RESOLUTION 11-01-2018

DIGEST
Landlord-Tenant: Determination of Prevailing Party Upon Lessee's Breach and Abandonment
Amends Civil Code section 1951.2 to provide guidance in determining the prevailing party in suits for rent where the lessee breaches a non-commercial lease and is no longer in possession.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons
This resolution amends Civil Code section 1951.2 to provide guidance in determining the prevailing party in suits for rent where the lessee breaches a non-commercial lease and is no longer in possession. This resolution should be disapproved because Code of Civil Procedure section 1032 already provides a clear and unambiguous definition of prevailing party in suits for money damages.

Section 1951.2 of the Civil Code provides for monetary damages a lessor may recover from a lessee who breaches the lease and abandons the property, or where the lessee's right to possession is terminated by the lessor due to the breach before the end of the term of the lease. The resolution proposes that in determining the prevailing party, the court should not compare the amount of the judgment awarded the lessor with the amount of rent the tenant would have owed to the end of the lease term where the latter is larger than the amount of the judgment rendered the lessor. Rather, it would direct the court to consider whether the lessor was entitled to the rent through the end of the term, and whether the landlord contested the amount claimed by the tenant as being reasonably avoidable. This approach would prevent the tenant from claiming to be the prevailing party where the landlord was able to sublet the vacated premises for the remainder of the lease term, and when that results in a lesser recovery by the lessor than the amount of the rent the breaching tenant would have otherwise owed. That would allow the lessor to recover costs of suit.

Code of Civil Procedure section 1032, subdivision (a)(4), defines a prevailing party as "the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." There is no good reason that section 1032 should not apply to landlord-tenant law. There is no basis in law for a breaching tenant to claim to be the prevailing party because the lessor mitigated damages. Absent a situation involving a judgment below the minimum jurisdiction of the court (Code Civ. Proc., § 1033), a failure to accept a statutory offer that is greater than the judgment (Code Civ. Proc., § 998), or where there are no damages to recover, so long as the lessor obtains a monetary recovery from the lessee, the lessor is the prevailing party.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1951.2 to read as follows:

§ 1951.2

(a) Except as otherwise provided in Section 1951.4, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by the lessor because of a breach of the lease, the lease terminates. Upon such termination, the lessor may recover from the lessee:

(1) The worth at the time of award of the unpaid rent which had been earned at the time of termination;

(2) The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided;

(3) Subject to subdivision (c), the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; and

(4) Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom.

(b) The "worth at the time of award" of the amounts referred to in paragraphs (1) and (2) of subdivision (a) is computed by allowing interest at such lawful rate as may be specified in the lease or, if no such rate is specified in the lease, at the legal rate. The worth at the time of award of the amount referred to in paragraph (3) of subdivision (a) is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus 1 percent.

(c) The lessor may recover damages under paragraph (3) of subdivision (a) only if:

(1) The lease provides that the damages he may recover include the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award, or for any shorter period of time specified in the lease, exceeds the amount of such rental loss for the same period that the lessee proves could be reasonably avoided; or

(2) The lessor relet the property prior to the time of award and proves that in reletting the property he acted reasonably and in a good-faith effort to mitigate the damages, but the recovery of damages under this paragraph is subject to any limitations specified in the lease.

(d) Efforts by the lessor to mitigate the damages caused by the lessee's breach of the lease do not waive the lessor's right to recover damages under this section.

(e) Nothing in this section affects the right of the lessor under a lease of real property to indemnification for liability arising prior to the termination of the lease for personal injuries or property damage where the lease provides for such indemnification.

(f) For the purposes of determining the prevailing party the court shall not compare the amount of the rent owed for the balance of the term and the judgment it renders. The court should instead consider whether there was an entitlement to the rent through the end of the term and whether the landlord contested the amounts claimed by the tenant as being reasonably avoidable.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: This resolution addresses the issue of prevailing party. Under this section, the landlord is entitled to the amount of the rent for the balance of the term minus what the tenant can prove could have been reasonably avoided. These actions are usually filed immediately after the tenant has abandoned the premises or been evicted and before the landlord has actually relet the premises. The landlord does not know if the premises can be successfully relet and the costs associated therewith. This statute allows the landlord to simply claim the rent through the end of the period. This section puts the burden upon the tenant to prove the amounts that could have reasonably been avoided. The problem arises when the court is called upon to determine the prevailing party. Tenants have argued that they are the prevailing party where the amount of the rent through the end of the term is much larger than the judgment entered against them and courts have agreed. This causes an injustice to the landlord because at the time the case commences the landlord could only speculate as to the prospects of re-letting the premises and the costs associated therewith.

The Solution: Example 1: A tenant abandons premises in the first year of a ten-year lease. The landlord files a complaint within a month of the tenant abandoning the premises seeking the balance of the rent through the end of the ten-year period, $900,000. By the time the case goes to trial a year later the landlord has managed to re-let the property and under the lease with the new tenant will receive $850,000.00 through the end of the term of defendant's lease. The landlord testifies as to the terms of the new lease and that landlord paid commission of $25,000 in connection with the re-let and incurred costs for tenant improvements of $25,000. Judgment is entered in favor of landlord for $100,000. However, since the complaint claimed damages of $900,000 and judgment was entered for $100,000 the trial court can no longer decide that the tenant is the prevailing party because it compared the sum of $900,000 to the $100,000 judgment.

Example 2: A tenant abandons the premises at the 9th year of a ten-year lease. Landlord sues seeking rent through end of the ten-year term, $100,000. The landlord relets the property and will received $50,000 through the end of the term of defendant's lease. The landlord testifies as to the terms of the new lease and that landlord paid commission of $ 5,000 in connection with the re-let and incurred costs for tenant improvements of $25,000. Landlord receives judgment of $80,000. Although the landlord would be deemed the prevailing party the trial court would not be doing so merely because the landlord obtained 80% of the sum sought.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISTATION

None known.

