ARTICLE: JUST COMPENSATION OR JUST MORE COMPLICATIONS? THE NEW COVID-19 RELIEF BILL (SB 91) AND ITS IMPLICATIONS FOR RESIDENTIAL LANDLORDS AND THEIR TENANTS

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In response to shut-down orders resulting from the COVID-19 pandemic, which effectively put many individuals in California out of work, the Governor and Legislature of the State of California, as well as many local jurisdictions, imposed a number of restrictions on residential evictions throughout the state. This led to significant hardships for many residential landlords, who were faced not only with lost rental income but also with continuing obligations to maintain their properties, provide tenant services, and pay their mortgages and other expenses.

More recently, the statewide "COVID-19 Tenant Relief Act of 2020," enacted as part of AB 3088[1] and effective August 29, 2020, allowed a tenant who could demonstrate "COVID-19 related financial distress" not only to avoid eviction for nonpayment of rent between March 1, 2020 until August 31, 2020 (a right granted by previous legislation), but also to continue in occupancy without fear of eviction or retaliation for nonpayment as long as the tenant provided certain information and documentation of income loss to the landlord and paid a portion (generally 25 percent) of the rent becoming due from September 1, 2020, through January 31, 2021.[2] While the landlord was permitted to evict a tenant for nonpayment of the reduced rent at the end of that time, and the landlord theoretically still had the right to recover the unpaid portion of the rent over an extended period of time, the landlord's remedies were subject to a number of notification requirements, documentation requirements, and other restrictions that, as a practical matter, could be expected to create ample opportunities for well-defended tenants to resist eviction or rent collection proceedings.[3]

AB 3088 imposed significant financial penalties for landlords who violated the COVID-19 related restrictions and requirements.[4] Moreover, there was no provision for compensation to a landlord who, for whatever reason, was unable

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to collect deferred or unpaid rent or regain possession from a COVID-19 distressed tenant. By their terms, most of the COVID-19 related tenant protections of AB 3088 were set to expire February 1, 2021.[5]

On Friday, January 29, 2021, Governor Newsom signed a new bill, SB 91, that had passed both houses of the Legislature earlier that week.[6] Effective immediately on the Governor's signature,[7] SB 91 extends most of the aforementioned limitations and restrictions of AB 3088 to June 30, 2021. It also changes many of the notification and debtor protection provisions of A.B 3088 in various ways, and at the same time provides some rental assistance and potential for recovery by landlords whose income was affected by COVID-19 related financial distress of their tenants that impeded collection of rent or recovery of premises.

The new legislation, now simply called "the COVID-19 Tenant Relief Act" (without including the year of enactment in the title),[8] generally allows for the accrual of unpaid "COVID-19 rental debt" without triggering eviction for any tenant who has suffered "COVID-19-related financial distress," as defined.[9] It generally prohibits any eviction and recovery of possession from a defaulting tenant who, after the landlord initiates a 15-day notice to pay rent or quit, provides a declaration of COVID-19-related financial distress but pays at least 25 percent of the rental payments that were missed.[10] Like AB 3088, the new law still restricts some of these protections for tenants who are considered "high-income tenants," as defined.[11] It also prohibits the application of security deposits to COVID-19 rental debt, and requires any current payments received from a tenant be applied to the current month's rent, not COVID-19 rental debt.[12] It continues to allow an action for recovery of COVID-19 rental debt, but such an action may only be commenced on or after July 1, 2021.[13] It separately allows actions to recover COVID-19 rental arrearages, as well as tenant defenses to such claims, through small claims courts without regard to the usual limits on such actions, subject to a number of restrictions including that the action may not be commenced prior to August 1, 2021, and is for recovery of rent accrued between March 1, 2020, and June 30, 2021.[14] It also prohibits a landlord from selling any "COVID-19 related debt" to a debt collection agency or other third party,[15] and "in ordinary circumstances," it limits attorney's fees recoverable by the prevailing party in any action to recover COVID-19 related debt to between $500 and $1000, depending on whether the action is "contested," as defined.[16]

The new law does more than this, however. It creates a potential for individual households, as tenants, to obtain rental assistance from the state,[17] but it also requires a landlord, as a condition of recovering unpaid COVID-19 related deferred rent, first to wait until the specified timeframe before filing suit, and then to demonstrate, *under penalty of perjury,* that the landlord has made good faith efforts to investigate the availability of such rental assistance *for the tenant.*[18] If the landlord cannot demonstrate such good faith efforts, the amount of the landlord's damages recovery is reduced by the amount the court determines the landlord should have obtained on behalf of the tenant, where the tenant met eligibility requirements and funding was available.[19] It conditions the recovery of attorney's fees in excess of $1000 in an action to recover COVID-19 related debt on, among other things, whether the tenant or landlord would have been eligible to receive rental assistance payments from a governmental entity or other third party.[20] Further, it prohibits a landlord, whether in the context of an unlawful detainer proceeding or in a separate action, from recovering any delinquent rent from a tenant who has experienced "COVID-19 related financial distress," as defined, without making this showing.[21]

