In discussing the Homeowner Bill of Rights, Los Angeles lawyer David Newman reviews ways to improve the nonjudicial foreclosure process.

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Given the relatively high cost of building multifamily housing for tenants who pay below market rents, how does unaffordable housing become affordable in Los Angeles and other major California cities? The answer lies in the complexities of housing subsidies provided by federal low-income housing tax credits (LIHTCs) bought by investors and low- or no-interest financing or grants provided by public agencies. In 2017, local developers may rely more on loans financed from new funding sources available to these agencies and less on equity as investors devalue LIHTCs due to an expected lower corporate tax rate.

An example illustrates this situation. Last year, nonprofit developers opened a nearly 70-unit low-income senior housing project near downtown Los Angeles. The cost per unit was approximately $350,000. However, tenants only pay rents ranging from $415 to $715. Rents were subsidized because roughly 40 percent of project costs were financed by equity generated from the “sale” of LIHTCs, and the balance was covered by no-interest debt and grants from public agencies totaling $26 million.

Multiple factors contribute to high housing costs. In October 2014, a California Department of Housing and Community Development (HCD) study found construction costs accounted for 69 percent of these costs. When public loans are used to finance projects, workers must usually be paid Davis-Bacon or state prevailing wages. Several years ago, UC Berkeley researchers concluded prevailing wages increase project construction costs from nine to 37 percent.

The HCD study identified other cost factors, including site preparation, demolition, and development fees, permit fees, design fees, and acquisition costs. Developers also incur carrying costs while getting projects approved as well as assembling debt and equity to fund construction and permanent loans. The senior housing project above took 12 years and eight financing sources.

While costs increase, so too does the demand for more affordable housing units. Mayor Eric Garcetti committed to build and preserve 15,000 affordable units by 2021. In June 2016, the mayor reported nearly 6,000 units were produced. Assuming the per unit cost of constructing affordable housing remains at roughly $350,000, $3 billion will be needed to produce the remaining 9,000 units.

Where will these funds come from given the 2016 election? On the positive side, L.A. voters approved Measure HHH authorizing the city’s issuance of $1 billion in bonds over the next 10 years for affordable housing, mainly for the homeless.

Conversely, congressional Republicans have committed to lower the corporate tax rate from 35 to 20 percent. The accounting firm Novogradac & Company reports this would reduce equity for housing between 8 to 12 percent, or a loss of $700 million to $1 billion. Meanwhile, investors are already backing out of deals, dropping prices paid for LIHTCs, or requiring adjusters if the corporate tax rate is lowered. The latter is an issue for lenders who underwrite loans based on the committed equity. Donald Trump has threatened to cut off federal funding to “sanctuary” cities like Los Angeles, thus eliminating monies used by the city to pay for housing.

Affordable housing provides safe, sanitary shelter, creates jobs, and improves communities. In this uncertain financial climate, developers will need to be more creative in structuring deals and building projects in the most cost-effective manner.
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Ron Galperin  Los Angeles City Controller

What is the perfect day? I am very lucky to do a job I love. Being in an elective office, the things you do vary widely, from policy discussions to waving from the back seat of an open convertible in a parade.

And, at the end of the day? I come home to a really wonderful husband.

What is a controller? It may be the most suggestive title in the City of Los Angeles. I do not get to control everything. It’s an aspirational title.

What is your major job duty? To keep the finances in some semblance of control.

How do you do that? We can accomplish it through 1) initiatives of transparency and open data, 2) our audits and the recommendations that we make, and 3) focusing on the many special funds of the city.

What are the special funds? We have more than 900 different accounts. I seek to dissect them and make sure they are put to good use.

What is an example of a special fund? From monster transportation projects to something small and specific that exists only for the purpose of trimming the coral trees on the median of San Vicente Boulevard in Brentwood.

You graduated from Loyola Law School in 1994. Why did you want to become a lawyer? I could quip that my mother offered me the choice either to be a lawyer or a doctor, and I was not good with blood.

Were you frightened the first time you appeared before a judge? Probably a little nervous, but not frightened. Litigation was so much about everything you do before you get in the courtroom.

You’ve been a businessman. Does that help you understand the problems Los Angeles business owners face? When you run a business and deal with paying the taxes and meeting the regulatory requirements, making sure all of the people who work for you get their paychecks and things like that, you have a very different perspective.

There are 42,000 city employees, and there were 290,000 payments made to vendors last year. Is your job unwieldy? We do all of it with 150 people. I am amazed at the volume of work that we do. The city has $49 billion in assets and $28 billion in liabilities.

What is our credit rating? We have a good credit rating. The assets are probably worth more than their book value; we own vast amounts of real estate. Many are undervalued and under-utilized. It’s time for an asset management overhaul.

The city’s financial policy states, “Temporary operating deficits will not be tolerated as extended trends.” Has that policy goal been met? The City of Los Angeles does not operate at a deficit. We aren’t like the federal government; we can’t print money. So, every year, we have a so-called balanced budget. Sometimes, that has come at the cost of not adequately investing in our infrastructure.

The city budgets one percent of the general fund for capital or infrastructure improvements. Is that enough? No.

Are department heads afraid of your audits? When I came into office and asked questions, the answer was, “This is how it’s been done.” I am more interested in how it should be done and how it can be done.

Do you get resistance? Changing the way that a city thinks is a cataclysmic change. When you work for the city, if you say no, you won’t be punished. If you say yes, something may go wrong. There is a perverse incentive to say no.

Are you saying yes? I am trying to say yes where it makes sense. We have to try out new things and embrace them. We have partnered with technology companies to try to find things where we can make improvements tenfold, not just incrementally.

Which municipal facility is in the most need? The so-called L.A. City Mall, which is right outside the front door, and perhaps the worst mall in the city. It’s an incredibly valuable travesty.

What is the most important quality of life improvement that the city can provide? The number one responsibility is public safety. We also have a role to play in transportation and the quality of our public spaces.

The Department of Cultural Affairs gets 1 percent for the arts program. What happens with that money? Developers pay 1 percent of the project towards the arts or they can place art on their sites. Previously, the money could only be spent within one block of where it was collected. That was insane. After our audit, we were able to change the interpretation of
the law, so the money could be spent within the council district.

What’s an example of the change? The whole river project. We want a city that inspires.

The controller is a four-year elected position.

What was the campaign trail like? It was a two-year process; I enjoyed every part of it except the fund-raising. Who put the word “fun” in fund-raising?

Were you surprised when you won? Between the runoff and the general election there were 10 polls conducted. All 10 showed that I was going to lose. But I knew instinctively they were very wrong. I won by a large margin.

What is the city’s greatest asset? The people who live in it. We’ve got a creative, diverse, and interesting population. The city looks to the future; we don’t look in our rearview mirror.

You built a reputation as a government reformer.

What needs to be reformed? The way that government does business. We are not a business, but we can and need to run in a much more business-like fashion to really serve the needs of the city.

In 2015, the payroll was $4.88 billion. Do you think anyone is overpaid? I believe that our city benefits from having well-qualified people working for it, and that costs money. A chief port pilot II earns nearly $499,382 a year. Too much? We compete with other ports around the nation, and yes, it’s a high number. But what do they earn in other major ports? What they get in Los Angeles is not out of whack.

In 2015, you were named one of the nation’s top 25 doers, dreamers, and drivers in technology. What is your dream? To revolutionize local government.

You launched Control Panel LA, the city’s first open data portal, featuring the city’s checkbook. Has it been successful? We’ve had 7 million page views. That tells me that people are really interested.

You said that LAPD has too many cubicle cops. What does that mean? We did an audit in which we looked at police officers who had been assigned to do clerical duties. Five hundred positions are currently being filled by sworn officers that could be filled by civilians. That would save $40,000 per year, per position.

Did your findings result in a change? We’re heading in the right direction. Did I get all that I want? No.

You are the first openly gay official to be elected to a citywide office in Los Angeles. What does that feel like? I am aware of the role that I have, and that my husband, Zach, and I have, in being good role models.

What characteristic did you most admire in your mother? Tenacity. She was a strong and talented person—both an opera singer and also in the Israeli army.

What are your retirement plans? I am not planning to retire.

What would you grab running out of the front door if your house were on fire? My husband. Once he was safe, I’d take old family photos because they’re irreplaceable.

Which U.S. president would you like to take out for a beer? Abraham Lincoln, but for a Chardonnay.

What are the three most deplorable conditions in the world? War, mistreatment of women, and poverty.

What do you want written on your tombstone? It doesn’t matter what’s written; we write our lives with the deeds that we do.
New Health Care Protections Under ACA Section 1557

IN 2010, THE AFFORDABLE CARE ACT instituted sweeping changes throughout the health care landscape by providing the groundwork for universal healthcare for all Americans. However, one area of change that went into effect in October 2016 has gone mostly unnoticed by the general media: implementation of the act’s Section 1557.1

Section 1557 is the “first federal law to prohibit discrimination on the basis of sex” and it also requires that (among other prohibitions and requirements) “covered entities must take reasonable steps” to implement a language access plan to “each individual with limited English proficiency”2 in health care activities.3

Thus, it institutes protection from discrimination based on sex or gender identity—including blanket exclusions of transition-related health care—as well as denial of access to linguistic and interpreter services, and denial of services based on sex or gender identity and language proficiency.

Furthermore, it provides mechanisms for individuals to file complaints and provides the means for the government (state or federal) to enforce compliance.

To be subject to Section 1557, any part of a health program or activity must be: 1) receiving, directly or indirectly, federal financial assistance provided or made available by the Department of Health and Human Services (HHS), 2) a health program or activity administered by the HHS, or 3) a health program or activity administered by an Affordable Care Act Title I entity, including state-based market places.

Under Section 1557, a covered entity cannot discriminate on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities. Similarly, they must not engage in business with an entity that discriminates in such a manner.

While this prohibition may seem familiar, the Office of Civil Rights—a division of the HHS—has expanded some of the terms. For example, the term “sex” recognizes gender to include male, female, transgender, or no gender identification.

Also, if a patient identifies—or does not identify—with a specific gender and his or her medical records state a different gender, identification with the chosen gender is protected.

Additionally, the term “national origin” includes not only a person’s ancestry, but language abilities. Under Section 1557, individuals with limited English proficiency have the right to reasonable access to interpreter assistance along with the right to deny the use of an interpreter.

However, the use of family members or individuals, including medical staff, who speak a specific language but are not deemed qualified to act as an interpreter is highly discouraged. A minor is prohibited from acting as an interpreter unless there is a dire need or emergency. While such changes in access to medical care are not new to states like California, they may require extensive changes in policies and processes in others.

In addition to changes in patient rights, Section 1557 institutes requirements for health plans and providers that will require action by all those covered by the regulation. In all significant publications and communications (including websites) that describe coverage, benefits, and denials of either, the covered entities must include a notice that states the entity does not discriminate on the basis of race, color, national origin, sex, age, or disability, as well as contact information for language interpretation services, the right to file a grievance with the entity or the Office of Civil Rights, or both, and taglines translated into the top 15 languages used within the entity’s state. Since publications and communications vary in size, an entity may use a shortened nondiscrimination notice and fewer translated taglines in its smaller sized items.