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RESOLUTION 11-02-2018

DIGEST
Landlord Tenant: Allowing Local Jurisdictions to Compel Rental of Real Property
Adds Government Code section 7060.8 to allow local jurisdictions to compel owners of residential property to offer, or continue to offer, accommodations in the property for lease.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 01-02-2017, which was disapproved.

Reasons:
This resolution adds Government Code section 7060.8 to allow local jurisdictions to compel owners of residential property to offer, or continue to offer, accommodations in the property for lease. This resolution should be disapproved because the balance of rights between building owners and tenants that is established in the Ellis Act will be disrupted.

Under the resolution, either the local government or the local voters could compel property owners to lease their property, even if the property owner had never previously rented units and without regard to the current use of the property or the cost of preparing the space for rental. This resolution has the laudable goal of providing additional affordable housing, but the proposed solution places excessive burdens on the building owners.

Under current law, the Ellis Act (Gov. Code, §§ 7060-7060.7) establishes a state-wide balance between rights of tenants and rights of building owners who wish to stop being landlords. There are legitimate reasons that a building owner may wish to cease leasing units. In some situations, rent control has made leasing the units cost prohibitive, as the costs of maintaining and operating the buildings exceeds the rents that can be charged. The resolution would go beyond suspending Ellis Act evictions, and would allow voters to force building owners to become landlords. San Francisco has a multi-step process that business owners must follow before removing units from the market. (S.F. Admin. Code, ch. 37, § 37.9A.) While there are sometimes abuses of Ellis Act evictions, Rent Boards are typically vigorous in assuring that the Ellis Act and local ordinances are followed. Courts and public pressure have also successfully preserved a tenant's ability to stay in their apartment.

There is a housing crisis, but the solution is not to require building owners, some of whom are families or small businesses, and who may have the bulk of their assets invested in a single building, to act as landlords if they do not wish to do so.

Recent legislative efforts to limit Ellis Act evictions have not been successful. For example, Assem. Bill No. 982 (2017-2018 Reg. Sess.), Sen. Bill 364 (2015-2016 Reg. Sess.), Assem. Bill No. 2405 (2014-2015 Reg. Sess.), all failed to pass.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Government Code section 7060.8 to read as follows:

§ 7060.8

Notwithstanding Section 7060, if a public entity, as defined in Section 811.2, finds that the prohibition of Section 7060 decreases the total number of affordable rental units within a jurisdiction, the board of supervisors, by the adoption of a resolution or by a majority vote of the electors within the county, may compel the owner of any residential real property to offer, or continue to offer, accommodations in the property for rent or lease.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: The Ellis Act was enacted in 1985 by the Legislature after the California Supreme Court held landlords do not have the right to evict tenants to go out of the landlord business. Having suffered a mortgage crisis, foreclosure crisis, and the loss of jobs and wages, local governments have little flexibility to limit the abuses occurring under the Ellis Act. Under the Ellis Act, public entities generally are prohibited from adopting any statute, ordinance, or regulation, or taking any administrative action, to compel the owner of residential real property to offer or to continue to offer accommodations in the property for rent or lease. The act authorizes, if an owner seeks to displace a tenant or lessee from accommodations withdrawn from rent or lease by an unlawful detainer proceeding, the tenant or lessee to assert by way of defense that the owner has not complied with the act, or statutes, ordinances, or regulations of public entities adopted to implement the act. The Planning and Zoning Law requires each city, county, and city and county to prepare and adopt a general plan that contains certain mandatory elements, including a housing element that includes an assessment of housing needs.

The Solution: Current public policy reflects a growing trend towards local control. Examples include realignment of corrections and social services, the Local Control Funding Formula in education, and local housing element requirements. Allowing local jurisdictions the flexibility to voluntarily suspend Ellis Act evictions will allow participating jurisdictions to reign in Ellis Act abuses that are preventing these jurisdictions from meeting their supply of affordable housing. Would authorize, if a public entity finds the prohibition of the Ellis Act decreases the total number of affordable rental units within a jurisdiction, the board of supervisors to compel the owner of a residential real property to offer, or continue to offer, accommodations in the property for rent or lease by adoption of a resolution or by a majority vote of the electors within the county.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
This resolution uses the language of Assembly Bill 2405 - Landlord Tenant: Ellis Act, introduced by Ammiano in the 2014-15 Regular Session. It failed passage in committee.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

ORANGE COUNTY BAR ASSOCIATION

This Resolution would not only make the rental housing industry the only industry in the United States where a board of supervisors or electors could force a property owner to go in to the rental housing business it would also be the only industry where a small business owner is required to stay in business regardless of the hardship imposed upon the business owner. Couple this resolution with a rent control statute under which the rental rates are set well below market rent and the impact of this resolution upon property owners would be horrendous. Property owners would be forced to enter into business and/or to continue to run a business with no prospect of at least breaking even. Not only would the property owner lose money in the operation of his rental housing business the value of the property would drop dramatically. Who would buy property where the property owner is required to rent the property.

The Ellis Act (which the author of this resolution wants to push aside was enacted in 1985 to provide a balance between the needs of tenants and landlords. The Ellis Act permits local governments to require that if a landlord wants to withdraw his/her property from the rental market the landlord must provide substantial notice to the tenants and provide moving assistance in the amount of thousands of dollars per person and giving those tenants with disabilities longer notice and higher relocation benefits. The Ellis Act was the legislative response to the California Supreme Court opinion in *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97 in which the Supreme Court opined that the burden imposed upon Nash's liberty interests were minimal and that the City's permit requirement was reasonably related to the City's goal of protecting its scarce rental housing supply. (Id. at 99, 104.)

