



# Evolution of tenant harassment statutes

*Strategies for lawsuits with attorney's fees based on local rent-control regulations*

BY JOSEPHINE L. ALIOTO  
AND AARON H. DARSKY

Many Californians have a general understanding of rent ordinances and rent-control regulations, but rent ordinances are constantly evolving. As residential rents soar, some unscrupulous property owners and managers use a passive-aggressive approach to maintenance in order to oust their long-term rent-controlled tenants from their homes. This article discusses how many jurisdictions have added "Tenant Harassment" statutes to up the ante for landlords who try to oust their tenants by failing to make necessary repairs.

Tenant Harassment statutes essentially add the element of bad faith or improper motive to common tenant causes of action such as breach of the warranty of habitability, breach of the warranty of quiet enjoyment or nuisance. In return, the statutes provide additional damages, such as attorney fees, statutory penalties, treble damages and criminal liability.

## The evolution of rent control

The international community has recognized that adequate housing is a basic human right. (The 1948 Universal Declaration of Human Rights, Article 25(1); The 1966 International Covenant on Economic, Social and Cultural Rights, Article 11.) However, with surging rental prices and a lack of affordable housing, there is no question that many Americans are without adequate housing. In fact, a lack of affordable housing is the leading cause of homelessness in most American cities. (The United States Conference of Mayors, *Hunger and Homelessness Survey: A Status Report On Hunger And Homelessness In America's Cities - A 25-City Survey* (Dec. 2014).)

There is no question that there is a housing shortage in cities across California, and that the Bay Area has been hit the hardest. A mere 8.6 percent of all housing units in California are vacant. This has a direct and adverse effect on current market rental rates. Not surprisingly, almost 70 percent of Californians

expend more than 25 percent of their income on rent, while 50 percent of Californians expend more than 35 percent. (U.S. Census Bureau, 2009-2013 5-Year American Community Survey, *Selected Housing Characteristics* (2014).) The data is based on the 2009-2013 U.S. Census Bureau's community survey and the housing crisis has only worsened since 2013.

In non-rent-controlled jurisdictions, landlords can raise the rent after a lease term expires or on short notice with month-to-month tenants. (Cal. Civil Code, § 827 (b).) So long as landlords provide proper notice, they can increase the rent to virtually any amount. Further, landlords in non-rent-controlled jurisdictions can also evict tenants for any purpose as long as they give proper notice, with few exceptions. (Code Civ.Proc., § 1161, et seq.) The landlord may then immediately re-rent the same unit to someone else.

To address housing shortages, many cities in California have enacted some form of rent control and/or eviction control. Cities in California with rent



control and eviction control are Berkeley, Beverly Hills, Campbell, East Palo Alto, Fremont, Hayward, Los Angeles, Los Gatos, Oakland, Palm Springs, San Francisco, San Jose, Santa Monica, Thousand Oaks, and West Hollywood. (Department of Consumer Affairs, *California Tenants – A Guide to Residential Tenants' And Landlords' Rights and Responsibilities* (2012), <http://www.dca.ca.gov/publications/landlordbook/catenant.pdf>.)

In these cities, residential landlords of rent-controlled units can only raise an existing tenant's rent once every 12 months by an amount set by the local rent board. Such ordinances have provisions for higher increases under certain circumstances such as when capital improvements are necessary, upon special application. The rent on a controlled unit can be reset to market rates once the unit is vacant. Over time, a gap opens up between the market value of the rent-controlled unit and the controlled rent, which generally only increases 1 to 2 percent annually. In rent controlled jurisdictions, the tenant builds "equity" in her tenancy as the disparity between the market value of the unit and the controlled rent increases over time.

Most rent-controlled jurisdictions also have eviction control laws. Eviction control restricts a landlord's ability to recover possession of a unit. Landlords of eviction-controlled units can only evict for explicit reasons enumerated in the statute (i.e., non-payment of rent, creating a nuisance) and not at the landlord's discretion. These laws operate together to protect a tenancy and ensure that tenants are not forced to vacate because rents are raised too high or through no fault of their own.

Individual landlords and landlord organizations have challenged the constitutionality of many rent ordinances. However, the California Supreme Court has generally held that rent-control measures survive Constitutional scrutiny, as they are a legitimate exercise of municipal police powers as long as they are rationally related to a legitimate government interest. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 158; *Santa Monica Beach, Ltd.*

*v. Super. Ct. (Santa Monica Rent Control Board)* (1999) 19 Cal.4th 952, 962.)

Many goals have been recognized as legitimate and rational by the California Supreme Court, including: Protecting low income tenants; equalizing the bargaining positions of landlords and tenants; and protection of consumer welfare. (Rutter Group, *California Practice Guide: Landlord-Tenant* (Rutter Grp. 2006) [5:37].)