Moreover, covered entities that employ 15 people or more must appoint an employee to coordinate efforts to comply with and carry out their responsibilities, including investigation of a grievance communicated to the entity alleging noncompliance or any prohibited action. Likewise, covered entities that employ 15 people or more must adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of grievances alleging prohibited actions.

Despite the required internal changes, Section 1557 provides some assistance in alleviating the impact. If an entity already possesses a nondiscrimination statement, it may blend Section 1557 language into its current notice.

The same applies to grievance procedures. The Office of Civil Rights has created a sample nondiscrimination notice, grievance policy, and taglines with translations for entities to use at their discretion. Entities are allowed to develop their own language as long as it complies with Section 1557 requirements.

Entities also may determine placement and font size of the language as long as it is conspicuous. Furthermore, an entity may use an existing employee to act as its required coordinator and is not required to ensure that the employee’s duties entail only overseeing implementation and grievance review.

Section 1557 has far-reaching implications for patients, providers, and health plans. Despite this, it has gone relatively unnoticed by those outside of the medical field. As these regulations are untested, it should prove interesting to see how they play out over time.

2 See 45 C.F.R. §§92 et seq.
4 This provision includes, but is not limited to, health plans, hospitals, doctors, and employee health benefits.

Victor Ortiz is an in-house health care attorney in Los Angeles and an executive committee member of the Barristers, Healthcare Law, and Corporate Law Department sections of the Los Angeles County Bar Association.
Applying LARSO to Illegal Units in Single-Family Dwellings

THE LOS ANGELES RENT STABILIZATION ORDINANCE (LARSO) enacted in 1979 applies to multifamily rental units in the City of Los Angeles and was designed to protect tenants from unreasonable rental increases and other actions by landlords to strip tenants of their rights under California case and statutory law through eviction and other means.1 Central to the LARSO is the governing of permissible rent adjustments.2 Under the LARSO a landlord is permitted to impose a “maximum adjusted rent” that is calculated by using a baseline “maximum rent.”3 It is unlawful for a landlord to “demand, accept or retain more than the maximum adjusted rent permitted pursuant to this chapter or regulation or orders adopted pursuant to this chapter.”4 Section 151.05(A) of the LARSO requires landlords to register rental units and serve a copy of a valid registration or annual registration renewal statement on the tenant before any demand or acceptance of rent.5

Single-family dwellings are exempt from LARSO unless there are multiple dwellings on the same lot.6 But in the face of a dwindling supply of affordable housing across much of the City of Los Angeles, it has become more common to see single-family dwellings converted into multiple dwelling units that are offered for rent to unrelated individuals or families. In the event that a conversion occurs many landlords assume that because the tenancies are maintained in a single-family dwelling structure, the LARSO does not apply. Adding to the confusion, the Los Angeles Housing Department, which is responsible for registration of rental units subject to the LARSO, has not always applied the LARSO uniformly to these types of tenancies.

For example, a single-family home owner might alter the interior of the dwelling so that it can accommodate multiple tenants. These alterations could include the adding of separate entrances, bathrooms, and kitchens. At some point the building and safety department or health department learns of the unpermitted improvements, multifamily use and occupancy of the dwelling and cites the owner for violating applicable zoning for the property, building codes, or health conditions. To cure the violation, the owner evicts the tenants but fails to abide by the rules concerning this kind of eviction under the LARSO, including the requirement to register the rental unit with the Los Angeles Housing Department, serving the registration on the tenant prior to any collection of rent or eviction, and payment of relocation benefits of up to $18,300.7 LARSO is applicable to these kinds of rental situations notwithstanding the single-family residence exemption from the LARSO. As a consequence, the failure by the owner to comply with the LARSO could expose the owner to liability up to three times the amount of rent unlawfully collected.8

The leading reported case on point, Carter v. Cohen, addressed the issue of the LARSO’s application to a guesthouse of a single-family residence illegally converted to a rental unit.9 The tenant in Carter brought an action against the landlord for overpayment of rent under the LARSO. The Second District in Carter recognized that the LARSO protected illegal tenancies even when the physical structure itself may be technically exempt from the LARSO or the tenancy illegal.10 The rationale adopted in Carter, explaining why the LARSO applies even when a tenancy is illegal, is worth examining. The Carter court stated that “the rule barring the enforcement of unlawful contracts is not absolute.”11 An exception to the rule exists “[w]hen the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction.”12 The protective purpose of the legislation is realized by allowing the plaintiff to maintain his action against a defendant within the class primarily to be deterred.”13

The Carter court noted that “[c]ourts have thus permitted parties to obtain benefits under a law enacted for their protection, despite from recovering for rent paid in excess of that permitted under the ordinance. The Second District in Carter recognized that the LARSO protected illegal tenancies even when the physical structure itself may be technically exempt from the LARSO or the tenancy illegal.10

The rationale adopted in Carter, explaining why the LARSO applies even when a tenancy is illegal, is worth examining. The Carter court stated that “the rule barring the enforcement of unlawful contracts is not absolute.”11 An exception to the rule exists “[w]hen the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction.”12 The protective purpose of the legislation is realized by allowing the plaintiff to maintain his action against a defendant within the class primarily to be deterred.”13

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their participation in transactions that con-
travened the law [citation omitted].”14 The
Second District concluded that “[b]ecause
[t]he protective purpose of the legislation
[was] realized by allowing [Carter] to main-
tain [her] action against [her landlord]” ( cita-
tion omitted) the trial court properly per-
mitted her to assert her [LARSO] claim.”15
The rationale adopted in Carter was applied
to a “mix use” tenancy in the case ABCO,
LLC v. Eversley in which the Second District
held that the tenant’s residence and work space
was a “rental unit” subject to the city’s rent
stabilization ordinance.16 The trial court in
ABCO granted the tenant’s motion for sum-
mary judgment in an unlawful detainer action
based on the tenant’s alleged failure to pay
certain increases in rent. The tenant asserted
as one of his affirmative defenses that the
rental unit was not registered as required under
the LARSO. The tenant asserted in his motion
for summary judgment that the landlord was
precluded from demanding or collecting rent
because the unit was not registered.
The landlord argued in opposition to the
motion that the building was zoned for com-
mercial use and thus not subject to the
LARSO. In a declaration submitted by the
landlord, it was asserted that “[a]t all times
[the] building was used as a commercial build-
ing for business purposes only.”17 The landlord
also attested that “[t]he purpose of the occu-
pancy permit was to allow defendant to use
the premises as both a business and residence.”
The landlord claimed the unique occupancy
permit only affected the defendant’s premises
and no other portion of the building.18
The Second District, relying on Carter,
affirmed the trial court’s granting of the ten-
ant’s motion and held:
Section 151.5(A) requires a lessor to
register if it rents a “rental unit.” The
term “rental unit” is defined in section
151.02 as “a dwelling unit” rented for
“living or dwelling” purposes. Section
151.02 extends the definition of a
“rental unit” to “the land and buildings
appurtenant” to the dwelling unit.
Section 151.02 provides an exception
to this broad definition of a rental unit
for, “Dwellings, one family, except
where two or more dwelling units are
located on the same lot.” Section 12.03
defines “Dwellings, one family” as,
“A detached dwelling containing only
one dwelling unit.” The express lan-
guage of section 12.03 requires that a
one-family dwelling be detached. There
is no ambiguity in section 12.03. Sec-
tion 12.03 expressly requires that a
one-family dwelling be “detached.”19
Both the Carter and ABCO opinions con-
clude that the physical structure and/or zoning
of the particular property does not necessarily
control whether that property and any ten-
ancies maintained in such structures will be
exempt from the LARSO. Moreover, the
rationale in Carter concerning illegal tenancies
and the application of the LARSO has been
applied by the Sixth District to justify pro-
tections under other statutory schemes. In
Nativi v. Deutsche Bank National Trust
Company the Sixth District held that the ille-
gality of a tenancy in a converted garage did
not render the Protecting Tenants at Fore-
closure Act of 2009 inapplicable.20
There is only one reported case that specif-
ically addresses the applicability of relocation
benefits provided under the LARSO to illegal
units, Salazar v. Mardeaga.21 The Appellate
Division of the Los Angeles Superior Court
held the LARSO applied to the illegal rental
of an attached garage of a single-family res-
idence and found that the trial court erred
in awarding possession to a landlord of the
illegally converted garage because the landlord
had not paid relocation benefits to the ten-
ant.22 The case determined that although the
tenancy was unlawful, the goals of rent sta-
bilization would be promoted by denying
the landlord possession of the unit until he
paid the tenant a relocation fee under the
ordinance.23
Under the rationales of Carter and Salazar,
it appears that even when a landlord attempts
to return a structure to its previous single-
family condition, if the eviction of tenants is
required, relocation benefits provided under
the LARSO must be paid to the tenants before
eviction proceedings may commence.
In the recent unpublished Second District
opinion Vaughn v. Darwish, the court of
appeal held that the physical alteration of
the single-family house to include multiple
kitchens and the use of the single-family res-
idence as multiple dwelling units for at least
four and possibly six separate tenancies ren-
dered the tenancies subject to the LARSO.24
The court of appeal explained why returning
the physical structure to a single-family res-
idence would not necessarily preclude appli-
cation of the LARSO to the tenants remaining
at the property:
Confidence At The Courthouse.
It is possible that, after demolishing
Hart’s room, constructing an interior
stairway, and removing numerous
kitchens and bathrooms, defendants
turned what was once a multiple-
dwelling unit property into a more typ-
ical single-family residence. This would
not remove the plaintiffs’ tenancies
from the protections of the LARSO,
however. Instead, the LARSO would
require defendants to pay relocation
fees to plaintiffs. (L.A. Mun. Code, §
151.09, subd. G; see also Salazar, supra,
Based on the current state of reported case authority, it would be wise for any landlord prior to initiation of any eviction proceeding to review the circumstances of any tenancy maintained in a structure that is arguably exempt from a rent control ordinance to ensure that the applicability of any such exemption is not nullified by the specific use or physical alteration of the premises. Similarly, landlords should not assume the LARSO is inapplicable simply because the Los Angeles Housing Department refuses to accept registration of a particular property based on its zoning or identification in the public records as a single-family dwelling or residence. The courts have concluded that the analysis should focus on the nature of the tenancy and not on the physical structure for determination of whether that tenancy is subject to the LARSO.

1 In 1979, the Los Angeles City Council enacted the LARSO (L.A., CAL. MUN. CODE §§151.00 et seq. to regulate rent increases due to a housing shortage. See, Klarfeld v. Berg, 29 Cal. 3d 893, 895–896 (1981). The legislative purposes of the LARSO are declared in §151.01: “There is a shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor....Therefore, it is necessary and reasonable to regulate rents so as to safeguard tenants from excessive rent increases, while at the same time providing landlords with just and reasonable returns from their rental units.”