The egregiousness of this resolution may be clearer if we liken it to attorneys. What if a local government or voters could determine that a shortage of affordable lawyers existed in a community and could require some of the lawyers in the community to open or continue operating a law practice for the purposes of providing legal advice to low income clients regardless of whether there were any profits or even money to pay the lawyers a salary.

While it is laudable that local governments and citizens want affordable housing within their community, the government should not have the power to compel a business owner to stay in business and/or the power to require land owners to rent out their property. If either or both the

board of supervisors or the electorate of county determine that there is a shortage of affordable housing then the local government needs to find a solution to meet the demand without imposing the burden entirely on a few property owners.

RESOLUTION 11-03-2018

DIGEST
Landlord Tenant: Confidentiality of Ellis Act Evictions
Amends Code of Civil Procedure section 1161.2 and Government Code section 7060.6 to require that evictions under the Ellis Act be kept confidential.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Similar to Resolution 01-02-2017, which was disapproved.

Reasons:
This resolution amends Code of Civil Procedure section 1161.2 and Government Code section 7060.6 to require that evictions under the Ellis Act be kept confidential. This resolution should be approved in principle because tenants who are evicted often have difficulty finding other housing, even when the eviction is not the result of the tenant's actions.

When a tenant applies to rent property, the prospective landlord may obtain a credit report that reflects the tenant's prior eviction, but does not state the reason for the eviction. The prospective landlord could use this report to reach an inaccurate conclusion that the applicant was not a good tenant. In addition, a tenant's fears about having an eviction on their record could deter the tenant from fighting a specious Ellis Act eviction.

The resolution would allow tenants to fight evictions without fear of being marked as a poor tenant and will protect tenants who are evicted because the building owner no longer wishes to continue acting as a landlord, as allowed by the Ellis Act. (Gov. Code, §§ 7060 – 7060.7.) The resolution differs from Resolution 01-02-2017, as it regulates only the confidentiality of lawsuits seeking Ellis Act evictions and does not otherwise affect evictions by building owners who wish to stop being landlords.

Recent legislative efforts to limit Ellis Act evictions have not been successful. For example, Assem. Bill No. 982 (2017-2018 Reg. Sess.), Sen. Bill 364 (2015-2016 Reg. Sess.), Assem. Bill No. 2405 (2014-2015 Reg. Sess.), all failed to pass.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1161.2 and Government Code section 7060.6 to read as follows:

§ 1161.2

(a) (1) The clerk may allow access to limited civil case records filed under this chapter, including the court file, index, and register of actions, only as follows:

(A) To a party to the action, including a party's attorney.

(B) To a person who provides the clerk with the names of at least one plaintiff and one

defendant and the address of the premises, including the apartment or unit number, if any.

(C) To a resident of the premises who provides the clerk with the name of one of the parties or the case number and shows proof of residency.

(D) To a person by order of the court, which may be granted ex parte, on a showing of good cause.

(E) To any person by order of the court if judgment is entered for the plaintiff after trial more than 60 days since the filing of the complaint. The court shall issue the order upon issuing judgment for the plaintiff.

(F) Except as provided in subparagraphs (G) and (H), to any other person 60 days after the complaint has been filed if the plaintiff prevails in the action within 60 days of the filing of the complaint, in which case the clerk shall allow access to any court records in the action. If a default or default judgment is set aside more than 60 days after the complaint has been filed, this section shall apply as if the complaint had been filed on the date the default or default judgment is set aside.

(G) In the case of a complaint involving residential property based on Section 1161a as indicated in the caption of the complaint, as required in subdivision (c) of Section 1166, to any other person, if 60 days have elapsed since the complaint was filed with the court, and, as of that date, judgment against all defendants has been entered for the plaintiff, after a trial.

(H) Notwithstanding paragraph (G), in the case of a complaint involving residential property described in Section 7060.6 of the Government Code, as indicated in the caption of the complaint, as required in subdivision (b) of Section 7060.6 of the Government Code, the clerk shall not allow access to any court records in the action, except as provided in paragraphs (A) to (D), inclusive.

(2) This section shall not be construed to prohibit the court from issuing an order that bars access to the court record in an action filed under this chapter if the parties to the action so stipulate.

(b) (1) For purposes of this section, “good cause” includes, but is not limited to, both of the following:

(A) The gathering of newsworthy facts by a person described in Section 1070 of the Evidence Code.

(B) The gathering of evidence by a party to an unlawful detainer action solely for the purpose of making a request for judicial notice pursuant to subdivision (d) of Section 452 of the Evidence Code.

(2) It is the intent of the Legislature that a simple procedure be established to request the ex parte order described in subparagraph (D) of paragraph (1) of subdivision (a).

(c) Upon the filing of a case so restricted, the court clerk shall mail notice to each defendant named in the action. The notice shall be mailed to the address provided in the complaint. The notice shall contain a statement that an unlawful detainer complaint (eviction action) has been filed naming that party as a defendant, and that access to the court file will be delayed for 60 days except to a party, an attorney for one of the parties, or any other person who (1) provides to the clerk the names of at least one plaintiff and one defendant in the action and provides to the clerk the address, including any applicable apartment, unit, or space number, of the subject premises, or (2) provides to the clerk the name of one of the parties in the action or the case number and can establish through proper identification that he or she lives at the subject premises. The notice shall also contain a statement that access to the court index, register of actions, or other records is not permitted until 60 days after the complaint is filed, except

pursuant to an order upon a showing of good cause for access. The notice shall contain on its face the following information:

(1) The name and telephone number of the county bar association.