### **Not all rent ordinances are created equal**

There are many differences between rent ordinances in California. First, although rent-control laws prohibit landlords from increasing a tenant's rent at their will, all rent-control laws contain one or more exceptions that allow landlords to apply for increases above the maximum allowable increase for delineated reasons such as capital improvements (Oakland, San Francisco, Santa Monica, Berkeley) or even to yield fair return on investment (Berkeley, Oakland, Los Angeles, Santa Monica, West Hollywood). (Rutter Group, *California Practice Guide: Landlord-Tenant*, supra, [5: Appendix A].) Further, local ordinances that once prohibited landlords from raising rents even after a unit had become vacant (Berkeley, Santa Monica, Cotati, East Palo Alto and West Hollywood) were invalidated by the Costa-Hawkins Rental Housing Act, discussed below.

Unfortunately, not all rental units are covered by their local rent-control ordinance. Most rent ordinances only apply to multi-unit residential rental property based on the year the unit obtained a certificate of occupancy (before June 13, 1979 for San Francisco; January 1, 1983 for Oakland; or April 10, 1979 for Santa Monica) in addition to whether the owner also lives on the property, whether the units are owned by nonprofit organizations, or whether the unit has been substantially renovated. It is important to know which units are exempt from the rent ordinance in the jurisdiction your client resides in to be able to ascertain the kind of damages you will be able to seek for the client.

### **Costa-Hawkins Rental Housing Act: Legislature's weakening of local rent-control ordinances**

In reaction to the adoption of local rent-control ordinances, the California State Legislature passed the Costa-Hawkins Rental Housing Act in 1995, which established mandatory statewide guidelines for local regulation of residential rental rates. (Civ. Code, § 1954.50 et seq.) Specifically, the Costa-Hawkins Rental Housing Act allows owners to set the rental price of vacant units, allows owners to set a new rent when the last "original" occupant no longer permanently resides in the unit, prohibits rent-control ordinances from applying to any buildings constructed after February 1, 1995, and completely exempts all single-family homes and condominiums from rent control where the tenancy began on or after January 1, 1996. (*Ibid.*)

Unfortunately, the effect of the Costa-Hawkins Act has been far-reaching, invalidating many provisions of rent-control ordinances and has left many tenants vulnerable to the whims of their landlords.

Again, it is important to ascertain whether your potential client's unit is exempted under the Costa-Hawkins Rental Housing Act.

### **Loss of use damages: Future damages when a rent-controlled tenant is forced to vacate**

Our practice focuses on tenants who are constructively evicted. This occurs when a landlord does not perform necessary repairs or maintenance and allows substandard conditions to exist in breach of the warranty of habitability or quiet enjoyment of the premises. If a tenant is ousted from a long-term rent-controlled unit under these circumstances, a major element of damages is the future "loss of use" of a rent-controlled apartment.

"The damages recoverable for wrongful eviction, actual or constructive, include whatever amounts are necessary to compensate the tenant for the detriment proximately caused by the eviction



or likely to result therefrom.” (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 926; quoting 42 Cal.Jur.3d, Landlord and Tenant, § 132, p. 155-156.) In *Castillo v. Friedman*, a sham relative-move-in case in a rent-controlled jurisdiction, the Court affirmed the trial judge’s determination that, “. . . plaintiff’s loss can best be measured by the difference between market value and the rent-controlled rate of the subject premises. . . .” (*Castillo v. Friedman* (1987) 197 Cal.App.3d Supp. 6, 20-21.) This is not based on what rent the client’s landlord actually ends up re-renting the unit for as “. . . the fact that defendant hoped to rent the subject premises for the sum of \$565 per month does not constitute substantial evidence of the market rental value of said premises.” (*Castillo v. Friedman* (1987) 197 Cal.App.3d Supp. 21.) A real estate appraiser can determine the fair market value of the unit and will act as Plaintiff’s real-estate appraisal expert for trial purposes.

This formula is in accordance with age-old contract principles: “[The] measure of damages for breach of lease is an amount which will compensate the aggrieved party for all the detriment caused by the breach or which in the ordinary course would likely result.” (Civ. Code, § 3300; *Guntert v. City of Stockton* (1976) 55 Cal.App. 131, 142.) This “loss of use” measure also corresponds to the damage formula employed when a landlord breaches a duty to put a tenant in possession of a leasehold. That measure is “the difference between the agreed rent and the rental value of the premises for the lease term.” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875.)

Wrongful eviction general damages include the “present cash value of the lost future possessory interest in the rent-controlled apartment.” These damages “can be estimated but not fixed. . . and are nonetheless awarded because they are considered a natural and proximate results of the eviction.” (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1600, quoting *Stillwell Hotel Co. v. Anderson* (1935) 4 Cal.2d 463, 468-469.)