2 L.A., CAL. MUN. CODE §151.06.
3 L.A., CAL. MUN. CODE §§151.02, 151.06, 151.07.
6 L.A., CAL. MUN. CODE §151.02.
7 L.A., CAL. MUN. CODE §151.09(G).
8 L.A., CAL. MUN. CODE §151.10(A).
10 Id.
11 Id. at 1048.
12 It appears the subjective intent of the landlord (i.e., whether landlord knew the use was illegal) is not relevant to the inquiry of whether a tenancy is subject to the provisions of the LARSO where it is maintained in a structure that may be exempt from the ordinance.
13 Carter at 1050 (citing Lewis & Queen v. N.M. Ball Sons, 48 Cal. 2d 141, 153 (1957)).
14 Carter, 188 Cal. App. 4th at 1048.
15 Id. at 1049.
17 Id. at 1096.
18 Id. at 1100.
19 Id. at 1100.
22 Appellate Department decisions are not binding on the California Court of Appeal. See Carter v. Cohen, 188 Cal. App. 4th 1038 (2010).
25 Id. at 14 n.10.
crisis hit California hard. In 2007, more than 84,375 residential properties were foreclosed, and another 254,824 loans went into default.1 The numbers were equally grim across the rest of the country, with nearly 1 percent of all U.S. households in some stage of foreclosure during that year.2 Nearly 10 years later, high foreclosure rates persist. In February 2016 alone, over 8,000 properties were in some stage of the foreclosure process in California.3 Currently, nearly 1 in every 1,700 properties in Los Angeles County is in some state of the foreclosure process, with rates more than double in some areas.4

In response to the initial crisis, California took a series of steps to modify the foreclosure laws: first, with a relatively small revision to the Civil Code in 2008, and, second, with a major reform in 2013 known as the Homeowner Bill of Rights (HBOR).5 Three years after enactment of the HBOR, foreclosure rates have decreased, and many homeowners have obtained loan modifications and other forms of payment assistance from their lenders.6 Yet the HBOR’s creation of a private right of action for borrowers to sue lenders,7 including preemptive lawsuits even before foreclosures are finalized, has converted a process that was designed to avoid the legal system into one regularly involving the legal system. California state and federal courts are overwhelmed with loan modification and foreclosure-related litigation. Revisions to the HBOR could reduce litigation while preserving the long-standing goal of making foreclosures relatively quick and inexpensive, and done without judicial intervention.8 The background that led to the HBOR is important to understanding the key changes that it has made to California law as well as possible revisions to the HBOR that may be required to improve and streamline the nonjudicial foreclosure process while achieving its goals of encouraging solutions other than foreclosure.

Nonjudicial Foreclosures
The purchase of real property in California most commonly involves borrowing money from a lender.9 As part of the purchase transaction, most lenders require that borrowers sign a deed of trust, which enables lenders to take ownership of the real property through a trustee’s sale, in the event that borrowers fail to repay the loan.10 In California, this process generally occurs outside the judicial system. The nonjudicial foreclosure process, embodied in Civil Code Sections 2924 et seq., has been authorized by statute since 1872.11 Historically, Section 2924 covered “every aspect” of the nonjudicial foreclosure process.12 Since the rules

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set forth in these statutes are “exhaustive…. California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.”

Prior to 2008, the nonjudicial foreclosure process could proceed rather quickly. Once borrowers stopped making loan payments, the first step for lenders was a notice of default and election to sell (NOD). Lenders provided the NOD—a publicly recorded document—to borrowers, who had 90 days to “reinstate” the loan by repaying the default amount. If, after 90 days, there was no reinstatement, lenders could issue a notice of trustee’s sale (NOTS), which set the date for the proposed sale and notified borrowers of the total amount of money owed. The foreclosure sale could proceed as early as 20 days after the issuance of the NOTS if borrowers did not repay the debt. In all, the process could last as little as 110 days. The expediency of this process served one of the foundational purposes of Section 2924 to “provide a creditor or beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor.” The system was designed to avoid court intervention and to minimize borrower challenges to foreclosures when the default is not disputed.

In addition, the legal framework for nonjudicial foreclosures was—and is—designed to benefit borrowers by prohibiting lenders from seeking a post-foreclosure deficiency judgment. If at the time of the foreclosure sale a borrower owes $500,000 to the lender but the property sells for only $200,000, the lender is prohibited from subsequently suing the borrower for $300,000. This ensures that borrowers are not faced with the threat of owing more money to the lender even after a foreclosure sale.

In 2008, the California legislature responded to the foreclosure crisis by enacting Civil Code Section 2923.5. Its most notable change was to prohibit lenders from initiating the foreclosure process unless they first contact—or at least attempt to contact—borrowers to assess their financial situation and explore possible alternatives to foreclosure. If lenders fail to satisfy Section 2923.5, the statute creates a private right of action for borrowers to obtain a postponement of an impending foreclosure sale to force compliance.

Despite the enactment of Section 2923.5, foreclosures in California increased. A total of 632,573 California properties were in the foreclosure process in 2009, an increase of nearly 21 percent from 2008. In 2010, the number of completed foreclosures represented 44 percent of all home sales. In 2012, over 30 percent of residential properties were underwater (i.e., with mortgage debt exceeding the value of the home), and the serious delinquency rate (90 days or more) was at 7 percent. The 7 percent rate was unprecedented, as the rate had never been higher than 1.5 percent in the preceding three decades.

**HBOR**

In 2012, California took additional steps to try to combat residential foreclosures. The most significant legislative step was the enactment of broader revisions to Civil Code Sections 2924 et seq., which became known as the HBOR and were effective January 1, 2013. Attorney General Kamala Harris, who spearheaded the effort to enact it, described it as legislation “designed to protect homeowner’s from unfair practices by banks and mortgage companies and to help consumers and communities cope with the state’s urgent mortgage and foreclosure crisis.” The HBOR’s stated goal was “to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain…loan modifications or other alternatives to foreclosure.”

The HBOR was enacted just months after attorneys general in 49 states, including California, signed the National Mortgage Settlement (NMS) with five of the largest mortgage servicers in the country. The HBOR was modeled on the NMS, enacted to ensure that the provisions of the NMS applied to all mortgage servicers doing business in California and that individual borrowers could assert a private right of action against lenders for a violation of the HBOR.

The HBOR includes a number of key provisions. It requires that lenders provide borrowers with a “single point of contact” who knows the facts of their case, has their paperwork, and can communicate with them about their account status and the results of any application for a loan modification. It allows borrowers to sue for injunctive relief to enjoin a pending sale or for monetary damages post-sale, if lenders violate specific statutory provisions. Finally, and perhaps most notably, is the prohibition on dual-tracking—the practice of evaluating borrowers for a loan modification while concurrently proceeding with the foreclosure process. Dual-tracking can occur by either recording a NOD, NOTS, or actually conducting a sale while the “borrower is seeking a loan modification.”

The dual-tracking prohibition was the most crucial impetus behind the HBOR. To trigger the anti-dual tracking provision of the HBOR, borrowers must submit a complete loan modification application to lenders. If this occurs, lenders cannot proceed with the foreclosure process until review of the application is finished. If lenders deny an application, borrowers have the right to appeal within 30 days, and no foreclosure can proceed during that time. If the appeal is subsequently denied, lenders must wait at least 15 days to continue with the foreclosure process.

The HBOR does not set forth specific deadlines for when borrowers can submit loan modification applications. Borrowers potentially could submit applications up to and including the day of a scheduled foreclosure sale, which would then prohibit the sale from proceeding because it would be considered dual-tracking. Notably, the absence of any deadline for submission of a loan modification application contrasts with a deadline in Civil Code Section 2924 for borrowers to reinstate a loan—i.e., cure the amount in default—prior to a scheduled sale. Borrowers must reinstate a loan no less than five business days before a sale, or the sale may proceed. Yet, revised Section 2923.6 seems to contain a loophole allowing borrowers to avoid that five-day deadline. It is unclear why the legislature did not adhere to the five-day deadline regarding the submission of loan modification applications. Also unclear is why the legislature did not follow the NMS, which only mandates that applications submitted more than 15 days before a scheduled foreclosure sale be reviewed and sales postponed. The absence of any deadline potentially enables borrowers to claim that they submitted an application seconds before a scheduled foreclosure sale, and if the sale is not postponed at the last second (which, as a practical matter, is difficult), to sue for damages under the HBOR.

Moreover, nothing in the HBOR prohibits borrowers from reapplying for a modification immediately following a denial. There is no set number of applications that borrowers can submit, nor is there any minimum waiting time before borrowers can submit new applications. The absence of this restriction is noteworthy because it contrasts with a parallel federal regulation that prohibits lenders from dual-tracking in connection with the first application submitted by borrowers. Unlike the HBOR, the federal regulation allows the foreclosure process to proceed if borrowers submit subsequent applications, even following a denial.

In an attempt to prevent borrowers from delaying the foreclosure process by repeatedly submitting new applications immediately following a denial, the legislature enacted Section 2923.6(g) as part of the HBOR. The provision allows borrowers to decline to re-review borrowers unless there has been a “material change in the borrower’s financial circumstances.” It provides:

In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January
1. The first step in the nonjudicial foreclosure process is the issuance of a notice of trustee’s sale.
   True.
   False.

2. The Homeowner Bill of Rights (HBOR) creates a private right of action that enables borrowers to sue lenders for statutory violations during the nonjudicial foreclosure process.
   True.
   False.

3. Borrowers can prevent a nonjudicial foreclosure sale from proceeding by reinstating their debt at any time before the sale is scheduled to occur.
   True.
   False.

4. If a lender opts for nonjudicial foreclosure, it cannot also pursue a deficiency judgment against the borrower.
   True.
   False.

5. The HBOR and the Code of Federal Regulations contain identical provisions regarding the timing and number of loan modification applications that could potentially constitute dual-tracking.
   True.
   False.

6. Civil Code Section 2923.5 changed the nonjudicial foreclosure process by requiring lenders to contact (or attempt to contact) borrowers to explore possible alternatives to foreclosure prior to the initiation of the foreclosure process.
   True.
   False.

7. Injunctive relief is not available under Civil Code Section 2923.5.
   True.
   False.

8. The HBOR’s private right of action only arises once a notice of default has been recorded.
   True.
   False.

9. Dual-tracking occurs if a lender reviews a loan modification application and concurrently records a notice of default or notice of trustee’s sale, or actually conducts a sale.
   True.
   False.

10. The HBOR requires that lenders only need to review a loan modification application that is submitted at least 15 days before a scheduled foreclosure sale.
    True.
    False.

11. Either an increase or a decrease in a borrower’s income could constitute a material change in financial circumstances that would require a lender to review a loan modification application.
    True.
    False.

12. Borrowers can submit a maximum of three loan modification applications in one calendar year under the HBOR.
    True.
    False.