(2) The name and telephone number of any entity that requests inclusion on the notice and demonstrates to the satisfaction of the court that it has been certified by the State Bar of California as a lawyer referral service and maintains a panel of attorneys qualified in the practice of landlord-tenant law pursuant to the minimum standards for a lawyer referral service established by the State Bar of California and Section 6155 of the Business and Professions Code.

(3) The following statement:

"The State Bar of California certifies lawyer referral services in California and publishes a list of certified lawyer referral services organized by county. To locate a lawyer referral service in your county, go to the State Bar's Internet Web site at www.calbar.ca.gov or call 1-866-442-2529."

(4) The name and telephone number of an office or offices funded by the federal Legal Services Corporation or qualified legal services projects that receive funds distributed pursuant to Section 6216 of the Business and Professions Code that provide legal services to low-income persons in the county in which the action is filed. The notice shall state that these telephone numbers may be called for legal advice regarding the case. The notice shall be issued between 24 and 48 hours of the filing of the complaint, excluding weekends and holidays. One copy of the notice shall be addressed to "all occupants" and mailed separately to the subject premises. The notice shall not constitute service of the summons and complaint.

(d) Notwithstanding any other law, the court shall charge an additional fee of fifteen dollars ($15) for filing a first appearance by the plaintiff. This fee shall be added to the uniform filing fee for actions filed under this chapter.

(e) This section does not apply to a case that seeks to terminate a mobilehome park tenancy if the statement of the character of the proceeding in the caption of the complaint clearly indicates that the complaint seeks termination of a mobilehome park tenancy.

(f) This section does not alter any provision of the Evidence Code.

§ 7060.6

(a) If an owner seeks to displace a tenant or lessee from accommodations withdrawn from rent or lease pursuant to this chapter by an unlawful detainer proceeding, the owner shall state the following in the caption of the complaint: "Civil Action Described in Section 7060.6 of the Government Code."

(b) If an owner seeks to displace a tenant or lessee from accommodations withdrawn from rent or lease pursuant to this chapter by an unlawful detainer proceeding, the tenant or lessee may appear and answer or demur pursuant to Section 1170 of the Code of Civil Procedure and may assert by way of defense that the owner has not complied with this chapter, or statutes, ordinances, or regulations of public entities adopted to implement this chapter, as authorized by this chapter.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Current law authorizes a court clerk to allow access to limited civil case records filed in unlawful detainer proceedings to specified persons and, after 60 days after the complaint has been filed, to any other person, with one specified exception. Tenants should not have their reputation damaged or their ability to access housing after an Ellis Act eviction compromised because they have been evicted under the Ellis Act. With increasing ease of access to public records through the internet, individuals who do not know the nature or process of Ellis Act evictions could understand such an eviction to be the result an individual being a poor tenant. To the extent a tenant is evicted solely because the property owner wants to remove the residential unit from the rental market, the interest of the tenant in protecting their reputation as a responsible tenant should outweigh the public interest in the outcome of the proceeding to evict them.

The Solution: This resolution would require, if an owner seeks to displace a tenant or lessee pursuant to the Ellis Act, they must state in the caption of the complaint that the civil action is described in a specified provision of the act. It would prohibit the clerk of the court from allowing access to court records filed in the above-described civil action, when the caption of the complaint states that it is a civil action described above, except as specified.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
This resolution uses the language of Assembly Bill 2405 - Landlord Tenant: Ellis Act, introduced by Ammiano in the 2014-15 Regular Session. It failed passage in committee.

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RESOLUTION 11-04-2018

DIGEST
Homeowners Associations: Management of Financial Accounts
Adds Civil Code sections 5590, 5591, 5592, and 5593, and amends section 5380 to add requirements for maintaining the financial accounts of common interest developments.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Civil Code sections 5590, 5591, 5592, and 5593, and amends section 5380 to add requirements for maintaining the financial accounts of common interest developments. This resolution should be disapproved because the current statutory scheme already sets forth the legal rights and duties for such financial management.

The resolution seeks to protect homeowners in common interest developments ("HOAs") from financial mismanagement and embezzlement by HOA managers. However, while such embezzlement may be a problem, the protections and remedies proposed by this resolution already exist; there is no indication that a duplicative statutory scheme would decrease it.

The resolution would require that (1) HOA funds be maintained in "fiduciary accounts," similar to escrow, estate trust, and attorney-client accounts, (2) that persons authorized to access such accounts be deemed fiduciaries, and (3) that there be "proper controls" implemented to protect the HOA funds. However, HOA funds are already required to be maintained in distinct trust accounts, just like escrow and attorney-client trust accounts. (Civ. Code, § 5380, Cal. Code Reg., Tit. 10, § 1737, and Bus. & Prof. Code, § 6211.) Likewise, HOA Board members already owe fiduciary duties to the HOA and its members. (*Kovich v. Paseo Del Mar Homeowners' Assn.* (1996) 41 Cal.App.4th 863, 867; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650-651.) Further, to ensure that HOA funds are properly managed, board members are obligated to conduct quarterly and annual reviews of the HOA's financial accounts, and HOA members have the right to inspect and copy association records, including accounting books and records, in accordance with Corporations Code section 8330, et seq. (Civ. Code, §§ 5205, 5240, 5500.) Moreover, the remedy for enforcing those member rights (and the proper management of HOA funds) is already set out in Civil Code section 5235, which is virtually identical to the remedy in the resolution's proposed addition of Civil Code section 5594.

Having duplicative statutes would add confusion to the law and increase litigation over which statutes control, how they are to be interpreted in light of each other, and whether different standards would apply to the competing statutes.