Part of the logic underlying most of these provisions of SB 91 assumes availability to a landlord of an alternative source of payment for the deferred rent—a state-administered program for disbursement of federally derived COVID-19 relief funds and other state funding to provide rental assistance to tenants who are impacted by COVID-19. This is contained in a separate part of SB 91, entitled the "State Rental Assistance Program."[22] This program is also administered on a tenant-by-tenant eligibility basis, but is structured in such a way as to essentially saddle the landlord with the administrative responsibility to pursue each tenant's separate claim or face the loss of any meaningful opportunity to recover delinquent COVID-19 rent arrearages from such tenants.

The provisions for rental assistance payments are complicated and convoluted, and largely opaque from the standpoint of someone in the private sector, which includes most residential landlords. In the first place, the existence and availability of such "tenant assistance" funds is dependent on the allocation of funds awarded from the federal COVID-19 relief legislation, as well as limited additional "block grants" from separate state funding sources, and is to be allocated among "grantees" (which are governmental entities) by the State Department of Housing and Community Development (DHCD) based on a set of population and socio-economic criteria that are not fully defined in the statute.[23]

The administration of these rental assistance payments is delegated to a "grantee," who may be a local governmental entity (city or county) or tribal entity,[24] although the funds available to any such grantee that has a population of less than 200,000 are administered by DHCD,[25] and any locality with a population greater than 200,000 also may enter into an agreement with the DHCD to administer the program.[26] The Department also is required to implement a program for administration of rental assistance funds through a vendor that will manage an on-line application process as "program implementer," expected to be up and running by March 15, 2021.[27]

The most important distinction in the statute is between rental assistance for prospective rental obligations and rental arrearage assistance for accumulated rental arrearages resulting from COVID-19 financial distress. For *prospective* rental obligations, an eligible household may receive up to 25 percent of the monthly rent.[28] For *deferred* rental obligations, the limit is 25 percent of rental arrearages from April 1, 2020 to March 31, 2021, or up to 80 percent of such arrearages, depending on whether the landlord arranges for direct payments and meets other criteria,[29] as discussed further below. The statute prioritizes use of available federal funds for "rental arrears" rather than prospective rental obligations,[30] although this prioritization occurs at the level of the "grantee" rather than the landlord or the tenant, specifically. Moreover, the program funding available to each "grantee," regardless of who administers or implements the rental assistance program, is based on criteria related to the locality's general socioeconomic conditions and identified COVID-19 impacts, not on specific amounts of COVID-19 related rental arrearages or demonstrated tenant financial needs on a property-by-property basis.[31] As a result, both the landlord and the tenants in a given property will have to rely on governmental agencies to identify and confirm funds are available as well as eligibility requirements for specific rental arrearage assistance or prospective rental assistance.

The law effectively puts the onus on the landlord to pursue rental assistance for the tenant before seeking any recovery of the premises for nonpayment of rent from a tenant affected by COVID-19, as well as for recovery of any deferred unpaid rent from a tenant affected by COVID-19. In other words, the cumbersome mechanism for recovering accumulated deferred rent from tenants who are paying at least 25 percent of the contract rent on a current basis, and the potentially onerous penalties for failing to assist the tenant in obtaining financial assistance, is the "stick" used to get landlords to go after the "carrot" of separate, potentially more remunerative, compensation.

Under this program, assuming it is funded and distributed in a timely manner, there are two alternative mechanisms for providing rental arrearage assistance to a qualifying tenant. One approach is for the landlord, on behalf of the tenant, to apply for and receive a direct payment to the landlord of 80 percent of back rent that was due between April 2020 and March 2021; if the landlord follows this approach, it must also waive recovery of the other 20 percent of back rent and must agree not to pursue eviction of the tenant.[32] This approach requires the landlord to enter into a specific agreement with the "grantee," which is either a local governmental entity or a recognized tribal authority that is tasked with administering the federally funded program.[33] It also implicitly requires the landlord to obtain financial information and other assistance from the tenant in order to demonstrate eligibility and receive the direct payment. Alternately, if the landlord "refuses to participate in a rental assistance program for the payment of the rental arrears," then the tenant itself may directly apply for the rental assistance from the grantee, but in that case the rental arrearage assistance is limited to 25 percent of the unpaid rental debt accumulated between April 1, 2020, and March 31, 2021.[34]