Thus, the loss of use damage is equal to the difference between the fair rental value of the premises and the rent-controlled rent. This number is commonly expressed as a monthly rent differential. A jury would then decide how long a tenant would have remained in the unit, absent the habitability issues that drove the tenant away. It is not hard to imagine that a rent-controlled tenant with an established tenancy and stable employment (especially one who already lived in the unit for five or more years) would have remained in the unit for five or ten more years. This damage can quickly add up.

#### Tenant harassment statutes

The “loss of use” damage is available in all rent-controlled jurisdictions for the breach of the warranty of habitability, the breach of the covenant of quiet enjoyment or other causes of action based on constructive eviction. In reality, an ousted tenant has an uphill battle when suing for constructive eviction. First, the tenant has to relocate at a significantly increased rent, and pay the appropriate security deposit. Even if a tenant is successful and recovers \$100,000 for being improperly ousted, that money is shared with a contingency attorney who is entitled to significant fees and costs. However, unless the tenant’s lease provides for attorney fees and costs to the prevailing party, a tenant will not be entitled to attorney fees from a landlord under an ordinary rent ordinance. Fortunately, a select few local ordinances have gone a step further in protecting the rights of tenants by expanding their rent control and eviction control protections and adding heightened damages and statutory penalties. San Francisco and Oakland’s “Tenant Harassment” ordinances are most potent, providing treble damages and attorney fees to tenants whose landlords breach the warranty of habitability in “bad faith.” They also provide alternative statutory penalties of \$1,000 per occurrence and make violation of the statute a misdemeanor.

• **San Francisco** – In 2008, San Francisco voters passed Proposition M, which

added Section 37.10B, “Tenant Harassment” to San Francisco’s Administrative Code. Section 37.10B provides for treble damages and attorney fees to a prevailing plaintiff (but not a defendant) when a landlord commits one of 15 delineated acts in bad faith against a protected tenant. Unfortunately, units exempt under the rent-control ordinance are not protected by San Francisco’s tenant harassment ordinance (i.e., units that obtained a certificate of occupancy after June 13, 1979, subsidized housing, condos and single family homes). Prohibited acts include: Interrupting, terminating or failing to provide housing services required by contract or by State, County or local housing, health or safety laws; Failing to perform repairs and maintenance required by contract or by State, County or local housing, health or safety laws; failing to exercise due diligence in completing repairs and maintenance once undertaken or failing to follow appropriate industry repair, containment or remediation protocols designed to minimize exposure to noise, dust, lead, paint, mold, asbestos, or other building materials with potentially harmful health impacts; interfering with a tenant’s right to quiet use and enjoyment of a rental housing unit as that right is defined by California law; and interfering with a tenant’s right to privacy.

San Francisco’s ordinance also contains a catch-all provision prohibiting “other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause, are likely to cause, or are intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy. (San Francisco Administrative Code, Chapter 35, § 37.10B(a).)

This statute is extremely powerful. A landlord acting in bad faith can have a modest verdict trebled and be saddled with Plaintiff’s attorney fees and costs.



That is exactly what happened in *Hurtado v. Segura*, Case No. CGC 12-517315, where a San Francisco Superior Court Judge awarded \$400,000 in attorney fees after a jury awarded damages of approximately \$100,000 trebled for the landlord's violation of the San Francisco Tenant Harassment Statute.

• **Oakland** – In response to “. . . rising rents, caused in part by the spillover of increasingly expensive housing costs in San Francisco. . . ,” Oakland's city council recently passed the “Tenant Protection Ordinance” (“TPO”) to combat increasing complaints from tenants claiming landlord harassment. (Oakland Municipal Code, Chapter 8.22, Article V, § 8.22.600 et seq.) Unlike San Francisco's harassment ordinance, Oakland's TPO applies to *all* units protected under the local eviction control ordinance, so it includes single family homes (constructed prior to January 1, 1983). Oakland's TPO mirrors San Francisco's harassment ordinance, requiring a finding that the landlord committed the same acts delineated in San Francisco's tenant harassment ordinance in bad faith. It is an additional violation of the TPO if a landlord removes a housing service for purpose of causing the tenant to vacate the unit in bad faith. (Oakland Municipal Code, Chapter 8.22, Article V § 8.22.640(A)(16).)

San Francisco and Oakland ordinances require a finding of “bad faith,” but do not actually define the term “bad faith.” However, San Francisco's ordinance provides some direction as to where “bad faith” lies on the spectrum of bad acts. Chapter 37.9 of San Francisco's Administrative Code only allows for a trebling of mental or emotional distress if the trier of fact also finds that the landlord acted in knowing violation or in reckless disregard of the rent ordinance. It also separately permits an award of punitive damages pursuant to state statutory guidelines. Thus, bad faith falls somewhere below “knowing violation of or disregard of the rent ordinance” and above ordinary negligence. Our firm has

used a definition based on the Black's Law Dictionary at trial: “Neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties.” In other words, bad faith is knowing what you are supposed to do and not doing it. Expect to fight with defense counsel about how to instruct a jury on this definition. Attorneys for landlords and tenants would benefit greatly if the term “bad faith” was defined in the ordinances in accordance with legislative intent.