13. The National Mortgage Settlement excludes the five largest mortgage servicers in the country.
    True.
    False.

14. Under the HBOR, a lender can refuse to re-review a loan modification application if the borrower has not experienced a material change in financial circumstances.
    True.
    False.

15. Any person who has filed for bankruptcy within 365 days of a foreclosure sale is not entitled to the protections of the HBOR.
    True.
    False.

16. The HBOR requires that evidence of a material change in financial circumstances be documented.
    True.
    False.

17. The HBOR authorizes recovery of monetary damages only if a foreclosure sale has been completed.
    True.
    False.

18. The HBOR allows borrowers to appeal at any time a decision by a lender to deny a loan modification.
    True.
    False.

19. The HBOR require that lenders review borrowers for a loan modification even if borrowers do not submit a complete application.
    True.
    False.

20. California is not a party to the National Mortgage Settlement.
    True.
    False.
of establishing a “material change.”52 Courts
income,” the lender could have determined
Court held that the mere allegation that a bor-
which one federal court in California noted that
language of the statute, lenders need not even
apply, and lenders can proceed with foreclosure
This predictably has led to significant litigation
ment that the material change be doc-
Moreover, the statute does not provide a
definition for “material change,” leaving
This predictably has led to significant litigation
concerning what the term means, and state
happened, including that change is documented by the
of the borrower’s previous application
ment—no matter how large—would not con-
ment that the material change be doc-
Another issue with the material change
request is that there is nothing in the
HBOR that requires borrowers to demonstrate
how or why a change is actually “material,”
i.e., how it might affect the outcome of a sub-
sequent review. A borrower may have a sig-
ificant change in income—for example, a 50
percent increase of the hourly wage, from $10
to $15—but if a prior application was denied
because the borrower needed to make an
hourly wage of at least $40 to qualify for a
modification, the change from $10 to $15
would not be considered material for the pur-
pose of obtaining a modification.
It is also unclear whether the material
change requirement is triggered by borrowers’
notifying lenders that their financial circum-
stances have changed or whether that change
has to be affirmatively documented to lend-
ers.53 Courts have varied widely on exactly
what is required for borrowers to document
a material change in their financial circum-
stances. Some courts have required only that
borrowers state (orally or in writing) that
there has been a change, while other courts
have held that the statute requires extensive
documentation of the exact nature of the
change. For example, one court held that a
“verbal overview of plaintiffs’ financial situ-
ation” was insufficient to satisfy the require-
ment that the material change be doc-
umented.56 Similarly, another court found that
a two-page letter that “simply states that bor-
rowers’ financial circumstances have materially
changed as their income and expenses have
changed since they last submitted an applica-
tion for foreclosure alternatives” was “bare-
bones [and] bereft of any details or documenta-
tion.”57 On the other hand, one court held
that a “statement in the letter regarding... elimina-
tion of credit card debt,” without any
further explanation or documentation, was
sufficient to satisfy the documentation require-
ment of a material change under the HBOR.58

Finally, the HBOR’s interplay with a com-
mom tactic used by borrowers—filing for bank-
rupucy to obtain an automatic stay that pre-
vents foreclosure—frequently does not achieve
the desired goal of the HBOR. The HBOR
excludes from the definition of “borrower”
any person who has a pending bankruptcy
case, and only borrowers are afforded HBOR
protections.59 However, once a bankruptcy
ceases, borrowers are no longer excluded
from the HBOR’s provisions. Borrowers are
free to file for bankruptcy to prevent a fore-
closure sale, obtain an automatic stay against
foreclosure, allow the bankruptcy case to be
dismissed, and then immediately apply for a
loan modification claiming that circumstances
have changed in light of the bankruptcy, which
would continue the prohibition against dual-
tracking pursuant to the HBOR.60

Possible Revisions to the HBOR
The HBOR has had both positive and negative
impacts. There are some indications that it
may be reducing foreclosures and increasing
the number of loan modifications offered
to borrowers.61 Through the HBOR and related
federal programs, hundreds of thousands of
homeowners in California have received sig-
nificant assistance from lenders through debt
forgiveness, loan modifications, or other forms
of relief.62 However, the HBOR has brought
with it significant litigation that has pulled
resources away from an already understaffed
and underfunded court system. The HBOR
has altered a policy in place for over a century
to keep the judiciary out of the foreclosure
process and afford lenders a relatively quick
and efficient way to foreclose when borrowers
fail to repay their debt, even if minor statutory
violations occur that result in no actual prejudice
by the lenders.

Another issue with the material change
requirement is whether the material change
requirements are being met. For example, one
court held that a “verbal overview of plaintiffs’
financial situation” was insufficient to satisfy
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One potential revision would be to limit
the number of applications that would invoke
the dual-tracking prohibition. A parallel federal
regulation that prohibits dual-tracking for the
first loan modification application enables
borrowers to be reviewed for alternatives to
foreclosure while ensuring that the process
does not indefinitely extend foreclosure pro-
cedings if an application previously has been
denied.64

Another possible revision would be to
impose a deadline by which applications must
be submitted in order to halt the foreclosure
process. The HBOR could align itself with
long-standing California law that imposes a
five-day deadline prior to a foreclosure sale
for borrowers to reinstate their loans to avoid
foreclosure. The HBOR could be revised to
include a provision that applications must be
submitted no later than five business days
before a scheduled sale in order to invoke the
dual-tracking prohibition. Alternatively, it
could be revised to follow the NMS require-
ment that applications submitted more than
15 days before a scheduled foreclosure sale
be reviewed and necessitate postponement of a
sale.65 Either way, this could reduce the num-
ber of last-minute applications that are sub-
mitted solely to invoke the anti-dual tracking
protections of the HBOR but have no realistic
chance of resulting in a modification. Since a foreclosure sale must occur at least 111 days after lenders have notified borrowers of a possible foreclosure sale, there is sufficient time for borrowers to apply before the eve of a scheduled sale.

The HBOR could also be revised to limit the ban on dual-tracking to borrowers who have recently filed for bankruptcy. As it stands now, borrowers who are not in bankruptcy at the time an application is submitted are entitled to full HBOR protections. This exposes the HBOR to abuse by potentially incentivizing borrowers to use bankruptcy as a vehicle to delay foreclosure sales without any real desire to improve their finances, and then rely on the fact of the bankruptcy to claim a material change in their finances. If borrowers file for bankruptcy, that is their opportunity to seek assistance from the lenders regarding their loan payments. Indeed, the purpose of bankruptcy is to afford borrowers, as debtors, an opportunity to communicate with any creditor, including lenders, to try to arrange an affordable and fair payment plan.\(^1\)

The HBOR could therefore be revised to exclude from the definition of “borrower” anyone who is currently in bankruptcy or has filed a bankruptcy case within the previous 365 days. Doing so might encourage borrowers to file for bankruptcy only for legitimate reasons, thus discouraging frivolous bankruptcy filings used solely to delay foreclosures.

Finally, the legislature could refine the language in Section 2923.6(g) regarding material change. As it stands, to invoke the anti-dual tracking provision, borrowers must show only that there has been a material change since their prior application in order to obtain a subsequent modification review. An additional requirement could be added to the statute that borrowers must also establish how that material change may actually entitle them to obtain a modification upon a subsequent review. Borrowers would have to tie the material change to the reason for the prior denial. Otherwise, the mere fact that there has been a material change is meaningless unless it could actually impact the outcome on a subsequent application.\(^2\) This would ensure that borrowers are afforded a fair opportunity for review but discourages them from reapplying without any real justification for doing so.

In the more than three years since its enactment, the HBOR has been shown to have both positive and negative impacts on the nonjudicial foreclosure process. It remains to be seen whether the legislature will take steps to modify certain provisions to ensure that the needs and goals of both borrowers and lenders are adequately met.


\(^5\) California continues to consider new laws to combat the foreclosure crisis, e.g., S.B. 1150, which would expand some of the previously enacted protections for homeowners to their heirs. See Civ. Code §52924.12, 52924.19.

\(^6\) Id.


\(^8\) Alliance Mortgage Co. v. Rothwell, 10 Cal. 4th 1226, 1235 (1995).

\(^9\) Civ. Code §2924.


\(^11\) Lane v. Vitek Real Estate Industries Group, 713 F. Supp.2d 1092, 1098 (E.D. Cal. 2010).


\(^13\) Civ. Code §§2924c.

\(^14\) Civ. Code §2924f.

\(^15\) Id.

\(^16\) With the passage of Civ. Code §2923.5 in 2008, an extra 30 days were added to the process because the notice of default could not be recorded until at least 30 days after lenders contacted, or attempted to contact, borrowers to explore alternatives to foreclosure.


\(^19\) Code Civ. Proc. §588d, 726(b).


\(^21\) Civ. Code §2923.5(a).

\(^22\) Mahry, 185 Cal. App. 4th at 214.


\(^26\) California’s Attorney General Office reached a $12 billion agreement with Bank of America, JP Morgan Chase, and Wells Fargo to provide mortgage assistance to homeowners. That was in addition to the $25 billion settlement National Mortgage Settlement. See Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses, U.S. Dep’t of Justice (Feb. 9, 2012), available at https://www.justice.gov; Dollars to Date: The Cal-

\(^27\) Id.
Federal HAMP guidelines similarly do not specify what constitutes a change in circumstances but states that servicers “must have an internal written policy which defines what they consider a change in circumstance, which policy must be consistently applied for all similarly situated borrowers.” However, unlike California law, HAMP provides that “servicers may limit the number of reconsideration requests in accordance with its written policy and must apply the policy consistently for all similarly situated borrowers.” HAMP Supplemental Directive 12-05 (Aug. 7, 2012).


Caldwell v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 100107, at *18 (N.D. Cal. July 16, 2013); see also McLaughlin v. Aurora Loan Servs., LLC, 2015 U.S. Dist. LEXIS 58308, at *15-16 (C.D. Cal. Apr. 28, 2015) (Even though the new “application indicated a $1,166 increase in monthly income since the October 2012 application [it] did not specify from which employer the increased income was obtained or provide any detail as to the source of the increased income. Without such details or any other documentation, the June 2013 application is insufficient to trigger the material change exception.”).


CIV. CODE §2920.5(c)(2)(C).


12 C.F.R. §1024.41(g).


There is a similar requirement in family law: to modify a court order regarding spousal support or custody, the moving party must demonstrate both a “material change in circumstances” as well as how that changes warrants reconsideration of the prior order. In re Marriage of McLoren, 202 Cal. App. 3d 108, 111-112, 114 (1988).
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is a key concern for homeless women veterans and safety concerns can put a variety of benefits and services, in particular those tailored to veterans, out of their reach. That is because a disproportionately high number of homeless women veterans suffer from post-traumatic stress disorder (PTSD) and other mental health conditions that stem from sexual assaults and other forms of sexual violence and harassment they experienced during their military service. Many women with these conditions feel unsafe or anxious, or both, in environments that remind them of their trauma, such as Veterans Administration hospitals or other environments with significant numbers of male veterans.

