LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, NOVEMBER 25, 2024

Despite Prop 33 defeat, landlord-tenant disputes remain costly and complicated

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When California voters rejected Proposition 33 in November, landlords across the state breathed a huge sigh of relief. Voters had removed any possibility that rent control would be enacted wholesale by cities and counties intent on protecting their tenants from exorbitant rents.

But even without the threat of statewide rent control, property owners must still deal with a complex system that, in many jurisdictions, imposes stiff penalties while often presenting tenants with a complicated and uncertain path for collecting damages. The costs of litigating many landlord-tenant disputes are so steep and the issues involved so complex that the best way to resolve such matters may be through mediation, with the help of a skilled and knowledgeable mediator.

Rent control ordinances

Proposition 33 would have overturned the Costa-Hawkins Rental Housing Act of 1995, Civil Code Section 1954.50 et seq., which prohibits local ordinances limiting initial residential rental rates for new tenants or rent increases for existing tenants in certain residential properties. Cities are barred from controlling rents for single-family homes or apartments built after 1995, and landlords can set their own rental rates when new tenants move in. Prop 33's defeat put to rest any possibility that rent control and its associated tenant protections would proliferate across the state.

But its defeat still leaves in place rent control ordinances in 39 of the state's 482 cities. In addition to limiting the amount of rent increases, most such ordinances include eviction control provisions restricting landlords' ability to take possession of units. Unless an eviction is for "just cause," as provided in Civil Code Section 1946.2 – such as nonpayment of rent, creating a nuisance, or criminal activity – it is likely to be found unlawful and tenants entitled to substantial damages and attorney's fees.

The California Supreme Court has generally upheld rent-control measures as a legitimate exercise of municipal police powers, as long as they are rationally related to a legitimate government interest. (See *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 158; *Santa Monica Beach, Ltd. v. Super. Ct.* (1999) 19 Cal.4th 952, 962).)

Some jurisdictions have added heightened damages and statutory penalties for certain "bad faith" actions of landlords. San Francisco and Oakland's tenant harassment ordinances provide for trebling of economic damages and attorney fees, with trebling of non-economic damages also available to tenants whose landlords breach the warranty of habitability in "bad faith."

Santa Monica's ordinance calls for attorney's fees and costs on top of "damages in the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent." It imposes a civil penalty of treble the amount by which those payments exceed the maximum lawful rent upon a showing that the landlord acted "willfully or with oppression, fraud or malice."

A landlord, if found to be acting in bad faith, could thus see an otherwise modest verdict trebled and

have to pay attorney fees and costs. In the 2013 case of *Hurtado v. Segura, et al*. (Case No. CGC 12-517315), a San Francisco Superior Court judge awarded $400,000 in attorney fees on top of a jury award of $100,000 in damages – an award that was trebled because of the landlord's violation of the San Francisco Tenant Harassment Statute.

In 2017, following a lengthy trial, a San Francisco jury awarded tenants more than $3.5 million after finding landlords liable for wrongful eviction and tenant harassment under the city's rent ordinance *(Dale Duncan, et al., v. Anne Kihagi, et al.* (S.F. Case No. CGC 15-545655)). The court reduced the judgment to $2.7 million, and the defendants appealed. An Appellate Court upheld the trial judgment in 2021 (68 Cal.App.5th 519) and again in 2023 (_Cal.App.5th _ , 2023 WL 6887149). With attorney's fees and treble damages, it was one of the largest jury verdicts in a tenant case in more than a decade.

Tenant Protection Act

Even in cities without rent control ordinances, landlords may still face landmines. In 2019, Governor Gavin Newsom signed into law the Tenant Protection Act, AB 1482, limiting annual rent increases for most residential tenants statewide to five percent plus inflation over a 12-month period. If the tenants of a unit move out and new tenants move in, the landlord may establish the initial rent to charge. (Civil Code Section 1947.12.)

More significantly, the law establishes statewide eviction protections for most residential tenants after they have lived in their unit for 12 months. It defines two types of permissible evictions: "at fault" – the landlord moves to evict a tenant because the tenant has allegedly engaged in wrongful conduct such as criminal activity or nonpayment of rent – and "no fault" – the landlord moves to evict the tenant for good reasons other than the tenant's actions, such as a plan to occupy or upgrade the unit.

If a landlord moves to evict a tenant other than for the above reasons, he or she could face significant liability. Civil Code Section 1946.2 provides as follows:

(h) (1) An owner who attempts to recover possession of a rental unit in material violation of this section shall be liable to the tenant in a civil action for all of the following:

(A) Actual damages.

(B) In the court's discretion, reasonable attorney's fees and costs.

(C) Upon a showing that the owner has acted willfully or with oppression, fraud, or malice, up to three times the actual damages. An award may also be entered for punitive damages for the benefit of the tenant against the owner.

In most parts of the state, landlords can assume that most claims brought by their tenants, and their potential cost, will continue to be manageable. As long as they are not in rent-controlled jurisdictions and are not seeking to evict long-term tenants for suspect reasons, property owners and their insurers will likely continue to treat claims for habitability, slip-and-fall, and other fairly predictable matters as simply a cost of doing business.

Mediation makes sense

But when there is liability under a rent control ordinance, there may be no way around paying the bill. If that bill comes due at the end of a trial, it could be catastrophic, forcing the defendant into bankruptcy. Unlike claims for leaking faucets and slippery steps, treble damages awarded under a rent ordinance often will not be covered by insurance. Many insurance policies also contain exclusions for attorney's fees awarded to the tenant – which could be substantial after a lengthy trial.

How much better, then, to limit attorney's fees by seeking to resolve the case in mediation. With the stakes so high and the exposure so great, defendants should seek early resolution of these disputes, especially those that arise in rent-control jurisdictions. But even where no local ordinance is in effect, attorney's fees may still be on the table through the applicable lease agreement or other statutory claims (e.g., Civil Code Section 1942.4). Landlords and counsel should therefore evaluate the strength of tenant claims and the potential costs of a trial loss before deciding to fight such claims through protracted litigation.

For plaintiffs, as appealing as treble damages and attorney's fees may sound, the reality could be far different. Because landlords' insurance policies may exclude coverage for treble damages and attorney's fees, there may be no deep pockets. The plaintiff could be awarded a significant amount by a jury but then be compelled to seek enforcement of the uncovered portion of judgment directly from the landlord. Recovering any or all of that judgment could be difficult, if not impossible, based on a potential bankruptcy filing by the landlord, possible asset protection strategies, or a lack of sufficient assets to satisfy the judgment. The collection process could take years.

For all of these reasons, it may be far better for both sides to seek early resolution of their matter through mediation. For the defense, early settlement limits the fees and costs incurred by plaintiff's counsel. For the plaintiff, early mediation can provide the certainty that comes with a compromised resolution of the dispute. For both parties, entrusting their dispute to a mediator who is well-versed in landlord-tenant law ensures that the final outcome will be fair and reasonable.

Nolan Armstrong *is a neutral with Signature Resolution with an extensive background managing civil matters in both state and federal courts, including personal injury and real property defense, landlord-tenant litigation, employment defense, professional negligence, and defense of public entities in various tort claims. Nolan can be reached at narmstrong@signatureresolution.com.*