This resolution is related to Resolutions 11-05-2018 and 11-06-2018.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Civil Code sections 5590, 5591, 5592, and 5593 and amend Civil Code section 5380 to read as follows:

§ 5590

(a) The Legislature intends that homeowner association moneys on deposit in California financial institutions shall be treated under California law as fiduciary accounts in the same manner as escrow accounts, irrevocable trust accounts, attorney trust accounts for clients, and other fiduciary accounts.

(b) The Legislature further intends that any person or organizational entity that establishes, has access to, withdraws or deposits money from association fiduciary accounts is a fiduciary, and shall exercise the fiduciary duties in managing the association bank accounts, funds and other assets, or in managing the financial affairs of such developments.

§ 5591

Fiduciary Accounts. All reserve accounts and operating accounts of the association shall be identified or named as fiduciary accounts. Reserve and operating accounts of one association shall be established and maintained separately from the accounts of other associations.

§ 5592

Fiduciary Status. Each of the following persons is a fiduciary within the meaning of Title 1, Part 3 of the Corporations Code governing nonprofit mutual benefit corporations:

(a) A director or officer of a common interest development, as defined in Section 4158 (association), whether incorporated or unincorporated,

(b) A signatory to a bank account in the name or for the benefit of the association,

(c) A person authorized to utilize funds held in such bank account,

(d) A managing agent as defined in Section 5380, and

(e) A person who otherwise gains access to or receives the funds of the association in any such bank account.

§ 5593: Adequate Controls.

The association board shall implement proper controls necessary to protect the association monetary and other asset deposits which are owned by its homeowner members who are the beneficiaries of the funds in the association accounts. Proper controls include but are not limited to the following:

(a) An adequately defined scope of authority given to any person with access to the accounts, including managing agents,

(b) Periodic review of account documentation,

(c) Periodic review of the financial institution's account documents for accurate identification of and fiduciary accounts,

(d) Delivery of the financial institution's account statements directly to the association, and copies to the account managers,

(e) Confirmation of annual audits by the financial institution,

(f) Dual signatures for high risk transactions,

(g) Adequately and reasonably extended time for notification of errors, omissions or malfeasance, and statement review for all accounts;

(h) Annual association reserve account analysis, not only of the status of required repairs for each reserve line, but also an accounting of funds held for that purpose,

(i) Managing agent bond, in an amount equal to the actual funds deposited in all accounts managed,

(j) Other monitoring of the practices of the financial institution and managing agent, and

(k) More stringent controls as the association board deems appropriate.

§ 5594: Remedies.

(a) A member of an association may bring a civil action for declaratory or equitable relief for violations of this Article by the association, including, but not limited to, injunctive relief, restitution, or a combination thereof.

(b) A member who prevails in a civil action to enforce the member's rights pursuant to this Article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars ($500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally. A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

§ 5380

(a) A managing agent of a common interest development who accepts or receives funds belonging to the association shall deposit those funds that are not placed into an escrow account with a bank, savings association, or credit union or into an account under the control of the association, into a trust fund account maintained by the managing agent in a bank, savings association, or credit union in this state. All funds deposited by the managing agent in the trust fund account shall be kept in this state in a financial institution, as defined in Section 31041 of the Financial Code, which is insured by the federal government, and shall be maintained there until disbursed in accordance with written instructions from the association entitled to the funds.

(b) At the written request of the board, the funds the managing agent accepts or receives on behalf of the association shall be deposited into an interest-bearing account in a bank, savings association, or credit union in this state, provided all of the following requirements are met:

(1) The account is in the name of ~~the managing agent as trustee for the association or in the name of~~ the association.

(2) All of the funds in the account are covered by insurance provided by an agency of the federal government.

(3) The funds in the account are kept separate, distinct, and apart from the funds belonging to the managing agent or to any other person for whom the managing agent holds funds in trust except that the funds of various associations may be commingled as permitted pursuant to subdivision (d).

(4) The managing agent discloses to the board the nature of the account, how interest will be calculated and paid, whether service charges will be paid to the depository and by whom, and any notice requirements or penalties for withdrawal of funds from the account.

(5) No interest earned on funds in the account shall inure directly or indirectly to the benefit of the managing agent or the managing agent's employees.

(c) The managing agent shall maintain a separate record of the receipt and disposition of

all funds described in this section, including any interest earned on the funds.

(d) The managing agent shall not commingle the funds of the association with the managing agent's own money or with the money of others that the managing agent receives or accepts, unless all of the following requirements are met:

(1) The managing agent commingled the funds of various associations on or before February 26, 1990 and has obtained a written agreement with the board of each association that the managing agent will maintain a fidelity and surety bond in an amount that provides adequate protection to the associations as agreed upon by the managing agent and the board of each association.

(2) The managing agent discloses in the written agreement whether the managing agent is deriving benefits from the commingled account or the bank, credit union, or savings institution where the moneys will be on deposit.

(3) The written agreement provided pursuant to this subdivision includes, but is not limited to, the name and address of the bonding companies, the amount of the bonds, and the expiration dates of the bonds.

(4) If there are any changes in the bond coverage or the companies providing the coverage, the managing agent discloses that fact to the board of each affected association as soon as practical, but in no event more than 10 days after the change.

(5) The bonds assure the protection of the association and provide the association at least 10 days' notice prior to cancellation.

(6) Completed payments on the behalf of the association are deposited within 24 hours or the next business day and do not remain commingled for more than 10 calendar days.

(e) The prevailing party in an action to enforce this section shall be entitled to recover reasonable legal fees and court costs.