These dynamics are of particular importance in the context of permanent supportive housing for homeless veterans, which couples low-income housing with a variety of social, mental health, and other medical services. However, the limitation to veterans creates an unusual housing environment reminiscent of the military in which male residents significantly outnumber female residents. The limitation to homeless veterans means that a significant share of the women eligible for this type of housing will suffer from PTSD and other mental health disabilities that stem from sexual assaults during their military service.

For many women veterans disabled by PTSD because of sexual assaults, safe housing—both actual and perceived—is of particular importance and gender-specific safety accommodations, such as separate housing areas for women, are a necessary prerequisite for residence. Without such accommodations, many women veterans are deterred from accessing important housing benefits that are uniquely tailored to the needs of veterans. The small number of women who do enter these facilities risk exacerbating preexisting injuries and further harm by living surrounded by male veterans. A recent U.S. district court decision, S. T. v. New Directions Inc. et al.,1 included two important findings that...
could help homeless women veterans to secure safer housing. First, the court squarely addressed whether, under the federal Fair Housing Act (FHA), separate housing for women veterans is lawful. Second, the court strengthened prohibitions against sexual harassment of tenants by declining to import from employment prohibitions against sexual harassment of ten-

Military Sexual Trauma

A disproportionately high number of home-

less women veterans experience sexual as-
saults and other forms of sexual violence during their military service, often termed military sexual trauma (MST). Among the population of women who sought health care services from the Veterans Health Admin-

istration in 2010, 23 percent of women veterans screened positive for MST, but over 39 percent of homeless women veterans screened positive for MST.

Research shows that MST can be a par-


ticularly disabling experience. MST has been found to be more traumatic than sexual assaults and rapes in the civilian context.

Researchers have found that women who suffer from MST are at a higher risk for a variety of psychological, physical, and social problems. They are nine times more likely to exhibit symptoms of PTSD than women veterans who have not been sexually assaulted. In fact, MST is more likely to lead to PTSD than other military or civilian traumatic events, including even combat exposure.

Homeless women veterans are uniquely vulnerable for other reasons as well, including disproportionately high levels of exposure to trauma throughout their lives (in families of origin, during military service, and as civilian adults). They suffer from significant levels of mental health symptoms in a variety of contexts, as well as co-morbid physical health symptoms and diagnoses. Since 2001, homeless women veterans have been deemed a “special needs” group along with other vulnerable populations, including frail, elderly, and terminally ill veterans.

The FHA and Separate Housing

Given the problems faced by many homeless women veterans with PTSD due to MST, many seek gender-specific accommodations, including in housing. However, some in the housing community have argued that in per-

manent housing in which there are no shared common living spaces (such as bathrooms and kitchens), the FHA precludes policies or accommodations that would provide women the option to live proximate to other women or separated from men. The defendants in S.T. argued that they are prohibited from expressing this type of preference in the rent-

ing of housing units to women veterans. However, the court in S.T. provided an important clarification to the general pro-

hibition against sex segregation under the FHA. The court explained that separate hous-

ing for women may be lawful in the unique context of veteran-only supportive housing, which is characterized by an “overwhelmingly male population” and includes female resi-
dents who suffer from mental health disabil-

ities stemming from sexual assaults during their military service. Indeed, the facility at issue in S.T. was home to only six women among 128 veterans. The small number of women who lived there did so literally sur-
rounded by men. In this context, the court denied the defendant’s motion for summary judgment finding that gender-specific safety accommodations, including separate housing for women veterans, may be justified under the FHA both as a legitimate health and safety exception and as a reasonable accommodation under a disability analysis.

The S.T. court’s findings are consistent with the FHA, which requires a duty not to discriminate and another to ensure equal access. The duty to ensure equal access has particular significance in the unique context of veteran-only housing where women are significantly outnumbered and many ex-

perience mental disabilities stemming from sex-

ual assaults perpetrated by men. The S.T. court provides an important clarification to the FHA in this special context: gender-spe-
cific accommodations, including separate housing for women and other heightened safety accommodations that would allow women to have equal access to these facilities, do not violate the FHA but rather support it. Whether as a legitimate health and safety exception under the Ninth Circuit’s decision in Community House, Inc. v City of Boise or as a reasonable accommodation under a disability analysis, separate housing for wom-

en can be a permissible accommodation to ensure that women have equal access to impor-
tant housing benefits that are specifically tai-

lored to the needs of homeless veterans.

Health and Safety Exception

A housing policy that allows women to live proximate to each other, even if it is facially discriminatory, can be lawful under the FHA if it is based on empirical evidence and facts, not stereotypes. In Community House, Inc. v. City of Boise, the Ninth Circuit reversed the denial of a motion for preliminary injunc-
tion under the FHA against a city in contract with a religious nonprofit that sought to tran-

sition a mixed-sex housing project into a men-only facility. The contractor proposed to move the women and children into a dif-

dent shelter, which the court described as “much less desirable housing.”

The Ninth Circuit, relying on the legal standards established by the Sixth and Tenth Circuits, articulated the following standard to justify a facially discriminatory policy in the housing context: It “must show either (1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes.”

In Community House, the court rejected the proposed separate housing policy as a violation of the FHA because the proponents of the policy failed to show with even “a single police report, incident report or any other documents” that their proposed policy was based on legitimate, nonstereotypical safety concerns that benefited women and families. The court found that while the FHA does allow “permissible discrimination” in certain contexts, this was certainly not the case.

In contrast, the court in S.T. found that the plaintiff, a woman veteran disabled by PTSD stemming from MST, could show that gender-specific safety accommodations, including placing women veterans in housing units proximate to each other, could benefit her class and are not based on unfounded fears or stereotypes, but rather responded to the anxiety caused by MST-related disabil-

ities. The court found the Community House standard could be met and therefore denied the defendants’ motion for summary judgment, which claimed that separate hous-

ing for women is prohibited under the FHA.

Besides the significant research and empiri-
cal evidence on the specific vulnerabilities of women veterans, particularly those with PTSD stemming from MST, there are numerous investigations of veteran-only housing facilities that have documented cases of sexual harass-

ment and assault of women veterans in vet-

eran-only transitional housing facilities by both residents and staff.

Moreover, at least in the transitional hous-

ing context, in which residents often share common living spaces like bathrooms and kitchens, separate housing for women veterans, including secured areas on separate wings or units in a facility, as well as other security protections, are required accommodations to protect women veterans. For example, tran-

sitional housing facilities seeking “special needs” grants to house women veterans must identify in their applications how their pro-

grams will “[a]ddress safety and security issues including segregation from other program par-

ticipants if deemed appropriate.”

Reasonable Accommodation

Separate housing can also be a necessary accommodation to ensure that women vet-

erans disabled by PTSD from MST have equal access to veteran-only supportive hous-

ing facilities. The FHA mandates an affir-

mative duty to reasonably accommodate the needs of protected classes to ensure that they
have equal access to housing facilities. Those protected include individuals with a mental health disability, such as depression or PTSD, which qualify as disabilities for purposes of the FHA. Under the FHA, discriminatory conduct includes a “refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling.” Only reasonable accommodations that cause neither undue hardship nor fundamental changes to a program are required.

Moreover, even accommodations that are not reasonable in most cases may be deemed necessary and reasonable in specific cases if “special circumstances” make the requested accommodation reasonable on the particular set of facts.

The court in S.T. denied the defendants’ motion for summary judgment under a reasonable accommodation analysis as well, finding that when “a female veteran with MST-related PTSD seeking equal access to housing that is restricted to veterans and therefore has an overwhelmingly male population[,] a jury could find Plaintiff’s requested accommodation to be reasonable and necessary.”

The court rejected the defendants’ claim that providing women veterans with separate housing accommodations would require them to fundamentally alter their program, including “their gender neutral practices and take sex into account in nearly every facet of the facility.” Rather, the court found that the defendants provided no evidence of this “fundamental alteration.” Thus, the court held that “given that the facility’s purpose is to create a supported living environment for formerly homeless veterans with disabilities, permitting Plaintiff and other similarly-situat...
defend it. Under tort law, one has a reasonable expectation of privacy within it. Under constitutional law, one has a right to be free from unreasonable searches and seizures within it, and a right to engage in certain activities and make certain decisions within the home. Protection of the home is so embedded in the history and traditions of our jurisprudence that the sanctity of the home has become an established doctrine in its own right. . . . [Thus,] sexual harassment of women in their homes violates not only their right to be free from discrimination, but also deprives them of their most fundamental and precious haven from abuse.46

As the court in Williams v. Poretsky Management noted, “Sexual harassment in the home may have more severe effects than harassment in the workplace.”47

Neither the parties nor the S.T. court were able to locate any direct authority on point regarding the applicability of the Faragher/Ellerth defense to housing sexual harassment cases.48 Indeed, only three out-of-circuit housing cases mentioned the Faragher/Ellerth defense. Although the defense failed in each case, none squarely addressed it. In Walker v. Crawford, the court, with little analysis, rejected the proffered Faragher/Ellerth defense in a summary judgment proceeding.49 There, the court focused primarily on the remaining questions of fact regarding whether the defendant “exercised reasonable care to prevent... any sexually harassing behavior” and denied summary judgment to the defendant. In United States v. Gumbaytax,50 the court rejected vicarious liability for punitive damages but otherwise did not analyze the applicability of the Faragher/Ellerth defense in housing cases. Finally, in Brillhart v. Sharp,51 the court discussed the Faragher/Ellerth defense only in dicta to support the holding that the Title VII McDonnell Douglas v. Green52 burden shifting framework does not apply to sexual harassment cases, which have their own liability framework.

The Faragher/Ellerth defense was grounded in agency law and the Supreme Court’s articulation of that defense centered on Sections 219, 228, and 229 of the Restatement (Second) of Agency, each of which specifically referenced an employment relationship.53 Given the analysis underlying articulation of the Faragher/Ellerth defense, the greater protection to be afforded to the home as compared with the workplace, and the absence of any authority applying the defense outside the employment context, the S.T. court concluded that the Faragher/Ellerth defense is unavailable in the housing context.54

There are currently efforts on multiple fronts to provide women veterans, particularly those disabled by MST, with benefits and services that are specifically tailored to accommodate a heightened need for safety and privacy. Women-only health clinics and treatment programs, separate women-only entrances and waiting areas, and a variety of other services are provided to women veterans separately from men. Housing is no exception. Transitional housing facilities already provide separate housing areas for homeless women veterans. And there are currently efforts to provide separate housing accommodations in the permanent housing context as well—both as separate housing areas within a larger mixed-gender facility and as stand-alone facilities limited to women. But lingering questions regarding the legality of separate housing in the permanent housing context coupled with genuine feasibility concerns, including how best to accommodate older male children and male spouses and partners, remain hurdles. It is also unclear that simply providing segregated housing without other gender-specific safety accommodations, such as enhanced security or surveillance systems, female security guards and housing staff, and policies that enhance women veterans’ perceptions of safety—e.g., clear guidance on sexual harassment prevention and reporting—is enough to ensure that women veterans will actually access these facilities. The S.T. case provides important guidance in both the area of permissible sex-segregation in housing and standards that apply to housing sexual harassment cases. Both holdings will positively impact the housing crisis for home- less female veterans with MST. The next step will be to work collaboratively with women veterans to identify the specific safety accommodations that will allow them to feel safe and thrive in veteran-only housing.