In order for a tenant to qualify for rental assistance, whether in the form of direct payments to the landlord or payment to the tenant, the tenant's household must fall into one of three tiers of priority, as detailed in the statute: Round One priority is for eligible households with household income less than 50 percent of area median income, as defined. Round Two priority is for "communities disproportionately impacted by COVID-19, as determined by DHCD." Round Three priority is for "eligible households with a household income that is less than eighty percent of the area median income."[35] It should be noted that all three tiers use demographic and socioeconomic criteria that are essentially undefined and left for determination on a community-by-community, region-by-reason basis, ultimately to be determined by DHCD, none of which can be determined before DHCD promulgates regulations, rules, and eligibility standards for each of the hundreds of cities, counties, and other communities involved.

The exact mechanism for a landlord to navigate the complicated and largely opaque application and funding procedure to determine tenant eligibility and apply for funds is still to be developed. The statute requires the "program implementer" to begin accepting applications by March 15, 2021, and "be available 24 hours a day, seven days a week, with 99 percent planned uptime

rating."[36] Communities that fail to implement and expend the allocated block grant funds in a timely manner stand to lose the funding under other provisions of the statute[37]—a possibility that presumably also leaves the tenants and landlords within the jurisdiction of that locality unable to pursue the tenant assistance payments once the funds are pulled back and assigned to other localities by DHCD.

The program is supposed to allow for either the landlord or the tenant to initiate the application and to keep both parties informed of status and potential available funding.[38] Inasmuch as the landlord's ability to recover back rent under the eviction and small claims court limitations of SB 91 is dependent on the landlord's ability to demonstrate good faith efforts to obtain rental assistance on behalf of the tenant, the landlord's ability and staffing to access the system, prosecute the application, and obtain and maintain records of the process, will be of great importance. Fundamentally, the landlord will be at the mercy of the DHCD bureaucracy as well as the local governmental entity for all of these matters, but the legislation squarely leaves the landlord holding the bag for any failure to diligently and promptly pursue these claims and essentially forces the landlord to accept this process and the possibility of funding in lieu of any other practical remedies for nonpayment.

Some landlords with a large enough compliance staff and the skills and financial wherewithal to pursue the tenants' claims for rental assistance will find the potential for compensation worth the effort. For smaller landlords, however, the complexity and lack of predictability, not to mention the downside risks of failure to pursue all available tenant assistance, may lead to abandonment of any claim for deferred COVID-19 rent, either from the government or from the tenants. Among other things, such landlords face potential inability to recover possession of the premises[39] as well as potential liability for perjury if the landlord asserts good faith efforts to pursue such assistance and is later determined not to have made sufficient efforts to meet the good faith standard, in addition to a potential loss of any right to recover deferred rent, and liability for the tenant's attorney's fees, if they failed to pursue the correct course of action under the statute. This is so even though the tenants are required by the statute to be notified by the landlord of their rights under the statute and to be provided with a form allowing them to claim COVID-19-related financial distress as well as information about potential tenant legal representation to assist.[40]

In this regard, the statute also directly prohibits any "third party" from receiving compensation for services to an eligible household in applying for or receiving assistance,[41] and it prohibits imposition of late charges or other increases in fees by the landlord as a result of the tenant's COVID-19 rental debt.[42] Both of these provisions likely would be construed to prevent a landlord from imposing an administrative fee for services in pursuing a tenant's claim for rental assistance.

The failure of this legislation to provide some reasonable accommodation for smaller, non-corporate landlords is striking. The definition of "landlord" for purposes of the COVID-19 Tenant Relief Act is broad, and covers any owner of residential real property, of a residential rental unit, or a mobilehome park, park space, or lot,[43] whereas the term "tenant" means any natural tenant who hires real property, other than a tenant of commercial property and certain transient occupants.[44] There is no exception for small, individual, or non-corporate landlords, and currently no alternative mechanism for such landlords to obtain compensation for being compelled to allow continued occupancy of residential premises by individuals at rental rates of 25 percent or less of the contract rate, without compensation for lost rental income. While the drafters of SB 91 may have thought the statewide "portal" for online tenant assistance applications by tenants or their landlords would be a user-friendly and efficient means of pursuing claims, recent experience in California with other state agencies administering COVID-19 related relief programs does not inspire much confidence that it will meet their expectations.

ENDNOTES:

[1]Stats. 2020, Ch. 37 (AB 3088), entitled "The Covid-19 Relief Act of 2020."

