense witness called, the clerk should administer an individual oath if no mass oath was given.*]

Do you solemnly state, under penalty of perjury, that the evidence you will give in the case now in hearing will be the truth, the whole truth, and nothing but the truth, so help you God? [*If a mass oath was administered, confirm that the witness was previously sworn.*]

[*In all cases for each witness, the judge or clerk should say*]

Please state your full name and then spell your name for the record. [*And after the witness has complied, say:*] Please proceed.

[*Once the defendant has finished with direct examination of the witness, say to the plaintiff or the plaintiff's attorney*]

You may now question the witness.

[*Allow for redirect and recross-examination as appropriate.*]

[*For each documentary piece of evidence produced, ask*]

Has this document/object been shown to the plaintiff? [*Allow the plaintiff a short period of time to review the* [*document/object*], *or consider a recess if there are many exhibits, and then ask:*] What, if any, legal objections do you have to the document/object? [*Rule on each objection.*] [*Sustained/ Overruled.*]

[*Once it appears that the defendant has finished, if the defendant does not indicate that the defense rests, then ask*]

Does the defense have anything further to present?

[*Rebuttal and surrebuttal presentations of evidence may be allowed as appropriate.*]

Note: In an unusual case, the judge may wish to call a witness or examine a witness. See Evid C §775 and discussion in §31.68.

[*Argument*]

The court will [*not*] entertain closing argument.

Note: If argument is allowed, you may want to consider limiting the time to a few minutes each. See *Guardianship of Baby Boy M.* (1977) 66 CA3d 254, 278, 135 CR 866 (in a nonjury civil trial, the extent of summation is within the sound discretion of the court). For further discussion, see

California Judges Benchbook: Civil Proceedings—Trial, Second Edition, §12.26 (Cal CJER 2010).

☛ JUDICIAL TIP: Because there are often pro per litigants in unlawful detainer cases, the better practice is to allow them a summation to help them feel that they have had their day in court, especially if they have prepared one in contemplation of the hearing.

[*Ruling, as appropriate*]

[*If the ruling is in favor of the plaintiff*]

The Court finds for the plaintiff. Judgment is ordered in favor of the plaintiff: Principal amount $_____, attorneys' fees $_____, costs $_____, for a total money judgment against defendant(s) _____ of $_____. The rental agreement is ordered canceled. A writ of possession will issue for the premises located at _____.

[*Plaintiff/Plaintiff's counsel*] is directed to prepare the appropriate documents and submit them to the Court for signature.

[*If the ruling is in favor of the defendant on a* Green *habitability defense* (Green v Superior Court *(1974) 10 C3d 616, 111 CR 704*)]

The Court finds a substantial breach of the warranty of habitability. If the defendant pays the plaintiff the sum of $_____ [*by cash, cashier's check, or money order, and court should consider adding a location for payment to be made*] no later than [d*ate*] [*5 days from current day*], 5:00 p.m., then defendant will be deemed the prevailing party, will retain possession of the premises, and will be entitled to recover attorneys' fees and court costs. If the defendant fails to pay by the due date, plaintiff may immediately file a declaration setting forth the facts of the default and recover against the defendant a judgment awarding plaintiff the principal of $_____, attorneys' fees of $_____, and court costs of $_____. The rental agreement will be canceled and a writ of possession issued.

B. [§31.101] Written Form: Unlawful Detainer Minute Order

_____ COURT
Unlawful Detainer Minute Order

DATE: _____ TIME: _____ DEPT.:_____ CASE: #_____
JUDGE: _____ CLERK: _____ BAILIFF: _____

	☐ Present ☐ Absent		☐ Present ☐ Absent
_____ PLAINTIFF		_____ COUNSEL	
	☐ Present ☐ Absent		☐ Present ☐ Absent
_____ DEFENDANT		_____ COUNSEL	

☐ Court trial conducted ☐ Case dismissed _____
☐ Matter dropped from calendar ☐ Plaintiff's request ☐ Settlement prior to trial
☐ Non-appearance
☐ Case continued to: _____ Reason for continuance: _____
☐ Matter taken under submission
☐ Other: _____

Witnesses sworn and testified	Plaintiff	Defendant	Exhibits	ID	ADM
_____	☐	☐	_____	☐	☐
_____	☐	☐	_____	☐	☐
_____	☐	☐	_____	☐	☐