Berkeley's and Santa Monica's tenant harassment statutes afford less protection:

• **Berkeley** – If a landlord evicts a tenant to demolish, repair or take possession and the actual demolition, repair, or owner move-in is not initiated within two months after the tenant vacates the unit, or it is shown the landlord's claim was false or in bad faith, the tenant shall be entitled to regain possession and to actual damages. If the landlord's conduct was willful, the tenant shall be entitled to treble damages. However, under [this specific section of the ordinance,] tenants do not have to make a showing of bad faith, but they are also not entitled to attorney fees. Interestingly, Berkeley's rent ordinance provides for attorney fees only if a landlord evicts a tenant under the guise that he or his immediate relative is going to move in and does so in bad faith, without honest intent, or with ulterior motive. In this case, damages would not be trebled, but the aggrieved tenant is entitled to attorney fees.

• **Santa Monica** – In Santa Monica, the Tenant Harassment law (Santa Monica Municipal Code, §4.56.020) applies to every tenant, not just those protected by rent and eviction controls. Violation of this section entitles a tenant to actual damages (such as loss of use, moving costs, property damage, personal injury and emotional distress) attorney fees or a statutory penalty between \$1,000 and \$10,000. In January 2015, Santa Monica's ordinance was amended and now mirrors San Francisco's and Oakland's harassment ordinances in that it requires a

finding of bad faith plus a delineated act. It includes violating a tenant's privacy (i.e., entering or photographing portions of unit that are beyond the scope of a lawful entry or inspection), threatening a tenant with physical harm, violating discrimination laws, interfering with a tenant's right to quiet use and enjoyment, and taking an action to terminate a tenancy based upon facts which the landlord does not reasonably believe are true. (Santa Monica Municipal Code, § 4.56.020) However, violation of this statute does not provide trebled damages. Santa Monica's ordinance explicitly defines “Bad Faith” as: “An intent to vex, annoy, harass, provoke or injure another person. This includes, but is not limited to, the intent of a property owner or manager to induce a tenant to vacate a rental housing unit through unlawful conduct.” (Santa Monica Municipal Code, § 4.56.010)

Treble damages are available in Santa Monica only in the limited circumstance where a landlord demanded, accepted, received or retained payments which exceed the maximum lawful rent, the amount, a civil penalty of treble the amount shall be awarded against the landlord upon a showing that the landlord has acted willfully or with oppression, fraud or malice. (Santa Monica Rent Control Charter Amendment, Article XVIII. Rent Control, § 1809.) This includes only *past* unlawful rent increases or the overpayment of rent due to the unit being uninhabitable (i.e., if your unit is not habitable, you are overpaying if you are still tendering the full rent amount). Thus, significant future damages from the loss of use of a rent-controlled unit are not subject to trebling. Although the amount subject to trebling is more limited than other ordinances, the prevailing tenant is entitled to attorney fees, which can be substantial.

Although East Palo Alto's and West Hollywood's ordinances have tenant harassment provisions, tenants who have been harassed by their landlords in those jurisdictions are not afforded greater



compensation such as the trebling of their damages or attorney fees.

Because of the growing trend to enact tenant harassment laws, attorneys representing tenants in San Francisco, Oakland, Berkeley, and Santa Monica can obtain fairer compensation for tenants who have to litigate their constructive evictions. While some statutes lack damage multipliers and others lack clear definitions of what it means to act in “bad faith,” Tenant Harassment statutes are important tools to encourage landlords to properly maintain their long-term tenants’ rent controlled units.



Alioto

*Josephine L. Alioto is an Associate at the Law Offices of Eric L. Lifschitz, a firm specializing in tenant rights and its attendant issues, including injuries from exposure to toxic mold. As a tenant rights attorney,*

*Josephine is committed to protecting and advocating for tenants who have been oppressed and neglected. She also volunteers regularly in the area of eviction defense and was awarded an Outstanding Volunteer in Public Service award in 2012 by the Bar Association of San Francisco and received a Volunteer Appreciation Award by the Aids Legal Referral Panel in 2013.*



Darsky

*Aaron H. Darsky is a Partner at the Law Offices of Eric L. Lifschitz. He began his legal career at Schubert & Reed, LLP, representing plaintiffs in consumer, antitrust, securities fraud, multilevel marketing fraud, and shareholder minority rights class actions and shareholder derivative actions.*

*Since 2009, when he began litigating habitability cases with Eric Lifschitz, he has successfully leveraged his complex litigation experience into becoming a vigorous advocate for tenants’ rights.*