[2]Civ. Code, § 1179.01, as enacted, Stats. 2020, Ch. 37 (AB 3088), § 20.

[3]E.g. Civ. Code, § 1179.01, subds. (b), (c), (d) required delivery of a particular form and notice of the tenant's legal rights, together with a form of declaration of COVID-19 related financial distress, and subd.(g) gave a tenant who failed to respond with the information demonstrating financial distress a second opportunity to do so after the unlawful detainer proceeding was filed, with a required noticed hearing as to whether the tenant's failure to respond to the initial request was excused by "mistake, inadvertence, surprise, or excusable neglect," and required dismissal of the action if the landlord either failed to provide the required notifications or if the tenant's failure to respond was excused.

[4]Civ. Code, § 1942.5, subd. (d).

[5]E.g., Civ. Code, §§ 1179.01 to 1179.07, as enacted, Stats. 2020, Ch. 37 (AB 3088), § 20; Civ. Code, § 1942.5, as enacted, Stats. 2020, Ch.37 (AB 3088), § 6; Civ. Proc. Code, §§ 1161, 1161.2, as enacted, Stats. 2020, Ch. 37 (AB 3088), §§ 15, 17.

[6]2021 Stats., Ch. 2 (SB 91), signed by Governor, January 29, 2021.

[7]2021 Stats., Ch. 2 (SB 91), § 28.

[8]Civ. Code, § 1179.01.

[9]Civ. Code, § 1179.02, subds. (b), (c).

[10]Civ. Code, § 1179.03.5.

[11]Civ. Code, § 1179.02.5, subds. (a), (c), (e).

[12]Civ. Code, § 1179.04.5.

[13]Civ. Proc. Code, § 871.10.

[14]Civ. Proc. Code, § 116.223.

[15]Civ. Code, § 1188.66.

[16]Civ. Code, § 871.11.

[17]See Health & Saf. Code, §§ 50897 et seq., as enacted by SB 91.

[18]Civ. Proc. Code, § 871.10.

[19]Civ. Proc. Code, § 871.10. See also Civ. Proc. Code, § 116.223, subd. (b)(3), postponing small claims court actions to August 1, 2021 or later.

[20]Civ. Proc. Code, § 871.11.

[21]Civ. Code, §§ 1179.03, 1179.03.5.

[22]Health & Saf. Code, §§ 50897 to 50897.6.

[23]See Health & Saf. Code, § 50897.1, subds. (a), (b).

[24]The definition of "grantee" is "a locality or a federally recognized tribe" that participates in a rental assistance program (see Health & Saf. Code, § 50897, subd. (g)), and a "locality" is a city, inclusive of a charter city, a county, or a city and county (see Health & Saf. Code, § 50897, subd. (h)).

[25]Health & Saf. Code, §§ 50897.2, subd. (a)(3), 50897.3, subd. (b)(1).

[26]Health & Saf. Code, § 50897.3, subd. (f).

[27]Health & Saf. Code, § 50897.3, subd. (a).

[28]Health & Saf. Code, § 50897.1, subd. (f).

[29]Health & Saf. Code, § 50897.1, subds. (d),(e).

[30]Health & Saf. Code, § 50897.1, subd. (c)(2).

[31]See Health & Saf. Code, §§ 50897.1, subd.(a), 50897.2, subd. (a).

[32]Health & Saf. Code, § 50897.1, subd. (d).

[33]Health & Saf. Code, §§ 50897, subd. (g), 50897.1, subd. (d).

[34]Health & Saf. Code, § 50897, subd. (e).

[35]Health & Saf. Code, § 50897.1, subd. (b).

[36]Health & Saf. Code, § 50897.3, subd. (a).

[37]Health & Saf. Code, § 50897.2, subds. (c), (d).

[38]Health & Saf. Code, § 50897.3, subd. (a)(ii).

[39]Civ. Proc. Code, § 1179.03.5.

[40]See Civ. Code, § 1179.04, which contains the required notice provisions for periods before and after February 1, 2021. See also Civ. Proc. Code, § 1179.03, which contains additional notice requirements to accompany any 15-day notice to pay COVID-19 rental debt.

[41]Health & Saf. Code, § 50897.1, subd. (n).

[42]Civ. Code, § 1942.9, subd.(a).

[43]Civ. Code, § 1179.02, subd. (e).

[44]Civ. Code, § 1179.02, subd. (h), also referencing Civ. Code, § 1162, subd. (c) and Civ. Code, § 1940, subd. (b), respectively, for the definitions of the excluded commercial properties and transient occupancies.