(ADDITIONAL WITNESSES ON REVERSE)
☐ See exhibit list ☐ Exhibits Returned Pursuant to Stipulation

---

☐ Parties agreed in open court to Stipulated Judgment
☐ Court issued Conditional Judgment (*Green* Defense)
☐ Judgment in favor of the Plaintiff/Defendant as follows:

Principal	$_____	☐ Rental Agreement is canceled
Attorney Fees	$_____	☐ Writ of possession to issue for the premises located at:
Court Costs	$_____	_____
Total	$_____	_____

☐ Execution of writ is STAYED until:
☐ No further stays will be granted
☐ Defendant agrees to vacate the property by: _____
☐ Defendant agrees to make payments in the following manner: _____
_____
☐ If Defendant complies with all conditions, then the Plaintiff will dismiss this action.

☐ If Defendant fails to deliver up possession of said premises or if Defendant fails to pay, then Plaintiff may immediately, without further notice, file a declaration setting forth the facts of such default and recovery against Defendant a judgment awarding Plaintiff restitution and possession of said premises, if possession of the premises has not been returned to Plaintiff; any of the $_____ rent due that remains unpaid: $_____ attorney fees: and $_____ court costs.

☐ Court found a breach of the warranty of habitability. If Defendant pays to Plaintiff the sum of $_____ (by cash, C/C, or M/O) no later than _____, then Defendant will be deemed the prevailing party and will retain possession of the premises.

☐ If Defendant fails to pay by the due date, then Plaintiff may immediately file a declaration setting forth the facts of such default and recover against Defendant a judgment awarding Plaintiff the principal of $_____; attorney fees of $_____; and court costs of $_____. Rental agreement will be canceled and a writ of possession will issue for the premises located at _____.

☐ Defendant states that no other adults reside in the premises that have a claim of a right to possession.

☐ Defendant agrees to leave the premises in a clean and orderly fashion, free of debris and trash.

☐ Other: _____

☐ Plaintiff/Plaintiff's counsel to prepare order and notice.

☐ Defendant/Defendant's counsel to prepare order and notice.

☐ Notices waived.

DATED: _____ _____

Deputy Clerk

C. [§31.102] Written Form: Judgment for Defendant

[*Title of Court*]

[*Title of Case*] **No.** _____

JUDGMENT

The above matter came on regularly for court trial on [*date*] at _____ in Department _____ of the above-entitled court, _____, presiding.

Plaintiff, [*name*], and defendant, [*name*], appeared in pro per. Evidence was heard, both oral and documentary, and the court ruled from the bench as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff [*name*] shall have and recover nothing from defendant [*name*]. The clerk is directed to give notice of entry of judgment.

DATED: _____

_____

Judge of the Superior Court

D. [§31.103] Written Form: Stipulation To Dismiss on Receipt of Payment

[*Title of Court*]

[*Title of Case*] **No.** _____

STIPULATION

Plaintiff, [*name*], agrees to allow defendants, [*names*], to remain on the premises located at _____, and plaintiff further agrees to dismiss this action (No. _____) with prejudice, provided that defendants make payment to plaintiff the sum of $_____ by the end of the day [*date*]. It is understood between the parties that defendants will telephone plaintiff on [*date*], regarding payment, and plaintiff will receive payment at the above-described premises.

If such payment is not made on the above date, then upon submission by plaintiff of a declaration under penalty of perjury attesting to the failure to pay, a judgment will enter for restitution of the premises, rent and damages in the sum of $_____, and costs of $_____ [including attorneys' fees] [*add as appropriate*].

DATED: _____

_____

E. [§31.104] Written Form: Stipulated Judgment

_____ COURT FOR COURT USE ONLY

_____
ADDRESS:
_____
PLAINTIFF:
_____
DEFENDANT:
_____ _____
STIPULATION: _____
CASE NUMBER:

❑ UNLAWFUL DETAINER POSSESSION ONLY
❑ UNLAWFUL DETAINER POSSESSION ONLY AND MONEY

It is hereby stipulated by and between the plaintiff(s) _____ and defendant(s)_____
that judgment shall be entered in favor of ❑ Plaintiff(s) ❑ Defendant(s)
As follows:

Principal/Rent $ _____ ❑ The Plaintiff is awarded forfeiture of the lease
Damages $ _____ ❑ The Plaintiff shall be awarded restitution of the premises located at: _____, California
Interest $ _____
Attorney Fees $ _____
Costs $ _____
Total $ _____
Enforcement of judgment stayed as follows: ❑ Possession ❑ Money Judgment
_____
_____
_____
_____
_____

❑ A writ of possession is to issue forthwith but no final lockout prior to _____

❑ Defendant(s) agrees to pay the money judgment as stated herein. In the event of default, a writ of execution is to issue on plaintiff's verified application without further notice of hearing.