(f) As used in this section, "completed payment" means funds received that clearly identify the account to which the funds are to be credited.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: There is growing concern over the incidence in California of embezzlement of and fraudulent activity jeopardizing homeowner funds held in accounts. Millions of homeowner dollars have been lost, usually over a period of several years, resulting in criminal prosecution in federal and state courts, imprisonment and other penalties. For example, the remaining defendant faces trial in April 2018 in San Mateo Superior Court for $2.8 million allegedly stolen through sham construction projects and other expenditures. The co-defendant previously entered a plea and is currently in prison.

An estimated 12-14 million Californian homeowners entrust their funds collected by 52,000 California associations through assessments to make long-term capital expenditures to maintain and preserve commonly-owned areas such as shared roofs, building infrastructure, walkways, parking and recreational facilities. Homeowner associations have become the only affordable housing in California for many seniors, low-moderate income families and first-time buyers.

Homeowners lose twice when embezzlement occurs: they lose the dollars they contributed to the common funds through regular assessments; then they face special assessments that boards levy to restore the monies. In addition, they risk losing their homes, as Associations have the right to foreclose if the homeowner cannot afford the assessments.

The cause is primarily inadequate control over (1) operating, reserve and other accounts of homeowner associations, (2) persons with access to the accounts, and (3) recordkeeping practices of the accounts. Excessive familiarity with the third-party funds management company personnel has led to overriding internal association controls and inadequate due diligence of suspect transactions, both by banks and association boards. In addition, there is a lack of transparency over the records detailing deposits into/withdrawals from the accounts. Persons with access to the accounts frequently commingle monies from multiple associations in their portfolio.
The Center for California Homeowner Association Law, a non-profit, non-partisan organization based in Oakland, California, supports the legislative establishment of fiduciary accounts and a fiduciary duty on those entrusted to manage homeowner funds. The Center has received an increasing number of reports of mismanagement and outright theft of funds by HOA board members, property managers, contractors and others. It offers educational resources and support to homeowners, and recently partnered with the Practicing Law Institute in January 2018 to train attorneys in common interest development law.

The Solution: The proposed solution is threefold: 1) to classify accounts in California financial institutions as fiduciary accounts in a manner similar to escrow, estate trust and attorney-client accounts, 2) to establish a fiduciary duty expressly imposed on association board members, officers, managing agents and other persons who have access to the association funds, and 3) to require association boards to identify and exercise appropriate oversight controls on the activities of such fiduciaries in managing the association accounts.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

SAN MATEO COUNTY BAR ASSOCIATION

Resolution 11-04-2018 purports to create a set of new "proper controls" for Association finances. However, several of the controls are already required by the Davis-Stirling Act. Also, the resolution would create a conflict with the Davis-Stirling Act with respect to the "comingling" funds between two or more associations. Additionally, the resolution's proposal to require a "managing agent bond" is already before the Legislature in AB 2912.

This Resolution would add several types of "proper controls." (Lines 28-48) However, several of the proposed controls are already required by the Davis-Stirling Act. For example:

1. Proposed section 5593(b) (line 34) would require "periodic review of account documentation." However, Civil Code section 5500 already requires specified review periods for five different types of Association financial reports.

2. Proposed section 5593(f) (line 40) would require "Dual signatures for high risk transactions." However, Civil Code section 5510 already requires dual signatures, by board members, for all "reserve account" transactions.

3. Proposed section 5593(h) (lines 43-44) would require:

Annual association reserve account analysis, not only of the status of required repairs for each reserve line, but also an accounting of funds held for that purpose.

However, Civil Code section 5300(b)(2)-(6) already requires annual reporting for reserve accounts, reserve funding plans, and plans to repair or replace "major components." (*See also* section 5305, which requires an annual CPA audit for all associations with an annual gross income that exceeds $75,000.)

Additionally, this resolution would prohibit comingling of one association's funds with another association's funds. (Lines 13-14) However, Civil Code section 5380(d) specifically allows such comingling if six specific requirements are met. As a result, this resolution would create a conflict with Civil Code section 5380(d).

Further, this Resolution proposes a new "proper control" for all Associations to provide a "managing agent bond." For example, the resolution would require a "Managing agent bond, in an amount equal to the actual funds deposited in all accounts managed." (Lines 45-46) However, AB 2912 (Irwin, 2018) proposes, in Section 6, to add section 5806 to the Civil Code, to read:

Unless the governing documents require greater coverage amounts, the *association shall maintain fidelity bond coverage* in an amount that is equal to or more than the combined amount of the reserves of the association and total assessments for three months. Coverage shall include dishonest acts by the managing agent or management company and for computer fraud and funds transfer fraud. (Italics added)

Because the issue of requiring fidelity bond coverage is already before the Legislature in AB 2912, the proposed requirement for a "managing agent bond" in Resolution 11-04-2018 is not necessary.

Finally, because several parts of Resolution 11-04-2018 would be redundant to several sections within the Davis-Stirling Act, the resolution would also conflict with the Davis –Stirling Act with respect to comingling of funds between two or more associations, and because the resolution's proposal to require a "managing agent bond" is already before the Legislature in AB 2912, Resolution 11-04-2018 should be disapproved.

RESOLUTION 11-05-2018

DIGEST
Homeowners Associations: Board Member Standards of Conduct
Amends the title of Division 4, Part 5, Chapter 6, Article 8 of the Civil Code and adds Civil Code section 5351 to codify the board member duties for residential common interest developments.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends the title of Division 4, Part 5, Chapter 6, Article 8 of the Civil Code and adds Civil Code section 5351 to codify the duties held by board members for common interest developments. This resolution should be approved in principle because it simply codifies the common law duties and responsibilities that Board members must follow when they serve common interest developments.