2 Both the federal and state fair housing laws prohibit discrimination in housing and housing-related activities and identify specific protected classes. The Federal Fair Housing Amendments Act provides specific protections on the basis of race, color, religion, sex, national origin, familial status and disability, 42 U.S.C. §§3601 et seq. The California Employment and Housing Act includes the protections provided under federal law and includes the following additional bases for protections: marital status, ancestry, sexual orientation and source of income. Gov’t Code §§12955 et seq.

3 U.S. Gov’t Accountability Off., GAO-12-182, HOMELESS WOMEN VETERANS: ACTIONS NEEDED TO ENSURE SAFE AND APPROPRIATE HOUSING, n.1 (Dec. 2011) [hereinafter GAO-12-182] (citing Donna L. Washington et al., Risk Factors for Homelessness Among Women Veterans, 21 J. HEALTH CARE FOR THE POOR AND UNDERSERVED, 82 (2010)).

4 Dep’t of Veterans Affairs, Off. Inspector Gen’l, INSPECTION AND RESIDENTIAL PROGRAMS FOR FEMALE VETERANS WITH MENTAL HEALTH CONDITIONS RELATED TO MILITARY SEXUAL TRAUMA, 16 (2012) [hereinafter OIG RESIDENTIAL PROGRAMS REPORT].

5 Id.


8 Nat’l Ctr. Report, supra note 7, at 12. See also OIG RESIDENTIAL PROGRAMS REPORT, supra note 4, at 3-4 (research has found that experiences of rape can be equal to or greater than other stressors, including combat exposure, in the risk of developing PTS).


10 Id. at 7-9.

11 LIBBY PERL, VETERANS AND HOMELESSNESS, 23 (Nov. 2014).


13 Id. at *1.


15 Community House, Inc. v City of Boise, 490 F. 3d 1041, 1050 (9th Cir. 2007).

16 Id. at 1046.

17 Id. at 1050 (citing Bangerter v. Orem City Corp., 46 F. 3d 1491, 1503-04 (10th Cir. 1995) and Larkin v. Mich. Dept. of Soc. Servs., 89 F. 3d 285, 290 (6th Cir. 1996)).

18 Community House, 490 F. 3d at 1051.


20 Specifically, the housing defendants argued that they are prohibited from expressing any preference in the renting of apartments to women by “[a]ssigning any person to a particular section of the community... because of... sex,” citing to 24 C.F.R. §100.70(a).

21 See, e.g., GAO-12-182, supra note 3, at 5 (nine of the 142 housing programs surveyed indicated that there had been reported incidents of sexual harassment or assault on women residents in the past five years); Dep’t of Veterans Affairs, Off. Inspector Gen’l, OFF. AUDITS AND EVALUATIONS, AUDIT OF THE HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM, 11-00334-115, 3-4, 6 (Mar. 12, 2012); Dep’t of Veterans Affairs, Off. Inspector Gen’l, OFF. AUDITS AND EVALUATIONS, SAFETY, SECURITY, AND PRIVACY FOR FEMALE VETERANS AT A CHICAGO, IL HOMELESS GRANT PROVIDER FACILITY, 2 (Sept. 6, 2011).

22 38 C.F.R. §61.41.


24 42 U.S.C. §3604(a), (f)(1); Laflamme v. New Horizons, Inc., 605 F. Supp. 2d 378, 390 (D. Conn. 2009). PTSID is recognized as a disability under the Americans with Disabilities Act (ADA) and thus also can be recognized as a disability under the FHA. U.S. Dep’t Justice, Civil Rights Div., DISABILITY RIGHTS SEC., ADA KNOW YOUR RIGHTS: RETURNING SERVICE MEMBERS WITH DISABILITIES, available at http://www.ada.gov; Giebeler, 343 F. 3d at 1147 (recognizing HIV infection as a disability under the FHA because it is categorized as a disability under the ADA).


26 Giebeler, 343 F. 3d at 1154.


[29] Id.
[30] Id.
[31] Id. (citing to Giebeler, 343 F. 3d at 1150).
[37] 802).
[38] Arguello v. Conoco, Inc., 207 F. 3d 803, 810 (5th Cir. 2000)). Out of 2,200 decisions citing Faragher, only two cases (other than the housing cases addressed above), both outside the Ninth Circuit, have considered its applicability in other contexts. In Doe, the court declined to apply the Faragher/Ellerth defense in a motion to dismiss a Title IX sexual harass-
[40] One survey revealed that in 63 percent of housing sexual harassment cases, “the harasser was likely to be the only person in charge. Thus, the power to evict as well as the power to withhold repairs and services are in the hands of the harasser.” Regina Cahan, Home is No Haven: An Analysis of Sexual Harassment in Housing, 1987 Wis. L. Rev. 1061, 1074.
[43] Id. at *4 (citing Doe v. Board of Educ. of Prince George’s Cty., 888 F. Supp. 2d 659, 668 (D. Md. 2012) and Arguello v. Conoco, Inc., 207 F. 3d 803, 810 (5th Cir. 2000)). Out of 2,200 decisions citing Faragher, only two cases (other than the housing cases addressed above), both outside the Ninth Circuit, have considered its applicability in other contexts. In Doe, the court declined to apply the Faragher/Ellerth defense in a motion to dismiss a Title IX sexual harass-
[44] 367 (internal citations omitted).
[45] Williams v. Poretsky Mgmt., 955 F. Supp. 490, 498 (D. Md. 1996) (quoting Beliveau v. Caras, 873 F. Supp. 1393, 1397 n.1 (C.D. Cal.1995)); see also Salisbury v. Hickman, 974 F. Supp. 2d 1282, 1292 (E.D. Cal. 2013) (quoting Beliveau, 873 F. Supp. at 1397 n.1) (“When sexual harassment occurs at work, at that moment or at the end of the work day, the woman may remove herself from the offensive environment. She will choose whether to resign from her position based on economic and personal considerations. In contrast, when the harassment occurs in a woman’s home, it is a complete invasion in her life. Ideally, home is the haven from the troubles of the day. When home is not a safe place, a woman may feel distressed and, often, immobile.”)
[48] No such exhaustion applies in Fair Housing Act Cases. Compare 42 U.S.C. §2000e-5(e) with 42 U.S.C. §§3610, 3613; see also Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 104 (1979) (“Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal district court, or a simple, inex-
[49] The Ellerth court also relied on Title VII’s administrative exhaustion requirement as justification for creation of the defense. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). No such exhaustion applies in Fair Housing Act Cases. Compare 42 U.S.C. §2000e-5(e) with 42 U.S.C. §§3610, 3613; see also Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 104 (1979) (“Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal district court, or a simple, inex-
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of blindly renting a room, an apartment, or an entire house to a complete and utter stranger for a day, a week, a month or longer would have been unthinkable until several years ago. However, as the hospitality industry has evolved from traditional hotels and motels to home-sharing rentals, landlords, homeowners, communities, and local and state governments now face the issue of whether a tenant or owner has a right to engage in short-term rentals and, if so, how the duties and obligations associated with that right should be defined.

The evolution is reflected in the fact that “Airbnb’s global inventory grew from 3,000 units in February 2009 to 2.3 million units—houses, condos, apartments—in 2016....”1 In financial terms, Airbnb generated $340 million in revenue during the third quarter of 2015 based on bookings of $2.2 billion, and the number of nights booked that quarter increased from 11.3 million the previous year to 23.8 million.2 Given these circumstances, the legal issues associated with home-sharing rentals are hardly inconsequential.

Today, this innovative concept created not only by Airbnb, but also VRBO and Home Away (collectively, hosting platforms), enable property owners and tenants to offer their apartments or homes for rent on the hosting platforms for a sum and on terms described on their individual postings. Hosting platforms charge a fee on every booking arranged through their websites by acting as middlemen. No background checks are performed on hosts or guests who use the companies’ websites. Hosting platforms only require that a user provide a valid email, phone number, or active Facebook, Google, or LinkedIn account. Hosting platforms do not conduct in-home inspections to verify whether a home is safe or sanitary nor do they confirm that the host owns the property or has authority to rent it.

The latter presents an immediate legal issue with short-term rentals in which there is a landlord-tenant relationship.

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Since hosts are not required to be the actual property owner, tenants with a valid lease may sublease their units to hosting platform guests without the landlord’s consent or knowledge, provided there is no prohibition against assignment or sublease in their leases. In 2015, the California legislature amended the Business and Professions Code to ensure tenants were aware of this requirement. The legislature adopted the term “hosting platform” to describe Internet websites like Airbnb that list properties available for transient occupancy. Hosting platforms must post a warning notice to tenants that they may be violating their lease by listing a unit on the website and that they could be evicted by the landlord for doing so.

As hosts, tenants and property owners must also be cognizant that the rental of properties falls outside the scope of most renter and homeowner insurance policies. Since hosts do not generally have commercial liability insurance, they need to be concerned about coverage when accidents and property damage occur with guests. In late October 2015, Airbnb began offering host protection insurance, which provides hosts with commercial liability coverage in an amount up to $1,000,000 per occurrence per policy year for third-party claims for bodily injury or property damage arising during an Airbnb stay. This coverage is subject to a per-location limit of $1 million with an aggregate limit of $10 million; however, this coverage excludes acts arising from assault and battery, sexual abuse or molestation, loss of earnings, personal advertising injury, fungi or bacteria, Chinese drywall, communicable diseases, acts of terrorism, product liability, pollution, or asbestos, lead or silica. Home Away and VRBO do not yet provide commercial liability coverage for hosts using their websites.

Hosts must also be prepared to address situations in which guests overstay their booking period. Over 70 years ago, two California courts established criteria distinguishing between a lodger and a tenant; however, there is no case law addressing this issue in the context of short-term rental guests. The factors identified by the courts in Roberts v. Casey and Edwards v. City of Los Angeles include who has direct control over the premises; who is responsible for maintaining, cleaning and caring for the unit; who has the keys and a right of access; whether the unit is furnished; and whether rent is fixed regardless of the number of occupants. The Roberts court acknowledged that it can be difficult to ascertain whether an individual is a tenant or lodger in situations in which some or all of these criteria may apply. In Roberts, plaintiffs offered the defendant a fully furnished room for rent on a monthly basis. Plaintiffs retained the keys and right of access, and also maintained and cared for the unit, all of which suggested the defendant was a lodger. At the same time, however, each room had its own amenities and private right of access, the unit was rented for the month, and rent was fixed regardless of the number of occupants, which supported the proposition that the defendant was a tenant. The court determined that in weighing these criteria, the balance should be struck in favor of the defendant’s being classified as a lodger and not a tenant.