I/We the undersigned understand that I/we have the right to: (1) Have an attorney present; (2) Notice and hearing of any default of terms of the stay of execution; (3) Give up the above rights.

Date: _____ _____ _____
PLAINTIFF/ATTORNEY DEFENDANT/ATTORNEY
Date: _____ _____ _____
PLAINTIFF/ATTORNEY DEFENDANT/ATTORNEY

Judgment is hereby ordered on all terms of the foregoing stipulation.

Date: _____ _____
JUDGE/COMMISSIONER

F. [§31.105] Written Form: Declaration in Support of Default Judgment

_____ vs. _____

DECLARATION

The undersigned declares:

____ I am the owner of the property.

____ I am the property manager and a written management agreement is attached. Plaintiff is the property owner.

____ The property is located in the North County Judicial District at (insert property address)
_____

____ The rental agreement is this case is ___ oral ___ written (*original* is attached).

____ Rental rate is $_____ per month.

____ The defendant(s) are tenants and took possession on _____

____ Tenants are in possession as of the date of the declaration _____

____ Tenants vacated the premises on _____

____ Rent is due and unpaid since _____

____ 3-Day/30-Day/60-Day Notice was served on _____

____ A *copy* of the notice with *original* Proof of Service is attached. _____

____ The 3-Day Notice demanded rent of _____, which was the rent due on the date it was served. No rent was paid within 3 days. $_____

____ The daily rental rate is $_____

____ Total rent due since the 3-Day Notice to *date* of this declaration is (use daily rental rate) $_____

____ Total rent sought to date of this declaration $_____

____ Court costs actually incurred are $_____

____ I request attorneys fees of $_____

which are provided by lease. If amount is not per Court fee schedule, a declaration is attached.

I declare under penalty of perjury that the foregoing is true and correct, the facts stated are within my personal knowledge, and I can competently testify thereto.

Executed at _____, California

_____
(Print Name of Declarant)

Dated: _____

_____
(Signature of Declarant)

FOR COURT USE ONLY

____ Original Summons and Proof of Service filed.

____ Default entered on _____ as to _____ only.

____ 3/30/60-Day Notice and Proof of Service filed.

____ 3/30/60-Day Notice served by:

____ Personal Service ____ Post & Mail ____ Substitute Service ____ Certified Mail

____ Complaint filed at least four (4) days after service of the 3-Day Notice,, or thirty-one (31) days after service of the 30-Day Notice, or sixty-one (61) days after service of the 60-Day Notice for personal service. ____ 5 additional days added for mailing.

Dated: _____ _____
Deputy Clerk

G. [§31.106] Written Form: Habitability Worksheet

Note: This worksheet sets out the months during which rent was unpaid at the top of each column and lists the defects in the first column. The judge places the reduction in rent due to that defect in the appropriate box. Once all the reductions are totaled, the judge can determine the amount of rent that should be paid for that month. For example, the worksheet may look like this:

MONTHS OF UNPAID RENT

DEFECTS	November	December	January	February	March
Roof leaks	$100 reduction	$150 reduction	$150 reduction		
Water heater broken	$100 reduction	no reduction (fixed)	no reduction		
Peeling paint	$25 reduction	$25 reduction	$25 reduction		
Broken toilet, etc.					
TOTAL REDUCTION IN RENT FOR MONTH	$225	$175	$175		

H. [§31.107] Written Form: Conditional Judgment

[*Title of Court*]

[Title of Case] No. _____

JUDGMENT

The above matter came on regularly for court trial on [*date*] at _____ in Department ___ of the above-entitled court. Plaintiff, [*name*], appeared by attorney, [*name*], and defendant, [*name*], appeared by attorney, [*name*]. The premises are located at _____.