Division 4, Part 5, of the Civil Code is commonly known as the Davis-Stirling Common Interest Development Act ("the Act"). (Civ. Code, § 4000.) The Act governs "Common Interest Developments," including "planned developments" which have a common area owned by an association or in common by owners of the separate interests who possess appurtenant rights. (Civ. Code, §§ 4100, 4175.) Under the Act, an "association" means a nonprofit corporation or unincorporated association. (Civ. Code, § 4080.) Associations are commonly referred to as "HOAs."

The Act expressly provides that statutes governing nonprofit mutual benefit corporations apply to "associations." (See Civ. Code, § 4805, subd. (a), *defining the scope of an association's powers*; and Civ. Code, § 5350, subd. (a), *determining when an association's director has a conflict of interest*.)

Case law clearly holds that Board members for HOAs owe fiduciary duties to the HOA and the members they serve. (*Kovich v. Paseo Del Mar Homeowners' Assn.* (1996) 41 Cal.App.4th 863, 867; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650-651.) Codifying these duties simply clarifies existing law for HOA members and Board members who volunteer for those positions.

Moreover, since the Act already incorporates statutes governing nonprofit mutual benefit corporations, requiring HOA Board members to adhere to the same standards of conduct set out in that established statutory scheme would help clarify their duties and maintain consistency in the law.

This resolution is related to 11-04-2018 and 11-06-2018.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend the title of Division 4, Part 5, Chapter 6, Article 8 of the Civil Code and to add Civil Code section 5351, to read as follows:

ARTICLE 8. Board Member Standards of Conduct~~Conflict of Interest~~ [5350- ~~5350~~5351.]

§ 5350

(a) Notwithstanding any other law, and regardless of whether an association is incorporated or unincorporated, the provisions of Sections 7233 and 7234 of the Corporations Code shall apply to any contract or other transaction authorized, approved, or ratified by the board or a committee of the board.

(b) A director or member of a committee shall not vote on any of the following matters:

(1) Discipline of the director or committee member.

(2) An assessment against the director or committee member for damage to the common area or facilities.

(3) A request, by the director or committee member, for a payment plan for overdue assessments.

(4) A decision whether to foreclose on a lien on the separate interest of the director or committee member.

(5) Review of a proposed physical change to the separate interest of the director or committee member.

(6) A grant of exclusive use common area to the director or committee member.

(c) Nothing in this section limits any other provision of law or the governing documents that govern a decision in which a director may have an interest.

§ 5351

Regardless of whether an association is incorporated or unincorporated members who serve on Boards of Directors of Common Interest Developments:

(a) Are fiduciaries of the Common Interest Development of which they serve.

(b) Shall adhere to the standards of conduct specified for nonprofit mutual benefit corporations as prescribed in Corporations Code sections 7230 – 7238.

(Proposed new language underlined, language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Most people who serve on the Boards of Directors for "Common Interest Developments" are laypeople, having had little or no legal training, and they do not realize that they must act and make their decisions according to the "Standards of Conduct" that are within the Corporations Code. For example, Common Interest Developments are also known as "Homeowners Associations," or "HOA's." And HOA Board Members are not required to complete any formal training in order to serve on such Boards. And yet, HOA Board Members

are required to follow the laws that apply to all directors of "Nonprofit Mutual Benefit Corporations," which include all HOA's. The law imposes fiduciary duties upon such directors, including the "Duty of Care" and the "Duty of Loyalty." In California, the "Duty of Care" is set out in Corporations Code section 7231-7231.5; and the "Duty of Loyalty" is set out in Corporations Code section 7233.

The Solution: HOA Members who serve on their respective Boards of Directors need to know that they are subject to the fiduciary requirements set forth in Corporations Code sections 7230 - 7238, for "Standards of Conduct." For example, HOA Board Members are bound by law to adhere to the "Duty of Care" standard, which involves performing a reasonable inquiry before making decisions and to make decisions that are in the best interest of the HOA. In addition, HOA Board Members are bound by law to adhere to the "Duty of Loyalty" standard, to refrain from or to restrict self-dealing.

This resolution would add Civil Code section 5350, in order to add a reference to the applicable Corporations Code sections that are about "standards of care." As a result, this resolution would notify HOA Board members about the standards of care that already exist in the Corporations Code, and it would not create any new requirements. If this resolution were implemented, then such Board Members would be more motivated to act in accordance with the law by making informed decisions, by avoiding self-dealing, and by making decisions that are in the best interest of the HOA.

IMPACT STATEMENT
Civil Code section 5350, for Common Interest Developments, within the "Davis-Stirling Act" – for residential uses, has language that is identical to Civil Code section 6758, for Commercial and Industrial Common Interest Developments, within the "Common Interest Development Act" – which is not about residential uses. In general, if an amendment is to be made that is not exclusively about residential use, then both Acts should be amended in the same way.

CURRENT OR PRIOR RELATED LEGISLATION
Civil Code Section 5350 was added by Stats. 2012, Ch. 180, Sec. 2. (AB 805) Effective January 1, 2013. Operative January 1, 2014, by Sec. 3 of Ch. 180.)

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RESOLUTION 11-06-2018

DIGEST
Associations: Fiduciary Responsibilities of Board of Directors
Amends Civil Code section 6758 and adds Civil Code section 6759 to set forth fiduciary responsibilities and standards of conduct for Board of Directors of Commercial and Industrial Common Interest Development Associations ("CIDs").

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 6758 and adds Civil Code section 6759 to set forth fiduciary responsibilities and standards of conduct for Board of Directors of Commercial and Industrial Common Interest Development Associations ("CIDs"). This resolution should be disapproved because there is no evidence that board members who serve on commercial CIDs do not appreciate their responsibilities and expected standard of conduct.