The difficulties that the court in Roberts experienced in striking this balance apply equally to short-term rental guests. On the one hand, a host maintains and cleans the unit and fixes the fee regardless of the number of occupants. Conversely, a guest is given the keys and exclusive right of access, and rents the property for less than 30 days.

Given these competing circumstances, a question exists whether a guest who exclusively rents an entire property from a host for less than 30 days is a lodger or a tenant. A lodger is considered a mere licensee who is granted a nonexclusive right to use and occupy a portion of the premises while the owner maintains primary control and right of access like a hotel. Lodgers who stay for periods of less than 30 days are not generally afforded the same protections granted to tenants and are required to pay transient occupancy taxes. Thus, a short-term rental guest who rents a single room in an owner-occupied dwelling for less than 30 days would likely be considered a lodger under Civil Code Section 1946.5.

If a guest does not leave, the host would be within his or her rights to have the lodger arrested for trespassing under Penal Code Section 602.3, provided the lodger is given the required notice under Code of Civil Procedure Section 1162. However, it must be noted that Section 602.3 only applies in situations where a single guest rents a room in an owner-occupied dwelling. If there are multiple guests or the guest rents the entire unit, this right to oust a guest without notice would not apply.

In contrast to a lodger, a tenant has an exclusive right to possession of the premises for a specified term which is typically 30 days or more. Tenants generally pay rent and maintain the premises. A tenant has all the rights and protections granted under Civil Code Sections 1940 et seq. The host would likely be obligated to ensure that termination notices are properly served on the guest in accordance with the Civil Code even if there is no formal lease and the stay is less than 30 days. If a homeowner is forced to evict the guest, the hosting platform will not reimburse legal fees incurred by the homeowner or cover the loss of use during lengthy eviction proceedings.

Unless the legislature elects to enact a statute establishing a clear line between a lodger and tenant in short-term vacation rentals, the present circumstances may lead to inconsistent outcomes and create uncertainty as to what actions hosts must take to remove an unwanted person from their home. Short-term vacation rentals present other significant issues for both local government and the legislature. A key issue is the conflict between the current lack of inventory of rental properties available for long-term tenants and how that shortage is exacerbated by the conversion of units into vacation rentals. Beach cities and major metropolitan areas like Los Angeles, Palm Springs, San Diego, and San Francisco are particularly desirable locations for these vacation rentals. Many property owners are now converting their long-term rentals into short-term ones because of the opportunity to earn greater fees from the latter. This is particularly true for homeowners who have high mortgage payments and who could use additional rental income to help cover their mortgages.

Cities are only now starting to realize the impact that home sharing is having on the availability of long-term rental properties and thus taking actions to counteract these unintended consequences. In San Francisco, owners of residential units that are subject to the Inclusionary Affordable Housing Program and units designated as below market rate or income restricted are not permitted to be used for short-term rental purposes. The Palm Springs Municipal Code expressly restricts multifamily property owners from evicting a tenant or breaking a lease to convert the property to vacation rentals. Regulation of the home sharing industry falls under the jurisdiction of each city and county. California cities have only gradually begun to update their municipal codes to restrict the ability of homeowners and tenants to offer short-term vacation rentals. In 2008, Palm Springs was one of the first cities to enact a Vacation Rental Ordinance, which regulates short-term rentals of 28 consecutive days or less. The Palm Springs ordinance requires an owner or tenant to register the property with the city, pay transient occupancy fees and taxes, obtain a valid business license, and provide a 24-hour call number in response to any neighbor complaint. To combat the housing crisis, Palm Springs expressly restricts owners of apartment complexes from evicting a tenant or breaking a lease in order to convert the property to vacation rentals. The city has realized millions in revenue annually from enforcement of these regulations.

Within the last year or two, other major cities have begun to follow Palm Springs in enacting new restrictions on vacation rentals. Santa Monica, for example, adopted the
REGULATION of the home sharing industry falls under the jurisdiction of each city and county. California cities have only gradually begun to update their municipal codes to restrict the ability of homeowners and tenants to offer short-term vacation rentals.

30 days. Under the ordinance, home sharing is permitted but vacation rentals are not. Also, hosting platforms are held responsible if they allow hosts to list their properties on the website without complying with the city registration and tax requirements. Violations of this ordinance by hosts and hosting platforms can result in fines of up to $250 per occurrence, or a misdemeanor punishable by a fine of $500 or imprisonment of up to six months in jail. To enforce this ordinance, the City of Santa Monica requires the hosting platforms to regularly disclose each listing located in the city, the name and address of each host with a listing, the length of the stay, and the fee paid for each stay. Finally, neighbors may report any violations to the city code enforcement.

The New York state legislature also went on the offensive against Airbnb and other hosting platforms by restricting advertisements of dwelling units in Class A multiple dwelling units in New York City from being available for rent for less than 30 days. Under New York law, “[a] class A multiple dwelling unit shall only be used for permanent residence purposes.” Violations of this law carry a hefty penalty of up to $1,000 for the first violation, $5,000 for the second, and $7,500 for subsequent ones that can be imposed against the host and hosting platforms.

Airbnb has taken two actions to respond to these legislative initiatives. The first is adopting a policy in San Francisco and New York named “One Host, One Home.” According to Airbnb, it is removing listings of hosts who violate this requirement. Also, Airbnb has filed legal actions challenging the validity of the ordinances adopted by San Francisco, Santa Monica, and Anaheim and the statute enacted by New York in federal courts. Airbnb alleges these laws violate the First and Fourteenth Amendments to the U.S. Constitution because they impose an impermissible content-based regulation on commercial speech and criminal liability without proof of mens rea. Airbnb claims that the cities cannot show that the ordinances are narrowly tailored to achieve a substantial governmental objective and that the ordinances impose civil and criminal penalties on hosting platforms for unlicensed listings without any requirement that

While this litigation is pending, the City of Los Angeles has ordinances pending to regulate short-term vacation rentals. Los Angeles zoning restrictions currently prohibit a homeowner from operating a “bed and breakfast” for a period of less than 30 days in most residential zones. This bed-and-breakfast restriction could arguably apply to homeowners engaged in short-term vacation rentals because the unit being rented likely contains a kitchen

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transient occupancy taxes; however, this does not apply if a host has never paid these taxes.\textsuperscript{48} In those situations, a city can audit the homeowner for as many years as necessary to account for and collect all unpaid taxes. Most municipal codes only require a homeowner to maintain records for a period of three years regarding payment of these taxes. However, if the homeowner is audited by the city, the burden is on the homeowner to refute the numbers proposed by the auditor, and without any records, that is difficult to accomplish. If there are no records, the auditor is permitted to estimate the number of rentals conducted over the period that the taxes were due and payable based on the current number of bookings for that particular host. Although it is the host’s responsibility to pay these taxes, Airbnb recently changed its policy so the company now automatically charges guests the transient occupancy tax in the booking fee. Airbnb then remits the tax to the city on behalf of the host. This currently applies to several California cities, including Los Angeles, Malibu, Santa Monica, San Diego, San Francisco, and Palm Desert.\textsuperscript{49}

Hosting platforms have dramatically changed how people think about travel by providing guests with the comforts of home at competitive prices. Hosts also benefit by having a new source of income. Although many positive effects exist from home sharing, homeowners, tenants, neighbors, hosting platforms, and local and state governments will need to work together to navigate the unanticipated consequences and legal ramifications of this relatively new service. While the initial response to home sharing by certain cities has been to enact more restrictive laws, the likelihood is that there will be an evolution within the next few years towards creating a more symbiotic relationship between each of these constituencies through the adoption of laws that balance their respective interests. 


\textsuperscript{3} BUS. & PROF. CODE §§22590, 22592, 22594.

\textsuperscript{4} BUS. & PROF. CODE §22590.

\textsuperscript{5} Id.


\textsuperscript{7} Id.


\textsuperscript{9} Roberts, 36 Cal. App. 2d Supp. at 772.

\textsuperscript{10} Id. at 773.

\textsuperscript{11} CIV. CODE §1946.5

\textsuperscript{12} REV. & TAX. CODE §7280

\textsuperscript{13} City and County of San Francisco, Office of Short-Term Rental & FAQs, http://sfplanning.org/office-of-short-term-rental-registry-faqs.

\textsuperscript{14} PALM SPRINGS, CAL., MUN. CODE §5.25.075.

\textsuperscript{15} PALM SPRINGS, CAL., MUN. CODE ch. 5.25.

\textsuperscript{16} PALM SPRINGS, CAL., MUN. CODE §5.25.40(a).

\textsuperscript{17} PALM SPRINGS, CAL., MUN. CODE §§5.25.40, 5.25.60.

\textsuperscript{18} PALM SPRINGS, CAL., MUN. CODE §5.25.075(c).


\textsuperscript{20} SANTA MONICA, CAL., MUN. CODE ch. 6.20.

\textsuperscript{21} SANTA MONICA, CAL., MUN. CODE §6.20.010.

\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} SANTA MONICA, CAL., MUN. CODE §6.20.030.

\textsuperscript{25} City of Santa Monica, Overview of the Home Sharing Ordinance, available at https://www.smgov.net (last visited Nov. 25, 2016).

\textsuperscript{26} SANTA MONICA, CAL., MUN. CODE §6.20.030.

\textsuperscript{27} S. 6340-A, Jan.-June 2016 Leg. (N.Y. 2016) [hereinafter S-6340-A].

\textsuperscript{28} N.Y. MULT. DWELL. LAW §4.8.

\textsuperscript{29} S-6340-A, supra note 27.


\textsuperscript{31} Id.


\textsuperscript{34} Airbnb, No. 3:16-cv-03615-JD.

\textsuperscript{35} Id. at 6.

\textsuperscript{36} Id. at 12.

\textsuperscript{37} Id.

\textsuperscript{38} Id. at 17.


\textsuperscript{40} L.A., CAL., MUN. CODE ch. I, art. 2, §12.03.


\textsuperscript{43} Id.

\textsuperscript{44} Los Angeles Department of City Planning Recommendation Report, available at http://planning.lacity.org/ordinances/docs/HomeSharing/StaffRept.pdf.

\textsuperscript{45} REV. & TAX. CODE §7280.

\textsuperscript{46} L.A., CAL., MUN. CODE ch. II, art. 1.7.

\textsuperscript{47} Information provided to author in client telephone conversations regarding being audited.

\textsuperscript{48} REV. & TAX. CODE §7283.51

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In mid-nineteenth century Los Angeles, what is now North Broadway Street was called Calle de Eternidad, or Eternity Street. Unlike North Broadway, Eternity Street didn’t continue northeastward across the Los Angeles River. It ended at a cemetery near today’s Chinatown. From about 1840 into the 1870s, traffic on Eternity Street was heavy with funeral processions for the victims of rampant violence and equally rampant frontier justice. That little-known period of Los Angeles history is the subject of Eternity Street: Violence and Justice in Frontier Los Angeles, by John Mack Faragher, the Howard R. Lamar Professor of History and American Studies at Yale University and a Southern California native.