The court, having heard the testimony and having considered the evidence, finds that plaintiff has breached the covenant to provide habitable premises to defendant by reason of the following defects:

Month	**Defect**
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

But for the breach, defendant would be liable to plaintiff in the amount of $_____. Because of the breach, defendant is liable to plaintiff in the sum of $_____ [*reduced rent based on reasonable rental value after reduction for defects*] less defendant's attorneys' fees in the amount of $_____ [*provide this figure only if the lease provides for attorneys' fees*] and costs in the amount of $_____, for a net sum owing to plaintiff in the amount of $_____.

Defendant shall pay $_____ in cash, certified check, or money order to [*plaintiff/plaintiff's attorney*] at _____ by 5:00 p.m. on [*date*]. If defendant makes this payment, defendant will be the prevailing party and will be entitled to remain in possession.

Judgment shall be entered for defendant on [*date*] unless plaintiff files a Declaration of Nonpayment within seven days after payment is due.

This Declaration shall be served on defendant on or before filing. Service may be by mail, and proof of service shall be filed with the clerk. If defendant does not pay the sum stated above, plaintiff will be the prevailing party, and judgment shall be entered in favor of plaintiffs for forfeiture of the lease, possession of the premises, the sum owing, plus daily rent at the reduced amount, excluding defendant's attorneys' fees and costs in the amount of $_____, two court days after the filing of the declaration.

[*Optional*]

Plaintiff shall repair the defects constituting the breach of warranty as specified above, and this Court retains jurisdiction over the matter until the repairs are made.

[*Continue*]

This notice of ruling has been served on the defendant personally, in open court on the date indicated, and no further notice is required.

Dated:_____

_____
Judge of the Superior Court

I. [§31.108] Written Form: Tenant Statement and Qualified Third Party Statement Under CC §1946.7

Part I. Statement By Tenant

I, [*insert name of tenant*], state as follows:

I, or a member of my household, have been a victim of:
[*insert one or more of the following: domestic violence, sexual assault, stalking, human trafficking, elder abuse, or dependent adult abuse.*]

The most recent incident(s) happened on or about:
[*insert date or dates.*]

The incident(s) was/were committed by the following person(s), with these physical description(s), if known and safe to provide:
[*if known and safe to provide, insert name(s) and physical description(s).*]

_____ _____
(signature of tenant) (date)

Part II. Qualified Third Party Statement

I, [*insert name of qualified third party*], state as follows:

My business address and phone number are:
[*insert business address and phone number.*]

Check and complete one of the following:
___I meet the requirements for a sexual assault counselor provided in Section 1035.2 of the Evidence Code and I am either engaged in an office, hospital, institution, or center commonly known as a rape crisis center described in that section or employed by an organization providing the programs specified in Section 13835.2 of the Penal Code.
___I meet the requirements for a domestic violence counselor provided in Section 1037.1 of the Evidence Code and I am employed, whether financially compensated or not, by a domestic violence victim service organization, as defined in that section.
___I meet the requirements for a human trafficking caseworker provided in Section 1038.2 of the Evidence Code and I am employed, whether financially compensated or not, by an organization that provides programs specified in Section 18294 of the Welfare and Institutions Code or in Section 13835.2 of the Penal Code.
___I am licensed by the State of California as a:
[*insert one of the following: physician and surgeon, osteopathic physician and surgeon, registered nurse, psychiatrist, psychologist, licensed clinical social worker, licensed marriage and family therapist, or licensed professional clinical counselor.*] and I am licensed by, and my license number is:
[*insert name of state licensing entity and license number.*]

The person who signed the Statement By Tenant above stated to me that he or she, or a member of his or her household, is a victim of:
[*insert one or more of the following: domestic violence, sexual assault, stalking, human trafficking, elder abuse, or dependent adult abuse.*]
The person further stated to me the incident(s) occurred on or about the date(s) stated above.

I understand that the person who made the Statement By Tenant may use this document as a basis for terminating a lease with the person's landlord.

_____ _____

(signature of qualified third party) (date)

V. [§31.109] ADDITIONAL REFERENCES

California Eviction Defense Manual (2d ed Cal CEB)
Friedman, Garcia, & Hagarty, Cal Prac Guide: Landlord-Tenant (Rutter Group 2014)
California Landlord-Tenant Practice (2d ed Cal CEB)
12 Witkin, Summary of California Law, *Real Property* §§703–742 (10th ed 2005)

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