Civil Code section 6758 provides that a board member may not vote on any issue that directly implicates that board member's interest, such as discipline, assessments, liens, or foreclosures on that member's individual property interest. (Civ. Code, § 6758, subds. (b)(1)-(6).) Section 6758 also provides that if a matter on which a board member may not vote arises, the board member must follow the requirements set forth in Corporations Code sections 7233 and 7234, which provide that although the board member may be present at the meeting and may be counted for purposes of a quorum, the board member may not vote on the matter in which he or she has an interest. (Corp. Code, §§ 7233-7234.)

As the resolution observes, many people who served on the board of directors for CIDs, that is condominium projects, planned developments and stock cooperatives (see Civ. Code, § 6500 et seq.), are laypeople. Parts 5 and 5.3 of Division 4 of the Civil Code (Civ. Code, § 4000 et seq.), set forth the intended structure, function and "operating rule" (Civ. Code, §§ 6630, 6632) which pertain to CIDs, and their governance. These include select incorporation of pertinent provisions from the Corporation Code, otherwise addressing the regulations applicable to corporations. As such, adequate and ample measures are in place without a wholesale incorporation of sections 7230-7238 from the Corporations Code, or reminding members of the board of directors of commercial CIDs they are fiduciaries.

The resolution seeks to add a new code section reminding board members they are fiduciaries and subject to the standards of conduct set forth in Corporations Code sections 7230-7238, relating to board members' performance of duties, such as the performance of their duties in good faith (Corp. Code, § 7231), when a board can provide a loan to a board member (Corp. Code, § 7235), when directors may be sued jointly and severally, and when a board member may seek indemnity against other board members (Corp. Code, § 7236), among other responsibilities.

If the goal is to make a lay board member aware of his or her legal duties and requirements, the resolution may have the unintended consequence of making board members think those are the only statutes with which they must comply because these are the only laws that are set forth in the Code.

This resolution is related to 11-04-2018 and 11-05-2018.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend the title for Division 4, Part 5.3, Chapter 6, Article 3 of the Civil Code; and to add Civil Code section 6759 to read as follows:

ARTICLE 3. Board Member Standards of Conduct~~Conflict of Interest~~ [6758- ~~6758~~6759.]

§ 6758

(a) Notwithstanding any other law, and regardless of whether an association is incorporated or unincorporated, the provisions of Sections 7233 and 7234 of the Corporations Code shall apply to any contract or other transaction authorized, approved, or ratified by the board or a committee of the board.

(b) A director or member of a committee shall not vote on any of the following matters:

(1) Discipline of the director or committee member.

(2) An assessment against the director or committee member for damage to the common area or facilities.

(3) A request, by the director or committee member, for a payment plan for overdue assessments.

(4) A decision whether to foreclose on a lien on the separate interest of the director or committee member.

(5) Review of a proposed physical change to the separate interest of the director or committee member.

(6) A grant of exclusive use common area to the director or committee member.

(c) Nothing in this section limits any other provision of law or the governing documents that govern a decision in which a director may have an interest.

§ 6759

Regardless of whether an association is incorporated or unincorporated members who serve on Boards of Directors of Commercial and Industrial Common Interest Development Associations:

(a) Are fiduciaries of the Common Interest Development of which they serve.

(b) Shall adhere to the standards of conduct specified for nonprofit mutual benefit corporations as prescribed in Corporations Code sections 7230 – 7238.

(Proposed new language underlined, language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Most people who serve on the Boards of Directors for "Commercial and Industrial Common Interest Developments," also known as "CID's," are laypeople, having had little or no legal training, and they do not realize that they must act and make their decisions according to the "Standards of Conduct" that are within the Corporations Code. And such Board Members are not required to complete any formal training in order to serve on such Boards. And yet, CID Board Members are required to follow the laws that apply to all directors of "Nonprofit Mutual Benefit Corporations," which include all CID's. The law imposes fiduciary duties upon such directors, including the "Duty of Care" and the "Duty of Loyalty." In California, the "Duty of Care" is set out in Corporations Code section 7231-7231.5; and the "Duty of Loyalty" is set out in Corporations Code section 7233.

The Solution: CID Members who serve on their respective Boards of Directors need to know that they are subject to the fiduciary requirements set forth in Corporations Code sections 7230 - 7238, for "Standards of Conduct." For example, CID Board Members are bound by law to adhere to the "Duty of Care" standard, which involves performing a reasonable inquiry before making decisions and to make decisions that are in the best interest of the CID. In addition, CID Board Members are bound by law to adhere to the "Duty of Loyalty" standard, to refrain from or to restrict self-dealing.

This resolution would add Civil Code section 6759, in order to add a reference to the applicable Corporations Code sections that are about "standards of care." As a result, this resolution would notify CID Board members about the standards of care that already exist in the Corporations Code, and it would not create any new requirements. If this resolution were implemented, then such Board Members would be more motivated to act in accordance with the law by making informed decisions, by avoiding self-dealing, and by making decisions that are in the best interest of the CID.

IMPACT STATEMENT

Civil Code section 6758, for Commercial and Industrial Common Interest Developments, within the "Commercial and Industrial Common Interest Development Act" – which is not about residential use, has language that is identical to Civil Code section 5350, for Common Interest Developments, within the "Davis-Stirling Act" – for residential uses. In general, if an amendment is to be made that is not exclusively about residential use, then both Acts should be amended in the same way.

CURRENT OR PRIOR RELATED LEGISLATION

Civil Code Section 6758 was added by Stats. 2013, Ch. 605, Sec. 21. (SB 752), effective January 1, 2014.

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