In the first half of the nineteenth century, Los Angeles was hit by a perfect storm of social and cultural disintegration. In the eighteenth century, Catholic Spain had taken the indigenous peoples from their communities and enslaved them on the grounds of the Franciscan missions. Then, upon gaining independence in 1821, Mexico secularized the missions, displacing hundreds of Indians formerly attached to Mission San Gabriel and forcing them to seek work and sustenance in the Pueblo of Los Angeles. In the 1830s, the modicum of order that independent Mexico had succeeded in imposing on Alta California was under pressure from disaffected Californios and from expansionist elements in the United States. Through a sequence of masterfully told stories, Faragher traces the slow creation of an ordered society of laws out of the lawlessness that arose in the wake of these events.

By the middle of the nineteenth century, Los Angeles’s murder rate was frightening. The city’s population grew from 3,500 in 1850 to 15,000 in 1870. In the City of Los Angeles, there were 10 to 35 murders each year between 1850 and 1875. In 1855, Los Angeles counted more murders than San Francisco, which had 10 times the population. As Faragher recounts, “Los Angeles was one of the most lethal places on the planet, with a murder rate comparable to that of Mexican border towns in the first decade of the twenty-first century, at the height of the violence between warring drug cartels.” Yet the murder statistics understated the true level of violence. Killings labeled murders excluded most killings committed in “self-defense.” As Faragher notes, gunfights were constant in a town “awash in guns.”

The courts themselves were not free of violence. Lawyers and judges were known to carry guns and Bowie knives into the courtroom. During a hearing in 1860, District Attorney E.J.C. Kewen fired a gun at defense counsel, hitting a bystander. In 1877, attorney and former judge Robert Widney pointed a gun at a witness and called him a “perjured villain” after the witness testified that Widney had participated in an infamous vigilante hanging. In fact, Widney was a vigilante—one of several responsible, public-minded citizens who participated in or supported frontier Los Angeles’s series of vigilance committees. During this period, vigilante groups were highly active in Los Angeles. Of the 300 vigilante executions recorded in California between 1836 and 1876, 50 occurred in Los Angeles. Vigilantism arose from a public perception that official institutions of justice were failing to stem the violence and administer “proper” justice. Over the century, Los Angeles’s vigilante groups grew in numbers and power to a point in which vigilante Lynchings were the most horrific expressions of the violence that the committees had been formed to prevent.

Los Angeles’s first recorded vigilante hanging occurred in 1836, under Mexican rule. José Domingo Féliz was found dead. His wife and her lover confessed to the killing, and there was an outcry for “speedy and solemn justice.” A “people’s committee” presented the town council with a petition asserting that official institutions were ineffectual in curbing violence. The committee declared María Félix and Gervasio Alipás guilty of murder and demanded that the couple be turned over to the people for execution. The council “chose not to wage a lonely struggle against a people angry and armed.” The lovers were taken from the jail and hanged.

By 1851, a year into California statehood, and for at least another 20 years, Los Angeles’s institutions of justice were no more effectual than in 1836. The city’s common council rejected an early proposal to prohibit guns within city limits and repeatedly rejected proposals to fund an adequate police force. From the founding of the county in 1850 to 1869, law enforcement consisted of the county sheriff, his undersheriff and deputy, plus the city marshal and two deputies. These officers were responsible for keeping the peace in an area comprising present-day Los Angeles, San Bernardino, and Orange counties. In addition, the sheriff was responsible for collecting county taxes—out of which he took a share. By 1870, the addition of four deputy marshals brought the number of law enforcement officials in Los Angeles to 10 for a population of 15,000. In this vacuum of public authority, 10 murders were recorded in 1850 and 12 in 1851, but an editorial in the Star asked, “Who today can name one instance in which a murderer has been punished?”

Los Angeles’s first legitimate, legal execution did not happen until February 1854, and it was tainted by apparent racism and unfairness. The defendant, Ygnacio Herrera, killed the victim in a brawl—the kind of killing that in previous years most likely would not have been prosecuted. Herrera’s actions, however, were arguably less blameworthy than two widely publicized killings early in 1853. Those killings, committed by two Anglos, had been ruled justifiable by the Anglo judge who presided at their preliminary hearing. The evidently differing standards used in the two cases led non-Anglo Californios to suspect discrimination. Still, Herrera’s trial, conviction, and lawful execution were a start toward fair, regular criminal pro-
procedures in Los Angeles and a corresponding end of vigilantism.

The event that most decisively turned Angelenos away from vigilantism took place on October 23, 1871, when 18 Chinese immigrants were tortured and hanged by a mob. The trouble began when a city patrolman heard gunfire, rode to the scene, found a chaotic situation, and sought help from bystanders in making arrests. The gunfighters escaped, but over the next several hours, the officers lost control and a mob reaching 600 surrounded a building in which several dozen innocent Chinese men and women were hiding. Eighteen men were dragged outside, beaten, shot, and hanged at locations around town.

Attorney Robert Widney and other “old vigilantes” teamed up with longtime opponents of vigilantism, confronted the mob, and ended the horror. It was widely recognized, though, that “the monstrosity of the thing was in imitation of the Vigilance Committee, in hanging those arrested… instead of allowing the law to take its own course.” In an evident gesture toward exonerating the vigilantes for the violence of October 23, or toward making amends for their actions over the preceding half-century, Robert Widney sought appointment as judge in the proceedings against the lynchers, and he was appointed.

Only eight lynchers were convicted and those convictions were of mere manslaughter. As to at least one victim, even that judgment was reversed by the California Supreme Court on the ground that the indictment failed to expressly allege that the victim was killed. In sum, the proceedings fell short of a dramatic triumph of justice over violence. Afterwards however, nothing was the same.

Los Angeles’s last vigilante hanging was in 1874. Jesús Romo was identified as the perpetrator of a horrific robbery and assault, and within hours was hanged near the scene of the crime by a group that included “some of the worthiest and most respected citizens of Los Angeles County.” After that, Los Angeles continued to be violent, exceeding the national murder rate by half until the end of the century. But the reign of vigilantism was over—a palpable step forward.

Although primarily an account of a victory of ordered justice over vengeance, Eternity Street offers more. The book recounts some of the rich history of Los Californios that preceded statehood, and it provides background on the Anglo-American conquest of California that most Californians are not taught in school. For lawyers, the book provides context and history to the formation of Los Angeles’s political and legal institutions. For all Angelenos and readers of history, the book provides insight into the soul of the City of Angels that will enrich our understanding of who we are as a community.
When You Don’t Settle, You May Get Six (Verdicts, That Is)

IT IS OFTEN SAID THAT ANYTHING CAN HAPPEN in a jury trial, and it is better to avoid risk by settling. A recent civil lawsuit is the poster child for the wisdom of that advice. The lawsuit involved disputed ownership of rental property. The plaintiffs claimed the defendants had given them a loan to avoid foreclosure of their second home; the defendants—represented by your author—asserted they had actually purchased the property. Confusion over terms existed because the defendants also promised to sell the home back to the plaintiffs—for a profit—after certain time had passed (to qualify for a lower tax rate).

Two weeks before trial, the lawyers pitched a short postponement to the trial judge, to conduct a settlement conference. The good trial judge would have none of it, undoubtedly sensing the parties were ill-prepared to try the case—indeed, the jury instructions and verdict form had not been filed in contravention of local rules. Surely, one side or the other would flinch upon seeing the whites of the jury’s eyes. And who can blame the judge? The gambit works in almost every case. But not this one.

On the first day of trial, “12 good citizens” were empaneled to hear the case, yet neither side panicked into settlement upon viewing the jurors’ collective sclerae. So, over the next four days, seven witnesses testified about the parts of the elephant they had touched. After the plaintiffs rested, the obligatory nonsuit motion resulted in dismissal of emotional distress and conversion claims. This left the jury to consider only two claims: fraud by concealment and negligentness of quiet title and deed cancellation—would be determined by the trial judge after the jury verdict.

The jury got the case at 3:45 P.M. on the Friday of a holiday weekend, which meant that if the jurors failed to reach a verdict in 45 minutes, they would have to return the following Tuesday. They did their best to avoid that outcome: at 4:29 P.M., two buzzes from the jury room meant we had a verdict. This is where it got interesting.

Awaiting a jury verdict is a scary time for lawyer and client alike. Time slows as the judge silently checks the verdict for irregularities. In our case, the judge got to the final page before cracking his head leftward, slightly wincing, as if the football had been fumbled on fourth and inches: “I have to send you back for more deliberations. I need you to carefully read the instructions right before the last question,” he intoned to the jury. Apparently, a wording change in the verdict form would assist in clarity, and with that the jury resumed deliberations.

The defense thought the jury had found for the defense on liability but had still awarded damages. Yet the court declined to share the verdict form, fearing to infringe upon jury deliberations.

No verdict that day, so cast and crew returned the following Tuesday. After an hour came verdict number two. The court: “I am going to have to invite you to go back in and read very carefully, very carefully, the instructions on how you answer question 11, okay?” Again, the defense smelled a defense verdict on liability, coupled with damages. But viewing the verdict form was again disallowed.

Thirty-five minutes later verdict number three appeared. The jury’s desire to award damages resulted in a flip-flop on liability that would be the envy of the most practiced politician. Thankfully for the defense, the court admonished the jury: “I am very concerned that you made totally contradictory findings to what you had made earlier. I am concerned that there is an effort…to maybe get the result you want without fully considering the evidence…I want you to go back and deliberate further…”

In thirty-five minutes, another verdict, and the jury got it right—as far as the defense was concerned. The verdict was published by the clerk, and the defense envisioned champagne corks flying. Then, the plaintiff’s lawyer cleared his throat and said, “That question number six, it got reversed!” The clerk reread question six: “Question: Did the defendant honestly believe that the [false] representation was true when he made it? Answer: No.”

Uh-oh. That sounds like the defendant is knowingly deceiving the plaintiff, but the verdict form told the jury that “no” meant a defense verdict. “This one may be on us,” the court told the jury, siding with the plaintiff. After a brief discussion among court and counsel, the jury was given another verdict form, this time with the “mapping” for question six reversed.

Sensing defeat being snatched from the jaws of victory, the defense began reconstructing how the verdict form could be wrong. We concluded it was correct! This was a cause of action for negligent misrepresentation, so intentional deceit—a claim not pled here—wouldn’t fly. Armed with the CACI instructions, we rushed back to argue that verdict number four was correct. The trial court agreed and was about to reinstate the prior verdict, but two buzzes from the jury room signaled verdict number five—surely favoring the plaintiff. However, the court, advising the jury the prior verdict was on the correct form, sent them back for one final round of deliberations. Verdict number four, for the defense, was hastily reproduced as verdict number six. We were fortunate, but next time we’ll try harder to settle.

The jury’s desire to award damages resulted in a flip-flop on liability that would be the envy of the most practiced politician.

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